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Bricker Bullets

Trump Administration Pulls Back Transgender Interpretations

Bricker Bullet No. 2017-01 *February 24, 2017*

In a widely-reported action, the U.S. Department of Education and the U.S. Department of Justice have issued a joint letter withdrawing prior guidances on the rights of transgender students in the public school setting. The prior guidances had been issued in 2015 and 2016, and included the controversial directive to allow transgender students to use the restrooms of gender identification, regardless of their biological (birth) gender. The retraction takes the form of a "Dear Colleague" letter issued jointly by both agencies. By its own terms, the letter "does not add requirements to applicable law," but only withdraws the prior interpretations. Those wishing to read the actual text of the letter may do so by following this link.

It is important for educators to understand that this action does not change the law itself—only the current administration's interpretation of that law. This may mean less enforcement pressure from the U.S. Department of Education, but individuals and organizations remain free to pursue legal challenges for sex discrimination under Title IX, including transgender-based claims. Ultimately, it will be up to the courts to define a public school's obligations under Title IX. To the surprise of some, the United States Supreme Court has already accepted jurisdiction in a school "restroom case," with oral arguments currently scheduled for March 28th of this year. The lower-court ruling in that soon-to-be-landmark case (which was generally favorable to the student) can be accessed here.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Federico G. Barrera III – 614.227.8820
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Joshua D. Nolan – 216.523.5485
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
S. Courter Shimeall – 614.227.7723
Sue W. Yount – 614.227.2336

Governor Signs Grab Bag of Education-Related Amendments During "Lame Duck" Session

Bricker Bullet No. 2016-10 *December 19, 2016*

Governor John Kasich has signed Senate Bill 3, a wide-ranging package of legislative amendments directed primarily at K-12 public schools. Some of the more noteworthy provisions of SB 3 include the following:

- threshold for competitive bidding on building improvements raised from $25,000 to $50,000 (same as for municipalities)
- reverts to prior law allowing JVSD board members to be members of local boards, with option to appoint a person with "experience or knowledge regarding the labor needs of the state and region"
- state and district-wide student testing time generally limited to 2% of school year (beginning with 2017-18 school year)
- preparation and practice testing generally limited to 1% of school year
- diagnostic testing in math and writing no longer mandatory for grades 1-2, or in writing for grade 3 (beginning with 2017-18 school year)
- districts no longer required to submit plans to ODE as to how they will make up missed days with online instruction or "blizzard bags"
- superintendents no longer required to sign home instruction diplomas

More comprehensive summaries of the bill are sure to follow in the coming days. Readers may view the entire text of the bill as enacted by following this link.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
S. Courter Shimeall – 614.227.7723
Sue W. Yount – 614.227.2336

New Overtime Rules Temporarily Blocked by Federal Court Order

Bricker Bullet No. 2016-09 *November 30, 2016*

In a dramatic last-minute ruling, a federal district court in Texas has issued a preliminary injunction prohibiting the U.S. Department of Labor from implementing new overtime rules which were set to take effect on December 1. These new rules, as reported in an earlier *Bricker Bullet*, would have significantly expanded the number of nonteaching school employees eligible for overtime pay. State of Nevada v. U.S. Dept. of Labor, Case No. 4: 16-CV-00731 (U.S. Dist. Ct., E. D. Tex. Nov. 22, 2016)(full opinion here).

It is unclear what effect the ruling will have on employers nationally, as many have already set in place procedures for implementation. While many employers are likely to go forward with the new overtime rules, many others may choose to adopt a "wait and see" approach as the case works its way through the federal court system.

A more extensive discussion of the new ruling has been prepared by the attorneys of Bricker & Eckler's Employment/Labor group, and can be accessed by following this link.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
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Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
S. Courter Shimeall – 614.227.7723
Sue W. Yount – 614.227.2336

Federal Court Issues Injunction Against USDOE Transgender Policy

Bricker Bullet No. 2016-08 *August 24, 2016*

A federal district court in Texas has issued a preliminary injunction prohibiting the U.S. Department of Education from proceeding with enforcement of the policy it announced on May 13 of this year, as reported here, concerning the rights of transgender students. The ruling was sought by the plaintiffs in the case, which include the states of Texas, Alabama, Wisconsin, West Virginia, Tennessee, Oklahoma, Louisiana, Utah, Georgia, and Mississippi, in addition to representatives of several other states or state agencies. In its opinion, the court found that the guidance, which was issued jointly by the U.S. Department of Education and the U.S. Department of Justice, failed to meet certain rule-making requirements and was otherwise unsupported by the wording of Title IX. The court found that it had proper jurisdiction of the case and, furthermore, that the injunction should be nationwide in scope. The full text of the ruling can be accessed by following this link.

School leaders are cautioned that as a preliminary injunction, the ruling in this case is temporary in nature, and could itself be subject to a stay order upon appeal. It should also be noted that while the order issued in this case may temporarily restrict enforcement actions by the federal government, it does not prevent private lawsuits on behalf of transgender students, which may continue to be pursued under Title IX.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Kate Vivian Davis – 937.535.3912
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

ESSA Brings Major Changes to Education of Children in Foster Care

Bricker Bullet No. 2016-07 *June 30, 2016*

On June 23, 2016, the U.S. Department of Education and the U.S. Department of Health and Human Services issued a joint letter emphasizing significant new responsibilities for K-12 schools with respect to children in foster care. These changes are required under provisions of the recently enacted Every Student Succeeds Act (ESSA)—the legislative successor to the No Child Left Behind Act, originally enacted in 2002. The focus of the new legislation is directed at achieving greater "educational stability" for children in foster care, and "improved outcomes," including higher graduation rates.

Some key responsibilities imposed by ESSA with respect to foster children are:

- a child in foster care must remain in his or her "school of origin" (school in which child is enrolled at time of placement in foster care) unless not in child's "best interest"
- "best interest" determination must be made jointly by school and the applicable child welfare agency whenever the child's placement is changed
- transportation must be provided to the foster child's "school of origin" under procedures developed collaboratively with state and local child welfare agencies
- foster children changing schools must be "immediately enrolled" in their new school, even if they are unable to produce records normally required for enrollment
- individual schools, as well as the state education agency, must "report annually on academic achievement and graduation rates for children in foster care as a separate subgroup."

A more detailed explanation of the new requirements relating to the education of foster children can be found in the Non-Regulatory Guidance also issued by USDOE and HHS on June 23, 2016.

Compliance with the ESSA' s provisions on foster children is required by December 10, 2016.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Kate Vivian Davis – 937.535.3912
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

New Overtime Rules for "White Collar" Employees Could Affect Nonlicensed Supervisors

Bricker Bullet No. 2016-06 *May 20, 2016*

The U.S. Department of Labor has announced a major change in the way it defines which employees are exempt from federal overtime law requirements. The key feature of the new regulations is a doubling of the amount employees may earn and still be entitled to overtime pay. Under the existing rules, persons employed in qualifying executive, administrative, or professional ("EAP") capacities must be paid a minimum salary of $455 per full-time week ($23,660 annually) in order to be considered exempt from overtime. Under the new regulations, which take effect December 1, 2016, such employees must be paid a minimum of $913 per week or $47,476 annually in order to be exempt. This salary threshold will be automatically updated every three years to keep pace with economic conditions.

The new regulations will not affect teachers, who are specifically excluded from any "salary test" requirements. Nor will it affect academic administrators, who (under a special rule) need only be paid an amount equal to a starting teacher's salary in order to be exempt from overtime.

"Non-academic" administrators and supervisors may, however, be affected. Examples of such positions would include transportation supervisors, custodial and maintenance supervisors, or food service managers who supervise and direct other employees of the district and generally function in a "bona fide administrative capacity." Such employees, although they might otherwise be exempt, will now be entitled to overtime if they are not compensated at the newly established minimum rate of $913/week or $47,476/year. Accurate time records would be required, as well as mandatory compensation (or compensatory time) at 1½ times the employee's regular rate of pay for all hours worked in excess of 40 during a given workweek.

A summary of the new overtime rules, as applicable to state and local government employers, may be viewed by following this link. Given the highly technical nature of the regulations involved, boards of education are advised to consult their legal counsel when attempting to determine the exempt or non-exempt status of any particular school district position.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
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Nicole M. Donovsky – 614.227.4866
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Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
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Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

Federal Government Issues Strong Pronouncement to All Public Schools on Transgender Student Rights

Bricker Bullet No. 2016-05 *May 16, 2016*

In a bold assertion of their enforcement authority over America's public schools, the U.S. Department of Education and the U.S. Department of Justice have issued what they describe as a "significant guidance" on the rights of transgender students. The pronouncement does not take any new policy positions, and no new laws or regulations have been created. The joint statement is, however, unequivocal in its broad support of transgender student rights—including the full right of restroom access according to students' self-determined gender identity. See *Dear Colleague Letter* (USDOE/USDOJ, issued May 13, 2016). The joint statement also incorporates an extensive Q & A document designed to assist public schools with practical advice on the implementation of transgender-friendly practices. *Examples of Policies and Emerging Practices for Supporting Transgender Students* (USDOE, May 2016).

As witnessed by recent headlines, public schools nationally continue to be in turmoil over transgender issues. Most notably, the State of North Carolina and the federal government are currently enmeshed in litigation over transgender rights. It should be noted that statements of policy such as "Dear Colleague" letters do not have the force of law, but are important in that they clarify the position the enforcing agency will take until the courts have established more definitive rules. The primary remedy for a violation of Title IX (in terms of USDOE enforcement) is the withholding of federal funds. However, that extreme penalty does not yet appear to have been implemented in a school transgender enforcement case. Most recently, a spokesperson for the White House has stated that "the administration will not take action to withhold funding while this enforcement process is playing out in the courts." (*White House Press Briefing* of May 12, 2016) (in reference to the North Carolina litigation). Individual litigation claims remain as a more immediate threat.

