

# Superintendents' Legal Issues Forum Meeting

May 19, 2022

**Presented by attorneys:**

Melinda B. Kaufmann

Zachary D. Schurin

Stephen M. Sedor

Mark J. Sommaruga



BLOGS

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# **Title IX Updates**

Melinda B. Kaufmann, Esq.

# Some Statistics on Sexual Harassment in Schools

According to the National Women's Law Center:

About 1 in 2 students in grades 7-12 are sexually harassed in any given school year.

More than 1 in 5 girls ages 14-18 have been kissed or touched without their consent.

More than 60% of college students experience sexual harassment, and 1 in 4 women, 1 in 4 transgender or gender-nonconforming students, and 1 in 15 men are sexually assaulted during college.

*<https://nwlc.org/resources/let-her-learn-toolkit-sexual-harassment/>*

“No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

**Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.* [“Title IX”].**

# Title IX – Regulations Addressing Sexual Harassment

- On August 14, 2020, the “new” regulations regarding how schools must address sexual harassment that occurs in the schools went into effect
- They are designed for colleges and are often a poor fit for K-12 schools
- They required sweeping changes to numerous things including
  - The definition of sexual harassment under Title IX,
  - How schools must address sexual harassment under Title IX,
  - How complaints under Title IX must be investigated, and
  - Many other aspects of addressing sexual harassment in schools
- Applies to sexual harassment of students AND staff

- **Title IX Coordinator**
  - Employee who will coordinate the district's efforts to comply with its responsibilities under Title IX
- **Investigator**
  - If possible, should not be the Title IX Coordinator
- **Decision-maker**
  - Must not be the Title IX Coordinator or the Investigator
- **Appeal Decision-maker**
  - Must not be the Title IX Coordinator, Investigator or Decision-maker
  
- ALL people in these roles, as well as those facilitating any informal resolution process, **MUST** have the required training and must be free of bias and conflicts of interest.

# Definition of Sexual Harassment Under the Title IX Regulations

- Conduct on the basis of sex that satisfies one of the following:
  - An employee of the district conditioning the provision of an aid, benefit, or service on the individual’s participation in unwelcome sexual conduct (*quid pro quo harassment*);
  - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it ***effectively denies a person equal access to the district’s education program or activity*** (*hostile educational environment*); or
  - sexual assault, dating violence, domestic violence and/or stalking.
- Per the Regulations, Title IX only applies to conduct that occurs in a program or activity over which the district exerts substantial control over both the respondent and the *context*.
- Does not apply if the conduct occurred against a person outside the U.S.



# Definition of Sexual Harassment Under the Title IX Regulations

- This is a much narrower definition of sexual harassment than schools used previously
- This is a much narrower definition of sexual harassment than used by State Law and most boards of education's policy
- Requires that your administrators understand the different definitions of sexual harassment
- Requires that your administrators know to refer anything with allegations of sexual harassment to the Title IX Coordinator
- Necessitates that the Title IX Coordinator, at the outset, before any investigation into alleged wrongdoing occurs, makes a determination whether the conduct as alleged would fall under Title IX
- **NOTE –The fact that the conduct falls outside of the Title IX definition of sexual harassment does not mean that it does not violate state law or board policy.**

# Title IX Overlap with Other State and Federal Statutes

- C.G.S. § 10-222d – Anti-bullying in schools
- C.G.S. § 10-15c – Discrimination in public schools
- C.G.S. § 46a-58 - General anti-discrimination statute
- Title VII of the Civil Rights Act – Anti-discrimination in employment
- Connecticut Fair Employment Practices Act – Anti-discrimination in employment
- Each of these laws have slightly different definitions of what conduct is prohibited.
- The same conduct may violate more than one law/policy.

# Title IX – When Can/Must an Investigation Take Place?

## Two Separate Situations

1. The district has knowledge of sexual harassment but there has not been a request for a formal investigation
  - The district **must** take steps to eliminate sexual harassment and provide support to the complainant whenever it has actual knowledge of sexual harassment;
  - The district **must** offer the complainant supportive measures whether or not the district investigates the alleged misconduct and whether or not the district believes sexual harassment occurred;
  - The district **cannot** issue discipline to the alleged harasser under Title IX;
    - Other statutes such as bullying might apply that would allow discipline.
  
2. A formal complaint of sexual harassment is filed under Title IX
  - The district **may** discipline the alleged harasser if the alleged harasser is determined to be responsible for sexual harassment after the completion of the grievance process

# When Can A District Be Liable?

- A district with actual knowledge of sexual harassment must take steps to address it.
- In elementary and secondary schools “actual knowledge” means that any employee of an elementary or secondary school had knowledge.
  - As written, this covers all employees including custodians, secretaries, food service workers, paraprofessionals, etc.
- Once the district has knowledge, it must act in a way that is not deliberately indifferent to the alleged harassment.
- It is, therefore, important to train all of your staff to recognize potential sexual harassment and how to report it.

# Emphasis On Supportive Measures

If the district knows about alleged sexual harassment, the subject of the harassment **must** be offered supportive measures.

Supportive measures are:

- Non-disciplinary, non-punitive individualized services offered without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
  - Such measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party,
  - Includes measures designed to protect the safety of all parties or the district's educational environment or to deter sexual harassment.

- Only the complainant, the complainant's parents (if the complainant is under 18) or the Title IX Coordinator can file a formal complaint.
- A formal complaint must be:
  - In writing
  - Signed by complainant, a student's parent/guardian or the Title IX Coordinator
  - Alleges sexual harassment
  - Requests an investigation

**A report of sexual harassment by anyone else is NOT a formal complaint and cannot lead to discipline under Title IX.**

- There is an overarching emphasis on making sure the respondent receives due process and the complainant receives supportive measures
- Each party must have equal opportunity to present witnesses, including fact and expert witnesses, and other evidence,
  - But the responsibility for determining whether sexual harassment occurred remains on the district, not the parties to the complaint
- Cannot restrict the ability of either party to discuss the allegation or gather/present relevant evidence,
- Allow each party to have an advisor of their choosing at each step,
  - The district may establish consistent restrictions on the extent to which the advisor may participate in the proceedings
- Provide each party the opportunity to inspect and review all evidence, and
- Allow the parties to review and comment on the draft investigation report prior to issuing a final report

- In a K-12 school, an in-person hearing is NOT required prior to determining whether the respondent is responsible for sexual harassment
- The Decision-maker is a different person than the Investigator
- Prior to rendering a decision, the Decision-maker must:
  - Give each party the opportunity to submit relevant questions that the party wants asked for any party or witness,
  - Provide each party with the answers to those questions, and
  - Allow for follow-up questions



- No decision is final until after the appeal process is completed or the timeline for appealing has passed
- Appeals must be decided by a different Decision-maker,
- Can only be based on:
  - Procedural irregularities that affected the outcome of the matter;
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and/or
  - The Title IX Coordinator, Investigator(s) or Decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally, or the individual complainant or respondent, that affected the outcome of the matter.

