# Pennfield Schools
# Monday, May 8, 2023 - 6:30 PM
# Regular Board Meeting
# High School Media Center
# 8299 Pennfield Road
# Battle Creek, MI 49017

1. Call Meeting to Order
2. Pledge of Allegiance
   Board President
3. Roll Call
   Board President
4. Agenda Changes
5. Public Comments - Participants are asked to keep comments to three (3) minutes.
6. Recognitions and Presentations
7. Communications
   - 7.1. Student Representative Report
   - 7.2. Superintendent's Report
8. Consent Agenda (Action)
   - 8.1. Approval of the Agenda
   - 8.2. Approval of Minutes
     April 3, 2023 Special Board Meeting Minutes 3

     - 8.2.1. Minutes of the April 3, 2023 special meeting
       April 3, 2023 Special Board Meeting Minutes 5

     - 8.2.2. Minutes of the April 17, 2023 regular meeting
       April 17, 2023 Board Meeting Minutes 7

   - 8.3. Approve Check Registers
     April 2023 Check Register
   - 8.4. Approve Electronic Funds Transfer
     April 2023 EFT
   - 8.5. Approve Finance Expenditure Report
     April 2023 Exp Board Report
   - 8.6. Communications to the Board
     - 8.6.1. Thrun Law Notes - December 2022

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9. Items Removed from Consent Agenda **(Discussion and/or Action)**
10. Approval of New Staff **(Action)**
11. Items for Approval or Discussion **(Discussion and/or Action)**
    Board President
    - 11.1. Approve MS Mechanical Equipment Bid Package (Action)
      Triangle Mechanical Bid Package 54
    - 11.2. Approve April Bond Invoices **(Action)**
    - 11.3. Approval of the 2023-2024 Calendar **(Action)**
12. Board Comments
    Board President
13. Closed Session for the Purpose of Discussing Negotiations with the Pennfield Education Association
14. Adjournment
    Board President

**Pennfield Schools**

Special Board Meeting ~ Work Session
Monday, April 3, 2023 - 6:30 p.m.

High School Media Center
8299 Pennfield Road
Battle Creek, MI 49017

# MINUTES

1. Call to Order

   The meeting was called to order at 6:30 p.m. by President Dana Wells-Jenney.

2. Pledge of Allegiance

3. Roll Call

   - Dana Wells-Jenny, President - Present
   - Sarah Jones, Secretary - Present
   - Brad Crandall, Trustee - Present
   - Jennifer Sheldon, Trustee - Present

   Dawn Forton, Vice President - Absent
   Tim Wood, Treasurer - Present
   Krystal Newman,Trustee - Present

4. Public Comments
   There were no comments from the public

5. Recognitions and Presentations

   5.1. 2023 State of the Budget Presentation from Superintendent Lemmer

Superintendent Lemmer and Angena Schwartz updated the board with the current budget status and projections going into the 2023-2024 school year. The update included the following points:

- Last year the district budgeted for 2030 students. Our actual counts were 1987 students in the fall and 1974 students in the spring count. Next year we will budget with a more conservative student count number.
- Superintendent Lemmer has analyzed where our school of choice students are coming from and where our residents are going out to. We are taking more in than we are losing.
- Our alternative high school program has helped us retain more students in the district.
- A possible partnership with local homeschool families could bring in more revenue.
- Although we are operating in a budget deficit this year, we have an acceptable fund balance.

6. Board Comments

7. Adjournment

The meeting was adjourned at 7:59 p.m. by President Wells-Jenney.

Respectfully submitted,

Recorded and submitted by
Stephanie Lemmer

Approved by the Board on
Monday, May 8th, 2023
Signed by Board the Secretary

_____
Stephanie Lemmer, Superintendent

_____
Sarah Jones, Board Secretary

**Pennfield Schools**

Special Board Meeting ~ Work Session
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Respectfully submitted,

Recorded and submitted by
Stephanie Lemmer

Approved by the Board on
Monday, May 8th, 2023
Signed by Board the Secretary

_____
Stephanie Lemmer, Superintendent

_____
Sarah Jones, Board Secretary

Regular Board Meeting
Monday, April 17, 2023 - 6:30 p.m.

High School Media Center
8299 Pennfield Road
Battle Creek, MI 49017

# MINUTES

1. Call Meeting to Order

    1.1. Called to Order at 6:30 p.m.

2. Pledge of Allegiance

3. Roll Call - Board President
    3.1. All Present

4. Agenda Changes
    4.1. Remove 10.6 - Motion TW, Support BC, Passes 7-0
    4.2. Table Until the Next Meeting

5. Public Comment
    5.1. Matt Kayner - Speak to the LED Scoreboard that is being installed. Bond was finally supported after several attempts. Price increases have restricted the amount of work that can be completed. Consider the necessity of spending $70,000 in the stadium given the budget concerns.

6. Recognitions and Presentation
    6.1. Middle School Principal - Present an Update of School Improvement Efforts at Pennfield Middle School

6.1.1. Instruction - NWEA Data, Reading Intervention, HMH Implementation, PLC's
6.1.1.1.1. NWEA Data - Administered 3 times per year.
6.1.1.1.2. Data Analysis & Communication to Families
6.1.1.1.3. Community Volunteer Beginning a Reading Buddies Program at the Middle School
6.1.2. Supporting Students
6.1.2.1. MTSS - Tiered Process throughout the Building
6.1.2.2. Culture & Climate
6.1.2.3. PBIS Integration

7. Communications
7.1.1. Student Representative Report
7.1.2. Honors Band - April 26th for Middle School & HS
7.1.3. Varsity Gold Going to State Festival on May 3rd
7.1.4. Choral Has the Chance to Sing with Foreigner
7.1.5. Spring Sports Going Well - 8th Graders Joining in with HS Football

7.1.6. Superintendent's Report
7.1.7. Central Office - Busy with Budget, MICIP, Meet with the Administrative Team for PD Vision (Long-Term), Breaking Down the Strategic Plan w/Clear Action Plans

7.1.8. Bond Work - Ramping up on projects starting in a month.
7.1.8.1. Parking Lots - Repaved and Resurfaced. Phase Plan for Parking Lots.
7.1.8.2. Locked in a Date to Resurface Tennis Courts
7.1.8.3. Lights Came Down in Stadium
7.1.8.4. Triangle Starting to Pour Foundations Starting Wednesday
7.1.8.5. Bid Openings for Mechanical Tomorrow at 10:30 a.m.
7.1.8.6. Construction Phasing at the Middle School

7.1.9. Legislative - Right to Work Bills are Up for Testimony This Week and Next Week

8. Consent Agenda (Action)
8.1. Approval of the Agenda, Motion to Approve TW, Support SJ, Passes 7-0
8.2. Approval of Minutes - Approval of the Regular Board Minutes from November 7, 2022 and March 20, 2023
8.3. Approve Check Registers
8.4. Approve Electronic Funds Transfer
8.5. Approve Finance Expenditure Report
8.6. Communications to the Board

9. Item Removed from Consent Agenda (Discussion and/or Action)

10. Items for Approval or Discussion (Discussion and/or Action)

10.1. High School Girls Golf Team (Action), Motion to Approve TW, Support BC, Passes 7-0

10.1.1. Description: It is the recommendation of the Athletic Director, and the Superintendent that the Board of Education approve the addition of a girls high school golf team beginning in the 2023-2024 school year as there is significant interest among the high school students and will expand extracurricular opportunities for our students.

10.2. Middle School Swimming Co-Op (Action), Motion to Approve TW, Support SJ , Passes 7-0

10.2.1. Description: It is the recommendation of the Athletic Director and Superintendent that the Board of Education approve the addition of a boys and girls swimming cooperative for Pennfield 7-8th graders for the 2023-2024 school year. The other schools participating in the coop include Battle Creek Public Schools and Battle Creek Area Catholic Schools. This program will operate similarly to how the high school swimming program works.

10.3. Approve March Bond Invoices (Action), Motion to Approve TW , Support BC, Passes 7-0

10.3.1. Description: It is the recommendation of the Director of Finance and Operations and the Superintendent that the Board approve the bond bills for the month of March, which include a payment of $206,920.25 to Triangle and Associates and $33, 731.41 to King Scott Architects. A summary of services rendered is as follows:

$32,800 to Triangle and Associates for preconstruction and construction services.

$36.556.24 to Triangle and Associates for Construction services in association with the Boilers at North Penn and Purdy.

$137, 564.01 to Triangle and Associates for work associated with the High School Stadium.

$28,931.38 for architecture services regarding the elementary boilers.

$2,550 for architecture services regarding the middle school roof.

$540 for architecture services regarding the High School Secure Entrance

$1,710.03 for architecture services regarding the stadium remodel.