More detailed information on public school transgender issues can be found on the Bricker & Eckler web site at this location.

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group *at Bricker & Eckler LLP:*

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Kate Vivian Davis – 937.535.3912
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.233

Ohio Supreme Court Says Board Member Use of E-mails May Violate Sunshine Law

Bricker Bullet No. 2016-04 *May 10, 2016*

In a much-publicized ruling, the Ohio Supreme Court has held that school board members who make a decision about a school-related matter "in a series of e-mail exchanges" can be found in violation of the Ohio Sunshine Law (ORC 121.22). In doing so, the Supreme Court overruled a lower court ruling which had found that the Sunshine Law simply did not apply to "sporadic e-mails" between public officials. The syllabus of the Supreme Court's decision declared broadly that the Ohio Sunshine Law

> *"prohibits any private prearranged discussion of the public business by a majority of members of a public body regardless of whether discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication."*
>
> White v. King, 2016 Ohio 2770 (May 3, 2016).

Justices Lanzinger and O'Connor, dissenting, took issue with the wide-open definition of "meeting" which the majority had created, believing that the kind of "meetings" prohibited by the Sunshine Law are "events or gatherings at which real-time communications can occur." They further warned that the "unintended consequences of broadening the word 'meeting' beyond its current definition could affect adversely how members of public bodies do their business."

The full opinion of the Court can be accessed by following this link.

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Janet K. Cooper – 937.224.1799
Kate Vivian Davis – 937.535.3912
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan Savage Knox – 614.227.8885
David J. Lampe – 513.870.6561
Beverly A. Meyer – 937.224.1849
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.233

Board Resolution Required for Middle School Career Tech Waiver

Bricker Bullet No. 2015-03 *April 20, 2015*

Boards of education are reminded that under the provisions of a bill enacted late last year (Am. Sub. House Bill 487, effective 9-17-14), career-technical education must be expanded to grades 7 and 8 beginning with the 2015-16 school year, unless a waiver is obtained from the Ohio Department of Education. In order to obtain a waiver, the board of education must adopt a formal resolution declaring "the district's intent not to provide career-technical education to students enrolled in grades seven and eight" for a specified school year. This resolution must be submitted to the Department by September 30th of that school year. (See current version ORC 3313.90[B].)

Due to the peculiar wording of this amendment, ODE has found it necessary to provide a clarification on its web site to the effect that the adoption and submission of a board resolution is required even if the district intends not to provide career-technical education in just one of the two grades.

It should be noted also that under HB 487, the minimum enrollment required for a school district wishing to provide a "comprehensive" (self-contained) career-technical program has been increased from 1500 students (in grades 9-12) to 2,250 students (in grades 7-12).

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Kate Vivian Davis – 513.870.6571
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan M. Knox – 614.227.8885
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

State Auditor Seeks Ohio Elections Commission Jurisdiction Over Levy Info Complaints

Bricker Bullet No. 2015-02 *April 7, 2015*

At its meeting this past Thursday, the Ohio Elections Commission considered legislation offered by State Auditor David Yost which would allow the OEC to take prompt action on citizens' complaints about school mailings, web pages, or other activities which allegedly promote levies using public funds. (The changes would apply to other political subdivisions as well.) The State Auditor currently has jurisdiction to consider allegations of such misspending of public funds, but only in the course of an audit which typically occurs long after the election in question. The proposed amendments would allow the OEC to conduct expedited hearings on cases brought within 90 days before a general election or 60 days before a special or primary election. The Executive Director of OEC has expressed support for the legislation. Because the legislation is proposed as an amendment to the pending biennial budget bill (HB 64), it is possible that enactment could occur prior to July 1, 2015.

Penalties for a violation of the Ohio election law involved* could include an order for restitution, the imposition of a fine of up to $1,000, and/or referral for criminal prosecution as a misdemeanor of the first degree. The proposed legislation is unclear as to who would be considered the "violator" in situations involving an informational mailing by a school district—but this could be interpreted to mean the superintendent or any other person deemed to be responsible for the communication.

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* The original draft of this legislation centers on violations of ORC 9.03, a law of general application which allows public officials to "present information" about their political subdivision, but prohibits the expenditure of public funds "on any activity to influence the outcome of an election." It is anticipated that a similar law applicable specifically to schools will eventually be included within the proposed amendments.

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
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Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

Criminal Background Check Law Upheld Against Challenge by Nonteaching Employees

Bricker Bullet No. 2015-01 *February 27, 2015*

A federal district court in Cincinnati has upheld the 2007 legislation* which instituted criminal records checks for all nonteaching school employees in Ohio, and which in some instances required the discharge of employees with very old criminal convictions. The case challenging the 2007 law was filed by two former employees of the Cincinnati Public Schools who were discharged** as required by the new law based on convictions occurring in 1977 and 1983 (felonious assault and drug trafficking). The primary claim in the case was that the legislation had a disparate impact on African-American employees and therefore constituted race discrimination in violation of Title VII of the Civil Rights Act of 1964. Evidence had been offered showing that nine out of the ten nonteaching employees terminated by CPS were African-American.

The court rejected the disparate impact claim because it found that the group selected for analysis was too small. Because the law was written for application to the entire state, as opposed to a specific policy or practice of CPS, the court found that the statistical analysis would need to be applied to the entire state in order to establish a case for disparate impact. The court also suggested, but did not decide, that the law might be justified on the basis of "business necessity" even if the broader statistical analysis was likewise unfavorable.

The full opinion of the district court can be viewed by following this link.

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* HB 190 (eff. 11-14-07), amending ORC 3319.39 and enacting new ORC 3319.391.
**One of the plaintiffs retired early in lieu of discharge.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
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Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

Ohio Supreme Court Finds Inside Millage Transfer Unjustified

Bricker Bullet No. 2014-05 *December 5, 2014*

The Ohio Supreme Court has invalidated a school district's reallocation of unvoted "inside" millage for permanent improvements because it found, under the circumstances, that the resulting increase in tax revenues for the school district was not "clearly required" by the district budget. The case involved the Indian Hill Exempted Village School District of Hamilton County, which had acted in 2009 to convert 1.25 inside mills levied for current expenses to 1.25 mills levied for permanent improvements. The ruling did not invalidate the inside millage shift procedure *per se*. Rather, the Court found that the county budget commission, in reviewing the requested change, should have considered the size of the district's current surplus and whether the additional tax revenues to be generated were in fact "clearly required" within the meaning of Ohio Revised Code Section 5705.341 for both permanent improvements and operating revenues. *Sanborn v. Hamilton County Budget Commn.,* 2014 Ohio 5218 (December 2, 2014).

The procedure for reallocating millage within the 10 unvoted "inside" mills allowed by law is well-established and has been utilized by many school districts whose levies have been reduced to the 20-mill "floor" by application of tax reduction factors first created under House Bill 920 in 1976. Such reallocations were made subject to a public hearing process under legislation enacted in 1998 (see ORC 5705.314). It was agreed by the parties and the Court that the Indian Hill Board of Education had fully complied with this process. The Court found, however, that the reallocation procedure was subject to the "clearly required" standard for approval of tax levies, and that the county budget commission had failed to give proper consideration to this standard given the size of the district's surplus.

In a closing comment, the Court attempted to limit the scope of its ruling, specifically stating that the case presented an "unusual circumstance" and that boards of education must be given the discretion to create budgets that include a surplus. However, the reasoning of the case would suggest that the Court will continue to require application of the "clearly required" budgeting standard not only to inside millage reallocations but to general "outside" millage requests as well.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group *at Bricker & Eckler LLP*

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Kate Vivian Davis – 513.870.6571
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Megan M. Knox – 614.227.8885
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

Attorney General Provides Guidance on "Self-Supporting" Students

Bricker Bullet No. 2014-04 *August 8, 2014*

The Ohio Attorney General has issued an opinion providing guidance on the recurring problem of how to determine when an 18-year old student should be deemed self-supporting so as to permit tuition-free enrollment in a district other than the district where his or her parent resides. This exception to the general rule on free attendance exists under Section 3313.64(F)(1), which allows students at least 18 years of age (and less than 22 years of age) to attend school free wherever they choose to live, if they *"live apart from their parents [and] support themselves by their own labor."*

The Attorney General acknowledges that the phrase "support themselves by their own labor" is rather open-ended and therefore probably "cannot be defined . . . in a manner that ensures uniform application in Ohio." Nevertheless, he does attempt to provide some broad parameters that may be of assistance. He indicates, for example, that:

- *Just producing a paycheck is not enough. The question is whether the amount of the check "demonstrates self-sufficiency."*
- *A statement from a head of household where the student lives, saying that the student does chores to support himself, is not enough. There must be an examination of the "relative value" of the services, which will not be enough if the district's total assessment of the situation is that the student is in fact still in some measure "dependent upon another for the necessities of life."*
- *"Supporting themselves" means to "finance or otherwise facilitate the furnishing of the necessities of life, including food, shelter, and clothing, by means of their own physical or mental effort."*
- *The phrase "does not apply to a person who depends on another for support."*

Perhaps the most useful finding of the Attorney General is that the General Assembly, in *not* providing a definition, "has delegated to local decision-makers the discretion to interpret and apply this provision." Thus, although the opinion does not provide educators with any kind of "bright line test," it does provide legal support for school administrators in defense of challenges to their decisions, which (according to the Attorney General) must be treated as a legitimate exercise of their discretion, as long as that discretion is not abused.

