



The Legal Update with Nicole Donovsky
September 2023



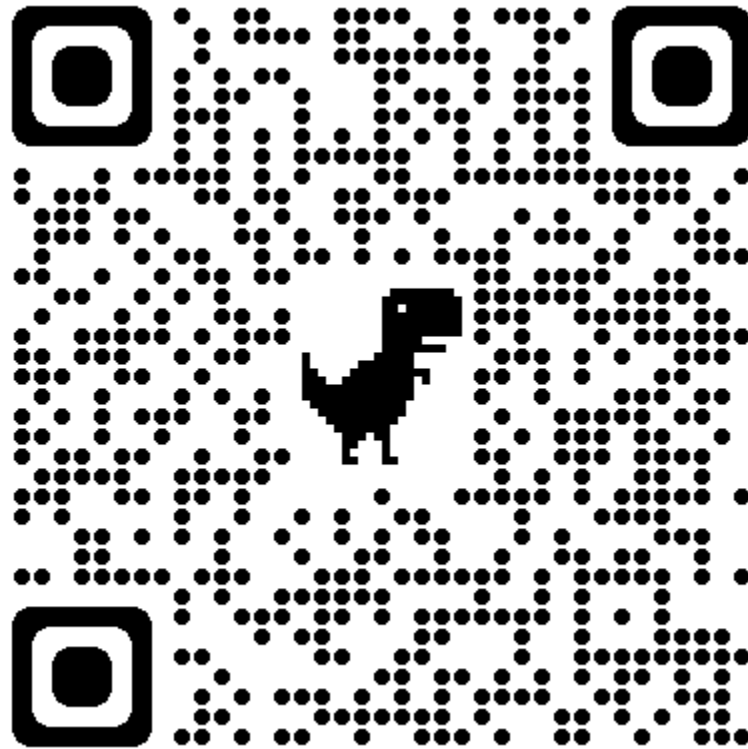
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Link for The Legal Update Handout



<https://www.bricker.com/documents/legalupdate.pdf>

**The Lesson
Learned
(so far)
in 2023?**

**That results
may vary.**

LESSON #1

The Legislature has been busy.

H.B. 33 – FY 2024 and 2025 Budget Bill



(135th General Assembly)
(Amended Substitute House Bill Number 33)

AN ACT

- Appropriations effective immediately
- Other provisions generally effective Oct. 3, 2023

To amend sections 101.34, 101.35, 101.352, 101.353, 101.84, 103.0521, 103.51, 103.60, 103.65, 103.71, 106.02, 106.031, 106.032, 106.04, 106.041, 107.03, 107.032, 107.033, 107.51, 107.63, 109.02, 109.11, 109.111, 109.112, 109.42, 109.572, 109.68, 109.803, 111.15, 113.41, 113.60, 117.103, 117.34, 117.46, 117.462, 117.463, 117.47, 117.473, 119.01, 119.06, 119.062, 119.07, 119.09, 119.092, 119.12, 120.04, 120.08, 120.34, 121.04, 121.08, 121.31, 121.37, 121.381, 121.49, 121.81, 121.811, 121.93, 122.07, 122.072, 122.16, 122.17, 122.171, 122.173, 122.1710, 122.19, 122.21, 122.23, 122.25, 122.27, 122.40, 122.407, 122.4017, 122.4019, 122.4020, 122.4023, 122.4030, 122.4031, 122.4034, 122.4037, 122.4040, 122.4041, 122.4045, 122.4050, 122.4071, 122.4076, 122.6511, 122.6512, 122.85, 123.20, 123.211, 124.136, 124.14, 124.15, 124.34, 124.387, 125.01, 125.035, 125.05, 125.071, 125.073, 125.09, 125.10, 125.11, 125.18, 125.182, 125.22, 125.901, 126.21, 126.25, 126.30, 126.46, 126.47, 126.62, 127.16, 131.02, 131.43, 131.44, 131.51, 131.56, 131.57, 131.58, 133.07, 145.01, 145.016, 145.017, 145.195, 145.201, 145.32, 145.33, 145.331, 145.332, 145.333, 145.35, 145.361, 145.38, 145.39, 145.41, 145.45, 145.46, 149.309, 149.43, 151.01, 151.40, 153.12, 153.17, 153.54, 164.02, 164.23, 164.24, 169.07, 173.03, 173.06, 173.21, 173.24, 173.39, 173.391, 173.51, 173.52, 173.521, 173.522, 173.54, 173.542, 173.544, 173.60, 183.19, 184.02, 184.20, 301.27, 307.86, 307.861, 307.87, 307.90,