10.4. High School ESports Team (Action), Motion to ApproveTW, Support DF , Passes 7-0

10.4.1. Description: The High School Principal, Athletic Director, and Superintendent are recommending the Board of Education add a Varsity E-Sports program at the high school beginning in the 2023-2024 school year. The high school principal has secured the support of PSEF to help with start-up costs of purchasing equipment needed to establish the team.

10.5. Pennfield Schools Shared Time Program (Action), Motion to Approve TW, Second SJ, Passes 7-0

10.5.1. Description: The superintendent is recommending the board approve a Pennfield Schools Shared Time Program as outlined in The State School Aid Act of 1979 Mcl 388.1766b in order to access an additional revenue stream to minimize the impact of declining enrollment on the district.

11. Board Comments

11.1. Dawn Forton - Expressed appreciation for Middle School Presentation, excitement for the Field, and Maintenance

11.2. Dana Wells-Jenney - Expressed appreciation for Middle School and Maintenance

11.3. Superintendent - Expressed appreciation for Administrative Staff

12. Adjournment - Adjourned at 7:26 p.m.

Respectfully submitted,

Recorded and submitted by
Stephanie Lemmer

Approved by the Board on
Monday, May 8th, 2023
Signed by Board the Secretary

_____
Stephanie Lemmer, Superintendent

_____
Sarah Jones, Board Secretary

# SCHOOL LAW NOTES

THRUN LAW FIRM, P.C.

DECEMBER 22, 2022



**Labor and Employment**

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GORDON W. VAN WIEREN, JR. | TIMOTHY T. GARDNER, JR.
LISA L. SWEM | IAN F. KOFFLER
JEFFREY J. SOLES | FREDRIC G. HEIDEMANN
ROY H. HENLEY | RYAN J. NICHOLSON
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## MDE Temporarily Waives Daily Substitute Permit Limitation

On November 17, 2022, the Michigan Department of Education (MDE) issued a memo waiving, for the 2022-23 school year, the 90-day teaching limitation that typically applies to Daily Substitute Permits. The announcement is intended to assist schools with the ongoing statewide teacher shortage. MDE's memo is available at:

https://www.michigan.gov/mde/-/media/Project/Websites/mde/Memos/2022/11/Daily-Substitute-Teaching-Permits-90-Day-Limitation-Waiver.pdf?rev=a777082e52f244008685bccb3f9eb09b

*Daily Substitute Permits*

State School Aid Act Section 163 authorizes MDE to initiate state aid deductions when a school employs an instructor who does not possess a teaching certificate, substitute permit, or other approval issued by MDE. Administrative rules allow schools to apply for a Daily Substitute Permit, which is valid for one school year for classroom teaching when the certified teacher regularly assigned to that classroom is temporarily absent. The permit is not valid for an assignment to the same classroom for more than 90 consecutive calendar days, unless MDE grants an extension.

*MDE Memo*

Although intended to relax Daily Substitute Permit requirements, MDE's memo appears to contain conflicting information. It announces that the State Superintendent waived the Daily Substitute Permit 90-day limitation for schools "that have applied for the waiver." It also suggests, however, that the waiver was granted for all schools, stating: "No further action is required to extend the validity of the Daily Substitute Permits issued during the 2022-2023 school year." The memo adds that Daily Substitute Permits will be valid for assignments until the end of this school year or August 31, 2023, whichever is later.

Our firm contacted MDE's Office of Educator Excellence, which clarified that the 90-day limitation is waived for all schools regardless of whether a school applied for a waiver. Accordingly, all Daily Substitute Permits issued for this school year will remain valid until the end of this school year or August 31, 2023, whichever is later, without any further action by schools and without a 90-day limitation. There is one significant caveat: the waiver does not apply to assignments in special education classrooms.

*Caution*

Although the increased flexibility granted by MDE's memo is welcome news for many schools, school officials are reminded that Revised School Code Section 1236 grants substitute teachers employed by a school and assigned to one specific teaching position for at least 60 days certain rights. After 60 days in one assignment, the substitute teacher is entitled to leave time and "other privileges"

granted to the school's regular teachers, including a salary equal to at least the minimum salary on the school's teacher salary schedule. While not defined by statute, an informal Attorney General opinion suggests that "other privileges" are benefits granted to regularly employed teachers by a collective bargaining agreement.

Additionally, a substitute teacher employed by a school for at least 150 days during a school year of at least 180 days must, after all other teachers are reemployed, be given the first opportunity (either during that school year or the immediately succeeding school year) to accept a contract for any position for which the substitute teacher is certified. The same right of first refusal applies to a substitute teacher employed for at least 180 days by an intermediate school district that operates any program for at least 220 days. This right of first refusal does not apply to a substitute teacher who fulfills the duties of a "teacher who is unable to teach due to a terminal illness."

Importantly, rights granted by Revised School Code Section 1236 apply only to substitute teachers employed by a school, not substitute teachers employed by a third-party that provides services to the school. RSC Section 1236 defines a "day" as "the working day of the regular, full-time teacher for whom the substitute teacher substitutes." A quarter-day, half-day, or other daily fraction of the substitute's service must be counted as the fraction worked unless the school acknowledges and pays a fraction of a day as a full day, in which case the time counts as a full day.

Notwithstanding MDE's November 17, 2022 memo, school officials should monitor the number of days that each school-employed substitute teacher works. Failure to do so could significantly limit the school's discretion over future hiring and salary decisions.

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## Sixth Circuit Clarifies FMLA Intermittent Leave Rules

The Sixth Circuit Court of Appeals, whose decisions are binding in Michigan, recently declined to dismiss an employee's Family and Medical Leave Act (FMLA) intermittent leave interference claim. *Render v FCA US, LLC*, 53 F.4th 905 (CA 6, 2022). The decision clarifies FMLA rules applicable to intermittent leave and highlights the importance of clear FMLA policies and procedures.

*Background*

FCA used a third party, Sedgwick, to process its FMLA leave requests. After FCA-employee Edward Render requested intermittent FMLA leave, Sedgwick sent Render a letter mandating medical documentation to support his FMLA leave request. The letter stated that Render must report FMLA absences by calling FCA.

Render sent Sedgwick a medical certification stating that intermittent leave was medically necessary to manage Render's major recurrent depression and generalized anxiety disorder. The certification also stated that during "flare-ups," Render would be unable to perform any job duties.

Sedgwick later sent Render a second letter approving intermittent FMLA leave. As with the first letter, the second letter directed Render to report FMLA absences by calling FCA. The second letter, however, also stated that Render must call Sedgwick on his first FMLA absence day "at the number listed below"; the letter did not list a number for Sedgwick.

Render called FCA on various days to report absences and tardies, stating either that he had a "flare-up" or was "sick." FCA marked all absences and tardies as "miscellaneous unexcused."

When a supervisor notified Render that his absences and tardies were unexcused, Render spoke to an FCA human resources representative. The representative contacted Sedgwick, inquiring whether Render was "FMLA approved." Sedgwick responded that the absences were not FMLA-approved because they were not marked as "FMLA" in FCA's system. Render then was discharged for the unexcused absences and tardies.

Render filed a lawsuit against FCA, arguing that FCA violated the FMLA by interfering with his FMLA rights. The Sixth Circuit declined to dismiss the lawsuit.

*FMLA Interference*

To establish FMLA interference, an employee must prove, among other things, that (1) the employee was entitled to FMLA leave, (2) the employee provided the employer with notice of the employee's intent to take FMLA leave, and (3) the employer denied FMLA leave. FCA only disputed the notice element, asserting that it properly denied Render's leave because he failed to comply with FMLA notice requirements.

FMLA regulations state that an employee "giving notice of the need for FMLA leave does not need to expressly assert rights under the [FMLA] or even mention the FMLA to meet his or her obligation to provide notice." Instead, an employee must make the employer aware that the employee's leave may qualify for FMLA leave, such as a statement that the employee is under the continuing care of a health care provider.

Additional notice requirements apply, but they vary depending on whether the employee's leave is foreseeable or unforeseeable. The Court concluded that because only regulations applicable to foreseeable leave mention intermittent leave, foreseeable leave

notice requirements apply to all intermittent FMLA leave requests.

The regulations applicable to foreseeable leave state: "notice need only be given one time, but the employee shall advise the employer as soon as practicable if dates of scheduled leave . . . were initially unknown." FCA argued that Render failed to meet this standard because Render's call-in statements typically failed to put FCA on notice that his absences and tardies may qualify for FMLA leave. The Court held that Render met the standard because he was required to provide notice only once, which he did when he initially applied for FMLA leave. After the notice was provided, Render was only required to "advise" FCA of anticipated absences, which he did.

FCA further argued that FMLA regulations allow an employer to require an employee to comply with the employer's "usual and customary notice and procedural requirements for requesting leave," and Render failed to comply with such requirements. Specifically, FCA claimed that Render failed to comply with the call-in requirements specified in Sedgwick's letters because he only called FCA (not both FCA and Sedgwick) to report absences and tardies.