The full text of the Attorney General's opinion (2014 OAG No. 026) may be viewed here.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Kate Vivian Davis – 513.870.6571
Nicole M. Donovsky – 614.227.4866
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Richard W. Ross – 614.227.4873
Sue W. Yount – 614.227.2336

E-Cigarette Bill Passes

Bricker Bullet No. 2014-02 *March 6, 2014*

The Ohio General Assembly has passed, and Governor John Kasich has signed, a bill which brings so-called "e-cigarettes" under the same general regulatory and child-protection framework applicable to conventional tobacco products. Under these regulatory provisions, minors will be prohibited from consuming, possessing, or purchasing "alternative nicotine products" such as electronic cigarettes.

E-cigarettes are battery-powered electronic devices which contain nicotine in a liquid solution, often with other chemicals and flavorings. A small heating element turns the liquid into a vapor, which is then inhaled by the user. Electronic cigarettes are often manufactured to resemble ordinary cigarettes, cigars, or pipes, but have also been made to resemble other objects such as fountain pens or USB memory sticks. The U.S. Centers for Disease Control and Prevention reports that e-cigarette use by American junior high and high school students more than doubled from calendar year 2011 to calendar year 2012.

Boards of education may wish to revisit their student discipline policies and handbooks to determine whether possession of e-cigarettes is a type of conduct for which a student may be suspended or expelled. Because these are relatively novel devices, and the devices themselves contain no tobacco, many policies may need to be amended in order to withstand legal challenge. Boards of education are reminded that changes to any student discipline policy must be "posted in a central location" in each school building and "made available to pupils upon request." (See ORC 3313.661[A].) However, nothing in Ohio law requires the actual reprinting of student handbooks in such circumstances.

The enacted bill, Substitute House Bill 144, may be viewed in its entirety by following this link. The official effective date for this legislation has not yet been established, but would appear to be on or about August 2, 2014.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Unilateral Implementation of New Evaluation Policy Not an Unfair Labor Practice

Bricker Bullet No. 2014-01 *January 14, 2014*

The State Employment Relations Board (SERB) has issued a ruling in which it found that a board of education did not commit an unfair labor practice when it unilaterally implemented a new standards-based teacher evaluation policy to comply with the "state framework" requirements of House Bill 153 (the 2011 budget bill). SERB accordingly dismissed the ULP charge which had been filed by the teachers' association for lack of probable cause. *In the Matter of Parma Education Association, OEA/NEA v. Parma City School District Board of Education*, Case Number 2013-ULP-10-0307 (January 9, 2014).

At the time of the board's action to implement the new policy, the negotiated agreement between the teachers' association and the board had expired and the parties were engaged in ongoing negotiations for a successor agreement. SERB found that, although a board of education is normally bound to maintain the *status quo ante* in such circumstances (as a requirement of good-faith bargaining), the clear wording of HB 153 indicated that it was to supersede collective bargaining agreements as of July 1, 2013. Therefore, since HB 153 required the adoption of a policy by such date, and the implementation of the policy upon contract expiration, the board did not commit an unfair labor practice when it proceeded to implement.*

Boards are cautioned that the dismissal of an unfair labor practice charge is a highly fact-specific determination and does not create a binding legal precedent. However, this ruling does appear to reflect the manner in which SERB views the state mandate on teacher evaluation created by House Bill 153.

The full text of the new SERB ruling may be accessed by following this link.

*It should be noted that ORC 3319.111, as enacted by HB 153, calls for the *adoption* of a policy by July 1, 2013, which is to "*become operative*" upon the expiration of then-existing negotiated agreements. The SERB dismissal order addresses the situation of an expired agreement, and does not appear to authorize *implementation* of the policy prior to the expiration of an agreement that was in effect on 9-29-11.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

San Diego Dad Awarded $2.8M for Release of Son to Mom's Boyfriend

Bricker Bullet No. 2013-08 *December 11, 2013*

A recent jury verdict in San Diego, California has dramatically highlighted the potential liability which may arise for schools and school personnel as a result of releasing students to persons not authorized by the parent or legal custodian.

The case involved a 9-year-old Mexican-American boy who had been dropped off at school in the morning by his father. Later that day, the school received a phone call from the boy's mother, who had been deported a month earlier. The mother said that she needed to pick up her son for a doctor's appointment in 15 minutes, but was unable to get away from work. She told the office manager that she was sending her boyfriend to pick up the child. The office manager checked the district's records to see if the boyfriend was listed on the "emergency card," as required by school policy. He was not. However, the mother was told that the boyfriend would be allowed to pick up the boy if he showed identification. When the boyfriend appeared at school, the boy clearly recognized him and "was happy to see him." When the father arrived at school at the end of the day to pick up his son, his son was gone. He had been taken to Mexico to live with his mother, where he continues to live.

After a five-day trial, the jury rendered a verdict against the district. The father was awarded $2 million in damages, and his son $850,000. The principal was assessed damages in the amount of $3,500. A key issue in the trial was the district's own policy, which strictly prohibited the release of a student to any person not listed on the emergency card.

The strongly punitive response of the jury in this case suggests that schools review their current policies and procedures for the release of students to authorized persons, and consult with legal counsel on the sufficiency of those policies and practices under current law.

Additional details on the case can be found in an earlier ruling of the court posted at this site.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
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Sue W. Yount – 614.227.2336

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Facebook "Likes" Declared Free Speech

Bricker Bullet No. 2013-07 *October 15, 2013*

On Wednesday, September 18, 2013, the United States Court of Appeals for the Fourth Circuit, in a closely watched case, held that "liking" a page on Facebook is "a form of speech protected by the First Amendment."

The case of *Bland v. Roberts*, 2013 U.S. App. LEXIS 19268 (4th Cir. 2013), involved a local sheriff who was running for re-election. It came to his attention that two of his deputies had "liked" his opponent's Facebook page. After the sheriff was re-elected, he removed these deputies from their positions. The deputies sued in federal court, claiming that pressing the "like" button on Facebook was free speech protected by the First Amendment. The lower court disagreed, finding that a mere click of a mouse button to "like" a Facebook page was insufficient speech to merit constitutional protection. However, the court of appeals disagreed. A unanimous court held that "liking" a Facebook page does in fact constitute a form of speech protected by the First Amendment. More specifically, the court noted that "liking" a Facebook page is the "Internet equivalent" of displaying a political sign in one's front yard.

As election season approaches, this decision serves as a reminder to public employers that their employees enjoy certain First Amendment free speech protections, particularly in the context of political speech. The decision is also significant as being one of the first to explore Facebook activity as a form of "speech." The court's analysis strongly suggests its reasoning would apply with equal force to other social media activity such as re-tweeting or clicking "favorite" icon on Twitter, or clicking the "heart" icon on Instagram.

It should be noted that the ruling in *Bland*, although significant, is not controlling law in Ohio at the present time, as it was decided in a different judicial circuit. Nor does it mean that all "likes" on Facebook are automatically protected for all purposes, since the right of free speech for public employees must always be balanced against the legitimate interests of the governmental entity.

Finally, it should be noted that this case did not focus on the use of public resources for political activity. School officials are reminded that under Ohio law, public resources (such as school networks and e-mail) may not be utilized to support ballot issues or candidates. *See* ORC 9.03.

You can read the full text of the court's opinion by following this link.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
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Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Legal Same-Sex Marriages Recognized for Federal Tax Purposes

Bricker Bullet No. 2013-06 *October 10, 2013*

➢ Bricker & Eckler LLP is sending you this bulletin to notify you that as a result of a recent Revenue Ruling and guidance from the IRS, a number of benefits offered by school districts may need to be administered differently.

As a follow-up to the June 26, 2013 U.S. Supreme Court ruling invalidating certain provisions of the Defense of Marriage Act (DOMA), the IRS has issued Revenue Ruling 2013-17 declaring that same-sex couples, legally married in states that recognize their marriages, will be treated as married for federal tax purposes. The IRS ruling, which will be prospectively applied by the IRS as of September 16, 2013, applies regardless of whether the couple lives in a state that recognizes same-sex marriage or a jurisdiction that does not recognize same-sex marriage (like Ohio). Under the ruling, same-sex spouses will be treated as married for all federal tax purposes, including income and employment (FICA) taxes. The ruling applies to all federal tax provisions where marriage is a factor, including income tax filing status (single vs. married) and income tax withholding (including selecting personal and dependent exemption withholding exemptions).

The Revenue Ruling also has various implications on an employer's employee benefit plans since many of the rules governing these plans are rooted in the Internal Revenue Code. For example, a qualified retirement plan, 403(b) plan, and 457(b) plan are now required to recognize a same-sex spouse as a "spouse" under the Internal Revenue Code's default beneficiary rules, the surviving spouse death benefit rules, and spousal rollover rules. On the employee welfare benefit side, an employer has more freedom to determine whether a same-sex spouse is considered a "spouse" under its employee welfare benefit plans. An employer should be reviewing its plans to determine whether "spouse" is defined to include same-sex spouses.*

Bricker & Eckler LLP is currently working to develop a webinar to explain in more detail the changes that will have to occur in school districts as a result of the IRS ruling and guidance. In the meantime, if you have any questions, please do not hesitate to call a member of the Education Practice Group (listed below) or visit the Bricker & Eckler *Health Care Reform Resource Center*.

**It should be noted that the Revenue Ruling relates only to the recognition of same-sex marriages for federal tax purposes. For employees residing in Ohio, same-sex marriages may not necessarily be recognized at this time for other employment-related purposes, such as FMLA. Consultation with legal counsel is advised on these issues.*

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
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Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Cell Phone Search Limits Explored in New Federal Appeals Court Ruling

Bricker Bullet No. 2013-04 *April 5, 2013*

The United States Court of Appeals for the Sixth Circuit, based in Cincinnati and presiding over all federal court appeals from the states of Michigan, Ohio, Kentucky, and Tennessee, has issued a significant decision dealing with the constitutional limits on student cell phone searches. In this case, the Sixth Circuit found that school officials acted unconstitutionally when they searched a student's cell phone after he was discovered sending text messages during class. *G.C. v. Owensboro [Kentucky] Public Schools*, Case No. 4:09-CV-102 (March 28, 2013).