- The district must:
  - Keep each investigation file for at least 7 years,
  - Including the disciplinary sanctions, if any, and
  - Including remedies and any supportive measures provided.
  
- Training materials
  - The district must keep copies of all training materials used to train employees on Title IX and *post them on the district's website.*

- The regulations prohibit any recipient (i.e., school district) or “other person” from
  - Intimidating,
  - Threatening,
  - Coercing, or
  - Discriminating against any individual

for the purpose of interfering with any right or privilege secured by Title IX.

## Protected Activity Under Title IX

- Reporting sexual discrimination including harassment
  - On your own behalf or on behalf of someone else
- Filing a discrimination complaint
- Assisting someone in reporting discrimination or filing a complaint
- Participating in any matter in an investigation into sexual harassment
  - e.g., protects witnesses
- Protesting any form of sexual discrimination
  - Although we are discussing harassment today, this would include protesting alleged lack of equality in athletic teams, etc.

## WHEN CAN A DISTRICT BE HELD LIABLE FOR VIOLATING TITLE IX?

- Title IX allows students (and staff in some circumstances) to sue school districts in court for violation of Title IX for monetary damages
- For student-on-student sexual harassment, in order to be liable schools must be deliberately indifferent to the sexual harassment
- There appear to be two main issues in the case
  - What “actual knowledge” means for purposes of liability
  - Whether a school’s response to sexual harassment can be determined to be deliberately indifferent even when no further sexual harassment occurs after the school learns of it

# *Doe v. Fairfax County School Board – Fourth Circuit Court of Appeals*

- **Basic facts**

- Doe, a 16 year old girl, was sexually assaulted by an older student on the school bus during the first night of a five-day school band trip
- At least two students reported the assault to staff soon after it happened
- Staff allegedly ignored the reports during the remainder of the trip and took no steps to ensure Doe's safety during the trip
- It is alleged that staff failed to provide Doe with medical treatment or counseling or respond to the assault in any way
- It is alleged that after the students returned to the high school, Doe was questioned by administrators in a way that suggested she might be disciplined for engaging in consensual sex on the trip and pressured her not to report the assault to the police
- The parents alleged that the investigation conducted was haphazard and they were never informed of the outcome

# *Doe v. Fairfax County School Board*

- The case went to a jury trial and the jury found the district was not liable because it lacked actual knowledge of what had occurred.
- The Fourth Circuit ordered a new trial holding that the lower court had improperly defined “actual knowledge”. The Circuit Court stated:
  - That a school’s receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice or knowledge under Title IX – regardless of whether school officials subjectively understood the report to allege sexual harassment or whether they believed the alleged harassment actually occurred.”
  - The Appellate Court also held that to state a claim under Title IX, a student who reports sexual harassment does not need to experience further harassment after the school’s deliberately indifferent response.
- The School Board has petitioned the U.S. Supreme Court to hear the case but the Court has not yet decided whether to accept it

# Next Steps to Ensure Compliance

- Make sure all of your staff is properly trained
  - Title IX Coordinators, Investigators, Decision-makers, Appeal Decision-makers and those involved in the alternative resolution process **MUST** be properly trained
  - Because “actual knowledge” is considered any staff member having knowledge, all staff should receive training at a minimum to understand what sexual harassment is and to know it must be immediately reported and how to make such a report
  - Administrators should be trained to recognize when misconduct potentially falls under Title IX so as not to risk improperly investigating what may be a Title IX complaint
- Make sure your policies and procedures have been updated to comply with the Regulations
- Make sure your websites are kept up to date
- Ensure a recordkeeping system is in place



# Next Steps to Ensure Compliance

- Make sure the district is offering supportive measures to any complainant, whether the district learns of the alleged sexual harassment from the complainant or a third party, and whether the complainant requests a formal investigation or not
  - Document the supportive measures offered
  - Document any refusal of supportive measures
- Make sure the Title IX process is explained to the student/parent at the outset of the process, including the requirements to share all evidence and information with both parties
- Make sure the proper person is investigating any Title IX complaints
  - Individuals who are not one of the school's assigned investigators should not be commencing an investigation because this risks the Title IX notice and other due process requirements being overlooked

*Questions?*

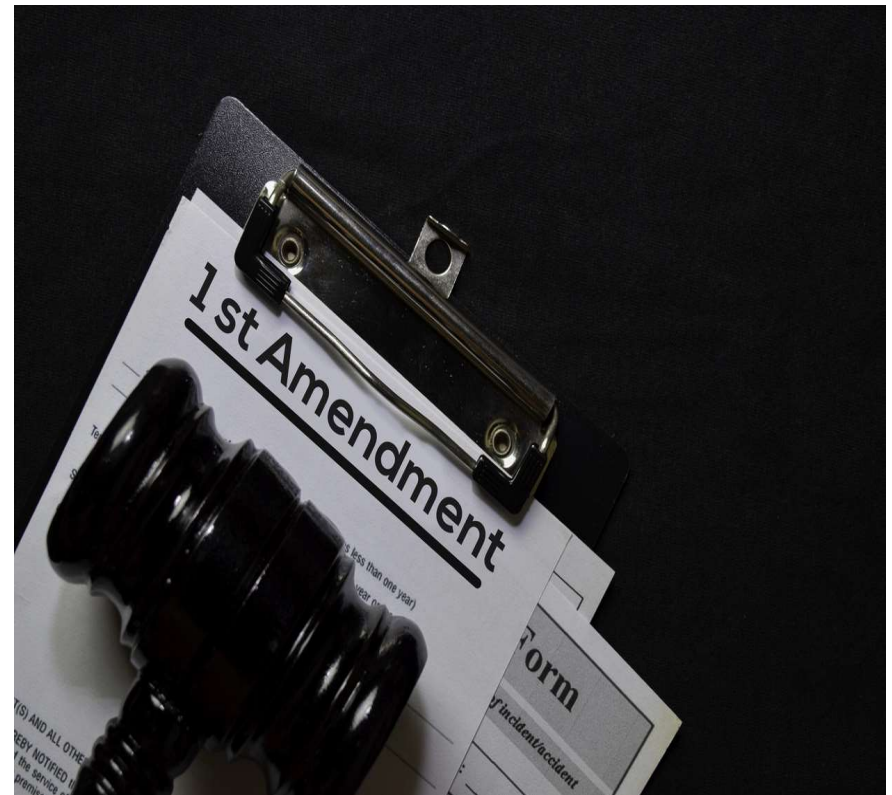
# ***Houston Community College System v. Wilson***

## **Understanding Board Member Censure and Officer Removal Bylaws**

Zachary D. Schurin, Esq.

