

# Bowles Rice

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## **West Virginia Legal Update**

### **WEST VIRGINIA ASSOCIATION OF SCHOOL BUSINESS OFFICIALS**

Embassy Suites  
Charleston, West Virginia

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May 20, 2022

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# HIGHLIGHTS OF LEGISLATION AFFECTING PUBLIC EDUCATION IN WEST VIRGINIA ENACTED AT THE 2022 REGULAR SESSION

*By the Education Law Group at Bowles Rice LLP*

## **Senate Bill 246**

### **Requiring newly constructed public schools and public schools with major improvements to have water bottle filling stations**

*In effect June 10, 2022*

[Read the Entire Bill](#)

Water bottle filling stations have touchless activators and dispense filtered drinking water into a bottle. Citing studies showing positive health outcomes when water bottle filling stations are installed in schools and the relatively unsanitary condition of most water fountain spigots, this bill requires the State Board of Education, on or before November 1, 2022, to require the installation of water bottle filling stations in new schools and schools undergoing major improvements. County boards are required to adopt policies permitting students to carry water bottles in schools which have one or more water bottle filling stations. *West Virginia Code § 18-9G-1; West Virginia Code § 18-9G-2(4); West Virginia Code § 18-9G-3(b)*.

Newly constructed school buildings and existing school buildings undergoing a “major improvement” (defined as increasing the school’s square footage by more than 5,000 square feet or the renovation of a school costing more than \$500,000 where the related plumbing work constitutes more than 20% of renovation costs) must provide a sufficient number of water bottle filling stations. *West Virginia Code § 18-9G-2(2)(A); West Virginia Code § 18-9G-2(2)(B)*.

The State Board policy required by this bill must specify the number and location of water bottle filling stations within new schools and schools undergoing major improvements. *West Virginia Code § 18-9G-3(a)(1)-(4)*.

## **Senate Bill 261**

### **Requiring video cameras in certain special education classrooms**

*In effect March 12, 2022*

[Read the Entire Bill](#)

For several years, county boards have been required to install and maintain video cameras in self-contained special education classrooms. S.B. 261 makes significant changes to who may view or obtain a copy of video camera data “videos,” imposes related deadlines on complying with certain requests to view videos, creates new requirements for video camera systems installed after April 1, 2022, modifies the amount of time and conditions under which schools must retain videos, and imposes a minimum amount of video monitoring, even in the absence of any alleged incident.

For existing video camera systems, all videos must be retained for at least three months after the recording date. If that three month period overlaps with the annual summer break between semesters, the three-month retention period must be extended by the number of overlapping days between the end of the spring semester and the start of the fall semester. Video camera systems

installed or replaced on or after April 1, 2022 must retain videos for at least 365 days. Schools are not required to expand the 365-day retention period to account for summer break days. *West Virginia Code § 18-20-11(g)(1)(A)*; *West Virginia Code § 18-20-11(g)(1)(B)*; *West Virginia Code § 18-20-11(g)(3)*.

As before, the bill requires the school to allow authorized persons to view the videos within seven days of receiving the request. But the list of persons authorized to view these videos has been expanded by S.B. 261 to include: 1) employees of the Department of Health and Human Resources who are investigating an alleged incident reported to the agency that is documented by the video recording, and 2) a judge, counsel, or other legal entity that is charged with deciding or representing either the school board, students, or employees in any matters related to legal issues arising from an incident. The latter group (judges, counsel, etc.) would include, among others, lawyers representing parents and students in civil suits against the school board. As to that same group, videos may only be released pursuant to an appropriate protective order or after being placed under seal by the court. *West Virginia Code § 18-20-11 (l)(1)*; *West Virginia Code § 18-20-11 (l)(2)*.

If an authorized person requests to view a video, schools are now required to retain the video until the requestor actually views the video or 60 days after the requestor was notified by the school that the video was ready to be viewed, whichever is earlier. Regardless of the circumstances, no videos may lawfully be deleted any earlier than three months or 365 days after the initial recording date, as applicable. *West Virginia Code § 18-20-11(g)(2)*; *West Virginia Code § 18-20-11(g)(3)*.

With respect to initial requests to view videos and subsequent requests to view and/or release videos to law enforcement officers or employees of the Department of Health and Human Resources, described above, those agencies are required to maintain strict confidentiality regarding the videos and to not release them to anyone else without authorization from a county board's superintendent. Although the bill does not say so, the term "strict confidentiality" suggests that these agencies should not allow others to view the video either. *West Virginia Code § 18-20-1(l)(1)*.

The bill allows school principals to designate other school administrators as the custodian of video camera data and permits a county-level administrator to authorize the viewing and/or release of videos in the absence of the principal or the principal's designated school administrator. *West Virginia Code § 18-20-11(c)*; *West Virginia Code § 18-20-11(j)*.

At least once every 90 days, school principals, or their school designees or a county designee, must watch at least 15 minutes of video from each self-contained classroom in the school building. The State Board of Education policy authorized by this bill must explain what documentation is required to show that a school has complied with this new monitoring duty. *West Virginia Code § 18-20-11(j)*.

Other than for authorized requests to view videos of alleged incidents and the new 15-minute per classroom per 90 days' monitoring requirement, S.B. 261 does not require a principal or their designee to view any videos recorded by the self-contained classroom video cameras. Notably, though, the bill eliminates a provision of the prior law that prohibited schools from regularly, continuously, or continually monitoring these video recordings. Therefore, while schools may

choose to monitor these video recordings more often than required, schools are not required to do so. *West Virginia Code § 18-20-11(h)(3); West Virginia Code § 18-20-11(i)*.

A mandatory reporter who views a video showing an act of abuse or neglect of a child or images from which a reasonable person could conclude that a child has suffered/is suffering abuse or neglect must make a report to DHHR, law enforcement, and/or others as required by law within 24 hours of viewing the incident on the video. *West Virginia Code § 18-20-11(m)*.

S.B. 261 clarifies that it applies only to self-contained classroom video camera systems, not to other video surveillance cameras operated by a county board. *West Virginia Code § 18-20-11(p)*.

**Senate Bill 268**  
**Creating exemption from compulsory school attendance for child who participates in learning pod or microschool**

*In effect June 10, 2022*

[Read the Entire Bill](#)

School-age children in West Virginia are required to attend public school with certain exceptions (e.g., children who are homeschooled or who attend private, parochial, church or other religious schools).

S.B. 268 adds new exemptions for children who participate in a learning pod or microschool. A “learning pod” is a voluntary association of parents who group their children together to participate in elementary or secondary academic studies instead of enrolling them in a public school, private school, homeschool, or microschool. Learning pod students are permitted to participate in paid education activities and services. *West Virginia Code § 18-8-1(n)(1)(A)*.

A “microschool” is a school initiated by one or more teachers or an entity (such as a corporation or limited liability company or other legal entity) created for the purpose of operating a school that charges tuition. A microschool is an alternative to enrolling in a public school, private school, homeschool, or learning pod. *West Virginia Code § 18-8-1(n)(1)(B)*.

Parents of students participating in learning pods and microschools are subject to the rules and conditions below. These are essentially the same rules with which homeschooling parents must comply:

- Upon beginning participation in the learning pod or microschool, the parent must present the county superintendent or county board with notice of intent to participate in a learning pod or microschool. This notice must include the name, address, and age of the participating child, an assurance that the child will receive instruction in reading, language, mathematics, science, and social studies, and an assurance that the child’s academic skills will be assessed annually by one of four methods (completing a nationally normed standardized achievement test; participating in the same annual testing program used by the county board where the student resides; submitting a certified teacher’s narrative assessment of a portfolio of the student’s work in reading, language, mathematics, science, and social studies which shows acceptable progress; or completing an academic assessment of proficiency agreed upon by the parent and the county superintendent). However,

learning pods and microschools are permitted to submit the school's "composite results" on the academic assessment to the county superintendent instead of individual student academic assessment results. "Composite" is not defined or explained. Ordinarily, a composite score would be the average of separate test scores. *West Virginia Code § 18-8-1(n)(2)*; *West Virginia Code § 18-8-1(n)(4)*.