The case involved an out-of-district high school student who had extensive disciplinary problems arising from certain mental health issues, including depression, anger, and suicidal ideation. He had also admitted that he used illegal drugs. When he was found violating school policy by using a cell phone in class, his phone was confiscated. The assistant principal read four text messages that had been sent that day, because she was aware of the student's prior record of suicidal feelings and drug use, and was concerned as to how he might react to the disciplinary action.

After reviewing the entire record, the Court found that on the day in question, the student was merely violating a school rule, and nothing more. The Court acknowledged that a cell phone search would have be permissible had it been likely to produce evidence of (1) criminal activity, (2) an impending violation of other school rules, or (3) potential harm to persons in the school. It concluded, however, that none of these circumstances were present. It declared that a "general background knowledge of drug abuse or depressive tendencies, without more," is an insufficient basis upon which to initiate a search of a student's cell phone.

One judge on the three-judge panel dissented from this conclusion, finding that the school's knowledge of prior suicidal thoughts and drug use should have been considered sufficient grounds for the limited search that was conducted by the assistant principal.

You can read the full text of the Court's opinion by following this link.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group *at Bricker & Eckler LLP*

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
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Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

A Game Changer?
OCR Issues New Guidance for Students with Disabilities in Extracurricular Athletics

Bricker Bullet No. 2013-03 *February 1, 2013*

On Friday, January 25, 2013, the U.S. Department of Education's Office for Civil Rights (OCR) issued a new formal guidance (in the form of a "Dear Colleague" letter) for public elementary and secondary schools and colleges and universities regarding their obligation to provide athletic opportunities for students with disabilities. Many are calling this a "landmark directive" and are suggesting that the Department's guidance will have as significant an impact on athletic opportunities for students with disabilities as Title IX created for female athletes.

The January 25th letter clarifies schools' existing legal obligations under Section 504 of the Rehabilitation Act of 1973 to provide students with disabilities an equal opportunity to participate in extracurricular activities. This means making reasonable modifications to the school's extracurricular programs and activities and providing necessary aids and services, unless the school can show that doing so would result in a fundamental alteration of its programs or put student safety at risk.

Within the letter, OCR provides concrete examples of the types of reasonable modifications that schools may be required to make in order to ensure that students with disabilities have an equal opportunity to participate in extracurricular athletics. For example:

- *Using a visual cue along with a starter pistol for a student with hearing impairment who is on the track team, or*
- *Providing after school nursing assistance (such as glucose testing and monitoring) to enable a student with diabetes to participate in an after school athletic program.*

The letter also cautions schools that they cannot limit athletic opportunities due to generalizations and stereotypes about students with disabilities and encourages them to "work with their communities and athletic associations to develop broad opportunities to include students with disabilities in all extracurricular athletic programs."

The full text of OCR's new "Dear Colleague" letter can be accessed here.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
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Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Reminder on Tax Valuation Appeal Deadline

Bricker Bullet No. 2013-02 *January 29, 2013*

Public school administrators and finance officers are reminded that the deadline for challenging a taxpayer's request for a property tax reduction is approaching soon. The last day for a taxpayer to initiate a property tax valuation appeal falls on March 31 each year. If the requested change in value is at least $17,500, then the county auditor must notify your school district of the property tax valuation complaint, and your district can make itself a party to the case (to oppose the reduction in property value) by filing a "counter-complaint" with the county board of revision. Your district must file its counter-complaint within 30 days of receiving notice of the tax appeal from the county auditor. Counter-complaints filed after more than 30 days are too late and will fail to make your district a party to the case or to any subsequent appeal. (See ORC 5715.19.)

Due to the technical nature of the underlying issues, and the complexity of school funding itself, caution must be exercised in the pursuit of any tax valuation appeal. Boards of education are advised to seek competent legal counsel to assess the potential financial benefits of any appeal, and to devise an appropriate strategy for litigation and/or or negotiation with the taxpayers involved.

Special thanks to tax practitioner Jon Brollier for his advice in preparing this *Bricker Bullet.* Jon invites your follow-up questions and can be reached at 614-227-8805 or jbrollier@bricker.com.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
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Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.233

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CRIMINAL RECORDS GUIDE

Prepared by **BRICKER & ECKLER LLP**

SCHOOL LAW / CONSTRUCTION LAW / SCHOOL FINANCE

	Licensed	Non-Licensed	Bus/Van Drivers
	• Teachers • Administrators • Educational Aides • Coaches • Adult Ed Instructors[1] • Other employees holding permits	• Classified/non-teaching personnel • Nonlicensed supervisors	• "Yellow bus" drivers • All other persons hired to operate vehicles for student transportation
Disqualifying Offenses – May NEVER employ	**List A** [R.C. 3319.31(C)] (mandatory revocation)	**List C** [RC 3319.39(B)(1), per RC 3319.391(C)]	**See Lists C and D** ***("Any Time" offenses)*** [3301-83-23 per RC 3327.10(K)(2), 3319.39(E)]
Disqualifying Offenses -- But eligible for rehabilitation	**List B (based on RC 3319.39[B])** [OAC 3301-20-01(E)]	**List C (certain offenses after stated years)** [OAC 3301-20-03(D)]	**See Lists C and List D (motor vehicle)[2] (certain offenses after stated years)** [OAC 3301-83-23(C)]
Immediate suspension from all duties that require care, custody, or control of a child upon arrest, summons, or indictment	**Yes, for violations on List A** [RC 3319.40]	**Yes, for violations on List C** [RC 3319.40]	**Yes, for violations on Lists C and D** [RC 3319.40, OAC 3301-83-23]
Automatic revocation of license	**Yes, for violations on List A** [RC 3319.31(C)]	**N/A**	**N/A**
Mandatory release from employment (existing employee)	**N/A** (may occur as result of license revocation by ODE)	**Yes, for violations within stated time periods on List C** [RC 3319.39(B)(1)], per RC 3319.391(C)]	**Yes, for violations within stated time periods on Lists C & D** [RC 3327.10(K)(2), OAC 3301-83-23(B)]

[1] Adult education instructors may be excused from the FBI portion of a criminal records check under certain circumstances. See ORC 3319.39(A).

[2] ***Caution:*** Wording of rule ambiguous; this is the apparent intention, subject to ODE interpretation.

LIST A LICENSED EMPLOYEES
Disqualifying Offenses – *NOT* Eligible for Rehabilitation ("Super Bad")

2903.01 Aggravated murder
2903.02 Murder
2903.03 Voluntary manslaughter
2903.04 Involuntary manslaughter
2903.041 Reckless homicide
2903.11 Felonious assault
2903.12 Aggravated assault
2903.15 Permitting child abuse
2905.01 Kidnapping
2905.02 Abduction
2905.04 Child stealing*
2905.05 Criminal child enticement
2905.11 Extortion
2907.02 Rape
2907.03 Sexual battery
2907.04 Unlawful sexual conduct with a minor
2907.05 Gross sexual imposition
2907.06 Sexual imposition
2907.07 Importuning
2907.12 Felonious sexual penetration**
2907.21 Compelling prostitution
2907.22 Promoting prostitution
2907.23 Procuring
2907.24 Soliciting; after positive HIV test
2907.241 Loitering to engage in solicitation; solicitation after positive HIV test
2907.25 Prostitution; after positive HIV test
2907.31 Disseminating matter harmful to juveniles
2907.311 Displaying matter harmful to juveniles
2907.32 Pandering obscenity
2907.321 Pandering obscenity involving a minor
2907.322 Pandering sexually oriented material involving a minor
2907.323 Illegal use of a minor in nudity-oriented material or performance
2907.33 Deception to obtain matter harmful to juveniles
2907.34 Compelling acceptance of objectionable materials
2909.02 Aggravated arson
2909.22 Soliciting or providing support for act of terrorism
2909.23 Making terroristic threat
2909.24 Terrorism
2911.01 Aggravated robbery
2911.02 Robbery
2911.11 Aggravated burglary
2911.12 Burglary
2913.44 Personating an officer
2917.01 Inciting to violence
2917.02 Aggravated riot
2917.03 Riot
2917.31 Inducing panic
2917.33 Unlawful possession or use of a hoax weapon of mass destruction
2919.12 Unlawful abortion
2919.121 Performing or inducing unlawful abortion upon minor
2919.13 Abortion manslaughter
2919.22 Endangering children***
2919.23 Interference of custody****
2921.02 Bribery
2921.03 Intimidation
2921.04 Intimidation of attorney, victim or witness in criminal case
2921.05 Retaliation
2921.11 Perjury
2921.34 Escape
2921.41 Theft in office
2923.122 Illegal conveyance or possession of deadly weapon or dangerous ordnance or illegal possession of an object indistinguishable from a firearm in school safety zone
2923.123 Illegal conveyance of deadly weapon or dangerous ordnance into courthouse, illegal possession or control in a courthouse
2923.161 Improperly discharging firearm at or into a habitation; school related offenses
2923.17 Unlawful possession of dangerous ordnance; illegally manufacturing or processing explosives
2923.21 Improperly furnishing firearms to minor
2925.02 Corrupting another with drugs
2925.03 Trafficking in drugs
2925.04 Illegal manufacture of drugs or cultivation of marijuana
2925.041 Illegal assembly or possession of chemicals for the manufacture of drugs
2925.05 Funding of drug or marijuana trafficking
2925.06 Illegal administration or distribution of anabolic steroids
2925.13 Permitting drug abuse
2925.22 Deception to obtain a dangerous drug
2925.23 Illegal possession of drug documents
2925.24 Tampering with drugs
2925.32 Trafficking in harmful intoxicants; improperly dispensing or distributing nitrous oxide
2925.36 Illegal dispensing of drug samples
2925.37 Possession of counterfeit controlled substances
2927.24 Contaminating substance for human consumption or use; contamination with hazardous chemical, biological, or radioactive substance; spreading false report
3716.11 Placing harmful objects in food/confection

* As it existed prior to 7/1/96.
** In violation of former R.C. 2907.12.