# The Legal Landscape

- A constant balancing between the rights of individual board members to speak their minds on matters of public concern **versus** the right of the board to effectively and efficiently perform its business.
- Generally, no right to remove or exclude Connecticut board members from the authority of their office. However, policies and bylaws provide useful remedies.



# The Legal Status of Connecticut Boards of Education

- A local or regional board of education is a legal entity **SEPARATE AND APART** from its individual board members.
- Statutory powers reside in the board of education as a body, **NOT IN INDIVIDUAL BOARD MEMBERS**.
- A school board member has **NO MORE RIGHT TO BIND** the school district than does any other member of the community.
- An individual board member has **NO** legal authority over school district matters in his or her individual capacity.

# The First Amendment

- Defining the exact contours of First Amendment protected speech is difficult, however speech on matters of public concern is generally protected.
- Certain broad categories of speech are not protected:
  - Obscenity;
  - “Fighting words” e.g. inciting violence;
  - Defamation;
  - Speech integral to criminal conduct.
- Speech rights are also protected under the Connecticut Constitution



# The Political Rights of the Board

- Just because individual board members have free speech rights does not mean that the board as a whole and its individual members cannot respond to a board member's speech.
- Boards of education and other municipal bodies have the right to take political action so long as such action does not act to disenfranchise or strip a fellow board member of his or her fundamental rights as a board member.
- Such fundamental rights may include:
  - The right to sit on the board;
  - The right to vote;
  - The right to speak during meetings subject to the terms of the board's bylaws.

# A Recent Case Study . . .

## *Houston Community College System v. Wilson*, 595 U.S. \_\_\_\_ (2022)







- The Houston Community College System (“HCC”) is governed by a nine-member Board of Trustees with each member elected from various districts within Houston.
- David Wilson was elected to the Board of Trustees in 2013. By 2016 he had brought numerous lawsuits against the HCC stemming from his disagreements with other Trustees over the direction of the HCC.

- In addition to filing numerous initial lawsuits against HCC, Mr. Wilson also:
  - Accused the Board of Trustees in various media outlets of violating its bylaws and ethical rules;
  - Arranged for robocalls of the constituents of other trustees to publicize his views;
  - Hired a private investigator to surveil another trustee to try to prove that she did not live in the district;
  - Filed a new lawsuit against HCC accusing the Board of Trustees of violating its own bylaws by letting a trustee vote via teleconference;
  - Filed a second lawsuit after the Board excluded him from a meeting to discuss his first lawsuit in executive session.

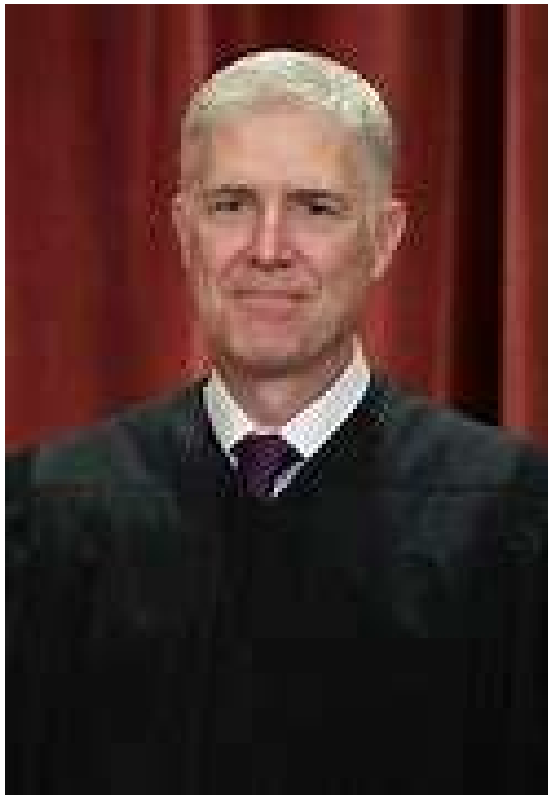
- By the time of the Supreme Court decision, Mr. Wilson’s lawsuits had cost the HCC at least \$270,000 in legal fees to defend.
- In 2018, the HCC Board of Trustees adopted a resolution censuring Mr. Wilson for conduct that “was not consistent with the best interests of the College” and “not only inappropriate, but reprehensible.”
- The resolution further made Wilson ineligible for election to any Board officer position for the 2018 calendar year and recommended that he undergo additional training in Board governance and ethics.
- Mr. Wilson sued....

# *Houston Community College System v. Wilson*, 595 U.S. \_\_\_\_ (2022)

- Mr. Wilson's lawsuit went all the way to the United States Supreme Court.
- In his lawsuit he argued (among other things) that the Board of Trustees' censure of him was unlawful retaliation for the legal exercise of his First Amendment rights.
- Ultimately the Court had to decide the question of whether a purely verbal censure can violate a public official's First Amendment rights.



# *Houston Community College System v. Wilson*, 595 U.S. \_\_\_\_ (2022)



- The Supreme Court **unanimously** found in favor of HCC.
- Justice Neil Gorsuch authored the Court's opinion. After conducting a lengthy examination of the history of censure resolutions in the United States, the Court ultimately found that a purely verbal censure resolution against an elected official by other members of the same body is not an adverse action for purposes of the First Amendment.

- Writing for the Court, Justice Gorsuch stated that:

***“The censure at issue before us was a form of speech by elected representatives. It concerned the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. As it comes to us, too, the censure did not prevent Mr. Wilson from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory. At least in these circumstances, we do not see how the Board’s censure could have materially deterred an elected official like Mr. Wilson from exercising his own right to speak.”***

# How to Respond to the “Rogue” Board Member

- Recognize that all Board members have the same **rights** and **responsibilities**.
- Rely on established **board policies** to guide action and establish process for communication.
- Where necessary use **board bylaws** to implement appropriate **political response**.
- Advise board members of **legal duties -- and potential liability** with respect to the disclosure of certain information.

- Board of education policies addressing several key topics should serve as the guidepost for dealing with difficult speech issues. Key policies include:
  1. **Confidential Information (Policy # 1150.1)**: Policy prohibiting disclosure of confidential information/documents obtained during executive session or by other means.
  2. **Public Complaints (Policy # 1312)**: Policy describing how board members should refer parent/community member complaints to district administration for investigation and response.