- As to children currently enrolled in a public school, the notice of intent to participate in a learning pod or microschool must be given to the county superintendent or county board on or before the date the student starts participating in the learning pod or microschool. *West Virginia Code § 18-8-1(n)(2)*.
- Parents must institute remedial programs to address less-than-acceptable academic student progress. *West Virginia Code § 18-8-1(n)(5)*.
- Parents must maintain copies of their student's academic assessment for three years. *West Virginia Code § 18-8-1(n)(5)*.
- The county superintendent is required to offer assistance to the person providing instruction to students in learning pods or microschools, such as textbooks and other teaching materials. *West Virginia Code § 18-8-1(n)(7)*.
- Learning pod and microschool students, with the approval of the county board, have the option of attending any class offered by the county board subject to normal registration and attendance requirements. *West Virginia Code § 18-8-1(n)(7)*.
- The person providing instruction to the student must notify the county superintendent when a child of compulsory school attendance age ceases to participate in the learning pod or microschool. *West Virginia Code § 18-8-1(n)(2)*.

So long as learning pods and microschools comply with the requirements of the foregoing rules and conditions, they are not subject to "any other provision of law relating to education" unless the pod or school has a student requiring special education instruction. In that case, the learning pod or microschool must comply with West Virginia Code § 18-20-11 (requiring video cameras in self-contained special education classrooms). It is unclear whether the Legislature considers State anti-discrimination, bullying/harassment/intimidation, or sexual harassment laws and the like to be "provisions of law relating to education." *West Virginia Code § 18-8-1(n)(8)*.

The bill concludes with the statement that microschools and learning pods are not the same as homeschooling merely because learning pods and microschools are subject to the "home instruction provisions and requirements." While not fully explained in the bill, learning pods and microschools, are in fact, not the same as homeschooling in several significant ways. *West Virginia Code § 18-8-1(n)(9)*.

West Virginia school boards are empowered by this legislation to deny a request for home instruction for "good and reasonable justification." And county superintendents may seek a circuit court order denying requested home instruction upon a showing of clear and convincing evidence that the child "will suffer neglect in his or her education or that there are other compelling reasons

to deny home instruction.” Neither learning pods nor microschools are subject to those provisions. Therefore, county boards and superintendents, regardless of the circumstances, are not empowered by this legislation to prevent a student from participating in a learning pod or microschool. *West Virginia Code § 18-8-1(c)(1)*; *West Virginia Code § 18-8-1(c)(2)*. Compare with *West Virginia Code § 18-8-1(n)*.

**Senate Bill 438**  
**Relating generally to WV Security for Public Deposits Act**

*In effect June 10, 2022*

[Read the Entire Bill](#)

Under this new Act, all banks and savings and loan associations that are designated as state depositories of public funds will be allowed to use a “pooled method,” instead of any other lawful method, to pledge collateral to secure the public funds. Under the pooled method option, participating state depositories must accept the contingent liability for any loss of public deposits by other participating state depositories. *West Virginia Code § 12-1-5(a)*; *West Virginia Code § 12-1B-2(a)*; *West Virginia Code § 12-1B-2(b)*.

Designated state depositories of public funds may choose, instead, to use any other lawful method to secure public funds. These include the traditional “dedicated method.” The dedicated method does not require a depository to accept contingent liability for the loss of public deposits by other designated state depositories. *West Virginia Code § 12-1B-4*; *West Virginia Code § 12-1B-9(a)*.

The Legislature anticipates that the pooled method will lower the overall cost of public deposits and make banking contracts in West Virginia more desirable to financial institutions. *West Virginia Code § 12-1B-2(c)*.

The State Treasurer will implement and administer the pooled method. The method will be operable on or before March 1, 2024. Regulations will establish how the collateral requirements and collateral pledging level will be determined for each state depository participating in the pooled method, to be based in part on the public funds held by a depository and the depository’s overall financial condition. *West Virginia Code § 12-1B-5*; *West Virginia Code § 12-1B-7(1)*.

County boards of education, like other public entities, must make time deposits, demand deposits, savings deposits and any other transaction account deposits into a designated state depository, which need not be a depository that uses the pooled method. Public depositors may not require any pledge of collateral from a depository in excess of the requirements of the Act. *West Virginia Code § 12-1B-4*; *West Virginia Code § 12-1B-11*.

**Senate Bill 529**  
**Encouraging additional computer science education in WV Schools**

*In effect June 10, 2022*

[Read the Entire Bill](#)

The Legislature finds that computer science instruction for all students is an important component of a well-developed education. Aligning West Virginia’s computer science education standards to relevant aspects of computer science jobs will help prepare students to work in that industry. The



State Board is required to submit to the Legislature, prior to the start of the 2023 regular legislative session, a plan to implement and update computer science instruction and learning standards. The plan must recommend course work in computer science-related areas, encourage schools to integrate computer science skills into required courses, encourage the availability of secondary computer science courses for interested students, and recommend academic and vocational courses and units of instruction on computer programming, network communication, computer architecture, coding, application development, and cyber security. *West Virginia Code § 18-2-12(a)(6); West Virginia Code § 18-2-12(b).*

**Senate Bill 531**  
**Increasing annual salaries of certain State employees**

*In effect July 1, 2022*

[Read the Entire Bill](#)

Beginning with the 2022-2023 school year, the minimum State salaries of teachers are increased by the annual amount of \$2,240. Also beginning with the 2022-2023 school year, the minimum State salaries of service personnel are increased by the monthly amount of \$122. *West Virginia Code § 18A-4-2(a); West Virginia Code § 18A-4-8a(a)(1).*

**Senate Bill 535**  
**Providing for revocation of school personnel certification or licensure in certain circumstances**

*In effect June 7, 2022*

[Read the Entire Bill](#)

The State Superintendent issues certificates to teachers, administrators, paraprofessionals, and others who work in the public schools. S.B. 535 grants the State Superintendent additional authority to suspend and revoke all such certificates automatically under certain circumstances. Certificate holders who are *charged or indicted* for certain forms of child abuse, sexual abuse, allowing sexual abuse and similar crimes, criminal offenses that require registering as sex offenders, first or second degree murder, and crimes involving delivery or distribution of controlled substances *may have* their certificates automatically suspended by the State Superintendent. When such charges and indictments are dismissed by the court or the certificate holder is acquitted of the charges, suspended certificates must be reinstated unless prohibited by law. *West Virginia Code § 18A-3-6(b); West Virginia Code § 18A-3-6(c).*

The certificates of persons who are convicted or plead guilty to any of the offenses above *must be* automatically revoked by the State Superintendent. If a certificate holder's conviction is overturned by a court of competent jurisdiction, the State Superintendent must reinstate that certificate unless prohibited by law. *West Virginia Code § 18A-3-6(d); West Virginia Code § 18A-3-6(e).*

**Senate Bill 704**  
**Parental right to inspect instructional materials; listing books on syllabus; right to file complaint**

*In effect June 10, 2022*

[Read the Entire Bill](#)

This new statute requires classroom teachers to comply with the requests of parents/custodians/guardians of enrolled students to inspect county board-adopted instructional materials, supplemental instructional materials which do not require the approval of the county board, and books available in their classroom for students to read. Classroom teachers may require parents/custodians/guardians to schedule an appointment for such inspections. An appointment must be scheduled to take place within ten business days of the request. If requested by the parent/custodian/guardian, the classroom teacher must demonstrate how those instructional materials relate to the county board's adopted content standards. *West Virginia Code § 18-5-27(a)*.

Under this law, the term "parent" means a parent who has some allocation of physical custody of the child or who has some share of joint decision-making authority for the child. The term "custodian" means any person who has some allocation of physical custody of the child or who has provided to the school written permission of a parent giving that person access to the information contemplated by this law. The term "guardian" means a person other than a parent or custodian who, pursuant to a court order, acts in place of the parent for the child. *West Virginia Code § 18-5-27(e)*.

For courses with required reading, the classroom teacher must include in the course syllabus information about the books the students must read and make the syllabus available to the students' parents/custodians/guardians upon request. This provision appears to apply to all grades, pre-K through 12. *West Virginia Code § 18-5-27(b)*.

Parents/custodians/guardians may file a complaint with the county superintendent regarding the alleged failure of a classroom teacher to comply with any of these requirements. If the county superintendent fails to resolve the complaint within seven business days, the parents/custodians/guardians may file a complaint with the State Superintendent or designee. *West Virginia Code § 18-5-27(c)*.

By September 1 of each year, the number of complaints filed must be reported by each county superintendent to the State Superintendent who, in turn, must report the total number of complaints to a legislative oversight committee. *West Virginia Code § 18-5-27(d)*.