*** Only sections (B)(1), (2), (3) or (4).
**** That would have been a violation of R.C. 2905.04 as it existed prior to 7/1/96, had the violation been committed prior to that date.

LIST B

LICENSED EMPLOYEES
Disqualifying Offenses – Eligible for Rehabilitation

-- Any felony other than a felony on the "Super Bad" list (List A)

2903.13 Assault
2903.16 Failing to provide for a functionally impaired person
2903.21 Aggravated menacing
2903.211 Menacing by stalking
2903.22 Menacing
2903.34 Patient abuse; neglect
2905.32 Trafficking in persons
2907.08 Voyeurism
2907.09 Public indecency
2909.03 Arson
2911.13 Breaking and entering
2911.31 Safecracking
2911.32 Tampering with coin machines
2913.02 Theft
2913.03 Unauthorized use of a vehicle
2913.04 Unauthorized use of property; computer, cable, or telecommunication property or service
2913.041 Possession or sale of unauthorized cable television device
2913.05 Telecommunications fraud
2913.06 Unlawful use of telecommunications device
2913.11 Passing bad checks
2913.21 Misuse of credit cards
2913.31 Forgery; identification card offenses
2913.32 Criminal simulation
2913.33 Making or using slugs
2913.34 Trademark counterfeiting
2913.40 Medicaid fraud
2913.42 Tampering with records
2913.43 Securing writings by deception
2913.45 Defrauding creditors
2913.47 Insurance fraud
2913.48 Workers' compensation fraud
2913.51 Receiving stolen property
2915.05 Cheating, corrupting sports
2919.24 Contributing to unruliness or delinquency of a child
2919.25 Domestic violence
2923.12 Carrying concealed weapons
2923.13 Having weapons while under disability
2925.11 Possession of drugs*
2925.12 Possessing drug abuse instruments
2925.31 Abusing harmful intoxicants

* Conviction is ***not*** a disqualifying offense if it is a minor misdemeanor.

LIST C **NON-LICENSED EMPLOYEES (including Bus Drivers)**
Disqualifying Offenses – *NOT* Eligible for Rehabilitation
if the Conviction is Within the Stated Time Period

Any Time	If Conviction Within 20 Years
2903.01 Aggravated murder 2903.02 Murder 2903.03 Voluntary manslaughter 2903.04 Involuntary manslaughter 2905.01 Kidnapping 2905.02 Abduction 2905.04 Child stealing* 2905.05 Criminal child enticement 2907.02 Rape 2907.03 Sexual battery 2907.04 Unlawful sexual conduct with a minor 2907.05 Gross sexual imposition 2907.06 Sexual imposition 2907.07 Importuning 2907.12 Felonious sexual penetration** 2907.21 Compelling prostitution 2907.22 Promoting prostitution 2907.23 Procuring 2907.25 Prostitution; after positive HIV test 2907.31 Disseminating matter harmful to juveniles 2907.32 Pandering obscenity 2907.321 Pandering obscenity involving a minor 2907.322 Pandering sexually oriented material involving a minor 2907.323 Illegal use of a minor in nudity-oriented material or performance 2919.22 Endangering children*** 2919.23 Interference of custody****	2903.11 Felonious assault 2903.12 Aggravated assault 2911.01 Aggravated robbery 2911.02 Robbery 2911.11 Aggravated burglary 2919.12 Unlawful abortion 2923.161 Improperly discharging firearm at or into a habitation; school related offenses 3716.11 Placing harmful objects in food/confection
If Conviction within 10 Years	**If Conviction within 5 Years**
2911.12 Burglary 2925.02 Corrupting another with drugs 2925.03 Trafficking in drugs 2925.04 Illegal manufacture of drugs or cultivation of marijuana 2925.05 Funding of drug or marijuana trafficking 2925.06 Illegal administration or distribution of anabolic steroids	2903.13 Assault 2903.16 Failing to provide for a functionally impaired person 2903.21 Aggravated menacing 2903.34 Patient abuse; neglect 2907.08 Voyeurism 2907.09 Public indecency 2919.22 Endangering children***** 2919.24 Contributing to unruliness or delinquency of a child 2919.25 Domestic violence 2923.12 Carrying concealed weapons 2923.13 Having weapons while under disability 2925.11 Possession of drugs (other than a minor drug possession offense)

If a conviction for any of the above-listed offenses is beyond the stated time period, the person is eligible for rehabilitation.

* As it existed prior to 7/1/96.
** In violation of former R.C. 2907.12.
*** Only sections (B)(1), (2), (3) or (4).
**** That would be a violation of R.C. 2905.04 as it existed prior to 7/1/96, had the violation been committed prior to that date.
***** Only division (A).

LIST D **SCHOOL BUS/VAN DRIVERS**

Disqualifying Offenses – *NOT* Eligible for Rehabilitation if the Conviction is Within the Stated Time Period

Any Time	If Conviction Within 6 years
2903.06 Vehicular manslaughter and assault **2903.08 Vehicular manslaughter and assault** **2903.09 Vehicular manslaughter and assault** **2909.24 Terrorism**	**4511.19 Operating a motor vehicle under the influence** **4511.20 Reckless operation** **4510.11 Driving under suspension** **4510.14 Driving under OVI suspension** **4511.194 Physical control while under the influence**
If Conviction Within 1 Year	
4511.75 Violation of school bus warning lights **4511.21 School zone speed limit (while operating a school vehicle)** **4511.62 Railroad crossing violation**	

If a conviction for any of the above-listed offenses is beyond the stated time period, the person is eligible for rehabilitation. (Caution: Wording of rule ambiguous; this is the apparent intention, subject to ODE interpretation.)

See also 3301-83-06(B)(3) for driver record disqualifiers.

April 30 Nonrenewal Date "Fix" Enacted, But Old Deadline May Still Apply in Your District

Bricker Bullet No. 2012-06 *December 17, 2012*

The Ohio General Assembly has corrected a legislative oversight which would have allowed teacher bargaining units to keep the "old" nonrenewal deadline of April 30th, despite recent changes to teacher evaluation timelines. However, school administrators should be alerted to the fact that the "old" April 30 deadline may continue to apply in their district this school year and perhaps beyond.

Some explanation: Senate Bill 316 (effective 9-24-12) made some significant modifications to the previously-enacted "state framework" for teacher evaluation. Among those changes was a shift to a "single-cycle" evaluation schedule with evaluations to be completed by May 1 (instead of April 1) and contract nonrenewal notices due by June 1 (instead of April 30). Unfortunately, however, there was no collective bargaining "protection" provided to the statute which contains the nonrenewal date (ORC 3319.11). As a result, this left open the possibility that the June 1 nonrenewal date could be overridden by the language of local negotiated agreements—putting the new evaluation dates "out of sync" with the nonrenewal deadline.

The amendment (found in the newly-enacted House Bill 555) coordinates the deadlines for evaluation in ORC 3319.111 with the nonrenewal deadline in ORC 3319.11 by making all of the key calendar dates non-bargainable. However, the question of *when* the new June 1 nonrenewal deadline applies in a given district will vary on a case-by-case basis, depending on whether your local agreement contains the "old" April 30 date, and when your local agreement expires.

The bottom line: There is a good chance that your district is "stuck" with the "old" April 30 nonrenewal date this year at least—which means that you may need to "back up" your planned evaluation dates as well. You may find it advisable to consult with your district's legal counsel as to how these changes will be affecting your district, particularly if a teacher nonrenewal is under consideration.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Kate Vivian Davis – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.233

Larger Booster Groups Now Required to Register with Ohio Attorney General

Bricker Bullet No. 2012-05 *October 4, 2012*

The Ohio Attorney General, exercising the rule-making authority of his office, has significantly modified the administrative rule relating to the registration of school booster organizations as "charitable trusts." Under the prior rule, school booster clubs were exempted from registration. Under the amended rule, which became effective on August 10, 2012, school "booster clubs" which have gross receipts of $25,000 or more in any taxable year OR which hold $25,000 or more in assets at the end of any taxable year must now register with the Attorney General. The rule change applies not only to athletic booster groups but also to PTAs and alumni groups.

Booster organizations required to register as "charitable trusts" will now be subject to a number of reporting requirements. Specifically, such booster groups will be required to

- file an annual report, including certain tax information
- submit copies of documents, including any applicable articles of incorporation, bylaws, or constitution (with subsequent amendments), and a copy of the IRS determination letter of tax exempt status, if available
- notify the Attorney General of any revocation of tax-exempt status by the IRS
- notify the Attorney General of the dissolution of the organization, together with a report on the final distributions
- pay an annual fee of between $50-$200 (depending on amount of assets held).

School booster groups subject to the new rule are required to register within six months of their creation or within six months after they meet the minimum dollar threshold for reporting. See *Ohio Adm. Code 109:1-1-02(A).*

Registration is to be performed on the Attorney General's web site at this address.

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Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Casino Tax Distribution Takes Shape— Special Enrollment Reports Required in October / May

Bricker Bullet No. 2012-04 *August 10, 2012*

The Ohio Department of Taxation has released its first quarterly report on tax revenues from Ohio's casinos, the first of which opened in May in Toledo and Cleveland. The total "take" was approximately $20 million, of which 34% will ultimately be distributed to Ohio public schools under provisions of the Ohio Constitution. The "cut" going to counties and high-population cities will be 51%— the first installment of which has already been made. The casino tax "paydays" for counties and cities will be quarterly on or before July 31, October 31, January 31, and April 30. School district "paydays" will be semi-annual on or before January 31 and August 31.