3. **Civility (Policy # 1316)**: Policy requiring board members, staff and community members to communicate with one another in a civil, respectful manner while on school grounds.
  
4. **Board/Superintendent Relations (Policy # 2000.1)**: Policy delineating roles and responsibilities of board members and superintendent in handling administrative matters and public communications.

- The board's bylaws govern the board of education's internal operations and should define the limits of board member authority. Key bylaws include:
  1. **Limits of Authority (Bylaw # 9010)**: Bylaw that memorializes the fact that board members have no individual authority and that all power rests with the board.
  2. **Public Statements (Bylaw # 9020)**: Bylaw typically designating board chair and superintendent as only authorized spokespersons for the board.
  3. **Board – Staff Communications (Bylaw # 9060)**: Bylaw ensuring that all board communications to district employees are made through the superintendent.

4. **Chairperson (Bylaw # 9121)**: Bylaw that typically grants authority to board chair to appoint committees subject to board approval and serve as presiding officer during meetings.
5. **Special Committees (Bylaw # 9133)**: Gives chair the ability to appoint special or ad hoc committees.
6. **Parliamentary Procedure (Bylaw # 9325.5)**: Bylaw that designates Robert's Rules of Order as governing procedure except where superseded by bylaw.

- **Resignation/Removal/Censure (Bylaw # 9222)**: Bylaw that often provides for process to censure members.
  - Typically censure motions require a 2/3 vote.
  - Can be a highly technical process that requires giving would-be censured member the opportunity to respond to allegations/clear name.
  - Procedural requirements must be strictly complied with.
    - Notice to Board member;
    - Opportunity to respond to allegations.
  - Per the *Houston Community College System* case a non-defamatory censure resolution based upon a rogue board member's speech or conduct does not violate the First Amendment.

# Other Ways to Deal with the “Rogue” Board Member

- Removal from officer position (chair, vice-chair, secretary, etc.) on the Board:
  - Resignation/Removal Bylaw or Robert’s Rules of Order;
  - Procedural requirements stated in bylaws must be strictly complied with. *See, LaPointe v. Board of Educ. of Town of Winchester, 274 Conn. 806 (2005).*
- Formation of *ad hoc* committee that excludes rogue board member.
  - Bylaws often allow chairperson to nominate members of committee subject to approval of board.

*Questions?*

# **Social Media, Free Speech and Student Discipline**

Stephen M. Sedor, Esq.

- On campus speech...

“Students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”



# What Makes Social Media Matters Difficult For School Districts?

- In many cases, the activity takes place off school grounds where the school district may have limited ability to take action.
- When issues are reported, school administrators may not know the context of what has been posted.
- Depending upon what a student has posted, the school may need to take swift action, even if the administration does not know all of the facts.
- Students have rights under the First Amendment to free speech, subject to certain limitations.
- Court decisions on social media are very *fact specific* and may not appear to be consistent.

# Free Speech (on campus) – How it Began...

- Four United States Supreme Court cases paved the limits of a school district's reach for speech that takes place on school grounds.

# Tinker v. Des Moines Indep. Cmty. Sch. Dist., 309 U.S. 503 (1969)

- Students were suspended for passively wearing black arm bands in protest of the Vietnam war. The Supreme Court ruled this was impermissible.
- The Supreme Court held that “students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”
- The Supreme Court ruled that expressions of student speech were permissible unless they “materially and substantially” disrupt the operation of the school and/or could be reasonably expected to do so.

# *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986)

- Student gave a speech before 600 students that nominated another student for class office. However, the speech was filled with easily identifiable sexual innuendos.
- As a result, the school suspended the student. The Supreme Court found that the suspension was lawful.
- “[I]t was perfectly appropriate for the school to ... make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education.”

# *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988)

- School administration prohibited the students in a school journalism class from writing stories about teen pregnancy in the school and the story of a divorced family. The story on teenage pregnancy contained information about teenagers pregnant at the school.”
- The Supreme Court ruled school districts’ suppression of student speech in this regard was appropriate “so long as their actions are reasonably related to legitimate pedagogical concerns.”

# *Morse v. Frederick*, 551 U.S. 393 (2007)

- Student unfurled a banner across the street from the school, where students were assembled during a school-sponsored event (Olympic torch relay), stating “BONG HITS 4 JESUS.” This resulted in the student being suspended.
- The Supreme Court ruled that the school was justified because it had a compelling interest in prohibiting speech that could reasonably be construed promoting drug use.

# The Start of Social Media Issues Begin!

- Social media and the internet have created effective ways for students to promote widespread harassment of other students and school staff as well as threats of violence.
- School districts still have the ability, and at times an obligation, to address off-campus conduct of its students, so long as it causes a substantial disruption to the educational process.



# But How Do The 4 Cases Relate to Social Media?

- Social media often occurs off campus.
- Can the social media activity be said to materially disrupt the school district?
- Courts in the early going on social media in most instances tried to apply some form the *Tinker* standard and require evidence of the social media activity having or reasonably construed as having a disruption to the school.
- So, what did the “early cases” decide?

# Threats of Violence Towards Identifiable Individuals

## Facts:

- Student sent an IM to a friend with a picture of a person firing a gun at his head and added pictures of splattered blood.
- Below the picture was a message that said “Kill [the name of his teacher.]”
- The message was sent to approximately 15 of his “IM” “buddies” and the word of the drawing ultimately reached the teacher and the school administration.
- *Although it was meant as a joke [ie context], the student was suspended.*
- *Wisniewski v. Weedsport C.S.D*, 494 F.3d 34 (2d Cir. 2007).
  
- WHO WON?

- “[W]e conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would materially and substantially disrupt the work and discipline of the school.”

- Pursuant to Connecticut General Statutes Section 10-233d, a student may be expelled for off-campus conduct if: (1) the conduct violated a publicized policy of the Board; and (2) the conduct was substantially disruptive to the educational process.

- Student who was angry at his teacher for giving him a “C” posted on his private Facebook account that the teacher should be “shot.”
- The posting was made on a day school was not in session.
- Only his Facebook “friends” could view the post.
- An anonymous student brought the post to the school administration and the student was suspended.
- The student meant the post as a joke, but the teacher who was the subject of the post did become scared.

- “The comments did not cause a widespread whispering campaign at school or anywhere else. No students missed class and no CMS employees, including [the Teacher], missed work. Although [she] initially protested having [the Student] back in her class, she accepted the school's decision for him to return and did not discuss the comments with either [the student] or with any other students or teachers at CMS.”