**House Bill 3073**  
**Relating to the West Virginia Emergency School Food Act**

*In effect June 10, 2022*

[Read the Entire Bill](#)

The new Emergency School Food Act builds on the Feed to Achieve and Shared Table initiatives of prior years by allowing, but not requiring, county boards to:

- annually survey public school students about their eating on noninstructional, remote learning, and virtual school days and the availability of nutritious food to them when schools are closed. The West Virginia Office of Child Nutrition may assist with and facilitate the surveys to determine the needs for supplemental food services. *West Virginia Code § 18-5D-6(a); West Virginia Code § 18-5D-6(b).*
- collect and compile information about the availability of food resources during noninstructional or nontraditional remote learning days. A county board may prepare a plan that includes virtual school students, and may distribute the information to students. The food resources may include public, private, religious and charity sources of food for children with food insecurity. *West Virginia Code § 18-5D-6(c).*
- investigate and implement any program that may facilitate this initiative, such as entrepreneurship programs to foster innovation in providing assistance, using program participation as a positive discipline option, and creating mentorship and other opportunities to participate in the feeding program. *West Virginia Code § 18-5D-6(d).*
- provide, with the help of the Office of Child Nutrition, annual county or regional training on operation of a feeding site for any entity that potentially qualifies as a summer feeding site. *West Virginia Code § 18-5D-6(e).*
- provide its survey, a summary of its activities, and any related findings or recommendations to the Office of Child Nutrition. *West Virginia Code § 18-5D-6(f).*
- include, in its Crisis Response Plan, an assessment and plan to feed students during noninstructional or nontraditional remote learning days, and to feed public virtual students, that includes emergency situations, using community support and resources in creating the plan. *West Virginia Code § 18-5D-6(g).*

The Act authorizes the Office of Child Nutrition to monitor these activities and share information with counties about innovative and successful program initiatives. *West Virginia Code § 18-5D-6(h).*

**House Bill 3220**  
**Restrictions on taxpayer funded lobbying**

*In effect July 1, 2022*

[Read the Entire Bill](#)

On every July 1, beginning in 2023, a school district that contracts for lobbying services must disclose to the West Virginia Ethics Commission: 1) the details of the contract, including, but not limited to, the parties, effective date, duration, terms of payment and reimbursement, plus any extension dates; 2) a copy of the contract; 3) all costs that were or are to be paid or reimbursed for the lobbying services, including itemized expenses such as for dinners, meals and events; and 4) the identities of people or entities whose work under the contract may require them to register as lobbyists. *West Virginia Code § 6B-3-10.*

“Lobbying” means the act of communicating with a government officer or employee to promote, advocate or oppose, or otherwise attempt to influence: 1) the passage, defeat, executive approval or veto of any legislation which may be considered by the Legislature, or 2) the adoption or rejection of any rule, regulation, legislative rule, standard, rate, fee or other delegated legislative or quasi-legislative action to be taken or withheld by any executive department. *West Virginia Code § 6B-3-1(6)*.

**House Bill 4012**  
**Prohibiting the showing of proof of a COVID-19 vaccination**

*In effect March 12, 2022*

[Read the Entire Bill](#)

Public school districts and their officials are not allowed to require proof of vaccination against COVID-19 as a condition to entering school district premises or using services provided by the school district unless any federal law or regulation requires proof of vaccination as a condition to entry. *West Virginia Code § 16-3-4b(c)(1); West Virginia Code § 16-3-4c(b)*.

**House Bill 4019**  
**Relating to deadlines for public charter schools**

*In effect March 8, 2022*

[Read the Entire Bill](#)

For public charter schools that plan to open in the school year beginning July 1, 2022, the deadline for the school’s governing board and authorizer to enter into the charter contract is May 15, 2022. If the contract is not signed by May 15, the school’s opening is delayed until the 2023-2024 school year. This delay applies only to public charter schools opening in the 2022-2023 school year. For schools that plan to initially open in other years, the deadline under section 5.5.e.1 of State Board of Education Policy 3300 remains March 15. *West Virginia Code § 18-5G-16*.

Additionally, public charter schools intending to open for the 2022-2023 school year must also conclude the primary round of student enrollment applications, lottery and enrollment on May 15, 2022. This delay applies only to public charter schools opening in the 2022-2023 school year. For schools that plan to initially open in other years, the deadline under section 9.3.b.2 of State Board of Education Policy 3300 remains April 15. *West Virginia Code § 18-5G-16*.

**House Bill 4065**  
**Allowing the Division of Natural Resources to teach hunter’s safety courses in schools**

*In effect June 7, 2022*

[Read the Entire Bill](#)

In 2008, Senate Bill 9 required the State Board of Education to develop a two-week hunter safety orientation program, voluntary to public school students in grades 6-12, to be taught by Department of Natural Resources–certified or other qualified instructors. County superintendents had the option of offering the program in their districts as part of physical education or the general curriculum, or at the end of the school day. Students choosing not to participate in the program

had to participate in “another education activity.” *West Virginia Code § 18-2-8a(b); West Virginia Code § 18-2-8a(c).*

As a result of this year’s H.B. 4065, every county board is now *required* to offer the hunter safety orientation program, still voluntary to public school students, at least once every spring semester in middle school, but only if there is sufficient demand and qualified instructors are available. The program must now include hands-on training, but there is no longer a statutory requirement that it cover a two-week period. County boards have discretion to establish the minimum number of students who must request the program in a semester in order for the program to be offered. The bill removes the requirement that students choosing not to participate in the program must participate in another education activity. As before, the State Board of Education is responsible for establishing and implementing the program, by rule, with the advice of the State Superintendent of Schools and the Director of the Division of Natural Resources. *West Virginia Code § 18-2-8a.*

#### **House Bill 4074**

#### **Require schools provide eating disorder and self-harm training for teachers and students**

*In effect May 12, 2022*

[Read the Entire Bill](#)

A new section of West Virginia Code, to be known as “Meghan’s Law,” requires the State Board of Education, by September 1, 2022, to adopt a rule establishing training requirements for all public school volunteers and county board employees who might have student contact, including part-time and contract employees. The training is to be focused on developing skills, knowledge and capabilities for preventing, recognizing and responding to students’ self-harm behaviors and eating disorders. Among other requirements, the State Board rule must require public school employees to complete the required training every three years. The training may be administered virtually or through self-review of materials and resources provided by the State Board every three years. *West Virginia Code § 18-2-40a(a); West Virginia Code § 18-2-40a(b).*

Additionally, beginning September 1, 2022, children in grades 5-12 must receive information at least once per school year on the awareness, treatment resources, and prevention of self-harm and eating disorders. The information is to be obtained from the Bureau for Behavioral Health and Health Facilities, a licensed healthcare provider, or commercially developed awareness and prevention training programs approved by the State Board in consultation with the Bureau to assure accuracy and appropriateness of the information. The State Board is authorized by H.B. 4074, but apparently not required, to adopt a rule to facilitate the student education process and develop resources. *West Virginia Code § 18-2-40a(c).*

#### **House Bill 4110**

#### **Relating to staffing levels at multi-county vocational centers**

*In effect June 9, 2022*

[Read the Entire Bill](#)

Under an unchanged provision of Step 1 of the Public School Support Program, if a county board does not establish and maintain a specified minimum ratio of professional instructional personnel per State aid funded professional educators, it is penalized with a pro rata reduction in the

allowance for professional educators, unless the county has increases in enrollment during the school year. H.B. 4110 adds a second exemption from the penalty: if the county is the fiscal agent for a multi-county vocational center and the county's failure to meet the required minimum ratio is due to staffing levels at the center. *West Virginia Code § 18-9A-4(c)*.

**House Bill 4353**  
**Relating to On Cycle Elections – Voter Turnout Act**  
*In effect June 10, 2022*  
[Read the Entire Bill](#)

In the past, the election laws allowed county boards to schedule excess levy and bond levy elections for dates that were not the same as the statewide primary and general election dates. H.B. 4353 prohibits that practice. It requires that county boards submit excess levy and bond levy propositions to the voters at only the May primary and November general elections (which are held only in even-numbered years). If a proposed levy is defeated at a primary election, the question may again be submitted to the voters at the next general election. *West Virginia Code § 13-1-7; West Virginia Code § 11-8-16*.

Additionally, if a levy is to expire at a time after July 1, 2022, but is not up for renewal at the next primary or general election, the county board may choose to hold the renewal election at the next regularly scheduled primary or general election. *West Virginia Code § 11-8-17(b)*.

The bill also allows a county board to authorize a special election, prior to the expiration of an existing or expiring levy, for the purpose of presenting to the voters the question of synchronizing the levy with a future primary or general election. *West Virginia Code § 11-8-17(b)*.

Finally, county boards will no longer appoint election officials. The provision requiring them to do so was repealed by H.B. 4353 and will no longer appear in the statute. *West Virginia Code § 11-8-17(b)*.