Mechanics of the casino tax distribution have been addressed in recently enacted Amended Substitute House Bill 386 (eff. 6-11-12). Because the casino tax distribution is county-based, school districts are now required to make a special enrollment report to the Department of Education twice a year to be used in determining the number of students attending public schools within each county. Reports must be made specifically for the Friday of the first full week in October (to be used for the January distribution) and the Friday of the first full week in May (to be used for the August distribution). If more than one district or community school reports a particular student as enrolled, the Department of Education is required to intervene for purposes of reconciling the reports. The count ultimately certified by ODE to the Department of Taxation is deemed to be final and will not be adjusted in future counts.

School personnel will need to exercise care with this new "casino count," since the governing laws and definitions differ in some respects from the more familiar criteria used under Ohio's "foundation plan" for school funding (ORC Chapter 3317). Guidance can be obtained from the Ohio Department of Taxation and, as always, from the attorneys of the Public Finance Group at Bricker & Eckler LLP.

[*] *Note that "public schools" as used here includes community schools, STEM schools, and college-preparatory boarding schools. See ORC 5753.11(A)(1).*

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Jerry E. Nathan – 614.227.2358
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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New Fraud Reporting Law Requires Notice Procedures for Both Old and New Employees, Action by May 4

Bricker Bullet No. 2012-03 *April 12, 2012*

On February 2, Governor John Kasich signed into law Substitute House Bill 66 (eff. 5-4-12), which mandates the creation of a system in the office of the State Auditor for making reports of fraud, "including misuse and misappropriation of public money," by any public office or public official. The system must allow the reports (which are referred to in the law as "complaints") to be made anonymously by any public employee or resident of the State of Ohio through a toll-free telephone number, the State Auditor's web site, or the regular U.S. mail. The State Auditor is required to maintain a log of all complaints and to "review all complaints in a timely manner." The log must be open to the public, subject to any redactions permitted under the Ohio Public Records Law (ORC 149.43).

The new law requires all public employers to take steps to ensure that their employees are aware of the fraud reporting system. New employees must confirm receipt of information about the system within 30 days of beginning employment. (The State Auditor has created a model form for this purpose.) Existing employees must be provided information about the fraud reporting system as soon as the new law takes effect (May 4, 2012).

It should be noted that public employees who make a report under the State Auditor's system are provided a measure of protection from retaliation by their employers. The new law extends the protections currently available under Ohio's "Whistleblower Law" to public employees making reports under the State Auditor's system. (See ORC 124.341 as amended by the bill.)

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Laura G. Anthony, Chair – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Jerry E. Nathan – 614.227.2358
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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Martins Ferry Ruling Upholds Right of Board to Implement "Uniform Plan" of Reduction

Bricker Bullet No. 2012-02 *March 15, 2012*

A ruling issued by the Common Pleas Court of Belmont County has upheld the authority of a board of education to implement a "uniform plan" of salary reduction even though such plan will reduce the amounts paid to employees under a collectively bargained salary schedule. In doing so, the Court found that unless a negotiated agreement deals specifically with the question of a "uniform plan," the board of education retains the right to implement uniform reductions as authorized by the school employment statutes.*

The case arose in the Martins Ferry City School District, which had implemented an across-the-board pay reduction of 5% (affecting teaching, nonteaching, and administrative personnel). The nonteaching employees' union challenged the action, claiming that the reduction violated the collective bargaining agreement—in particular, the negotiated pay schedules in that agreement. A grievance was filed, which resulted in an arbitration award against the District. The Common Pleas Court, however, vacated the arbitration award as being contrary to law and in excess of the arbitrator's authority. The Court found that the "uniform plan" exception was created by the General Assembly for the purpose of giving boards of education flexibility to deal with "unusual financial conditions" such as those being experienced by so many school districts today. The Court therefore concluded that the uniform plan option should not be "trumped" by the negotiated agreement unless the parties have *specifically* so indicated in the agreement itself.

It should be noted that this ruling does not directly address issues of the duty to bargain prior to implementing a "uniform plan" of reduction, which must be given separate consideration.

An appeal would appear likely but has not been filed as of the date of this printing. The full text of the Court's opinion may be viewed by following this link.

** Should be noted that for classified personnel, the "uniform plan" option is not applicable in districts following civil service (ORC Chapter 124).*

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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Moneys Released from Bond Retirement Fund Under New HB 153 Procedure

Bricker Bullet No. 2012-01 *February 24, 2012*

Under a new procedure created by Amended Substitute House Bill 153, an Ohio school district has been able to gain access to a portion of the unexpended balance in its bond retirement fund to use for permanent improvements within the district. The transfer is believed to be the first in the state under the HB 153 procedure, which allows the county budget commission—instead of the common pleas court—to review and authorize the transfer of funds.

Under prior law, unexpended moneys in a bond retirement fund could generally be transferred only after all debt obligations of the fund had been retired, or such unexpended moneys were sufficient to pay all outstanding obligations. To make a transfer to any other fund required an order of the local common pleas court. The amendment made by HB 153 (effective 9-29-11) allows transfers to be made out of a school district bond fund or bond retirement fund even before all debt obligations of the fund have been satisfied. Application for the transfer must be made to, and approved by, the county budget commission (consisting of the county auditor, the county treasurer, and the prosecuting attorney). The budget commission may approve the transfer to a specific permanent improvement fund of the district if it determines that the money being transferred will not be required to meet the obligations payable from the fund. In so doing, it must consider "the balance of the bond fund or bond retirement fund, the outstanding obligations payable from the fund, and the sources and timing of the fund's revenue." (ORC 5705.14 [C][2].)

The new process created by HB 153 for public schools may allow for an earlier transfer of funds than would have been possible under prior law, thereby enabling the "redirection" of bond-generated dollars to other worthy construction or renovation projects that otherwise would have had to wait.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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General Assembly Agrees (Finally) on Single Primary Date of March 6

Bricker Bullet No. 2011-09 *December 16, 2011*

After weeks of wrangling tied to a dispute over a congressional redistricting plan, the Ohio House and Senate have agreed on a single primary election date of March 6, 2012. The compromise, set forth in Substitute House Bill 369, will now go to the Governor's desk, where a veto is viewed as highly unlikely. The bill repeals key portions of an earlier bill (Sub. H.B. 318) which would have required dual primaries on March 6 and June 12. It also reinstates an August special election date (August 7, 2012) for school and other political subdivision issues.

The bill does not provide relief from the December 7 filing date for March tax levies. School districts that did not complete the required filings by December 7 will not be able to submit a levy to the voters on March 6.

An updated levy calendar showing action deadlines for school tax issues has been prepared by the Public Finance Group of Bricker & Eckler LLP and may be accessed by following this link.

❖

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
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Diana S. Brown – 614.227.8823
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Warren I. Grody – 614.227.2332
David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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IRS Clarifies Tax Treatment of Employer-Provided Cell Phones

Bricker Bullet No. 2011-08 *October 31, 2011*

Employees using cell phones provided by their employers may find some tax relief— or at least some paperwork relief— under a new Notice issued by the IRS.

According to Internal Revenue Service Notice 2011-72, the value of employer-provided cell phones is excludable from an employee's income and is thus not taxable to the employee if two basic conditions are met:

- *First*, the cell phone must be provided to the employee for *noncompensatory reasons*— that is, the phone is not being provided to increase the employee's compensation, attract a prospective employee, or increase the morale or goodwill of the employee.
- *Second*, the cell phone must be provided for *substantial business reasons*. Examples of such reasons include where the employer needs to be able to contact the employee at all times when the employee is away from the office, or where the employer must be able to reach the employee regarding work-related emergencies.

If the two conditions above are met, IRS Notice 2011-72 provides that the value of both the business use and personal use of the cell phone are excludable from the employee's income. Further, any substantiation requirements that the employee would have to meet for the value to be deducted from the employee's income are deemed to be met. The new rule applies retroactively to any use of an employer-provided cell phone occurring after December 31, 2009.

One cautionary note: While this new position helps to clarify the tax treatment of an employee's use of employer-provided cell phones for federal tax purposes, it does not necessarily indicate a change in the Ohio Auditor of State's treatment of personal use of such phones for audit purposes. Districts should carefully consider the possible audit implications before making any changes in cell phone procedures in order to avoid a potential finding for recovery.

The full text of IRS Notice 2011-72 is available online here.

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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Melissa M. Carleton – 614.227.4846
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Bricker & Eckler
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Reapportionment Battle Leads to 2012 Election Date Changes

Bricker Bullet No. 2011-07 *October 24, 2011*

On October 20, the Ohio Senate approved Substitute House Bill 318, which takes the highly unusual step of creating two separate primary election dates for calendar year 2012. The bill, which Governor Kasich has signed, establishes a three-election calendar for 2012 as follows:

- March 6 (primary) — Ohio General Assembly, U.S. Senate
- June 12 (primary) — U.S. House of Representatives, U.S. President
- November 6 — General Election

The August special election is eliminated; however, political subdivisions and other taxing authorities will be permitted to place a question or issue on the ballot at the June 12, 2012 primary election. Additional costs incurred by the respective counties will be reimbursed by the state.

The enactment of HB 318 in the above form is the latest in a series of events arising from the ongoing political struggles over congressional redistricting. On October 14, the Ohio Supreme Court ruled that the recent redistricting legislation (House Bill 319) was subject to the referendum process. Because this ruling created uncertainty about the use of the new redistricting map, the sponsors of the redistricting legislation have sought to delay the federal primary elections dependent on that map in order to allow additional time to negotiate a possible compromise.