Although the Court acknowledged that an employer can deny leave if an employee fails to follow the employer's usual and customary notice and procedural requirements for requesting leave, the Court determined that an employee "cannot be faulted for failing to comply with company policy if the policy was unclear or the employee lacked notice of the policy." The Court observed that Sedgwick's letters were so confusing that even FCA's human resources representative was unsure whether the letters required Render to call both FCA and Sedgwick to report absences and tardies. The Court concluded that Render could not be faulted for failing to comply with Sedgwick's conflicting letters. Accordingly, the Court held that Render provided sufficient evidence to establish that FCA interfered with his FMLA rights by inappropriately denying him FMLA leave.

Although an employer is typically permitted to negate an employee's interference claim by proving a nondiscriminatory reason for the alleged interference, the Court concluded that opportunity does not apply when an employee alleges that the employer wrongfully denied FMLA leave.

To reduce the potential for FMLA claims, school officials are encouraged to review their school's FMLA leave policies and procedures for clarity and consistency. For Thrun Policy Service subscribers, Board Policy 4106 contains an FMLA policy, while Administrative Guideline 4106 contains FMLA procedures. Schools should assign responsibility for processing FMLA leave requests to staff familiar with both the FMLA and the school's FMLA polices and procedures. Failure to do so could result in costly lawsuits.

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## Employee Denied Unemployment Benefits for Leaving Work Early

The Michigan Court of Appeals recently held that an employee who left work mid-shift without the employer's permission was ineligible for unemployment benefits because such conduct constituted voluntarily quitting his job, even though he attempted to return to work the following day. *Anderson v Wright Coating Co*, COA Docket No. 357295 (November 10, 2022).

Travis Anderson worked for Wright Coating Company (WCC) as a forklift operator. He was suspended from work for refusing to wear a facemask as required by WCC policy. WCC employees accumulated demerit points for misconduct. Employees who accumulated 14 points were subject to discharge.

When Anderson returned from his suspension, a WCC administrator informed him that he would accumulate demerit points for the days he was suspended. That information angered Anderson, and he left work mid-shift. When Anderson returned to work the next day, the WCC administrator told him that WCC considered his decision to leave without authorization to be a resignation.

Anderson applied for unemployment benefits. The Michigan Unemployment Insurance Appeals Commission denied his claim, and the Michigan Court of Appeals affirmed.

Under Michigan Employment Security Act Section 29, an employee is disqualified from receiving unemployment benefits if the employee: "Left work voluntarily without good cause attributable to the employer." Michigan courts have interpreted "left work voluntarily" to be synonymous with quitting a job voluntarily. The Section 29 standard is presumed met if the employee leaves work.

Additionally, an employee "who is absent from work for a period of 3 consecutive work days or more without contacting the employer in a manner acceptable to the employer and of which the individual was informed at the time of hire" is considered to have met the Section 29 standard. The employee has the burden of proof to establish that the employee left work involuntarily or for good cause attributable to the employer.

The Court of Appeals concluded that Anderson's conduct of leaving work mid-shift without the employer's permission constituted voluntarily quitting

his job. The Court rejected Anderson's argument that under Section 29 he had to be absent for 3 consecutive days to be disqualified from benefits, finding that an absence of 3 consecutive days is merely one way to demonstrate that an employee left work voluntarily without good cause attributable to the employer. Accordingly, the Court concluded that Anderson was disqualified from receiving unemployment benefits.

Although unemployment claims are fact specific, this decision demonstrates that even temporarily leaving work without the employer's permission could serve as a basis for an employer to challenge an employee's unemployment benefits claim.

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## MERC Finds Employer Did Not Violate Its Duty to Bargain

The Michigan Employment Relations Commission (MERC) recently decided that an employer did not violate its duty to bargain in good faith under the Public Employment Relations Act, dismissing claims that the employer engaged in surface bargaining, prematurely declared impasse, and engaged in regressive bargaining. *Capital Area Transp Authority*, MERC Case No. 21-E-1120-CE (November 16, 2022).

The Capital Area Transportation Authority (CATA) and a union attempted to negotiate a successor collective bargaining agreement. Making little progress after 40 bargaining sessions, CATA filed a petition with MERC for fact-finding.

During fact-finding, a MERC representative holds a hearing at which the parties present their bargaining proposals. The MERC representative then issues a non-binding recommendation intended to assist the parties with finalizing an agreement.

CATA rejected all fact-finding recommendations that favored the union, and the union rejected all fact-finding recommendations that favored CATA. The parties continued to bargain. After over 70 bargaining sessions, CATA notified the union that it was declaring impasse and unilaterally implementing certain employment terms, including wage increases and changes to work assignments.

The union filed an unfair labor practice (ULP) charge, asserting that CATA violated its duty to bargain in good faith by engaging in surface bargaining, prematurely declaring impasse, and engaging in regressive bargaining.

MERC adopted the decision of the MERC Administrative Law Judge (ALJ), who dismissed the ULP in its entirety. The ALJ rejected the union's argument that CATA engaged in surface bargaining due to its refusal to move in any substantial manner from the positions it took before fact-finding. The ALJ explained that a party's behavior over the entire course of bargaining must be examined in determining whether it engaged in surface bargaining. In this case, although CATA never moved from its initial position on various issues, it did not maintain a fixed position on all issues and made concessions on many matters. The ALJ also noted that CATA participated in more than 70 bargaining sessions with the union and that there was no evidence that it presented unusually harsh or unreasonable proposals to the union during the bargaining process.

The ALJ found no merit to the union's claim that CATA prematurely declared impasse. In determining whether impasse exists, MERC examines:

(1) the amount of time spent in bargaining;

(2) whether the parties' positions have become fixed;

(3) the parties' contemporaneous understanding regarding the state of the negotiations;

(4) the importance of the issue or issues on which there is disagreement; and

(5) whether the parties have utilized mediation and fact-finding.

The ALJ explained that at the time CATA declared impasse, the parties had bargained for more than 16 months, exchanged dozens of proposals, participated in over 70 bargaining sessions, participated in fact-finding, and remained far apart on significant issues.

The ALJ found the union's third argument - that CATA engaged in regressive bargaining by proposing less favorable terms than in its prior proposals and by unilaterally withdrawing from tentative agreements signed during negotiations – similarly lacked merit. The ALJ explained that making a proposal which is less favorable than a previous proposal is not in itself evidence of bad faith bargaining, and a party may modify its position, or offer less, over the course of bargaining. He added that regressive bargaining occurs when there is evidence that a party is making successively less generous offers as a tactic to avoid reaching an agreement, and the evidence did not support that CATA engaged in such a tactic.

This decision serves as a reminder that, although the duty to bargain does not compel a party to agree to a proposal or make a concession, it does require the party to actively engage in bargaining with an open mind and sincere desire to reach an agreement.

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## Back to Basics: Student Discipline

This month's Back to Basics article focuses on constitutional and statutory requirements school officials must consider when handling student discipline.

*Due Process*

In 1975, the U.S. Supreme Court ruled in *Goss v Lopez* that the right to attend public school is a property interest protected by the 14th Amendment to the United States Constitution. Exclusion from school violates the Constitution's Due Process Clause unless the school gives the student "some kind of notice" of the charges and an opportunity to respond. The Court concluded that a "10-day suspension from school is not *de minimis* [i.e., minor] . . . and may not be imposed in complete disregard of the Due Process Clause." Although the case involved a series of suspensions of 10 days or less, the Court recognized that a suspension for more than 10 days "may require more formal procedures."

Following the *Goss* decision, most schools now require different procedures for (1) suspensions of 10 days or less and (2) suspensions over 10 days and expulsions. For suspensions of 10 days or less, students usually are entitled to (1) oral or written notice of the charges, (2) an explanation of the evidence, and (3) an opportunity to respond to the charges and evidence. For most schools, building-level administrators may suspend students for up to 10 days. Your school's board policy and student handbook should clearly describe the process for short-term suspensions, including any appeal process.

Suspensions over 10 days and expulsions require more formal procedures and additional protections, including written notice, as detailed below, and an opportunity to respond in a more formal hearing. Often, a student has the opportunity for a hearing before a panel, the superintendent, or the board. Specific procedures for suspensions over 10 days and expulsions should be included in your school's board policy and student handbook.

*Suspension vs. Expulsion*

Revised School Code Section 1310d defines a "suspension" as a disciplinary removal from school for *fewer* than 60 school days. An "expulsion" is a disciplinary removal from school for 60 *or more* school days. A student therefore cannot be "suspended" for 180 school days. Many student handbooks and board policies, however, reference "180-day suspensions," and some school boards vote to "suspend" students for periods longer than 59 school days. Check your school's board policies, student handbooks, and practices to ensure the definitions of "suspension" and "expulsion" are consistent with Section 1310d.