# Perceived Threats of Mass Violence

## Facts:

- Student posted on his private social media site a video of the “Evan” video, which was developed by families of the victims of the Sandy Hook tragedy.
- The “Evan” video starts with two students writing notes to each other on desks all year; and then finally meeting each other while signing yearbooks in the gym.
- The video ends with a student pulling out a gun in the gym and shooting. The video then replays, but highlights the shooter in the background being bullied and otherwise showing signs of being a possible school shooter.
- The Student imposed violent lyrics over the video when he posted it on his social media page.
- WHO WON?

- “Students, parents and school officials reacted. Police became involved...Additionally, the morning after the post, the School District was closed, buses in the school district were cancelled, and school district officials messaged all schools and parents of School District students.”



- In another case upholding the school's suspension of student, the student at issue sent a string of increasingly violent messages to his friends that bragged of the weapons he owned. He further sent some messages that were threatening to shoot specific classmates, intimating that he would "take out" other people at a school shooting on a specific date, and invoking the image of the Virginia Tech massacre.
- The Court upheld the school's discipline of the student, stating: "[w]e can only imagine what would have happened if the school officials, after learning of [the] writing, did nothing about it" and [the student] did in fact come to school with a gun."

*Wynar v. Douglas Cty. Sch. Dist.*, 728 F. 3d 1062.

## *Kowalski v. Berkley County Schools (Fourth Circuit-Mississippi)*

- Student created a “myspace” page called “S.A.S.H.” that was directed towards a fellow female student.
- “S.A.S.H.” stood for “Students Against Slut Herpes.”
- One student uploaded a picture of the female victim student, where she was referred to as a “whore” and other hurtful comments.
- Approximately 2 dozen students from school posted comments on the site.
- Parents of the victim complained to the school.
- The school concluded that the student who created the page had created a “hate” website, which resulted in her suspension.

## WHO WON?

## The School

“This is not the conduct and speech that our educational system is required to tolerate, as schools attempt to educate students about habits and manners of civility or the fundamental values necessary to the maintenance of a democratic political system.”

### FACTORS CONSIDERED BY THE COURT

- The dialogue on the webpage took place among students at school who the student invited to join.
- It was reasonable to conclude that the dialogue, being directed at a fellow student, would reach the school.
- Comments were made specifically about the victim student.
- “Given the targeted, defamatory nature of Kowalski’s[the] speech, aimed at a fellow classmate, it created actual or nascent substantial disorder and disruption in the school.”

*J.C. v. Beverly Hills Unified School District (District of California)*

- Student recorded herself and her friends at a restaurant after school talking about a female victim student.
- The discussion included comments that the victim is a “slut,” “spoiled” and that nobody liked her.
- One of the students said the victim was the “ugliest [profanity] I’ve ever seen in my whole life.”
- The Student posted the video to “youtube” and told other students from the school, including the victim. Students from the school viewed the video.
- The victim went to her guidance counselor crying and missed some of her classes.
- The school administration interviewed the students who were in the video and suspended the Student who made it. The Student sued the school.

## WHO WON?

## The Student

“[A]t most, the record shows that the School had to address the concerns of an upset parent and a student who temporarily refused to go to class, and that five students missed some undetermined portion of their classes...this does not rise to the level of substantial disruption.”

“[T]o allow the School to cast this wide a net and suspend a student simply because another student takes offense to her speech, without any evidence caused a substantial disruption of the school’s activities, runs afoul of *Tinker*.”

### FACTORS CONSIDERED BY THE COURT

- The video was not violent or threatening.
- The victim never feared any physical attack.
- The victim merely felt embarrassed, her feelings were hurt and she only temporarily did not want to go to class.
- The victim did not confront any of the students who made the video in school.
- “[I]t took the school counselor, at most, 20-25 minutes to calm C.C. down and convince her to go to class.”

## In 2021, the Supreme Court Issues a Decision on Social Media...

**FACTS:**

- The Student was a freshman who tried out for but did not make the varsity cheerleading team. She became extremely upset over this.
- While out with her friend during the evening, she posted on “snap chat” multiple vulgar messages about the school and the team. She also accompanied the posts with vulgar gestures.
- These posts were later shown to the administration. Considering these posts violated school rules, were vulgar, inappropriate and connected to a school-sponsored activity, the school district dismissed the student from the j.v. cheerleading team.
- Who won?

- In the decision, the Court focused on the fact that the post happened off campus, where the school district had limited ability to regulate student speech.
- The Court presented three reasons why the off campus nature of social media speech are out of a school district's reach:
  1. "First, a school, in relation to off-campus speech, will rarely stand in *loco parentis*."
  2. "Second, from the student speaker's perspective, regulations of off campus speech, when coupled with regulations of on-campus speech, include all the speech a student utters during the full 24-hour day.
  3. "Third, the school itself has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus. America's schools are the nurseries of democracy."



- “Consider too when, where and how [the student] spoke. Her posts appeared outside of school hours from a location outside the school. She did not identify the school in her posts or target any member of the school community with vulgar or abusive language. [The student] also transmitted her speech through a personal cell phone, to an audience consisting of her private circle of snapchat friends. These features of her speech, *while risking transmission to the school itself*, nonetheless...diminish the school’s interest in punishing [the student’s] utterance.”
- The decision in total can be construed as providing a meaningful limitation on a school district’s reach when handling social media cases.

- The Court identified multiple circumstances in which a student's social media use *may be* subject to discipline, notwithstanding that it occurred off-campus:
  1. Severe bullying or harassment targeting particular individuals.
  2. Threats aimed at teachers or other students.
  3. The failure to follow rules concerning lessons, writing of papers, use of school computers or participation in other online school activities.
  4. Breaches of school security devices.

- The Court unfortunately declined to set a rule as to how to evaluate to off-campus speech:

“Particularly given the advent of computer-based learning, we hesitate to determine precisely which of many school-related activities belong on such a list. Neither do we now know how such a list must vary, depending upon a student’s age, the nature of the school’s off-campus activity, or the impact upon the school itself. ***Thus, we do not now set forth a broad, highly general First Amendment rule stating just what counts as “off campus” speech and whether or how ordinary First Amendment standards must give way to a school’s need to present, e.g., substantial disruption of learning-related activities or the protection of those who make up a school community.***”

# What Can We Take Away From The Social Media/First Amendment Cases?

- Each case is fact intensive.
- Administrators should consider:
  - Where did the speech take place?
  - Does the speech fall into the categories identified by *Mahanoy Area School District v. B.L. case*?
  - Should the administrator(s) contact the police, depending upon the post?
  - What is the nexus of the speech to the school? (i.e. how many students were involved, how did the matter come to the attention of the administration, etc...).
  - Did the speech cause a substantial disruption to the school activities and operation?
  - Were school officials pulled away from their ordinary duties to address the issue(s) caused by the social media use?