**House Bill 4380**  
**Relating to transportation of athletic teams**  
*In effect March 9, 2022*  
[Read the Entire Bill](#)

Despite the summary title of the bill, H.B. 4380 relates to the transportation of students for all school-sponsored activities, not just athletics. County boards were previously authorized by the Legislature to transport students to school-sponsored activities in vehicles other than school buses. This bill modifies and clarifies the type and number of vehicles which may lawfully be used to transport students to school-sponsored activities, as well as the kinds of school employees who may operate these vehicles. As in the past, “school-sponsored activities” does not include the transportation of students between home and school. *West Virginia Code § 18-5-13(f)(4)*.

Previously, students could not lawfully be transported to a school-sponsored activity in any county-owned or leased vehicle that did not meet school bus or public transit ratings. Now, such vehicles may lawfully be used to transport students to a school-sponsored activity so long as the maximum seating capacity of the vehicle is no more than 9 persons, *including* the driver. Such

vehicles may be operated by service personnel who are certified by the county board to perform this task. Previously, only professional personnel certified by the county board were permitted to perform this task. Now, both may do so. County boards are limited to using no more than two such vehicles in connection with any school-sponsored activity. In the past, only one such vehicle was authorized. (Note: the prior version of the law only authorized the use of vehicles having a “designed seating capacity of fewer than ten occupants, *not* including the operator.”). *West Virginia Code § 18-5-13(f)(4)*; *West Virginia Code § 18-5-13(f)(5)*.

The bill mandates the use of school buses to transport nineteen or more passengers for “extracurricular activities.” It is not clear whether the term “extracurricular activities” was meant to convey something different than “school-sponsored activities,” or whether the Legislature counted the bus operator among the “nineteen or more passengers.” *West Virginia Code § 18-5-13(f)(7)*.

The bill does not prohibit parents/guardians from transporting students in privately owned vehicles so long as the parent/guardian operating the vehicle has the written permission of the parents/guardians of each student being transported in his/her privately owned vehicle. (Note: the prior version of the law limited the number of students who could be transported in this manner to “ten or fewer.”) The bill does not explain whether the transportation of students in privately owned vehicles is prohibited when there are nineteen or more passengers, which would normally require the use of a school bus as described above. *West Virginia Code § 18-5-13(f)(5)*.

State Board Policy 4336, last revised in February 2020, will need to be updated to account for H.B. 4380. *West Virginia Code § 18-5-13(f)(4)*.

**House Bill 4420**  
**To modify definitions of school bus operators**

*In effect June 6, 2022*

[Read the Entire Bill](#)

This bill clarifies that “school bus operator candidates” are subject to the licensure rules relating to having a diagnosis of diabetes which requires insulin treatment. Current school bus operators and school bus operator candidates with this condition are not prohibited from employment as bus operators so long as they: 1) are issued a passenger and school bus endorsement for their commercial driver’s license through the West Virginia Department of Motor Vehicles and 2) comply with all Federal Motor Carrier Safety Administration, DMV, and State Board of Education rules. (Note: The FMCSA can issue an exemption to such bus operators for up to two years. School bus operators with this condition are required to reapply for renewal of the exemption every two years.) *West Virginia Code § 18A-2-4(c)*.

**House Bill 4466**  
**Relating to School Building Authority’s review of school bond applications**

*In effect June 9, 2022*

[Read the Entire Bill](#)

H.B. 4466 amends certain portions of West Virginia Code § 18-9D-15 relating to the West Virginia School Building Authority’s review and approval of county board bond levies (*i.e.*, the issuance

of general obligation bonds) that utilize SBA funding. The bill provides that any project funded by the SBA must be in accordance with a Certified Educational Facilities Plan approved by the State Board and the SBA. *West Virginia Code § 18-9D-15(b)(3)(A)*.

H.B. 4466 provides a new framework for county boards to apply for SBA funding in connection with its bonds. The county board must first submit a request for the funding to the executive director of the SBA prior to the proposed bond levy election. After initial consultation with the executive director, the county board must prepare a written outline of the bond finance plan, the capital improvements to be made with levy funds, and the amount and timing of funding requested from the authority. The county board shall then present its request at an SBA meeting. *West Virginia Code § 18-9D-15(j)(2)*.

Any such initial grant by the SBA to the county board is contingent upon passage of the bond levy and final approval by the SBA of the county's bond finance plan. Any materials produced by the county board that refer to the SBA shall include a statement about this contingency. SBA funds may only be used to pay costs of capital improvements and may not be pledged as security for or repayment of any bonds issued by the county board. *West Virginia Code § 18-9D-15(j)(2)*.

Upon passage of the bond levy by the voters, the county board will now have four years to finalize the project. However, the SBA may grant an extension to the four years under "extenuating circumstances." *West Virginia Code § 18-9D-15(j)(2)*.

Notably, the provisions of H.B. 4466 do not apply to any proposed capital improvement bond levy election that is held on or before December 31, 2022. *West Virginia Code § 18-9D-15(j)(2)*.

#### **House Bill 4489**

#### **Require counties to post open positions on statewide job bank**

*In effect June 6, 2022*

[Read the Entire Bill](#)

Until now, the State Board of Education has been required to establish and maintain a statewide job bank to assist the recruitment and employment of experienced professional personnel. The job bank lists each county board's professional employees who were terminated due to reduction in force, as well as the professional positions for which each county seeks applicants. This legislation expands the required lists to cover not only professional personnel and positions, but also service and extracurricular personnel and positions. The bill makes mandatory the participation by all county boards in the job bank. *West Virginia Code § 18A-2-7a(a); West Virginia Code § 18A-2-7a(b)*.

#### **House Bill 4535**

#### **Repeal section relating to school attendance and satisfactory academic progress as conditions of licensing for privilege of operation of motor vehicle**

*In effect June 9, 2022*

[Read the Entire Bill](#)

Until now, before issuing a license or instruction permit to a person under the age of 18, the Division of Motor Vehicles was required to have documentation of the person's: 1) graduation



from a secondary school, 2) GED certificate, 3) enrollment and satisfactory progress in a secondary school or course leading to a GED, 4) enrollment as a full-time student in an institution of higher education, or 5) exemption from this requirement due to circumstances beyond their control. H.B. 4023 repeals this requirement, which will no longer appear in the statute. *West Virginia Code § 18-8-11*.

Until now, a county board's attendance director or superintendent was required, on request, to furnish a driver's eligibility certificate on a State Board of Education form to any student who is at least 15 years old but less than 18 years of age who is properly enrolled and making satisfactory progress. The certificate was to be presented to the DMV on application for or reinstatement of a student's instruction permit or license to operate a motor vehicle. (2021 legislation allowed the DMV to accept from a county board electronic, instead of written, notice of a student's compliance.) H.B. 4023 repeals these requirements, which will no longer appear in the statute. *West Virginia Code § 18-8-11*.

Until now, the attendance director or superintendent was required to notify DMV when a student who is at least 15 years old but less than 18 years of age withdrew from school or failed to maintain satisfactory academic progress. There is still a duty to make such reports, but only when the student is at least 15 years old and less than 17. In such cases, instead of suspending the student's instruction permit or license, DMV must restrict the permit or license so that the student may use it for only certain purposes. *West Virginia Code § 18-8-11(a)*.

### **House Bill 4562**

#### **Relating generally to the suspension and dismissal of school personnel by board and the appeals process**

*In effect June 7, 2022*

[Read the Entire Bill](#)

At the start of a fact-finding investigation into an allegation that a school employee jeopardized the health, safety, welfare or learning environment of students, the county board must now suspend the employee, place them on administrative leave, or reassign them to duties that do not involve direct pupil interaction, regardless of whether the investigation is internal or in cooperation with the police or the Department of Health and Human Resources. *West Virginia Code § 18A-2-8(a)*.

The bill places a duty on every school principal to report any such allegation to the county superintendent within 24 hours. The report is in addition to, and not in place of, any report the principal is required to make as a mandatory reporter of suspected child abuse or neglect. *West Virginia Code § 18A-2-8(e)*.

The legislation also clarifies that when a school employee is charged with committing a felony, a misdemeanor with a rational nexus to the performance of the employee's job, or child abuse, the county board has a duty, pending final disposition of the charges, to suspend the employee, place them on administrative leave, or reassign them to duties that do not involve direct interaction with pupils. *West Virginia Code § 18A-2-8(c)*.