*Seven Factors*

When the Legislature enacted Revised School Code Section 1310d, it added the requirement that school administrators and boards consider seven factors before suspending or expelling a student for any period of time. The seven factors are:

(1) age;

(2) disciplinary history;

(3) whether the student has a disability;

(4) the seriousness of the violation or behavior;

(5) whether the violation or behavior threatened the safety of any student or staff member;

(6) whether restorative practices will be used to address the behavior; and

(7) whether a lesser intervention would properly address the violation or behavior.

School administrators and school boards must document their consideration of the seven factors for any suspension or expulsion, except for an expulsion for possession of a firearm. A suspension of more than 10 days or an expulsion is presumed unwarranted unless supported by an analysis of the seven factors. School officials also should ensure that board policy and the student handbook address the 1310d requirements.

*Notice to Parents*

Administrators must provide written notice to the student and parent before any disciplinary hearing at which long-term suspension or expulsion will be considered. The notice should include, at a minimum:

(1) a statement of the offense committed, including a reference to the specific code of conduct provision that was violated and applicable law;

(2) the recommended consequence (e.g., 30-day suspension, 90-day expulsion, or permanent expulsion consistent with state law);

(3) the date, time, and place of the disciplinary hearing;

(4) a copy of the school's hearing rights (which is usually a separate document); and

(5) anything else required by board policy, the student handbook, or the student code of conduct.

Be careful when drafting the notice letter – many board policies and student handbooks impose additional requirements or afford parents specific rights. For example, some policies guarantee parents the right to a hearing "transcript" or require an administrator to

meet with the parent before moving to a board hearing. Other policies require pre-hearing witness lists and a summary of proposed testimony. Failure to notify parents of their rights or to follow your school's specific procedures, may provide a basis for a parent to challenge the discipline on due process grounds.

*Interplay with Other Laws*

Before imposing discipline, school administrators must carefully review whether there are any other laws that grant the student additional rights in the disciplinary process. For example, as detailed in last month's edition of *School Law Notes*, the 2020 Title IX regulations afford students accused of sexual assault and sexual harassment significant due process rights and limit a school's ability to discipline students before the conclusion of a lengthy grievance process. Consult with your Title IX Coordinator before moving forward with discipline related to sexual harassment, sexual assault, or sexual misconduct to ensure all requirements are met.

Students with disabilities also have additional protections in the discipline process. For example, if the student has an IEP or 504 plan, or if the school has "knowledge" that the student is a student with a disability, the student has the right to a manifestation determination review before any disciplinary change in placement. A school is deemed to have "knowledge" if:

(1) the parent expressed a concern in writing to school administrators or the teacher that the student may need special education and related services;

(2) the parent requested an evaluation;

(3) the student is currently being evaluated; or

(4) the teacher or another staff member expressed specific concerns about the student's pattern of behavior to the special education director or another administrator.

It is therefore important to review a student's file before suspending or expelling a student.

*Returning After a Suspension or Expulsion*

Most students who are suspended or expelled become eligible at some point to return to school or to apply for reinstatement. Consider the student's potential return date at the time of suspension or expulsion so that the timing of the student's return is in the best interests of both the student and the school community. For example, returning a student at the beginning of a trimester, semester, or year (especially for secondary students where grades/credits have significance) will make the transition easier than if the student returns after a term has begun. While aligning a return with a natural break in the school calendar is not always possible, doing so may minimize problems.

For Thrun Policy Service subscribers, Board Policies 5206 through 5206E address student discipline consistent with this article. For others, we encourage school officials to carefully review their student discipline policies and handbooks to ensure that they are legally up to date, consistent with the guidance in this article, and internally consistent with other policies, handbooks, and practices.

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## Student Threat Considerations

School officials across the state are facing the unenviable task of determining when a student may constitute a threat to themselves or others and then taking the appropriate next steps. Contrary to popular belief, removing the student that potentially constitutes a threat from school is not always the answer, nor is it always legal. When facing a student threat, consider the following guidance.

*Immediate Response*

Depending on the threat, consider whether to contact law enforcement or the need for a lock-down or school closure. Student and staff safety should be the top priority. Once safety is secured, determine if communicating the disruption to parents is advisable.

*May I search?*

If you believe there may be a weapon in school, you first should consider whether it is safe to search. If it is safe, then determine if you have consent to search the item or area that you intend to search (e.g., backpack, jacket, or car). If you have consent, then you or another school official may conduct the search.

If you do not have consent, then you must have individualized suspicion that: (1) the student engaged in misconduct or that the student poses imminent risk of harm to the student or others *and* (2) the search will reveal relevant contraband or evidence of the misconduct or safety risk. As always, the search must be reasonable at inception and in scope.

Remember, school officials may always search lockers, even without individualized suspicion, if a locker search policy is included in the student handbook.

*Is Discipline Appropriate?*

Not all threats warrant student discipline or removal. Discipline may be appropriate when the student's actions violate the student code of conduct, board policy, or law. Writings, drawings, and counseling disclosures may be cause for concern but may not be cause for discipline in every situation.

Consider whether the student's actions constitute a "true threat." In other words, was there a serious

expression of intent to commit unlawful violence against a specific target? If so, then discipline is likely warranted, subject to procedural safeguards. School officials may also discipline students if their actions create a substantial disruption or school officials can reasonably forecast a substantial disruption. Remember speech (including social media posts) that does not constitute a true threat or create a substantial disruption is protected by the First Amendment and cannot result in discipline.

If discipline is warranted, ensure that adequate due process is provided, including complying with the IDEA and Section 504 for students with disabilities.

*Non-Disciplinary Removals*

If a student cannot be removed for disciplinary reasons, consider whether a non-disciplinary removal may be necessary and lawful. Unless discipline is appropriate or there is an imminent threat of harm to others, unilateral removals are typically not authorized. Instead, consider creating a safety plan or removing the student with parental agreement. Days of removal should not be counted as suspensions, but they will count toward days of removal for special education students.

*Safety Plans*

School officials can implement a safety plan for students who remain in school or return after a disciplinary removal. The school generally does not need parental consent to create and implement a safety plan. Although there is not a one-size-fits-all approach to safety plans, consider addressing the following:

(1) when and who will check-in with the student;

(2) backpack protocol (e.g., no backpacks, clear backpacks, or backpacks left in the office);

(3) student search (parent or student consent is required if you do not have individualized reasonable suspicion);

(4) dress code (e.g., no jackets or baggy sweatshirts);

(5) supervision for the student during unstructured times (e.g., bathroom breaks, passing times, or lunch); and

(6) other supportive measures.

*Threat Assessments*

Although schools across the state are using threat assessments to analyze whether a student is considered a threat, school officials should tread carefully before referring a student for a threat assessment.

Before a referral, school officials should consider who will conduct the threat assessment, whether that individual is appropriately trained, and whether the assessment is likely to yield accurate results. School officials also should consider whether parental consent is required before a threat assessment is conducted, as the assessment may implicate the Protection of Pupil Rights Amendment (PPRA). The PPRA requires parental notice and consent if the school is inquiring about, among other things, mental or psychological problems of a student or family; illegal, anti-social, or incriminating behaviors; critical appraisals of close family members; or religious practices or beliefs. Given that a threat assessment may delve into these issues, parental consent or notice and the right to opt out may be required to prevent an inadvertent PPRA violation.

To assist clients with assessing student threats, Thrun Law Firm is offering a student threat webinar on Wednesday, January 11, 2023, from 12:00-3:00 p.m. To register for the webinar, please complete and return the registration form attached to this newsletter. Each attendee will receive an email with a link to the event in advance of the webinar.

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## FERPA Exception: What Is a Health or Safety Emergency?

The Family Educational Rights and Privacy Act (FERPA) generally prohibits school officials from disclosing a student's education records or personally identifiable information from those records without written consent from a parent or eligible student (adult student or emancipated minor). There are 17 exceptions to this rule. Most of these exceptions either arise infrequently or are so routine (such as the directory information exception) that staff have little difficulty navigating them. The health or safety exception, however, is a unique beast.

FERPA's health or safety exception allows school officials to disclose student education records and personally identifiable information from those records to "appropriate parties" if "knowledge of the information is necessary to protect the health or safety of the student or other individuals." In a situation that involves a possible health or safety emergency, school officials need to understand these concepts so that a relatively quick decision can be made.

The first consideration is whether the information is necessary to protect health or safety at the time of the disclosure. There must be an actual, impending, or imminent emergency that could affect the health or safety of the student or other individuals. Before disclosing information pursuant to the health or safety exception, a school official must identify the "articulable and significant threat" that exists to justify the disclosure.