*Questions?*

# **The Connecticut General Assembly Has Spoken: Legislation From the 2022 Session Effecting the Schools**

**Mark J. Sommaruga, Esq.**

May 19, 2022

- The 2022 session of the General Assembly adjourned on May 4, 2022. (It was a short session.)
- Several bills passed; we await Governor Lamont's signature (or veto) on most of these bills.
- **PLEASE NOTE: THIS POWERPOINT WAS CREATED ON MAY 17, 2022**

***BILLS THAT HAVE  
BEEN PASSED BY THE  
LEGISLATURE:  
EDUCATION LAW***



- Authorizes the State Board of Education upon the request of a school district or RESC to issue a “human services permit” to applicants with specialized training, experience or expertise in social work, human services, psychology or sociology.
- Bill sets forth minimum education/experience requirements; permit would authorize holders to be employed and provide mental health and human services to students within their scope of practice/area of expertise or specialty.

- Requires State Department of Education (“SDE”) to administer a program to provide grants to school districts for hiring and retaining additional school social workers, psychologists, counselors and nurses (*and as per Public Act 22-116, licensed marriage and family therapists*).
- Requires SDE to develop and distribute a survey that school districts must annually complete on the number of school social workers, psychologists, counselors, and nurses (*and as per Public Act 22-116, licensed marriage and family therapists*) they employ; Commissioner of Education will calculate the student-to-worker ratio for each of these positions and report the survey results to the General Assembly’s Education and Children’s Committees.

- Amends school medication administration laws to allow school nurses (or during their absence/unavailability, qualified/trained school employees) to administer opioid antagonists to provide emergency first aid to students experiencing opioid-related drug overdose *and* who do not have prior written authorization from a parent or prior written order of a qualified medical professional.
  - During regular school hours, must be at least one qualified/trained school employee on school grounds in the absence of a school nurse.
  - Parent/guardian may submit a request in writing to the school nurse and medical advisor that an opioid antagonist not be administered to their child.

# Public Act 22-80 and Remote Learning

- For the 2022-23 school year, school districts have the option of providing remote learning for grades nine through 12.
- Effective with the 2024-25 school year, the bill permit school districts to authorize remote learning for grades **kindergarten** through 12.
- Remote learning must be in accordance with SDE standards.
- Bill explicitly prohibits dual instruction (i.e., the simultaneous instruction by a teacher to students in-person in the classroom and students engaged in remote learning).

# Yes, Even More From Public Act 22-80

- Requires that the **duty-free lunch periods** for certified employees who work directly with children must be 1) **uninterrupted**, and 2) the length of the period be the **greater of 30 minutes** or the amount of time prescribed in the appropriate **collective bargaining agreement!**
- Requires SDE to administer a new **minority teacher candidate scholarship** program.
- Codifies the *A.R.* case by requiring provision of special education to qualifying students up to age 22 (instead of 21).
- Includes Guilford as a participant in the “Open Choice” program for the New Haven region.

# Public Act 22-80 and “Career Pathways”

- Authorizes the State Board of Education (upon request of a school district or RESC) to issue a “career and technical pathways instructor permit” to any applicant with specialized training, experience or expertise in the field of manufacturing, allied health, computer technology, engineering or any of the construction trades.
- Such permit shall authorize a person to hold a part-time position of not more than 20 classroom instructional hours per week as a teacher of a class in such person's area of specialized training, experience or expertise.
- Sets forth the qualifications and evaluation provision for a permit holder
- Provides that no person holding such a permit shall fill a position that will result in the displacement of any person holding a teaching certificate who is already employed at such school.

# Public Act 22-80 and AAPI Studies

- Effective July 1, 2025) require public schools to include “Asian American and Pacific Islander studies” as part of their social studies curriculum.
- Such studies shall include, but need not be limited to, a focus on 1) the history of Asian American and Pacific Islanders in the state, the region and the United States, and 2) the contributions of a) Asian American and Pacific Islanders towards advancing civil rights from the 19<sup>th</sup> century to the present day, b) individual Asian American and Pacific Islanders in government, the arts, humanities and sciences, and c) Asian American and Pacific Islander communities to the economic, cultural, social and political development of the United States.
- School districts may: 1) utilize the curriculum materials developed by the State Board of Education, and 2) accept donations designated for the development and implementation of this curriculum.

# Public Act 22-80 and Task Forces and Studies

- Establishes the state **teacher shortage and retention** task force, which shall develop a comprehensive report that includes recommendations that address 1) strategies to address attrition rates of teachers leaving the teaching profession, 2) the retention of teachers, 3) teacher shortages across subject matter disciplines, 4) the impact of retention and shortages in financially distressed school districts, and 5) streamlining teacher certification without diminishing standards or the professional value of a teaching certificate and then submit a report on its findings and recommendations by January 1, 2024 to the General Assembly's Education and Children's Committee.
- Requires the Department of Correction in consultation with the SDE to conduct a study of how **Unified School District #1 is funded** and how its funding compares to other school districts and education programs, and then submit a report with its findings and recommendations by January 1, 2023 to the Education and Appropriations Committees



# Public Act 22-80 and Even More Task Forces and Studies

- Creates a task force to combat **ableism**, which is “bias, prejudice or discrimination, intentional or unintentional, against people with physical, psychiatric or intellectual disabilities.” Task force shall identify 1) current efforts to educate all students on disability and combat ableism in public school curriculum and classrooms, and 2) opportunities to expand such efforts and integrate them into social-emotional learning, then submit report with findings and recommendations to Education and Children’s Committees.
- Creates a task force to study the **governance structure and internal procedures of CIAC**, which is to submit its findings and recommendations to the Education Committee by 1/1/23
- Requires SDE to review the **state’s teacher certification statutes** and regulations for obsolete provisions and barriers for recruitment, and report to the Education Committee by 1/1/23

- Effective upon passage, requires school boards to adopt policies governing the withholding of recess as a form of student discipline; policies **cannot** include provisions that are unreasonably restrictive or punitive or that allow recess prevention/restriction due to student’s academic performance or failure to complete work.
- Reconvenes a **task force** to continue to study the 1) comprehensive needs of children in the state and 2) extent to which educators, community members, and local and state agencies are meeting them
- Requires Governor to proclaim May 26<sup>th</sup> to be “**Get Outside and Play for Children’s Mental Health Day**” and SDE next year to provide annual notice about the day to school districts (including suggestions or materials for suitable exercises that may be held to observe it).