Transfer of Powers (pp. 1/2)

- **On Oct. 3, ODE renamed the Dept. of Education and Workforce (DEW)**
 - **Transfer of power from ODE and State Board of Education must be completed within 90 days of Oct. 3**
- **Dept. of Children and Youth**
 - **Transfer of duties from various departments to DCY by Jan. 1, 2025**

School Funding Highlights (pp. 2-4)

- Base Cost Updated – uses FY 2022 data
- Minimum state share increased from 5% to 10%
- Gifted spending requirements made permanent
- **Guarantees retained (for now)**

Teacher Licensure (pp. 4/5)

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- Student-teachers must obtain a pre-service permit
 - Sub up to the equivalent of one full semester
 - Can be renewed one or more semesters
 - May be paid for teaching
 - Non-degreed substitute teachers – now codified
 - Teacher license grade bands changed to grades preK-8 and grades 6-12 and 2 grade band flexibility

Teacher Licensure, cont. (pp. 5/6)

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- Teacher residency
 - Mentoring can be online or in person
 - No limit on number of attempts on assessment
 - School counselors must complete building and construction trades career pathways training
 - Computer science license exemption continued through 2024-2025 school year

Teacher Licensure, cont. (pp. 6/7)

- Alternative resident educator license
 - Reduced from 4 to 2 years and is renewable generally
 - Obtaining professional educator license is optional
 - Do not have to participate in teacher residency program, but must complete professional development and take professional knowledge assessment in year 2
 - If an alternative license is renewed without advancing to professional license, becomes an alternative educator license

Teacher Licensure, cont. (pp. 6/7)

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- New alternative military educator license (funded)
 - Grow your own teacher college scholarship program (funded)
 - Minimum base teacher salary increased from \$30,000 to \$35,000 and stepped salary amounts adjusted accordingly

Other School Employment Provisions (pp. 7/8)

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- Criminal records check and RAPBACK for nonlicensed employees (and positions)

Employment Issues, cont. (p. 8)

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- Certain teaching/nonteaching employee contract action notices can be served by regular mail with certificate of mailing, other form of delivery with proof of delivery, or electronic delivery with electronic proof of delivery
 - Teacher termination hearings – record of proceedings not required to be stenographic

Training Requirements (pp. 8/9)

Fraud-reporting system training

- AOS must create training material
- Must complete within 90 days of date specified by AOS and 30 days of hire
- Notice in handbook is insufficient notice

Training Requirements (pp. 8/9)

Mental health training required for coaches (new)

- Training frequency – each time person applies for or renews pupil activity permit
- Training frequency for sudden cardiac arrest and concussion/head injuries also changed to within duration of individual's previous permit

Third-grade reading guarantee (pp. 12/13)

- Student can be promoted to 4th grade if parent, in consultation with reading teacher and principal, requests promotion
- Content of notice to parent for student reading below grade level modified
- Reading improvement and monitoring plans must include high-dosage tutoring opportunities **until student is reading at grade level**

Science of reading (p. 13)

- New R.C. 3313.6028 defines science of reading
 - Curriculum – districts must use core curriculum and instructional materials in English language arts and reading intervention programs from the lists established by DEW
 - Three-cueing approach not allowed (but may request waiver in some cases)
 - Must participate in survey about curriculum, instructional materials, and reading intervention programs being used
 - \$64 million appropriated in FY 2024 to subsidize cost to purchase curriculum and instructional materials

Reading professional development (pp. 9/10 and 13/14)