### **House Bill 4571**

#### **Modifying foundation allowance to account for transportation by electric powered buses**

*In effect July 1, 2022*

[Read the Entire Bill](#)

Under Step 4 of the Public School Support Program, a county board's allowance for transportation costs is already increased for that part of its school bus system that uses compressed natural gas or propane as an alternative fuel. H.B. 4571 affords the same increase in the transportation allowance for that portion of a county's school bus system that is fully powered by electricity that is stored in an onboard rechargeable battery or other storage device. The legislation also entitles a county to a separate increase in its allowance for the portion of its bus system that is manufactured in West Virginia. *West Virginia Code § 18-9A-7(a)(1)(F)*.

### **House Bill 4596**

#### **Relating generally to additional persons qualifying for the provisions of the Law Enforcement Officers Safety Act**

*In effect June 7, 2022*

[Read the Entire Bill](#)

Certain persons, such as law enforcement officers, are already permitted to possess deadly weapons on school premises, on school buses, and at certain school-sponsored activities in spite of the law that prohibits people in general from doing so. The exceptions are now expanded to include, in the performance of their official duties, State juvenile probation officers, home confinement supervisors employed by a county commission, and State parole officers, all of whom may lawfully possess firearms and deadly weapons in those places. *West Virginia Code § 61-7-11a(b)(2)*.

### **House Bill 4600**

#### **Making it a felony for a "Person in a Position of Trust" to assault, batter or verbally abuse a child, or neglect to report abuse they witness**

*In effect June 10, 2022*

[Read the Entire Bill](#)

H.B. 4600 acknowledges the particular vulnerability of children with disabilities. They are found to have a greater need for protection than nondisabled children and an enhanced risk of injury and intimidation, particularly when they are noncommunicative. The bill puts enhanced protections in place to provide what the Legislature terms "a framework of protections to improve disabled children's education and quality of life as well as ease the concerns of their loved-ones and caregivers." *West Virginia Code § 61-8F-1; West Virginia Code § 61-8F-2(2)*.

In place of 2020 legislation that criminalized verbal abuse of noncommunicative children, this bill creates a number of new misdemeanor and felony criminal offenses for acts against children with disabilities.

Some of the offenses are directed at persons "in a position of trust in relation to a disabled child," meaning an adult who: 1) is acting in place of a parent and charged with any of a parent's rights, duties or responsibilities concerning a disabled child, 2) has supervisory responsibility for a

disabled child's welfare, or 3) by virtue of their occupation or position are charged with any duty or responsibility for the health, education, welfare, or supervision of a disabled child. *West Virginia Code § 61-8F-2(3)*.

For some of the new offenses, it matters whether a person has "supervisory responsibility," which means any situation where an adult has direct supervisory decision-making, oversight, instructive, academic, evaluative, or advisory responsibilities regarding the child. Supervisory responsibility may occur in a residence, in or out of a school setting, institutional setting, and in curricular, co-curricular, or extra-curricular settings. *West Virginia Code § 61-8F-2(5)*.

H.B. 4600 creates the following criminal offenses:

- *Maltreatment of a disabled child* occurs when a person in a position of trust in relation to the child has supervisory responsibility over the child, and on two or more occasions engages in conduct, verbal or otherwise, toward the child in an insulting, demeaning or threatening manner. Beginning July 1, 2022, this is a misdemeanor for which they must be punished by a fine of \$500-\$2,500 and/or a jail sentence of up to one year. The prohibited behavior includes conduct intended to humiliate, intimidate, shame, degrade, or cause emotional distress. *West Virginia Code § 61-8F-3; West Virginia Code § 61-8f-7(b)*.
- *Battery of a disabled child* occurs when a person in a position of trust in relation to the child, with supervisory responsibility over the child, unlawfully and intentionally makes physical contact of an insulting and provoking nature to the person of the child or unlawfully causes physical harm to the child. Beginning July 1, 2022, this is a felony for which they must be fined not more than \$1,000 and/or imprisoned for 1-5 years. *West Virginia Code § 61-8F-4(a); West Virginia Code § 61-8f-7(b)*.
- *Assault of a disabled child* occurs when a person in a position of trust in relation to the child, with supervisory responsibility over the child, unlawfully attempts to commit a violent injury to the person of the child or unlawfully commits an act that places the child in reasonable apprehension of immediately receiving a violent injury. Beginning July 1, 2022, this is a felony for which they must be fined not more than \$500 and/or imprisoned for 1-3 years. *West Virginia Code § 61-8F-4(b); West Virginia Code § 61-8f-7(b)*.
- *Failure to report* occurs when a person in a position of trust in relation to a disabled child, and who is a mandatory reporter of suspected child abuse or neglect, fails to make a required report regarding the child. Beginning July 1, 2022, this is a misdemeanor for which they must be jailed for not more than one year. *West Virginia Code § 61-8F-5(a); West Virginia Code § 61-8f-7(b)*.
- *Obstructing a reporter* occurs when any person willfully impedes or obstructs, or attempts to impede or obstruct, a person in a position of trust in regard to a disabled child from making a report that, as a mandatory reporter of suspected child abuse or neglect, the person in a position of trust is required to make regarding the child. Beginning July 1, 2022, this is a felony for which the obstructor must be fined not more than \$5,000 and/or imprisoned for 1-3 years. *West Virginia Code § 61-8F-5(b); West Virginia Code § 61-8f-7(b)*.

- *Retaliation against a reporter* occurs when any person discriminates or retaliates against a person in a position of trust in relation to a disabled child for making a report of suspected abuse or neglect under the mandatory reporter statute. Beginning July 1, 2022, this is a felony for which the retaliator must be fined not more than \$5,000 and/or imprisoned for 1-3 years. *West Virginia Code § 61-8F-5(c); West Virginia Code § 61-8f-7(b).*

Under H.B. 4600, the Secretary of the Department of Health and Human Resources and the State Superintendent of Schools are to develop and disseminate by January 1, 2023, an eight-hour program for people employed in or to be employed in the care, housing, and education of disabled children, as well as their supervisors and administrators. These employees are required to complete the program on and after July 1, 2023. Additionally, the DHHR Secretary and State Superintendent must, by January 1, 2023, investigate the availability and implementation cost of a program which allows parents, guardians and custodians to remotely view classrooms and other areas where disabled children are taught, housed or cared for. *West Virginia Code § 61-8F-6(a)(1); West Virginia Code § 61-8F-6(a)(2).*

Also, by January 1, 2023, the West Virginia Prosecuting Attorney’s Institute is to develop a three-hour mandatory educational program for prosecuting attorneys and law enforcement officers concerning the crimes established in H.B. 4600 and the investigation and prosecution of those crimes. *West Virginia Code § 61-8F-6(b).*

Finally, the State Board of Education is required to create a database that identifies school employees who are under active investigation for misconduct toward children. County boards have a duty to review the database when considering employing a person with previous experience in the education system. County boards also must report to the database. The provisions of this paragraph supposedly took effect back on March 12, 2022, when H.B. 4600 was passed. *West Virginia Code § 61-8F-6(c); West Virginia Code § 61-8f-7(a).*

### **House Bill 4642**

#### **Relating to pecuniary interests of county and district officers, teachers and school officials in contracts**

*In effect June 10, 2022*

[Read the Entire Bill](#)

Under West Virginia’s pecuniary interest statute, it has long been unlawful for a county board of education officer, secretary, supervisor, superintendent, principal or schoolteacher to have a pecuniary interest in the proceeds of a contract with the county board if they have voice, influence or control in the award or letting of the contract. Violators can be convicted of a misdemeanor, removed from office, and lose their certificates. *West Virginia Code § 61-10-15(a); West Virginia Code § 61-10-15(b); West Virginia Code § 61-10-15(c).*

Over the years, the Legislature has created exceptions to the rules of the pecuniary interest statute. H.B. 4642 adds another. It provides that even if one of the covered board officers or employees has a pecuniary interest in a contract over which they may have had any voice, influence, or control, no violation will be found if: 1) the contract is not a contract for services, 2) the contract is put out for bid, 3) the contract is awarded based on lowest cost, 4) the covered person, if in a voting or other decision-making position regarding the contract, recuses themselves from voting

or decision-making, and 5) the covered person previously obtained a written advisory opinion from the West Virginia Ethics Commission permitting them to have a pecuniary interest in the contract. *West Virginia Code § 61-10-15(n)(4)*.

**House Bill 4662**  
**Relating to licensure of Head Start facilities in this State**

*In effect March 12, 2022*

[Read the Entire Bill](#)

Head Start programs in good standing with the U.S. Department of Health and Human Services may now request to be deemed a licensee to operate a childcare program for the sole purpose of utilizing the West Virginia Clearance for Access Registry and Employment Screenings program. *West Virginia Code § 49-2-115a*.