- Requires SDE to annually survey school districts regarding their employment of student mental health specialists and calculate student-to-specialist ratios for districts (and schools within).
- Requires SDE to administer a grant program for to provide funding to boards to hire student mental health specialists and deliver student mental health services. *(As per Public Act 22-116: if you receive a grant to hire a school counselor, the counselor must provide 1:1 consultations to all 11<sup>th</sup> and 12<sup>th</sup> grade students on applications for federal student aid.)*

- Beginning July 1, 2022, requires SDE and school districts to use the term “**emotional disability**” instead of “emotional disturbance” when providing special education. No change in meaning.
- Requires each RESC to hire a regional trauma coordinator to develop and implement a **trauma-informed care training program**; requires coordinators to train school district specialists so that they in turn can train teachers, administrators, and other staff.
- Beginning in 2022-23, allows any classroom teacher to request a **behavior intervention** meeting with the school’s crisis intervention team for any student whose behavior has caused 1) a serious disruption to other students’ instruction or 2) self-harm or physical harm to the teacher, another student, or staff in the teacher’s classroom. Team must hold a meeting, and participants must identify resources and supports to address the social, emotional, and instructional needs of the student.

- Requires school districts to provide notice to a truant child's parent or guardian about the availability of the **2-1-1 Infoline** program and other pediatric mental and behavioral health screening services and tools.
- Requires (beginning July 1, 2023) an appropriate student mental health specialist evaluate each child who is a truant to determine if more behavioral health interventions are necessary for the child's well-being.
- Requires school districts by September 1, 2023, to adopt and implement 1) SDE-developed truancy intervention model that accounts for mental and behavioral health or 2) a truancy intervention plan that meets the SDE truancy model requirements.

- Requires SDE to administer the Pipeline for Connecticut's Future program in which it will assist school districts in enhancing existing (or establishing new) partnerships with one or more local businesses to offer a pathways program one or more fields (e.g., manufacturing, computer programming or the culinary arts) that may lead to a diploma and a certificate or license upon graduation.
- Program will assist students in 1) obtaining occupational licenses, 2) participating in apprenticeship opportunities, and 3) gaining job skills, along with providing industry-specific class time and cooperative work placements, on-site and apprenticeship training, and course credit and occupational licenses to students upon completion. SDE to develop best practices that schools may use.
- Requires Commissioner of Education to review existing state laws and regulations related to the establishment of pathways programs to identify any obstacles or prohibitions that may limit a school district's ability to build partnerships with local businesses for establishing a successful program. Commissioner is then to submit recommendations for legislation by 1/1/23 to the Education Committee.
- Requires school counselors to provide information to students in middle and high school about technical education and career schools and regional agricultural science and technology education centers.

- Effective October 1, 2022: establishes a new state holiday on June 19<sup>th</sup> -**Juneteenth Independence Day**.
- If this holiday occurs on a school day, school districts can choose to close their schools for such day; if schools are in session on that date, districts shall require each school to hold a suitable nonsectarian educational program in observance of such holiday.

- Among other things, would extend the term for public school teaching certification by permitting the Commissioner of Education to reissue both the initial certificate (for someone who holds it but has not taught under it) and the provisional certificate, and extending validity of the professional certificate from 5 years to 10 years.
- Delays by one year (from January 2023 to January 2024) the deadlines in the law for the SDE and SERC to develop a model Kindergarten through Grade Eight curriculum (and submit a report to the General Assembly’s Education Committee regarding the same).
- Grants the Commissioner of Education the authority to temporarily waive or modify provisions in state laws about eligibility for school feeding programs in response to changes in federal law or USDA waivers.



- Extends the deadline of the **Special Education Task Force** finishing its work and issuing report to the General Assembly’s Education Committee from January 1, 2022 until January 1, 2024.
- Includes one’s “class rank” among the records that a parent is entitled to.
- Requires CAFE’s Executive Director to establish a working group to examine and make recommendations concerning the **consolidation or elimination of unnecessary, obsolete or redundant professional development and in-service requirements**. The bill specifies the groups’ membership and requires the Executive Director to submit a report on the group’s findings and recommendations by January 1, 2024 to the Education Committee.
- Requires SDE to develop a report about **recovery high schools** (i.e., schools designed for students in recovery from substance use disorder or co-occurring disorders) and then submit a report on its findings and recommendations by January 1, 2023 to the Education Committee

# Public Act 22-116 and Paraprofessionals

- Requires districts to provide 1) adequate prior notice of PPT meetings where parent has requested presence of paraprofessional assigned to their child, so that para may adequately prepare for the meeting, and 2) training (upon request of the para) on the role of the para at the PPT meeting.
- Requires district to provide paras with access to the IEPs so that they may be able to provide the special education/related services within.

# H.B. 5506-The “Budget Implementer” -not just \$\$\$

- Establishes a system of **professional development for paraeducators**. Commencing 2022-23, each paraeducator must participate in a program of professional development, to be made available by the school district, annually at no cost to its paras, that is at least 18 hours in length, “of which a preponderance is in a small group or individual instructional setting.”
- Beginning July 1, 2023, requires the SDE to allow private schools to accept curriculum accreditation from Cognia (a nonprofit accreditation and certification agency).
- Requires SDE to compile and analyze information from school districts on the costs of special education. SDE must identify districts with expenditures on special education that are 2 ½, 3, 3 ½ and 4 times the district’s net current expenditures per student, along with analysis of cost to reimburse districts at each level of expenditure.

# The Budget Implementer and Excess Cost Grants

- Replaces the existing “within available appropriations” threshold for the excess cost grant for special education with a three-tiered threshold system based on the property wealth of a town.
- Currently, the funding of special education costs for a student above four and half times the per pupil costs of such district is subject to available appropriations (and there is a proportionate reduction for all such grants if the need for such grants exceeds the available appropriations for that year).
- The bill groups towns based upon wealth (AENGLC), and State will pay on a sliding scale when the grant need exceeds appropriations, with “poorest” districts receiving 76.5% of their grant and on the other end of the scale, “richest” district receiving 70% of their grant.

# The Budget Implementer: \$\$\$

- Lowers the enrollment threshold that triggers the cap on **East Hartford tuition payments to magnet schools**; the same and tuition cap to all other Sheff region towns, New Britain, and New London for 2022-23, with SDE to be responsible for magnet tuition losses from these caps within available appropriations.
- Moves up by one year the sunset of the cap on the **state's adult education program** grant for school districts and RESCs; there will be no cap in 2022-23.
- Provides increases in the **per pupil charter school grants** for 2022-2023, with state charter schools receiving the ECS foundation grant plus 25.42% (instead of 14.76%) of its charter grant adjustment.
- Renews the **alliance school district** program for five years and requires the Commissioner to designate 36 (instead of 33) alliance districts.
- Increases the **bilingual education** grant from \$3,832,260 (instead of \$1,916,130).
- Mostly status quo on **ECS** grants
- Creates an additional \$2,000 per pupil grant for Hartford area/*Sheff* region school districts that accept public-school students through the **Open Choice** program.