- Dyslexia professional development deadline changed
 - If hired prior to 4.12.21: 9.15.24 for grades 2-3 and 9.15.25 for grades 4-12
 - If hired after 4.12.21: later of 2 years after date of hire or dates above
- Science of reading professional development required for all teachers and administrators
 - **Must complete by June 30, 2025**
 - Districts must pay stipend to teachers completing the course - \$1,200 for grades K-5 teachers, grades 6-12 English language arts, and grades preK-12 intervention specialist, English learner teacher, reading specialist, or instructional coach
 - \$400 stipend for grades 6-12 teachers of other subject areas
 - May apply to DEW for reimbursement

Transportation (pp. 10-12)

- Must not deliver students late to school
- Must provide transportation to students enrolled in nonpublic schools as a related service
- Can use vehicles originally designed for not more than 9 passengers, not including the driver, to transport students to and from regularly-scheduled school sessions (only for community and chartered nonpublics)

Transportation noncompliance (p. 10)

- “Out of compliance” – for period of 5 consecutive school days or 10 school days within a school year, at least one of the following has occurred on each of those days:
 - Students transported to and from school by a school bus
 1. Arrive more than 30 minutes late to school;
 2. Are picked up more than 30 minutes after the end of the school day; or
 3. Not transported at all due to failure of bus to arrive; also
 4. A school district has been noncompliant with any other transportation requirements under Chapter 3327 of the Revised Code.
 - Excludes school days in which noncompliance occurred due to inclement weather

Noncompliance penalties (p. 10)

- After 1st notification, must submit corrective action plan within 1 week
- Occurrences 2, 3 and 4 - 25% of daily student transportation payment withheld for each day district is out of compliance
- 5th occurrence – 100% of daily transportation aid withheld until department determines district is no longer out of compliance

Transportation, cont. (p. 11)

- Bus driver flex career path to be developed by DEW
- DEW must establish transportation pilot program (in Franklin and Montgomery counties, per LSC)

Seizure Action Plans (p. 14)

- School nurse or district employee must create seizure action plan in collaboration with parent/guardian
 - Plan must include written request signed by parent to have one or more prescribed drugs administered by student
 - Must include written statement from prescribing treating practitioner providing drug information
 - Plan must be renewed at beginning of each school year and maintained in nurse or administrator's office

Seizure Action Plans, cont. (p. 15)

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- School nurse or administrators must notify certain employees, contractors, or volunteers, in writing, regarding existence and content of plan
 - One-hour of training on seizure disorders required for all administrators, guidance counselors, teachers, or bus drivers
 - May be self-study or in person
 - Must be completed within 24 months of effective date – if employed after that date, within 90 days

Seizure Action Plans, cont. (p. 15)

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- Nurse or administrator must identify individuals who received drug administration training under R.C. 3313.7117(G) for drugs prescribed for seizure disorders
 - At least one employee in each building, aside from school nurse, must be trained on implementation of seizure action plans every 2 years

Student records (p. 16)

- School records must be transmitted within 5 school days
 - If district has no record of attendance, must transmit statement of this fact within 5 school days
 - May withhold records if more than \$2,500 outstanding debt
 - School records include academic records, assessment data, or other information for which there is a legitimate educational interest
 - Does not affect obligation to comply with R.C. 3313.642(D) (abused, neglected, or dependent child) and R.C. 3313.672 (presenting school records/missing children)

Free meals and feminine hygiene products (pp. 16/17)

- Free breakfast or lunch
 - If district participates in national school breakfast or lunch program, it must provide free meal to students eligible for a reduced-price meal
 - DEW must reimburse districts for the cost difference between the free and reduced price meal
- Free feminine hygiene products
 - Schools enrolling girls in any of grades 6-12 must provide free feminine hygiene products to those students for use on school premises
 - May provide to below grade 6
 - Funds appropriated to install dispensers and reimburse schools for product costs

Additional requirements (p. 17)

- Districts must provide state assessment scores to student's parents by June 30 each year
- If district conducts lottery for *intra-district* open enrollment, must conduct it ON 2nd Monday of June
- Home education notice effective upon receipt

Blizzard bags 2.0 (p. 18)

- Current blizzard bag law repealed
- School governing body “shall adopt a plan” to provide instruction via online delivery to make up hours for which it is necessary to close schools for
 - disease epidemic,
 - hazardous weather conditions,
 - law enforcement emergencies,
 - inoperability of school buses or other equipment necessary to the school's operation,
 - damage to a school building, or
 - other temporary circumstances due to utility failure rendering the school building unfit for use.