The second consideration is whether the person or agency seeking the information is an appropriate party. An appropriate party is one for whom the knowledge found in the education record is necessary to protect the health or safety of the student or other individuals. Often, such an individual will be a law enforcement officer, medical personnel, crisis team member, or the parent of an eligible student.

FERPA regulations explain that school officials may consider the totality of the situation to determine whether information from an education record should be disclosed under this exception. If a FERPA complaint arises from the disclosure of information under the health or safety exception, the U.S. Department of Education will consider whether there was a rational basis for the decision to disclose, *based on the information known at the time.* Thus, even if in hindsight there was no actual threat to health or safety, so long as the school official disclosed information only to appropriate parties and can explain a rational reason for believing that there was an articulable threat, there is no FERPA violation.

An appropriate use of the health or safety exception often arises when a student is experiencing a medical emergency and first responders need to know about medical conditions or medication allergies. In this situation, first responders on the scene are appropriate parties and the information disclosed from the school health record is necessary to protect the student. If the school official also disclosed information about the student's discipline history to the first responders, that disclosure likely would not fit within the health or safety exception.

When a health or safety emergency disclosure is requested and when information from a student's record is disclosed, school officials must record both the request and the specific disclosure in the student's records. The documentation must include the name of the person or agency who requested and, if applicable, received the records, the articulable and significant threat that formed the basis of the disclosure, and the parties to whom the information was disclosed.

The U.S. Department of Education's Student Privacy Policy Office offers FERPA resources on its website at https://studentprivacy.ed.gov/.

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## I've Got 1099 Problems, But Board Member Compensation Ain't One

As we wrap up 2022 and prepare for the new year, now is a good time to remind school officials about how to properly report school board member compensation.

In our February 2022 edition of *School Law Notes*, we explained that the Revised School Code permits schools to compensate their board members for costs associated with attending board meetings. The board may determine whether to compensate board members and the rate of compensation. The Internal Revenue Code (IRC), however, makes clear that such compensation must be reported on a Form W-2, not a Form 1099.

Under the IRC, people performing services are generally classified as either "independent contractors" or "employees." If the person is an independent contractor, then the school is not required to withhold or pay any taxes on payments made to that person, and those payments must be reported using a Form 1099. On the other hand, if the person is an employee, then the school must withhold income taxes on the person's wages and file a Form W-2 for that employee.

The IRC defines an "employee" as "an officer, employee, or elected official of the United States, a State, or any political subdivision thereof." The Internal Revenue Service (IRS) considers a board member to be a "public officer" and therefore a school employee, even if the board member only receives a per diem allowance for attending board meetings. Consequently, board member compensation is subject to employment taxes and must be reported on Form W-2.

Tax laws are purposely broad and intentionally inclusive to allow for maximum income tax collection. The IRS's inclusion of school board members as employees should *not* be construed to suggest that school board members are employees for purposes of other laws, such as the Fair Labor Standards Act.

All board members should be treated as school employees for federal tax purposes by withholding applicable taxes from board member compensation and reporting the compensation on Form W-2. Though the IRS has not historically penalized schools for misclassifying school board members as independent contractors, such a misclassification or failure to report a board member's income could lead to IRS penalties, including fines and repayment of unpaid taxes.

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## Don't Forget to Take the Oath!

Congratulations to all recently elected school board members! We look forward to working with you. Before commencing board duties in January, board members elected to full-term seats must remember a critical step: taking the oath of office and completing the corresponding oath form. This is true even for those who are re-elected to a new board term.

Both the Michigan Constitution and Michigan election laws require board members to take and

subscribe to an oath of office before performing the duties of their office. Thrun election clients received the oath and accompanying instructions in an October letter outlining post-election procedures. The language of the oath and the form to be filed can also be found on the Secretary of State's website:

https://www.michigan.gov/sos//media/Project/Websites/sos/01holland/Accpt of Off New.pdf?rev=3b771eb46c754d399974e35323769566

Though elected board members should have already filed their "Acceptance of Office," taking and filing the oath form is an equally important step for holding office. Failing to do so creates an immediate vacancy, requiring the board to appoint a replacement within 30 days.

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## Filing Requirement for Issuers of Tax Credit Bonds

Schools that issued tax credit bonds *on or before* December 31, 2017 must annually complete and file Form 1097-BTC with the IRS. For tax year 2022, Form 1097-BTC must be filed via mail by **February 28, 2023**, or alternatively, filed electronically by **March 31, 2023**.

Tax credit bonds differ from conventional school bonds because the bond purchaser receives a tax credit in lieu of, or in addition to, periodic interest payments. For schools, tax credit bonds were typically issued as either a Qualified School Construction Bond (QSCB) or a Qualified Zone Academy Bond (QZAB).

Many schools issued their QSCBs and QZABs as "direct-pay" bonds that do not give the purchaser a tax credit but, instead, provide the school with a subsidy from the federal government to make debt service payments. Those direct-pay bonds are not subject to Form 1097-BTC filing requirements. Only QSCBs and QZABs issued as tax credit bonds trigger the Form 1097-BTC filing requirements.

Form 1097-BTC must be filed either by: (1) using the IRS's e-filing "FIRE" system, which many find cumbersome; or (2) mailing paper forms to the IRS. Issuers that file the paper Form 1097-BTC must also include a Form 1096, which can be downloaded from the IRS website. In addition to the annual IRS filing, school officials must send a Form 1097-BTC statement to the original bond purchaser (but not the IRS) each quarter. The fourth quarter submission to the purchaser, however, can serve as the annual IRS filing and should be sent both to the IRS and the purchaser. The deadline for providing a copy of the annual (2022 fourth quarter) form to the purchaser is **February 15, 2023**, which is earlier than the IRS deadline.

Even though the IRS website provides detailed instructions for completing and filing both Form 1097-BTC and Form 1096, tax credit bond issuers should consider outsourcing that task to a financial institution that provides paying agent services.

For tax credit bonds issued after 2013, the financial advisor for many school transactions negotiated a contract with a Kansas bank to file the forms on the school's behalf. If your tax credit bond was issued after 2013, we recommend contacting your financial advisor to inquire whether a third party already files the forms as part of an existing engagement.

If your school has an outstanding tax credit bond, we recommend that school officials, or the bond registrar or paying agent acting on your school's behalf, comply with the Form 1097-BTC filing requirements and consult the IRS website for filing instructions. A link to the IRS webpage devoted to Form 1097-BTC, including instructions for completing and filing the form, is available on our website under "Links" – "Bond and Finance."

We encourage clients to start the tax year 2022 filing process, or to make arrangements with an appropriate financial institution to file the form on your behalf, well before the February 28 or March 31 IRS filing deadlines.

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## Reminder: January 12 FOIA Webinar

As announced in last month's *School Law Notes*, Thrun Law Firm is offering a Freedom of Information Act (FOIA) webinar on Thursday, January 12, 2023, from 1:00-3:00 p.m. to refresh school officials on FOIA obligations. This webinar will address FOIA timelines, common exemptions, and fee calculations, among other topics. Understanding FOIA is critical because a failure to comply with FOIA requirements can subject a school to litigation, court costs and legal fees, and media scrutiny.

To register for the webinar, please complete and return the registration form attached to this newsletter. Each attendee will receive an email with a link to the event in advance of the webinar.

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## Vaping Litigation Settlement

We previously notified our retainer clients through E-Blasts and *School Law Notes* about the opportunity to join a nationwide lawsuit against Juul Labs, Inc., Altria, and other vaping product manufacturers. The lawsuit alleges that these entities fraudulently and intentionally marketed their products to children.

A settlement is currently pending with Juul and Juul-related parties, including Juul executives. Although the settlement will resolve the litigation against Juul and Juul-related parties, litigation would continue against the remaining defendants, including Altria.

Schools that have not yet joined the litigation may still join. Those schools are not eligible for settlement funds from Juul and Juul-related parties, but they may be eligible for funds from any future settlement with the remaining defendants.

If your school has not yet joined the vaping litigation but is interested in doing so, please email your interest to attorney Piotr Matusiak at pmatusiak@thrunlaw.com.

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## Policy Service Update

Thrun Law Firm's policy service is designed to provide school officials with guidance and flexibility in a well-organized and used-friendly manner. Effective July 1, 2023, prices for policy services will be as follows for retainer clients:

Board Policy Manual: $8,000
Administrative Guidelines and Forms: $4,500
Annual Updates: $2,750

Prices for non-retainer clients will be:

Board Policy Manual: $10,500
Administrative Guidelines and Forms: $7,000
Annual Updates: $4,250

To purchase Thrun policy services, please contact Lucas Savoie at lsavoie@thrunlaw.com or 517-374-8818.

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THRUN LAW FIRM, P.C.