# The Budget Implementer: More Stuff

- Effective July 1, 2023, requires school districts to provide **climate change instruction** as part of the science curriculum.
- Makes necessary revisions to the statutes in light of the **Connecticut Technical Education and Career System** becoming an independent agency and sets forth provisions with respect the qualification and hiring (by the System's executive director) of the System's Superintendent.
- Requires the Office of Workforce Strategy' to develop a model "**student work release**" policy by July 1, 2023, which then must be adopted by school districts
- Requires SDE to study the funding process for **The Gilbert School** and report its results and any recommendations a to the Education Committee by January 1, 2023.

# The Budget Implementer: Construction/buildings

- Authorizes state grant commitments for numerous school building projects.
- Requires DAS to administer a reimbursement grant program beginning 2022-23 for costs associated with projects for the installation, replacement or upgrading of heating, ventilation and air conditioning systems or other improvements to indoor air quality in school buildings.
- Requires school districts to conduct a uniform inspection and evaluation of the HVAC system in each school every five years; requires any HVAC inspection report be made public at board meetings and include any corrective actions; requires the existing air quality inspections to take place every three years rather than five years.
- Establishes a working group to study and make recommendations related to indoor air quality within schools; must then submit a report on its findings and recommendations to the Governor and the Education, Labor, and Public Health Committees by January 4, 2023.

# The Budget Implementer: Construction/buildings

- Requires towns (or regional school districts) to submit a notice of project completion within three years from the date of the issuance of a certificate of occupancy for a school building project. If they fail to submit such notice of project completion, the DAS Commissioner shall deem such project completed and conduct an audit of such project.
- Eliminates the School Safety Infrastructure Council and generally transfers its duties to the School Building Projects Advisory Council.
- Withholds 5% of a school construction project's reimbursement grant if the applicant does not meet Minority Business Enterprise set-aside goals
- Require the invitation of bids on construction projects to be through the State Contracting Portal (instead of newspapers).
- Provides that construction managers shall not be eligible to submit a bid to perform any work on a school construction project.
- Eliminates the DAS Commissioner's authority to approve emergency school construction reimbursement grants for administrative and service facility and school safety projects.



***BILLS THAT HAVE  
BEEN PASSED BY THE  
LEGISLATURE:  
LABOR/EMPLOYMENT  
LAW***

- Requires each state agency to apply the following terms from the agreement between the state and the State Employee Bargaining Agent Coalition (SEBAC) to their **nonunion state employees**: 1) for 2021-22, a \$2,500 lump sum payment and 2.5% base annual salary increase; 2) for 2022-23, 2.5% increase plus step increases, annual increments (or their equivalents), and a \$1,000 lump sum payment); and 3) for 2023-24, 2.5% increase plus step increases, annual increments (or their equivalents).
- Requires health insurance coverage for children, stepchildren, or other dependent children of state or nonstate public employees via the State Partnership Plan to continue until at least the end of the calendar year after the earlier of when they 1) **obtained coverage through their own employment** or 2) turn age 26.

# The “Implementer” and Teacher Retirement System (TRS)

- Excludes school business administrators who hold a certificate with an administration endorsement from TRS.
- Limits eligibility for professional employees of the State Education Resource Center (SERC) to only those hired before July 1, 2022.
- Explicitly includes CT Technical and Career System professional employees.
- Increases from \$220 to \$440 per person, the monthly health insurance subsidy under TRS for eligible retired teachers (and their spouses or surviving spouses or disabled dependents), who receive health insurance coverage from the retiree’s last employing board of education.

- Lowers the threshold of “employer” under the CT Fair Employment Practices Act (CFEPA) from three employees *to* one or more.
- Adds **status as a domestic violence** victim as a protected class under CFEPA (and prohibits discrimination against such persons).
- Amends CFEPA to prohibit employers from refusing to provide a reasonable accommodation (including a reasonable leave of absence) to an employee for the purpose of seeking attention to injuries caused by (or services relating to) domestic violence, unless the absence would cause an undue hardship.
- Employers can seek certain documentation from employees with respect to such a leave of absence; employers must maintain the confidentiality of information (to the extent permitted by law) regarding one’s status as a domestic violence victim.

- Requires an employer having three or more employees to **post** in a prominent location information concerning domestic violence and the resources available to victims of domestic violence.
- Requires each **state agency** to provide a minimum of one hour of training and education related to domestic violence and the resources available to victims of domestic violence 1) to all employees by July 1, 2023, and 2) to all employees hired on or after January 1, 2023, not later than six months after their assumption of a position. The bill sets forth the contents of such training, and the requirements of this bill may be met by using the online training and education video (or other interactive method of training and education) that is to be developed by CHRO in conjunction with CCADV (and made available at no cost to each state agency).

***BILLS THAT HAVE  
BEEN PASSED BY THE  
LEGISLATURE:  
FOIA***

# Public Act 22-3: An Act Concerning Remote Meetings under the FOIA

- Makes permanent changes to FOIA so as to preserve the ability of public agencies to conduct “**remote**” and “**hybrid**” meetings.
- Largely mirrors the temporary provisions which were set to expire on April 30, 2022. <https://www.pullcom.com/education-law-notes/the-foia-and-the-pandemic-new-temporary-provisions-on-remote-and-hybrid-meetings-for-public-agencies>
- Can continue to hold (**if you choose**) meetings that are accessible to the public through 1) electronic equipment only (i.e., “**remote meetings**”) or 2) remote participation in conjunction with an in-person meeting (i.e., “**hybrid meetings**”).
- For **regular** meetings, in addition to 24 hour posting requirement, must provide **48 hours** notice of decision to hold a remote or hybrid meeting.
- Must still record and post recordings of remote meetings.
- Board members still have absolute right to participate remotely.
- **NEW**: Specifically permits a regional school board to conduct remotely (or as a hybrid meeting) the public hearing at which it presents its proposed budget.

# Contact Information



**Melinda B. Kaufmann**

Tel: 860.424.4390

Email: [mkaufmann@pullcom.com](mailto:mkaufmann@pullcom.com)



**Zachary D. Schurin**

Tel: 860.424.4389

Email: [zschurin@pullcom.com](mailto:zschurin@pullcom.com)



**Stephen M. Sedor**

Tel: 203.330.2137

Email: [ssedor@pullcom.com](mailto:ssedor@pullcom.com)



**Mark J. Sommaruga**

Tel: 860.424.4388

Email: [msommaruga@pullcom.com](mailto:msommaruga@pullcom.com)





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