Administered by the West Virginia Department of Health and Human Resources and the West Virginia State Police Criminal Investigation Bureau, the program, known as “WV CARES,” uses web-based technologies to provide employers a single portal for checking state and national abuse registries and state and national sex offender registries. Through fingerprinting, the program provides a comprehensive criminal history records search of national and state criminal history records. The system also alerts officials when a subsequent change in criminal history occurs. *West Virginia Code § 16-49-1 et seq.; 69 CSR 10*.

**House Bill 4829**  
**Modifying definitions of certain school cafeteria personnel**

*In effect June 9, 2022*

[Read the Entire Bill](#)

In 2021, H.B. 2145 established four new class titles for aides: “Aide V (Special Education Assistant Teacher – Temporary Authorization,” “Aide V (Special Education Assistant Teacher),” “Aide VI (Behavioral Support Assistant Teacher – Temporary Authorization,” and “Aide VI, (Behavioral Support Assistant Teacher).” One year later, H.B. 4829, which amends and reenacts the list of service personnel class titles, omits all four of these Aide class titles. *West Virginia Code § 18A-4-8*.

H.B. 4829 also amends the definitions of the class titles of Cafeteria Manager, Cook II and Cook III. The Cafeteria Manager, although retaining all prior statutory duties, is now charged with monitoring freezers and temperatures on equipment, communicating with the food service supervisor or food service director, and “maintaining that an appropriate time per day will be for ordering/emailing and paperwork as needed.” The definition of the Cook II class title is amended to remove the interpretation of menus. The duties of a Cook III are expanded to include assisting the cafeteria manager, interpreting menus, and acting as the cafeteria manager if that employee is absent. *West Virginia Code § 18A-4-8(i)(19); West Virginia Code § 18A-4-8(i)(27); West Virginia Code § 18A-4-8(i)(28)*.

**House Joint Resolution 102**  
**Clarifying that the policy-making and rule-making authority of the State Board of  
Education is subject to legislative review approval, amendment, or rejection**

*Adopted by the Legislature March 3, 2022*

[Read the Entire Resolution](#)

West Virginia’s Constitution entrusts the West Virginia Board of Education with the general supervision of the State’s schools. Among other things, that general supervision includes adopting policies which regulate most facets of public education, from transportation to special education to certifying teachers and nearly everything in between. The Legislature plays no role in reviewing, amending, accepting, or rejecting State Board policies. House Joint Resolution 102 seeks to change that.

West Virginia’s Constitution may be amended after two events occur: a proposed amendment is passed by two-thirds of the members of the House of Delegates and State Senate, and the voters of West Virginia approve the proposed amendment. The first of those events, passage of HJR 102, has occurred. Next, the voters of West Virginia will be presented at November’s general election with Amendment 1, the “Education Accountability Amendment.” If Amendment 1 is passed by the voters, the following sentence will be added to Article XII, Section 2 of the West Virginia Constitution:

“Under its supervisory duties, the West Virginia Board of Education may promulgate rules or policies which shall be submitted to the Legislature for its review and approval, amendment, or rejection, in whole or in part, in the manner prescribed by general law.”

Notably, executive agencies of State Government (e.g., Dept. of Labor, Dept. of Agriculture, etc.) have long been required to submit their proposed regulations to the Legislature in the same manner.

## **Advisory Opinion 2021-15**

**Issued on August 5, 2021, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A **County Health Department** asks whether its employees may use their agency-provided cellular phone as their personal cellular phone.

### **Facts Relied Upon by the Commission**

A County Health Department (“agency”) provides certain employees with cellular (“cell”) phones. The agency has a cell phone plan that has unlimited talk, text, and data and costs \$39.99 per month per line. The Requester states that all agency employees who are provided cell phones are expected to keep their cell phones near them 24 hours a day, seven days a week, so that they may be notified of, and prepared to respond to, emergencies.

The Requester inquires whether the agency’s employees may use the cell phones for personal use, during and outside of their regular work hours, to avoid the inconvenience of carrying two cell phones. The Requester states that if its employees are authorized to use their agency-provided cell phones as their personal phones, the agency would not incur any additional costs. The Requester also asks if it would be permissible to allow its employees to use their agency-provided cell phones as personal cell phones if the employees pay the agency a percentage of the monthly plan fee.

### **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b)(1) states:

*(b) Use of public office for private gain. -- (1) A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection. The performance of usual and customary duties associated with the office or position or the advancement of public policy goals or constituent services, without compensation, does not constitute the use of prestige of office for private gain.*

W. Va. Code R. § 158-6-5 states, in relevant part:

5.2. Improper Use - Public officials and public employees may not use government property for personal projects or activities that result in private gain.

5.3. This section does not apply to the de minimis use of government property.

### **Advisory Opinion**

The Ethics Act prohibits public officials and public employees from knowingly and intentionally using their office for their own private gain. W. Va. Code § 6B-2-5(b)(1). This section excepts from the prohibition the incidental use of public equipment “for personal or business purposes resulting in de minimis private gain.” *Id.*

The Ethics Commission recognizes that since the Ethics Act’s enactment in 1989, cell phone technology has significantly advanced; many citizens now own and use cell phones as their primary telecommunications device, and many private and public employers provide cell phones to their employees for business purposes. There are also increasing options to purchase flat rate plans which provide unlimited use of the cell phone for texting, talking, and using data. The Ethics Commission further recognizes that the personal use of a government agency’s cell phones or plans may not result in additional cost to the government agency. The Commission must determine, nevertheless, whether allowing public employees to use their agency’s cell phone as their personal cell phone constitutes prohibited use of office for private gain.

In Advisory Opinion 2012-52, the Ethics Commission considered whether a city may allow its employees to use the city’s equipment for personal, but not commercial, purposes for free. The Opinion states:

The private gain provision of the Ethics Act . . . is not limited to commercial use. Instead, if an individual derives a private benefit from the use of public equipment, that constitutes private gain. Even if an individual’s use does not result in a cost to the government, still the individual benefited from the use of public equipment....

The Opinion further states: “Generally, when public officials and public employees avail themselves of public resources not available similarly to the general public, it constitutes prohibited private gain.” The Ethics Commission then held that the city may not allow the private use of its equipment by employees except for public purposes.<sup>1</sup> *Id.*

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<sup>1</sup> For example, in Advisory Opinion 1995-39, the Ethics Commission held that a mayor may store equipment in a municipal garage while the equipment was being used for free by the city because the public benefit outweighed the private gain to the mayor.



The Ethics Commission held in Advisory Opinion 2010-18 that a municipal public servant's private use of a Sam's Club membership card obtained as part of the municipality's membership was prohibited even if there was no additional cost to the municipality. In contrast, the Ethics Commission has held that in certain instances, the use of public resources for private purposes by public employees is permissible. For example, in Advisory Opinion 2008-07, the Ethics Commission held that municipal employees may be given limited free use of a municipal pool, if it did not interfere with the public's use and enjoyment of the pool, did not cause the municipality to lose money, and there was a rational basis for providing this fringe benefit.<sup>2</sup>

Based upon the prior Opinions of the Commission, the Commission finds that a public agency may only allow free use of public equipment or property for personal use, as a permissible fringe benefit, when there is a rational basis for the decision. Advisory Opinions 2008-07 and 2008-09. The cost to the agency must also be considered. *Id.* Decisions relating to the use of public resources must also be justified by a specific public policy reason. Advisory Opinion 2020-04.

While not dispositive of the question presented, the Ethics Commission finds that policies issued by the State of West Virginia and the federal government are instructive for determining what constitutes the acceptable use of government-provided cell phones. An overview of the policies follows.

The State of West Virginia Office of Technology ("Office of Technology") Policy limits the personal use of state-issued mobile devices.<sup>3</sup> The policy at 3.1.4 states: "Personal use of wireless devices and service is prohibited except in certain limited and occasional circumstances that meet with the supervisor's approval." Regarding internet usage, the "Office of Technology policy provides: "Excessive use of the Internet by personnel that is inconsistent with business needs is considered a misuse of resources."<sup>4</sup>

The United States Department of the Interior (DOI) telephone use policy states:

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<sup>2</sup> In Advisory Opinion 2008-05, the Commission held that a county parks commission may give its employees limited free use of its recreational and golf facilities, and in Advisory Opinion 2008-09, the Commission held that faculty members at a public university may receive a discount at the university bookstore because there was a rational basis for offering the discount as a fringe benefit.