# Schedule of Upcoming Speaking Engagements

Thrun Law Firm attorneys are scheduled to speak on the legal topics listed below. For additional information, please contact the sponsoring organization.
www.thrunlaw.com/calendar/list

| Date | Organization | Attorney(s) | Topic |
|---|---|---|---|
| January 11, 2023 | Thrun Law Firm, P.C. | Jennifer K. Starlin<br>Robert A. Dietzel | Student Threat Webinar |
| January 12, 2023 | Thrun Law Firm, P.C. | Jennifer K. Starlin<br>Philip G. Clark | Freedom of Information Act Webinar |
| January 12, 2023 | St. Joseph County Business Managers | Lisa L. Swem | School Law Update Webinar |
| January 17 & 18, 2023 | MSBO Financial Strategies Conference | Raymond M. Davis<br>Timothy T. Gardner, Jr. | Strategies for Upcoming Labor Negotiations |
| January 18, 2023 | MASA Midwinter Conference | Cristina T. Patzelt | Transgender Student and Staff Rights |
| January 19, 2023 | MASA Midwinter Conference | Daniel R. Martin<br>Cathleen M. Dooley | Analyzing Student Threats: a Framework |
| January 19, 2023 | MASA Midwinter Conference | Raymond M. Davis | Collective Bargaining Hot Topics: Safety Protocols, Remote Work, & Employee Retention |
| January 19, 2023 | MASA Midwinter Conference | Daniel R. Martin<br>Cathleen M. Dooley | School Law and Legislative Update |

THRUN LAW FIRM, P.C.

# Registration Form

## Student Threat Webinar

**Training Date:** Wednesday, January 11, 2023 from 12:00 p.m.-3:00 p.m.

**Cost:** $175 per person for retainer clients and $350 per person for non-retainer clients

Over the past year, school administrators have had the undesirable task of responding to, evaluating, and imposing discipline related to an increased number of student threats. Balancing student safety against the rights of the individual student involves a difficult, high-stakes balancing act. Join us as we discuss best practices for evaluating student threats, First Amendment implications, the intersection between threats and disability rights, legal issues related to threat assessments, and other common traps and pitfalls.

To register for this training, please complete and return this form. Each attendee will receive an email with a link to the event after the order form has been processed.

Name of District/ISD/PSA: _____

Name of Person Submitting Form: _____

**(Please provide the name and email address for each person attending.)**

**Number of people attending Student Discipline Webinar on January 11, 2023: _____**

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

**The cost of the training session will be included on the District's/ISD's/PSA's monthly bill.**

_____ _____

Signature Date

Please return to:
Jill Walker (JWalker@thrunlaw.com)
P.O. Box 2575, East Lansing, MI 48826
Phone: (517) 374-8822

THRUN LAW FIRM, P.C.

# Registration Form

## Freedom of Information Act Webinar

**Training Date:** Thursday, January 12, 2023 from 1:00 – 3:00 p.m.

**Cost:** $150 per person for retainer clients and $300 per person for non-retainer clients

To register for this training, please complete and return this form. Each attendee will receive an email with a Zoom link to the event after the order form has been processed.

Name of District/ISD/PSA: _____

Name of Person Submitting Form: _____

**(Please provide the name and email address for each person attending.)**

**Number of people attending Freedom of Information Act Webinar on January 12, 2023:** _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

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Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

**The cost of the training session will be included on the District's/ISD's/PSA's monthly bill.**

_____ _____

Signature Date

Please return to:
Jill Walker (jwalker@thrunlaw.com)
P.O. Box 2575
East Lansing, MI 48826
Phone: (517) 374-8822

# SCHOOL LAW NOTES

THRUN LAW FIRM, P.C.

JANUARY 26, 2023



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## School Board Recognition Month

January is School Board Recognition Month. Thrun Law Firm has had the privilege of working with Michigan school boards for over 75 years. We recognize your commitment, dedication, and passion. We applaud the positive impact your efforts have on your students and your schools. Thank you for the continuing opportunity to work with you in serving your communities.

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## Thrun Coauthors U.S. Supreme Court Amicus Brief

Thrun Law Firm recently contributed to an amicus (friend of the court) brief with the National School Boards Association in support of Sturgis Public Schools, which was argued before the U.S. Supreme Court on January 18, 2023. In filing an amicus brief, an individual or organization who is not a party to a legal case assists the court by offering information, expertise, and insight that has bearing on the issues in the case. The Court will decide whether, and under what circumstances, courts may excuse the Individuals with Disabilities Education Act's requirement to exhaust administrative processes. We anticipate a decision by June 2023. Thrun remains committed to supporting and advocating for schools at all levels.

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## Supplemental Student Count Day Reminder

The State School Aid Act establishes two student count days each school year to determine the amount of state aid distributed to a school – the first Wednesday in October and the second Wednesday in February. The 2023 supplemental count day is Wednesday, February 8, 2023.

School officials must strictly follow the *Pupil Accounting Manual* requirements to count students in membership and must ensure that:

- each student is properly enrolled on or before the count day;
- student schedules and attendance records match;
- attendance records identify the teacher, class, hour, and dates of instruction;
- original attendance records, including computer-generated records, are signed in ink by the teacher of record;
- attendance marks and excused/unexcused absences comply with school policy; and
- each teacher of record is certificated, authorized to teach under Revised School Code Section 1233b, or holds an MDE-issued substitute teaching permit, authorization, or approval.

A student who is absent from class on count day may still be counted if the student:

- has an excused absence and attends within 30 calendar days after count day;
- has an unexcused absence and attends within 10 school days after count day; or
- is suspended and attends within 45 calendar days after count day.

If instruction is canceled on count day due to conditions not within the school's control, with the State Superintendent's approval, the affected instructional programs must use the immediately following day on which the school resumes session for count purposes.

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## Michigan Supreme Court Declines to Review State Aid Penalty Reversal

As reported in the September 2022 edition of *School Law Notes*, the Michigan Court of Appeals reversed a state aid penalty against a Michigan school district for the employment of a noncertificated school administrator. Although MDE and the State Superintendent appealed, the Michigan Supreme Court declined to review the Court of Appeals' decision. *Tecumseh Pub Schs v Dep't of Ed*, Docket No. 164879 (Jan. 4, 2023). Accordingly, the Court of Appeals' decision is the final decision in the matter.

As a reminder, the Court of Appeals held that MDE may not impose a state aid penalty against a school for employing a noncertificated administrator hired on or before January 4, 2010 if the administrator completes continuing education requirements established by the State Superintendent. Thrun Law Firm, P.C. assisted the district with defending its position in this matter.

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## Back to Basics: Probationary Teacher Nonrenewal

As we pass the school year's halfway point, school officials should begin considering whether to nonrenew the contracts of poorly performing probationary teachers. Failure to comply with statutory timelines and procedures may result in an unintended contract extension or a teacher acquiring tenure.

*Probationary Period*

Typically, a teacher must serve an initial 5-year probationary period and receive an "effective" or "highly effective" evaluation rating on the teacher's three most recent performance evaluations to acquire tenure. This 5-year probationary period is reduced to 4 years if a teacher is rated "highly effective" on 3 consecutive annual year-end performance evaluations. If a teacher previously acquired tenure with another Michigan public school district, the probationary period is only 2 years, unless reduced in duration or waived entirely to allow immediate tenure.

School officials must accurately compute the probationary period and apply the correct timelines for nonrenewal. Different timelines apply depending on a teacher's hire date or if a lengthy leave of absence or layoff interrupts the probationary period. We recommend that school officials create and monitor a chart that identifies each teacher's hire date, status as a previously tenured teacher, annual performance evaluation ratings, and expected date for acquiring tenure.

*Nonrenewal*

The Michigan Supreme Court has established June 30 as the uniform date for the end of the school year for Tenure Act purposes. Thus, for most probationary teachers, a statement of nonrenewal from the board must be delivered to the teacher by June 15 of a school year. For a teacher hired after the start of a school year, the teacher's hire date (known as the "anniversary date") defines the end of the probationary period, which is measured in "full school years."

For a probationary teacher who previously acquired tenure in another Michigan public school district and has a maximum two-year probationary period, the teacher must receive a nonrenewal notice at least 60 days before the end of the probationary period (i.e., May 1 or 60 days before the anniversary date). Although the administration may recommend nonrenewal to the board, the board must authorize the nonrenewal and the nonrenewal notice must come from the board. For all other probationary teachers, the teacher must receive the nonrenewal notice at least 15 days before the end of the school year (i.e., June 15 or 15 days before the anniversary date).

Administrators must allow sufficient time for the board to nonrenew a probationary teacher's contract and to provide written notice to that teacher within these timelines. The common belief that a school board "grants" tenure to a probationary teacher is incorrect. Rather, a probationary teacher automatically acquires tenure by operation of law upon the successful completion of the probationary period, unless the board timely acts to nonrenew the probationary teacher's contract.