Blizzard bags 2.0, cont. (p. 18)

- Plans must include:
 - a statement that the school will provide for teacher-directed synchronous learning to the extent possible,
 - attendance requirements and how the school will document participation,
 - how equitable access will be ensured,
 - the process for providing notification,
 - information on contacting teachers,
 - and how the school will meet internet connectivity and technology needs for staff and students.
- Can be used for up to 3 (hours equivalent) school days (except JVS boards)
- Must include written consent of teacher's union

Cash payments at school events (p. 18)

- “Qualifying school” must permit an individual to pay cash for a ticket to a school-affiliated event
 - If the school does not accept cash payment from someone who wishes to purchase a ticket on the date of an event, the school must give the person a free ticket if tickets are still available and the person demonstrates they have enough cash to cover the full ticket cost
- Concessions – A “qualifying school” must also provide at least one location where an individual can pay cash for concessions
 - If concessions are sold on multiple floors, each floor must have a location that accepts cash payment

Odds and ends (p. 22)

- School facilities

- Extends the time during which voters must approve bond and tax levies related to a project from 13 to 16 months of the date of certification

- Innovative waivers

- Districts cannot propose an exemption from any requirements related to implementation of a blended or online learning model

- Emergency management plan submission deadline

- Changed from July 1 to **September 1**

Odds and ends (p. 22)

- Value-added data

- Individual student performance data reports and data used to calculate a district's or school's overall growth rating must be available to districts and schools that have an overall value-added progress dimension score

- Modified graduation rate without performance rating

- Must be included on state report cards for students who are in the 12th grade and have 15 high school credits when first enrolling in the online school

LESSON #2

Consider settling special education disputes by paying a little money and securing a full and complete release if you'd like to avoid an ADA claim.

Does IDEA's exhaustion requirement bar ADA lawsuit for compensatory damages?

No, if the relief sought is not something the IDEA can provide (such as compensatory damages).

LESSON #3

Special ed students may have independent, non-monetary claims for accommodations under the ADA and Section 504.

Was a student with misophonia required to exhaust IDEA's administrative remedies?

No. The gravamen of the claim (request for a ban on eating and chewing gum in classrooms and other accommodations) is not the denial of FAPE, as no instructional changes were requested. Instead, it is the denial of an accommodation/access under the ADA and Section 504.

LESSON #4

A court has jurisdiction over exhausted IDEA claims, even if other claims are not yet exhausted.

Does a court have jurisdiction to hear a claim that a school district violated the IDEA by denying the parents' request to conduct an MDR, an IDEA IEP evaluation, and IEP team meeting before expelling a student who threatened to "do a school shooting" and stated his parents owned an assault rifle?

- Yes. Even though some of the IDEA claims were not yet exhausted, the court had jurisdiction over the pre-expulsion claim, which was exhausted.
- However, the court properly dismissed the ADA and Section 504 discrimination claims for failure to state a claim. Even if the parents sought compensatory damages in their complaint (which was not clear), the parents failed to explain how the failure to timely identify their child as ED rose to the level of bad faith or gross misjudgment that would allow them to avoid the exhaustion requirement. The court left that for resolution in the pending IDEA due process proceeding.

LESSON #5

We can do hard things
(and the courts expect us to).

Did placement of student with autism in self-contained classroom violate the IDEA?

Yes. The supports the student needed could be provided in the regular classroom, and the educational benefits the student would gain in a self-contained classroom do not “far outweigh” the benefits of a general education classroom, despite the fast pace of the curriculum and large class sizes. The expectation that full-time mainstreaming will be difficult is no excuse.