<sup>3</sup> The State of West Virginia Office of Technology Policy: Acceptable Use of State-Issued Portable/Mobile Devices Policy No: WVOT-PO1002 Rev. 12/22/2020. The policy also imposes the following requirements at 3.1.4: "Personal use should only occur when it does not (1) interfere with the employee's work performance; (2) interfere with the work performance of others; (3) have undue impact on business operations; (4) incur incremental cost; or (5) violate any other provision of this policy or any other State policy, procedure, or standard. Use of wireless devices is a privilege that may be revoked at any time. (See Appendix A for more information.)"

<sup>4</sup> The State of West Virginia Office of Technology Policy: Acceptable Internet Usage, Policy No: WVOT-PO1022 Rev. 12/22/2020. The policy also states: "3.1.3 Incidental personal use is permissible so long as it: 3.1.3.1 is completed on personal time (i.e., lunch time, break) 3.1.3.2 does not consume more than trivial amount of systems resources, 3.1.3.3 does not interfere with worker productivity, 3.1.3.4 does not preempt business activity, 3.1.3.5 does not violate any State, department, or agency policy and 3.1.3.6 is not used for illegal activities."

Federal employees may use Government property only as authorized. Employees may use DOI landline telephones for personal calls when they are necessary, provide a benefit to DOI, and do not result in any additional costs to the Government. Such calls are deemed to be in the interest of the Government to the extent they enable employees to remain at their work stations, thereby increasing Government efficiency. Personal phone calls may not adversely affect the performance of official duties or the employee's work performance, must be of reasonable duration and frequency, and could not reasonably have been made during non-duty hours.

DOI cell phones may be used for personal calls only to the extent that such calls would be authorized on a DOI landline telephone *and* [emphasis added] so long as no additional costs are imposed on the Government.<sup>5</sup>

The Commission notes that while personal use of government-provided cellular phones with a flat rate talk, text, and data plan may result in little to no additional cost to the government employer, nevertheless, the cell phone, phone number, and the text, talk, and data plan are paid for with public funds and must be used for a public purpose. The Requester states that allowing the agency's employees to use the agency's cellular phones and plans as their personal cellular phone (and plan) will eliminate the inconvenience of carrying two cellular phones.

**The Ethics Commission finds that the inconvenience to the employees alone is not enough to constitute a rational basis for the agency to allow its employees to use, for free, their agency-provided cell phone as their personal cell phone device and plan.<sup>6</sup> The Requester may allow its employees to use their agency-provided cell phones for incidental and de minimis personal use which does not result in an additional cost to the agency.**

The Requester also asks whether it may allow its employees to use their agency-provided cell phones as their personal cell phones if the employees pay the agency a percentage of the monthly plan fee. This type of use in most instances would be more than a de minimis use of the cell phone and plan for personal purposes.

In Advisory Opinion 2009-03, the Ethics Commission held that county employees may be reimbursed for government calls placed on their personal cell phones. **The Ethics Commission finds that it is permissible for an agency to allow its employees to use their agency-provided cellular phone and plan as their personal cell phone if the employees pay a reasonable fee to the agency for the personal use. In order to ensure the personal use of agency-issued cell phones does not cost the agency**

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<sup>5</sup> [Use of Government Property, U.S. Department of the Interior \(https://www.doi.gov/ethics/use-of-government-property\)](https://www.doi.gov/ethics/use-of-government-property) (last visited July 20, 2021).

<sup>6</sup> The Ethics Commission recognizes that the Internal Revenue Service (IRS) has ruled that personal use of employer-provided cellular phones does not constitute a taxable fringe benefit when the cellular phone is provided for a business purpose, even if the employee uses the cell phone for personal use. I.R.S. Notice 2011-72, 2011-38 I.R.B. 407. The IRS ruling is relevant to the Ethics Commission's consideration of the issue presented but is not controlling for purposes of analyzing the private gain provision in the Ethics Act.

**additional money or interfere with employees' work performance, the Requester should institute a policy on the acceptable use of agency-issued cell phones.**

It is further the opinion of the Commission that an agency may not allow employees to use their agency's cell phone and cell phone plan as their primary phone and plan for commercial or political campaign purposes, even if the employee is reimbursing the agency for personal use. The Commission finds that this type of use goes beyond a de minimis use of public resources and that there is no rational basis for allowing the State of West Virginia to subsidize a private business or political campaign. Nevertheless, this prohibition does not restrict *incidental* use of an agency-provided cell phone for commercial or political campaign purposes. For example, a public employee may use his or her agency cell phone and data plan to send an email to a private client to inform the client that the public employee is running late for a business appointment. On the other hand, a public employee may not use his or her agency-provided cell phone for purposes of operating a private business.

*This Advisory Opinion is based upon the facts provided. If all material facts have not been provided, or if new facts arise, the Requester must contact the Ethics Commission for further advice as it may alter the analysis and render this Opinion invalid. This Advisory Opinion is limited to questions arising under the Ethics Act, W. Va. Code §§ 6B-1-1 through 6B-3-11, and W. Va. Code § 61-10-15, and does not purport to interpret other laws or rules.*

*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
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Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

## **Advisory Opinion 2021-21**

**Issued on November 4, 2021, by**

**The West Virginia Ethics Commission**

### **Opinion Sought**

A County **Board of Education Member** who owns a construction company asks whether he must recuse himself from matters affecting the financial interests of his private customers.

### **Facts Relied Upon by the Commission**

A County Board of Education (“BOE”) member owns a construction company, and one of his customers is a private corporation that owns and operates a sports, recreation, wellness, and events complex (“Recreation Complex” or “Complex”).

The BOE also has a financial relationship with the Recreation Complex. The BOE owns several parcels of land in the Recreation Complex which the BOE uses for an elementary school and an alternative education campus. The BOE also leases a parcel in the complex, under a lease purchase agreement, which is used as a transportation garage/office. The BOE also pays the Recreation Complex to use various athletic facilities at the Complex and for the maintenance of common areas.

The BOE member’s construction company has previously contracted with the Recreation Complex to construct one or more buildings at the Complex and has a current contract to build an addition to an existing privately-owned facility at the Complex. The BOE member’s construction company also does projects on other buildings and facilities in the Complex that are owned by private companies and investors.

The BOE member’s company is not a contractor or subcontractor on any project funded wholly or in part by the BOE. Nevertheless, because the BOE member privately contracts with the Recreation Complex, he seeks guidance on voting on BOE matters relating to the Recreation Complex and other private customers that come before the BOE.

## **Provisions Relied Upon by the Commission**

W. Va. Code § 6B-2-5(b)(1) states, in relevant part:

A public official or public employee may not knowingly and intentionally use his or her office or the prestige of his or her office for his or her own private gain or that of another person. Incidental use of equipment or resources available to a public official or public employee by virtue of his or her position for personal or business purposes resulting in de minimis private gain does not constitute use of public office for private gain under this subsection.

W. Va. Code § 6B-2-5(d) states in pertinent part:

*Interests in public contracts.* - (1) In addition to the provisions of §61-10-15 of this code, no elected or appointed public official or public employee or member of his or her immediate family or business with which he or she is associated may be a party to or have an interest in the profits or benefits of a contract which the official or employee may have direct authority to enter into, or over which he or she may have control . . .

W. Va. Code § 6B-2-5(j) states, in relevant part:

(1) Public officials ... may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

W. Va. Code § 61-10-15(a) states in pertinent part:

It is unlawful for any member of a county commission, district school officer, secretary of a Board of Education, supervisor or superintendent, principal or teacher of public schools or any member of any other county or district board or any county or district officer to be or become pecuniarily interested, directly or indirectly, in the proceeds of any contract or service or in the furnishing of any supplies in the contract for or the awarding or letting of a contract if, as a member, officer, secretary, supervisor, superintendent, principal or teacher, he or she may have any voice, influence or control. . . .

## **Advisory Opinion**

County officials, including BOE members, may not have a pecuniary interest in any public contract over which they may have direct authority or any voice, influence or control. W. Va. Code §§ 6B-2-5(d) and 61-10-15(a). The Ethics Act also prohibits a county official from voting on a matter that the official or a business with which the official is associated has a financial interest. W. Va. Code § 6B-2-5(j).

### *Prohibited interest in public contract*

In the instant situation, the BOE member does not have a financial interest in the contracts between the BOE and the Recreation Complex because the BOE member does not perform work for the Recreation Complex, as a contractor or subcontractor, on projects which are funded wholly or in part by the BOE. Accordingly, neither West Virginia Code §§ 6B-2-5(d) or 61-10-15(a) are applicable to the current factual scenario.