Although nonrenewal is within the board's discretion, school officials must comply with statutory procedures, timelines, and criteria to successfully nonrenew a probationary teacher's employment. For example, administrators must ensure that: (1) probationary teachers are evaluated in compliance with Revised School Code Section 1249 and applicable board policy, (2) an individual development plan has

been in place for each probationary teacher each year beginning at the start of the probationary period, (3) the probationary teacher received a mid-year review (this is only required for teachers in the first year of the probationary period or who received a minimally effective or ineffective rating in their most recent annual year-end evaluation), and (4) the probationary teacher has been provided with multiple classroom observations and ample opportunity to improve consistent with the Tenure Act. For Thrun Policy Service subscribers, Board Policy 4403 addresses evaluations and Board Policy 4409 addresses nonrenewal. Schools should review their policies to ensure they comply with Michigan law.

We recommend that school officials promptly prepare the monitoring chart described above and follow the applicable timelines and procedures required to properly make these important personnel decisions.

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## Michigan Supreme Court Issues Whistleblower Reminder

The Michigan Supreme Court recently held that the Michigan Whistleblowers' Protection Act (WPA) prohibits an employer from retaliating against an employee who reports a suspected violation of law, regardless of whether the violation actually occurred. *Janetsky v Saginaw Co*, Docket No. 161612 (Dec. 21, 2022).

An assistant prosecutor claimed her supervisor reached an unlawful plea deal with a defendant accused of sexual assault. The supervisor denied violating the law but agreed to withdraw the plea deal.

The assistant prosecutor asserted that after her accusations, her duties had been altered because she was no longer solely responsible for sex crimes charging. She also alleged that her supervisor instigated an angry confrontation with her during a meeting. She resigned after the altercation and sued her employer, Saginaw County, alleging a WPA violation.

The WPA states that an employer "shall not discharge, threaten, or otherwise discriminate against an employee . . . because the employee . . . reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule . . . unless the employee knows that the report is false." An employee must establish that: (1) they engaged in the protected activity, (2) they were discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or discrimination.

Here, the Michigan Court of Appeals dismissed the claim, finding that the supervisor's conduct did not violate the law and the employee's suspicion that her supervisor violated the law was not reasonable.

The Michigan Supreme Court reversed, allowing the case to go to trial. The Court rejected the Court of Appeals' assertion that an employee must *reasonably* suspect a violation of law. The Supreme Court recognized that the WPA "protects those who report suspected violations of the law" and then cited to documents drafted by the employee claiming that her supervisor violated the law. Accordingly, even though no law was broken, the attorney had a viable WPA claim because no evidence existed that she *knowingly* made a false claim.

The decision serves as a reminder to school officials to exercise caution when an employee alleges that a supervisor or the school violated the law. If the employee reasonably believes that the alleged violation is true, the employee's conduct may be protected under the WPA.

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## School's Prompt Response to Student-to-Student Harassment Avoids Liability

The Michigan Court of Appeals recently held that a school can be liable for student-to-student harassment under Michigan's Elliott-Larsen Civil Rights Act (ELCRA) if school officials do not take prompt and appropriate remedial action upon learning of the harassment. *Doe v Alpena Pub Sch Dist*, COA Docket No. 359190 (Dec. 22, 2022).

This case involved fourth grade students, referred to in the decision as Jane and John. John was a special education student with a full-time instructional aide. Jane reported to school officials two incidents approximately three months apart. In the first incident, John gave her an unwanted hug and "humped" her three times. In the second incident, he tickled and scratched her breast and groin areas. School officials suspended John for three days for the first incident and eight days for the second incident.

Upon John's return from the second suspension, the school assigned John to a different fourth grade classroom and lunch period and imposed a no-contact order between John and Jane. Shortly after, Jane transferred to a different elementary school.

Jane and John both began 6th grade at the same junior high school. Despite school officials' best efforts, on the first day of school John danced next to Jane in the aisle on the bus. Jane also saw John in the hallways during passing periods. In response, school officials changed John's bus assignment and his instructional aide was directed to take him a different route to his classes. Jane eventually left the junior high school and transferred to a private school.

The issue for the court was whether the school was vicariously liable under ECLRA for John's actions. ELCRA prohibits sexual harassment as a form of sex discrimination. The court found that schools exercise a measure of control over students and may be vicariously liable for hostile educational environment discrimination arising from student-to-student harassment. The school's responsibility for a student's sexually harassing conduct is weighed against whether school officials can show that they took prompt, appropriate investigatory and remedial action upon learning of the harassment.

Here, the court found that the school took prompt and appropriate remedial action upon learning of the student's misconduct. Accordingly, the school was not liable for the student's actions and dismissal of the case against the school was appropriate.

This decision serves as a reminder that school officials must promptly investigate allegations of student-to-student harassment and, if the investigation determines that harassment occurred, put in place appropriate measures to stop the harassment and prevent future harassment.

Importantly, the conduct described in this case may rise to the level to Title IX sexual harassment, as defined in the 2020 regulations. When dealing with student conduct that may rise to the level of Title IX sexual harassment, promptly advise your school's Title IX Coordinator *before* imposing any discipline.

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## Transgender Student Issues: The Bathroom Debate

Administrators, boards of education, and communities often struggle to navigate the issue of which bathroom a transgender student should use. Conflicting court decisions and varying guidance from state and federal agencies over the years makes the issue more complex, as agency guidance can change with new administrations. Several federal courts, however, have held that schools must allow students to use the facilities, including bathrooms, that correspond to their gender identity, rather than to their sex assigned at birth.

The Michigan State Board of Education has long taken the position that the best person to determine gender identity is the individual student and has encouraged schools to allow students to use the bathroom that corresponds with their gender identity. In June 2021, the U.S. Department of Education (USDOE) announced that it would interpret Title IX, which prohibits sex discrimination by educational institutions, to include protection on the basis of sexual orientation and gender identity. This USDOE guidance aligned with the Supreme Court's decision in *Bostock v Clayton Cty*, 140 S Ct 1731 (2020), which held that employers may not discriminate against employees because of sexual orientation or gender identity.

On December 30, 2022, the Eleventh Circuit Court of Appeals, whose decisions are not binding on Michigan schools, held that a Florida school district's policy segregating bathrooms by a student's "biological sex" as indicated on their enrollment documents did not violate the Fourteenth Amendment or Title IX. *Adams v School Bd of St. John's Cty*, No. 18-13592 (CA 11, 2022).

The Eleventh Circuit reasoned that *Bostock* was limited to employment decisions and does not apply to facility use policies. The court also rejected the notion that bathrooms segregated on the basis of biological sex discriminate against transgender people because the court reasoned that all people born "biologically male," including transgender males (identifying as female) and non-transgender males, and all people born "biologically female," including transgender females (identifying as male) and non-transgender females, are subject to the same policy—a requirement to use the bathroom that corresponds with their "biological sex."

The *Adams* ruling is the first decision by a federal circuit court of appeals finding that segregating bathrooms by "biological sex" is constitutional and does not violate Title IX. This decision conflicts with decisions by other federal appellate and district courts as well as state and federal guidance, all of which assert that that transgender students should have access to the bathroom that corresponds with their gender identity. Other federal courts have also consistently dismissed lawsuits brought by non-transgender students and parents who argue that allowing transgender students to use school bathroom and locker room facilities consistent with their gender identity violates other students' privacy rights, the U.S. Constitution, or Title IX. For a summary of these cases and guidance, see the May 2022 edition of *School Law Notes* article "2022 Update: Transgender Student Issues."

Importantly, *Adams* is not binding on Michigan schools. School boards in Michigan should be cautious before relying on it as justification for refusing to allow transgender students to use the bathroom that matches their gender identity. Michigan courts have recognized that gender identity is a protected category, Michigan's civil rights law has been interpreted to include protections for transgender status, and both the federal and state departments of education have opined that forcing transgender students to use the bathroom associated with their biological sex may violate their civil rights. Moreover, the Sixth Circuit Court of Appeals, whose opinions *are* binding in Michigan, has previously upheld an injunction against an Ohio school,

reversing that school's policy prohibiting an 11-year-old transgender girl from using the girls' restroom at school and requiring the school to allow the transgender girl to use the girls' restroom. *Dodds v US Dept of Educ*, 845 F3d 217 (CA 6, 2016).

Michigan school boards considering an approach similar to the one taken in the *Adams* case should therefore be aware of the potential for significant legal risk. Please contact a Thrun attorney if you have questions regarding your school's approach to this issue.

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## 2023 Election Dates and Deadlines

The available 2023 regular election dates for millage or bond proposals are on the following Tuesdays:

May 2

August 8

November 7

A certified copy of the school board resolution approving ballot language for a millage or bond proposal must be filed with the school's election coordinator (typically the county clerk) at least 12 weeks before the chosen election date. For the May 2023 election date, that filing deadline is **Tuesday, February 7, 2023, at 4:00 p.m.** If your school district is considering a millage or bond proposal in May, please contact the attorney who assists your school district with election matters as soon as possible.