LESSON #6

You can(!) discipline for off-campus student speech that is severely harassing, directed at teachers and students, and will cause disruption.

Can a school discipline a student responsible in part for off-campus harassing speech?

In this case, yes. The speech involved serious or severe harassment of three teachers and a student, and school officials were justified in believing it would result in substantial disruption.

The district could punish the student who created and monitored a fake Instagram account impersonating one of his teachers, even though he personally made only one innocuous comment and his friends added the graphic, harassing, and threatening posts. “[W]hen a student causes, contributes to, or affirmatively participates in harmful speech, the student bears responsibility for the harmful speech.”

LESSON #7

The restroom debate is far
from settled.

Adams v. St. Johns County (FL) (p. 47)
(11th Cir. 12/30/2022)



Is a district required to accommodate a student's preferred restroom of choice based on their gender identity?

Not in the 11th Circuit, where it is constitutional to assign restrooms by biological sex, but the issue will likely end up before the Supreme Court given the Circuit Court splits.

Stay tuned . . .

A note from the Ohio Attorney General: Ohio Civil Rights law does not prohibit operators of public accommodations from adopting policies that limit communal restrooms, changing rooms, and locker rooms to members of single sex.

- **Per OAG, R.C. 4112.02(G) does not prohibit operators of public accommodations from limiting restrooms to a single sex.**
 - R.C. 4112.02(G) prohibits a place of public accommodation from denying access to a person because of a protected trait, including sex.
- **OAG notes if court rejects this reading of the statute, political subdivisions and their employees could be liable for violations.**
- **OAG said it was up to the courts to determine whether a restroom, etc. open to the public that is located in a facility owned by a governmental entity is considered a “public accommodation.”**

But wait . . . There's more!

- **Bethel Local School District**
- **Olentangy Local School District**

LESSON #8

If an employee requests a religious accommodation, be prepared to grant it if you can't show the accommodation is unduly burdensome and would result in substantial costs.

Groff v. DeJoy (p. 54)

(U.S. S. Ct., 6/29/2023)

How do you establish undue hardship if an employee requests a religious accommodation under Title VII?

- **Must show more than *de minimis* hardship before the declining accommodation.**
- **The “undue hardship” standard is met when a burden substantially affects the conduct of the employer’s business.**
- **Must do more than just assess the reasonableness of an accommodation—must also make accommodation by considering all options, such as voluntary shift swapping.**

Did district violate Title VII when it stopped accommodating teacher who had a faith-based objection to using preferred names and pronouns of transgender students?

~~Not in the Seventh Circuit, as of today.~~ While the school initially accommodated the teacher by allowing him to refer to students by their last name, it reversed course after students and faculty complained about how that accommodation made them feel. The teacher resigned in lieu of termination and sued the district for failing to accommodate his religion. The school district initially prevailed because it presented evidence that the teacher's requested accommodation resulted in undue hardship on its students and educational mission. **Update! On July 28, 7th Circuit vacated its opinion and judgment and remanded to district court to apply *Groff*.**

LESSON #9

Promptly taking action to address reported harassment will help you win a lawsuit.

Greenberg v. Toledo Public Schools (p. 55)

(6th Dist. Lucas Cty., 3/17/2023)



Did a district's response to a sexual harassment complaint create a hostile work environment?

No. When a teacher filed a complaint of sexual harassment against her supervising principal, the district banned the principal from school property and from contacting teacher. The principal was placed on administrative leave shortly thereafter and commenced an investigation. While the teacher's claims alleged that she feared for her safety and was forced to resign her employment, the facts showed that she only returned to school for one day after her making complaint, admitted she had no further contact with principal, and resigned before the investigation concluded and in advance of her interview with the investigators.

LESSON #10

Board committees are also subject to the Open Meetings Act and Public Records Laws.

Does a school district committee have to comply with R.C. 121.22 and 149.43?

It does if it is a committee of the board. Where a committee is “subordinate to the board,” it has no individual autonomy as to its composition, purpose, or function and is subject to the same requirements as the board and is subject to the requirements established by the board.

Thank you!

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