**The Ethics Commission finds that the BOE member's company may continue to contract with the Recreation Complex for construction projects that are not funded wholly or in part by the BOE.**

### *Voting*

The Ethics Commission must determine whether the voting restrictions in the Ethics Act, at W. Va. Code § 6B-2-5(j), require the BOE member to recuse himself from voting on matters affecting the financial interests of the Recreation Complex. The relevant provision in the voting restrictions states:

(1) Public officials ... may not vote on a matter:

(A) In which they, an immediate family member, or a business with which they or an immediate family member is associated have a financial interest. Business with which they are associated means a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent or more of the total outstanding stocks of any class.

The Ethics Commission will first consider whether the BOE member or his business is "associated" with the Recreation Complex owner for purposes of the voting restrictions. If so, then the member of the BOE must recuse himself from any discussion and vote on matters which affect the Recreation Complex's contracts with the BOE.

The term "associated" with a business is defined by W. Va. Code § 6B-2-5(j) as "a business of which the person or an immediate family member is a director, officer, owner, employee, compensated agent, or holder of stock which constitutes five percent

or more of the total outstanding stocks of any class.” When the meaning of a term is defined clearly and unambiguously by statute, the West Virginia Ethics Commission will simply apply the statutory language. See Advisory Opinion 2021-08 (discussing rules of statutory interpretation). The statutory language enumerates an exclusive list of the ways in which an individual may be “associated” with a business.<sup>1</sup>

The application of the statutory definition of “associated” with a business is simple in the instant case. The BOE member does not have an ownership interest in the Recreation Complex nor is he a director or officer of it. The BOE member, through his construction company, has and continues to do business with the Recreation Complex. However, he does so as an independent contractor rather than as an employee or as a compensated agent<sup>2</sup>. **Accordingly, the Ethics Commission finds that neither the BOE member nor his construction company is associated with the Recreation Complex as defined by W. Va. Code § 6B-2-5(j).**

Next, the Ethics Commission will consider whether the BOE member has a financial interest in the Recreation Complex by virtue of the Complex being a customer of his construction company. The Ethics Commission considered this question in Advisory Opinion 2017-14 in relation to a county commissioner who manufactured and sold construction materials to private customers/contractors that did business with the county. The Ethics Commission held in Advisory Opinion 2017-14 that the county commissioner may vote on matters concerning county contractors who are also his private customers because the county commissioner did not have a financial interest in the contracts between his customers and the county commission for which he was not a contractor or subcontractor.<sup>3</sup>

The Ethics Act does not define what constitutes a financial interest for purposes of the voting restrictions. The Ethics Commission considered this issue in Advisory Opinion 2013-18 in which it held that the voting restrictions in the Act did not prohibit a county commissioner from voting on a matter relating to an insurance company of which he was a customer because the connection was too remote to constitute a financial interest. The holding of the Ethics Commission in Advisory Opinion 2013-18 is consistent with the following legal treatise statement: “Under a provision governing mandatory abstention from city council voting, ‘special private gain’ described by a

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<sup>1</sup> “In the interpretation of statutory provisions the familiar maxim *expressio unius est exclusio alterius*, the express mention of one thing implies the exclusion of another, applies.” *Webster Cnty. Bd. of Educ. v. Davis*, 856 S.E.2d 661 (W. Va. 2021)

<sup>2</sup> The term “agent” is not defined by the statute. “In the absence of any definition of the intended meaning of words or terms used in a legislative enactment, they will, in the interpretation of the act, be given their common, ordinary and accepted meaning in the connection in which they are used.” *Syllabus Point 1, Miners in General Group v. Hix*, 123 W. Va. 637, 17 S.E.2d 810 (1941)” *Fountain Place Cinema 8 Llc v. Morris*, 227 W. Va. 249, 707 S.E.2d 859 (W. Va. 2011) Accordingly, “agent” is defined as “A person authorized by another to act for him, or entrusted with another’s business.” *Agent*, Black’s Law Dictionary (5th ed. 1979);

<sup>3</sup> The Opinion makes clear that the county commissioner may not sell materials or supplies to his customers for use on county projects as addressed in Advisory Opinions 2017-02, 2017-10, and 2017-11.

voting conflict statute almost always, if not always, refers to [a] financial interest of a public official that is directly enhanced by the vote in question. n. 5 To constitute a prohibited voting conflict, the possibility of gain to a council member must be direct and immediate, not merely remote and speculative. n. 6.” 62 C.J.S. Municipal Corporations § 286.

The Commission also notes that the Ethics Act specifically prohibits voting on matters concerning a public official’s customers in only one section of the voting provision: W. Va. Code § 6B-2-5(j)(1)(B) restricts public officials who are employed by financial institutions from voting on matters involving *customers* [emphasis added], but the Act does not have similar voting restrictions for customers in other business sectors, e.g., construction, medical, or an auto repair business.<sup>4</sup> In Advisory Opinion 2021-08, the Commission held: “The Ethics Act and the Legislative Rule contain the express and limited instances when recusal is required. It is the duty of the Commission to apply the provisions of the Act and Rule.” The Ethics Commission further held in 2021-08 that the Ethics Act does not prohibit “voting based on a fiduciary duty, the appearance of impropriety, the mere possibility of a breach of the confidentiality provision (W. Va. Code § 6B-2-5(e), or a potential violation of the private gain provision. (W. Va. Code § 6B-2-5(b)(1)).”

Based upon the plain language in the Ethics Act and prior Advisory Opinions, the Ethics Commission holds that the mere possibility of gain to the BOE member when voting on matters affecting his customers is too remote to be a financial interest for purposes of the voting restrictions in the Ethics Act. **The Ethics Commission holds, therefore, that the BOE member may vote on matters affecting the financial interests of the Recreation Complex and other customers of his business.**

Finally, it is noted that Advisory Opinion 2005-12 indicates that a public official’s current business relationship with a customer requires recusal from voting on any matter concerning the business customer, even if the private business relationship is unrelated to matters before the governmental body on which the official serves. Advisory Opinion 2005-12 was issued under a previous version of the West Virginia Ethics Act and a Legislative Rule which has been repealed.<sup>5</sup> **Accordingly, to the extent Advisory**

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<sup>4</sup> The full provision, at W. Va. Code § 6B-2-5(j)(1)(B), states:

If a public official is employed by a financial institution and his or her primary responsibilities include consumer and commercial lending, the public official may not vote on a matter which directly affects the financial interests of a customer of the financial institution if the public official is directly involved in approving a loan request from the person or business appearing before the governmental body or if the public official has been directly involved in approving a loan for that person or business within the past 12 months: *Provided*, That this limitation only applies if the total amount of the loan or loans exceeds \$15,000.”

<sup>5</sup> The Ethics Act was amended in 2008. PUBLIC OFFICERS AND EMPLOYEES—ETHICAL STANDARDS, 2008 West Virginia Laws Ch. 106 (H.B. 4524). One change made to the Act was the inclusion of voting restrictions. The Bill Title states that one purpose of H.B. 4524 is to provide “standards



**Opinion 2005-12 requires recusal by a public official from any matter involving a customer, it is expressly overruled. Advisory Opinion 2012-07 is also overruled to the extent it states that a mayor may not vote on a matter involving a current customer.**

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*In accordance with W. Va. Code § 6B-2-3, this Opinion has precedential effect and may be relied upon in good faith by public servants and other persons unless and until it is amended or revoked or the law is changed.*

  
Robert J. Wolfe, Chairperson  
West Virginia Ethics Commission

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for determining when public officials may or may not vote on matters involving a for profit or not for profit business, including financial institutions, with whom either they or an immediate family member are (sic) associated . . . .” Id. Subsequent to the passage of H. B. 4524, the Legislature repealed W. Va. Code R. § 158-9-1 through 158-9-2 which previously governed voting by public officials and was cited in Advisory Opinion 2005-12.

<sup>6</sup> For example, the West Virginia Supreme Court, in a per curiam opinion relating to quasi-judicial proceedings, held that “where an adjudicator possesses the possibility of a disqualifying bias such that the proceedings, themselves, would appear to be constitutionally infirm, the adjudicator will be deemed to be disqualified to ensure that the aggrieved party receives the process to which he/she is due, *i.e.*, a hearing before an impartial tribunal.” Rissler v. Jefferson Cty. Bd. of Zoning Appeals, 225 W. Va. 346, 353, 693 S.E.2d 321, 328 (2010) (per curiam).

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