The legislation creating two primary elections in 2012 is sure to be controversial and the subject of intense negotiation over the coming weeks. No prediction can be made at this time as to whether these negotiations will, or will not, result in further changes to the 2012 election calendar. School districts considering a ballot issue in the first half of 2012 may want to plan initially for a March election, which would ensure compliance with a possible shift to a later date (note that special language in the resolution of necessity may be required). An updated levy calendar showing action deadlines for all 2012-2015 elections has been prepared by the Public Finance Group of Bricker & Eckler LLP and may be accessed by following this link.

❖

Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
David J. Lampe – 614.227.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

House Bill 194 Changes Election Laws

Bricker Bullet No. 2011-06 *August 1, 2011*

House Bill 194 (effective 9-30-11) makes some significant changes to Ohio's election laws—including a number of provisions affecting schools. Among the key provisions are the following:

- Schools are prohibited from transporting students, during the regular school day, to a polling place or board of elections for the purpose of casting a ballot. (ORC 3599.30)
- Elected officials (such as school board members) may not, during the 90 days before their name appears on the ballot, produce or disseminate with office resources any mass communication or advertising that includes their name or photograph (other than routine office correspondence). (ORC 3517.211)
- Political subdivisions (such as school districts) placing an issue on the ballot at a special election are required to pay at least 65% of the estimated election cost *prior to the election*. (ORC 3501.17)
- Ballot issues and questions may be withdrawn at any time prior to 70 days before an election. (ORC 3505.05)
- The presidential primary election date has been moved from the first Tuesday after the first Monday in March to the first Tuesday after the first Monday in May. (Next year's presidential primary/May special election will therefore be held on May 8, 2012.) The bill also eliminates the special election occurring in March and brings back the February special election in presidential primary years. (ORC 3501.01)*

Note that the new law affects certain deadlines for the upcoming November 2011 election. A revised 2011 *BASA School Issue Calendar* and the new 2012 *BASA School Issue Calendar* may be accessed by following these links: 2011 2012

** Certain provisions in HB 194 (such as the new absentee ballot deadlines) are the subject of a referendum petition drive which, if successful, will place the issue on the November 2012 ballot.*

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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Dane A. Gaschen – 614.227.8887
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Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

AG Says Annual Vacation Leave Cash-Outs OK, But Need Board Policy

Bricker Bullet No. 2011-05 *July 21, 2011*

Ohio Attorney General Mike DeWine has issued an opinion finding that boards of education may properly allow their superintendents to "cash in" unused vacation leave on an annual basis as a fringe benefit, as long as the board has adopted a policy that includes "formal guidelines" for such payments. *Opinion of the Ohio Attorney General 2011-025*. The request for an opinion was made by the State Auditor, who was seeking to determine whether such payments constituted a lawful expenditure for a board of education. The statute governing superintendent contracts (ORC 3319.01) specifically authorizes payments for accrued but unused vacation leave upon separation from the district, but is silent on the question of payments for unused vacation leave during the term of the superintendent's contract.

The Attorney General, citing earlier AG opinions and ORC 3319.01, concluded the provision of fringe benefits to a school superintendent is a matter left to the discretion of the board of education, as long as the particular type of benefit is not defined or limited by statute. For example, the statute does limit the amount which may be paid for unused vacation leave upon separation to the amount accrued within the preceding three years. However, the Attorney General found no prohibition or limitation on the making of payments at other times during the employment relationship, and no limit on the amount of such earlier payments.

The Attorney General did emphasize, however, that the authority to pay for accrued but unused vacation leave prior to separation depends on the existence of a board policy authorizing this particular fringe benefit. Furthermore, the policy adopted must include "formal procedures" or "formal guidelines" for the making of such payments.

Boards of education wishing to avoid audit issues relating to vacation leave "cash-outs" by superintendents and other administrators (who are subject to similar statutory provisions) are encouraged to review their existing board policies and, if necessary, revise or supplement those policies to conform to the guidance which has now been given to the State Auditor.*

**It should be noted that Senate Bill 5, signed by the Governor on March 31 but subject to a pending statewide referendum, would require a unified school district leave policy which would need to be coordinated with any such policies and may have other effects beyond the scope of the present discussion.*

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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David J. Lampe – 513.870.6561
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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What's *Not* in the Budget Bill

Bricker Bullet No. 2011-04 *July 5, 2011*

On the evening of June 30, Governor John Kasich signed House Bill 153, the biennial budget for fiscal years 2012 and 2013. While you are no doubt reading the many summaries available as to the contents of this legislation, it should be noted that many widely-discussed provisions affecting K-12 education were **NOT** included in the final version of the bill. Among these are the following:

- performance-based salary schedules for teachers, *unless* your district is participating in Race to the Top funding (note, however, that SB 5, if not repealed in the pending statewide referendum, will require a performance-based system for teacher compensation)
- Ohio Teacher Incentive Payment Program (would have provided $50/student stipend for classroom teachers meeting certain value-added criteria)
- ban on new continuing contracts for teachers (note, however, that SB 5, if not repealed, will create such a ban)
- initial 1-3 year/2-5 year contract sequencing for teachers
- assignment limitations and possible early termination for teachers receiving "needs improvement" or lower ratings
- changes to teacher and administrator termination process (would have eliminated referee hearings and required State Board to specifically define "good and just cause")
- home-schooled children participation in public school extracurricular activities

In a veto message, Governor Kasich chose to invalidate a provision that would have repealed the body mass index (BMI) screening requirements for certain public school students. The BMI/weight status screenings in existing law are thus continued.

The budget bill, veto message, and related materials are available at our HB 153 resource center.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
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Dane A. Gaschen – 614.227.8887
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Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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U.S. Department of Education Prohibits Questions on Immigration Status

Bricker Bullet No. 2011-03 *May 18, 2011*

On May 6, 2011, the U.S. Department of Education, through its Office for Civil Rights (OCR), issued a "Dear Colleague" letter which specifically prohibits public school officials from inquiring as to the immigration status of children seeking to enroll in school. Although the OCR has previously issued guidance materials critical of such practice, this appears to be the most direct prohibition issued by the agency to date.

The position of the Office of Civil Rights is based upon its interpretation of Titles IV and VI of the Civil Rights Act of 1964, as well as the ruling of the United States Supreme Court in *Plyler v. Doe*, 457 U.S. 202 (1982) (illegal immigrant status of children may not be used as basis for denying public education). It should be noted, however, that this interpretation is not universally held and may be subject to judicial challenge.

The new "Dear Colleague" letter, which addresses other student enrollment issues such as the use birth certificates and Social Security numbers, may be viewed in its entirety by following this link.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
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Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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New Law Restores Calamity Days to Five for Current School Year and Provides New Option for Making Up Days

Bricker Bullet No. 2011-02 *April 7, 2011*

Legislation to increase the number of excused calamity days for this school year from three to five days was approved by the General Assembly yesterday, and Governor Kasich has indicated that he intends to sign the bill. The bill (House Bill 36) will go into effect immediately upon his signature.

In addition to restoring the two calamity days eliminated under the previous budget bill, House Bill 36 also gives school districts additional flexibility in making up missed days. School districts may now make up *any* unexcused calamity days by lengthening the school day in half-hour increments (previously, this method could only be used for days *after* the first five unexcused days—that is, after the tenth calamity day). Thus, schools no longer need to make up the first five unexcused days as full school days.

For school districts, 10 half-hour increments (five hours) constitute one make up "day" for grades 1-6, and 11 half-hour increments (five and ½ hours) constitute one make up "day" for grades 7-12.* Boards of education are still required to have contingency plans for making up at least five school days; however, these plans can include making up some or all of the five days by lengthening other school days. It appears that this day-lengthening method may be used even if the current contingency plan refers to "full" school days.

What is NOT in House Bill 36? A provision that would have given schools the option of making up calamity days by posting lessons online. It was removed from the final version of the bill. Also excluded from the final bill is a provision that would have prohibited school districts from declaring it "impractical" to transport nonpublic or community school students on days scheduled as make up days.

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*It should be noted that under current ODE interpretations, school districts must "further lengthen" their *existing* school days in order to create the half-hour increments. That is, hours that are presently in excess of the state minimum school day may not be "counted" toward these half-hour increments. See Ohio Department of Education School Finance Guidance Document #2010-002 (effective Jan. 10, 2011).

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

IRS Delays Implementation of "Highly Compensated Employee" Rule on Health Care Benefits

Bricker Bullet No. 2011-01 *January 4, 2011*

The Internal Revenue Service has issued an official notice indicating that it will not require compliance with the provision of the Affordable Care Act requiring nondiscrimination in favor of "highly compensated employees" until such time as it is able to issue regulations "or other administrative guidance" on the issue. The IRS has also indicated that, once such regulations or guidance documents are issued, it is anticipated that they will not take effect until "plan years beginning a specific period after issuance." IRS Notice 2011-1, "Affordable Care Act Nondiscrimination Provisions Applicable to Insured Health Plans" (December 22, 2010).

Under the nondiscrimination requirement, which is being made applicable to insured health plans, employers will not be permitted to discriminate in favor of "highly compensated individuals" in terms of eligibility or benefits. The nondiscrimination rule requires generally that benefits be provided to at least 70% of all employees and that the benefits provided to "highly compensated individuals" be provided to all other participants in the plan. "Highly compensated individuals" are defined (for purposes of a public entity) as one of the five highest paid officers or anyone who is among the highest paid 25% of all employees. Certain exclusions apply for part-time or seasonal employees, employees below the age of 25, and employees having less than three years of service with the employer. (See Internal Revenue Code, 26 USC § 105[h].)

It is important to note that the nondiscrimination provision described above is being made applicable to *insured* health plans by means of the Affordable Care Act legislation. *Self-insured* health plans are, as a general matter, already subject to the nondiscrimination requirements of IRC Section 105(h). Compliance with the nondiscrimination provision is necessary to preserve the tax-exempt status of health care benefits under a group plan.

Consultation with legal counsel is advised in applying these highly technical and still-evolving requirements. Additional information on Health Care Reform issues may be obtained by following this link.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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Health Care Bill Requires Break Time for Nursing Mothers

Bricker Bullet No. 2010-02 *March 30, 2010*

Under a little-discussed provision of the Patient Protection and Affordable Care Act (Public Law 111-148, signed by President Obama on March 23, 2010), employers are required to provide reasonable break time for nursing mothers to express milk, as necessary, during the first 12 months following the birth of a child. The legislation also requires that a private break area (not a bathroom) free from intrusion by coworkers and the public be provided for this purpose. The law does not require that nursing mothers be compensated for the time taken on such breaks.

The new workplace rights for nursing mothers have been added to the Fair Labor Standards Act (the "Act"), the federal labor law which currently provides minimum wage and overtime protections for most American workers in both the public and private sector. (See new subsection at 29 U.S. Code Section 207[r].) Employers with fewer than 50 employees may be able to avoid the nursing mother requirements, but only if they can demonstrate that such requirements create an "undue hardship" for their particular business.

Because an effective date for this provision was not specified, the new requirements for nursing mothers are presumably effective immediately, and will be applicable to public school districts to the same extent as other provisions of the Act. We are seeking additional guidance from the U.S. Department of Labor concerning implementation of this provision.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Mark A. Engel – 614.227.2327
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
C. Allen Shaffer – 614-227-4868
Sue W. Yount – 614.227.2336

Ohio Supreme Court: Documents Must Be Used in Order to Be "Public Records"

Bricker Bullet No. 2010-06 *December 6, 2010*

In a unanimous decision, the Ohio Supreme Court has determined that the mere receipt of resumes and application materials by a school district does not make the documents "public records." It found, rather, that documents received by a public entity must be retained and used or otherwise relied upon in order to constitute "public records." *State ex rel. Cincinnati Enquirer v. Ronan*, 2010 Ohio 5680 (November 24, 2010).

The case arose in the context of a running dispute between the Cincinnati Public Schools and the *Cincinnati Enquirer* over access to information about job applicants—and, in particular, applicants for the position of superintendent. The school district devised a method for soliciting the resumes of applicants in a way that would not require immediate disclosure of their resumes and related materials. It directed applicants for the position of superintendent to submit such materials to a specific post office box and advised applicants that the box would not be opened until a specific date. The *Enquirer* sought access to materials submitted prior to that date. When the district refused, the *Enquirer* filed a lawsuit to compel release of the materials.

The Ohio Supreme Court ruled in favor of the school district on the question of when the documents became "public records." Quoting from an earlier opinion, it emphasized that the Public Records Law "requires more than mere receipt and possession of a document" in order for it to be a "public record." Applying this principle to the post office box procedure, it found that

> *"until the school district retrieved the documents from its post office box and reviewed them or otherwise used or relied on them, they were not records subject to disclosure under R.C. 149.43* [the Public Records Law] *and the Enquirer was not entitled to them. When the school district opened the post office box and used the documents, the documents became records subject to disclosure. . . ."*

The full opinion of the court may be accessed by following this link.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

Confederate Flag Ban Upheld by Court Even Without Showing of Likely Disruption

Bricker Bullet No. 2010-05 *November 30, 2010*

A federal court has upheld a school district's decision to suspend a student for wearing a Confederate flag shirt in violation of school rules. The decision is unusual in that the court did not require the district to show a likelihood of "substantial disruption" in order to justify the punishment. Rather, the discipline was upheld on the basis of the district's need to communicate and enforce standards of good behavior. *Defoe v. Spiva*, 2010 U.S. App. LEXIS 23714 (November 18, 2010).

In making its ruling, the court rejected the traditional "disruption" standard made famous in the 1969 case of *Tinker v. Des Moines Independent School District* (the "black armband case"),[1] choosing instead to rely on more recent U.S. Supreme Court rulings involving sexually suggestive speech and speech promoting illegal drug use: [2]

> *"A public high school . . . can put reasonable and even-handed limits on racially hostile or contemptuous speech, without having to show that such speech will result in disturbances. . . . Schools are places of learning and not cauldrons for racial conflict. . . . [S]chool administrators can limit speech in a reasonable fashion to further important policies at the heart of public education.* Tinker *provides the exception—schools cannot go so far as to limit nondisruptive discussion of political or social issues that the administration finds distasteful or wrong."* [3]

The decision is especially significant for Ohio school districts since it was issued by the Sixth Circuit Court of Appeals— the federal appellate court for Ohio. The opinion of the court can be read in its entirety by following this link.

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[1] 393 U.S. 503 (1969).
[2] *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Morse v. Frederick*, 551 U.S. 393 (2007).
[3] Quotations taken from concurring opinion, specifically indicated as being the controlling opinion of the court.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
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Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
John P. Concannon – 513.870.6571
Jennifer A. Flint – 614.227.2316
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Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
Sue W. Yount – 614.227.2336

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Last-Minute Amendments to H.B. 48 Change Tax Levy Filing Dates

Bricker Bullet No. 2010-04 *May 19, 2010*

Late amendments to a recently enacted House Bill have revamped filing deadlines for Ohio school district tax levies. The bill, Amended Substitute House Bill 48 (effective July 2, 2010), was concerned mainly with providing leave benefits for military families and to allow for the earlier filing of absentee ballots by military personnel and voters living overseas. The fast-moving bill soon became a target, however, for a series of amendments affecting virtually all of the tax levy statutes utilized by public school districts.

The primary effect of the amendments is to lengthen the "advance" period for the filing of tax levy resolutions with the board of elections from 75 days to 90 days. This in turn requires other related actions to be completed earlier, in particular the submission of proposed tax levy resolutions to the county auditor for the calculation of specific millage and revenue information.

School districts should be alerted to a problem of "compression" created by the new deadlines. For example, a school district that fails a levy on the August 3, 2010 ballot will have only one day to adopt a resolution, certify that resolution to the county auditor, obtain the necessary calculations from the county auditor, and adopt a second resolution to proceed with a levy at the November general election. Realistically, steps to return to the ballot would need to be taken even before obtaining the results from the first election.

The November 2010 election is the first election to which the new deadlines will apply. A revised version of the BASA/Bricker & Eckler School Issue Calendar, incorporating the new deadlines, may be obtained by following this link.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Melissa M. Carleton – 614.227.4846
Mark A. Engel – 513.870.6565
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
C. Allen Shaffer – 614-227-4868
Sue W. Yount – 614.227.2336

Bricker & Eckler
ATTORNEYS AT LAW

U.S. Department of Education Downgrades Role of Surveys in Showing Title IX Compliance

Bricker Bullet No. 2010-03 *April 28, 2010*

On April 20, 2010, the U.S. Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague" letter providing new guidance on how it determines whether educational institutions are providing sufficient competitive opportunities for female athletes under Title IX. The new guidance deals with the question of how much reliance may be put on student surveys in showing compliance.

In 2005, OCR issued a letter indicating that a district may use a survey of its female athletes to demonstrate that the district was fully and effectively accommodating their interests and abilities. The letter even included a sample survey. The new guidance letter issued by OCR rescinds the 2005 guidelines, finding that they promoted over-reliance on surveys. Districts may continue to use survey results in responding to OCR's inquiries. However, surveys will be considered as just one indicator among many when gauging student interests and abilities. It will therefore be possible for OCR to find a violation even when the surveys show a lack of interest in a sport sufficient to support a team.

A copy of the new guidance materials may be viewed on the USDOE web site.

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Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
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C. Allen Shaffer – 614-227-4868
Sue W. Yount – 614.227.2336

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U.S. Department of Labor Issues Updated Guidance, New Forms on COBRA Extension

Bricker Bullet No. 2010-01 *January 25, 2010*

The U.S. Department of Labor has issued a new set of guidance materials explaining the extension of the 65% COBRA subsidy eligibility date from December 31, 2009 to February 28, 2010 and the extension of the benefit period from 9 months to 15 months. The new guidance materials include updated Model Forms which employers must send to eligible employees, even those who were previously notified under the original COBRA amendments. These amendments, enacted as part of the American Recovery and Reinvestment Act (ARRA) in February of 2009, were extended by Congress in December of 2009. (For more detailed information on the COBRA extension, see the Bricker & Eckler LLP *Human Resources E-Alert* at this link.)

The updated DOL guidance materials, prepared by the Employee Benefits Security Administration (EBSA), may be viewed at this location on the U.S. Department of Labor web site.

Specific information on the COBRA ARRA Updated Model Notices, including the Premium Assistance Extension Notice, may be found here.

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Questions concerning the above may be referred to the attorneys of the Education Practice Group at Bricker & Eckler LLP:

Jerry E. Nathan, Chair – 614.227.2358
Laura G. Anthony – 614.227.2366
H. Randy Bank – 614.227.8836
Melissa Martinez Bondy – 614.227.8875
Diana S. Brown – 614.227.8823
James P. Burnes – 614.227.8804
Kimball H. Carey – 614.227.4891
Mark A. Engel – 614.227.2327
Jennifer A. Flint – 614.227.2316
Dane A. Gaschen – 614.227.8887
Susan E. Geary – 614.227.2330
Susan B. Greenberger – 614.227.8848
Warren I. Grody – 614.227.2332
Susan L. Oppenheimer – 614.227.8822
Nicholas A. Pittner – 614.227.8815
C. Allen Shaffer – 614-227-4868
Sue W. Yount – 614.227.2336