Registered electors in a school district may circulate petitions to place a millage or bond proposal on the ballot on a date other than one of the regular election dates listed above. Petitions bearing enough signatures must be filed at least 12 weeks before the applicable election date. For 2023, the remaining available petition initiative "floater" election dates are the following Tuesdays (even if the date is a legal holiday):

June 13, 20, 27

July 4

September 19, 26

October 3

December 19, 26

The 2023 regular and "floater" election dates may be used to seek voter approval for any of the following:

- millage renewal;
- restoration/override of Headlee reduction to existing millage;
- new millage, such as sinking fund, recreational, or regional enhancement; or
- voted bonds.

For a new bond issue that a district would like qualified under the School Bond Qualification and Loan Program, school officials should contact their bond attorney at least six months before the prospective election date, if not earlier, to schedule a preliminary qualification meeting with the Department of Treasury. Reserving a meeting date early offers school officials the best chance to develop a favorable bond election schedule.

If you have questions about voted bonds or millages, please contact the Thrun Law Firm attorney who assists you with election matters.

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## 2023 ISD Biennial Elections

For intermediate school districts that do not have a popularly elected board of education, the Revised School Code dictates that board membership is determined at an election conducted biennially on the first Monday in June (June 5, 2023). Under this process, an electoral body of designated representatives from constituent schools elects the ISD board. This article describes the biennial election process and significant dates for the 2023 biennial election.

*Appointing a Representative*

Each constituent board must consider the appointment of its representative to the ISD electoral body during at least one public meeting before adopting the resolution to appoint its representative. A majority of the members of the constituent board must adopt the appointment resolution at a meeting no earlier than 21 days before the biennial election date (i.e., May 15, 2023 or later).

The resolution must identify the candidate(s) that the constituent board supports for each ISD board position and must direct its representative to vote for the candidate(s) on at least the first ballot. A form appointment resolution is available from your Thrun Law Firm election attorney.

*Notice to Constituent Boards*

The ISD board secretary must send notice of the date, time, and place of the electoral body's biennial election meeting by certified mail to each constituent board's secretary at least 10 days before the meeting.

*Candidate Petitions/Filing Fee*

A biennial ISD board candidate may be nominated by filing petitions signed by school electors within the ISD's jurisdiction. County clerks must maintain a supply of petition forms to provide to interested candidates.

Once signed, the petitions must be filed with the ISD's election coordinator (the county clerk of the county in which the largest number of the ISD's registered electors reside) at least 30 days before the election.

If the ISD's population is less than 10,000 according to the most recent federal census, a minimum of 6 and a maximum of 20 school elector signatures must be obtained. If the ISD's population is 10,000 or more, a minimum of 40 and a maximum of 100 signatures must be obtained. A registered voter within the ISD's jurisdiction may sign as many petitions as there are vacancies to be filled. An ISD candidate may circulate a petition through all constituent school districts, not just the candidate's constituent district of residence.

As an alternative to the petition process, a candidate may pay a $100 non-refundable filing fee to the ISD's election coordinator. If a filing fee is paid by the nominating petition due date, a nominating petition is not required.

The ISD's election coordinator determines the sufficiency of the nominating petitions and the eligibility of the named candidates.

*Biennial Election Meeting Requirements*

The ISD's board president and secretary act as the biennial election meeting's chairperson and secretary, respectively. While the ISD's election coordinator must provide ballots for the electoral body's use at the meeting, the election coordinator is otherwise not responsible for conducting the meeting or running the election.

The biennial election meeting must comply with the Open Meetings Act. Consequently, the ISD is responsible for posting required meeting notices. All other standard Open Meetings Act requirements (e.g., providing an opportunity for public comment and the taking of meeting minutes) also must be satisfied.

*Voting and Nominations*

The ISD's election coordinator is responsible for providing ballots listing the names of all properly nominated candidates for the electoral body's use at the biennial election meeting.

The ISD board president, as the biennial election meeting's chairperson, may take nominations from the floor for a vacancy only if no nominating petitions were filed for an available position.

For a tie vote, it is strongly recommended that the electoral body take one or more re-votes to attempt to break the tie. If the tie persists after multiple votes, the electoral body has the discretion to declare a "deadlock." That determination only should be made once the electoral body concludes that additional re-votes would be futile. If a deadlock occurs, a vacancy will result (as of July 1) and the ISD board would need to act to fill that vacancy.

*ISD Board Members*

Each member of an ISD board is elected to a six-year term that begins on the July 1 following the election. No more than two ISD board members should be from the same constituent school unless there are fewer constituent schools than there are positions to be filled. Additionally, not more than three ISD board members may simultaneously serve as a board member of a constituent district or PSA.

*ISD Board Vacancies*

An ISD board vacancy must be filled by a vote of the remaining ISD board members. Within 5 days after the vacancy occurs, the ISD must file a notice of vacancy with the State Board of Education. If the ISD does not fill a vacancy within 30 days, the State Board of Education must fill the vacancy. Appointed board members serve until the next biennial election, at which point the vacancy will be filled for the balance of the unexpired term.

## 2023 ISD Biennial Election Schedule

**Monday, May 8*:** Deadline for candidates to file nominating petitions or $100 fee (and Affidavit of Identity) for candidacy with ISD's election coordinator (county clerk).

**Monday, May 15**:** Earliest date for constituent board to adopt the resolution to designate the district's representative to the electoral body and to support its desired candidate(s).

**Friday, May 26:** Deadline for the ISD board secretary to send notice by certified mail to the secretary of each constituent board of education of the date, time, and place of the biennial election meeting.

**Monday, June 5:** Electoral body meeting to conduct the election.

*Note that 30 days before the election date is May 6. Because that date falls on a Saturday, the deadline moves to Monday, May 8.

**Revised School Code Section 614(2) states: "The board shall consider the resolution at not less than one public meeting before adopting the resolution." This language suggests a constituent board must hold a public meeting before the meeting at which it adopts the resolution appointing its representative. In other words, the process requires two public board meetings.

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## SAM.Gov Releases New Guidance for State and Local Entities

Over the last year, inboxes and listservs have been flooded with questions about registering or renewing System for Award Management ("SAM") accounts. In the November 2022 edition of *School Law Notes*, we explained that to register or renew SAM accounts, school officials must validate their school's legal business name, physical address, start year, and national identifier. School officials have consistently had problems establishing their school's "start year" because schools were created by legislative action, rather than being incorporated like businesses, and have likely undergone annexations and consolidations.

Now, the Federal Service Desk has released guidance that clarifies these issues. The new guidance can be found here:

https://www.fsd.gov/gsafsd_sp?id=kb_article_view&sysparm_article=KB0064308&sys_kb_id=8e444a541b279d1034b11179bc4bcb19&spa=1

The guidance provides that state and local governments, including school districts and intermediate school districts, are public sector entities. Registrations for public sector entities often require additional documentation and manual review. To establish their start year, public sector entities may provide any of the following documentation:

- Municipal charter established/codified by state legislature or local governing body.
- Municipal codes establishing an entity.
- State government declarations published in official government records.
- Governor's declarations published in official government records.
- Formal resolution from a town council.
- State law related to the entity formation.
- Screenshot of your verifiable, official government website with information on entity formation.

Consistent with this guidance, we suggest providing one or more of the following documents to assist in establishing a school's start year:

- **State Law.** The Michigan legislature has enacted several laws to organize and reorganize schools. Most notably, Revised School Code Sections 11a and 601a became effective in 1997. Section 11a reclassified most K-6, K-8, and K-12 schools as "general powers" school districts. So long as your school was not a district of the first class or a community district, listing the start year as 1997 and submitting a copy of the applicable statute likely will be sufficient to establish your start year.

- **Board Resolution.** Though the guidance refers to resolutions from a town council, a school board resolution likely will be sufficient to establish a start year. The school board may prepare a resolution to adopt at its next board meeting. The resolution should identify that: (1) Michigan schools were established by legislative action; (2) in 1997, the Michigan legislature reorganized and re-classified schools, causing schools to begin operating as general powers school districts; and (3) though the school cannot establish exactly when it began operating, it can provide certain other information validating its historical existence (e.g., formal documentation, past resolutions, or previous bonds that were issued).

- **Website Screenshots.** If your school's website contains any sort of school history that mentions when it began operating, a screenshot of the website, showing the web address ending with a ".org," ".edu," or ".us," will also help to establish your school's start year.

If you require any assistance with locating or preparing this information, please contact a Thrun attorney. If, for some reason, your school cannot provide any of the documents described above, then SAM suggests noting in the comment section that as a public sector entity, you are submitting alternative documentation and select "Other Documents" in the dropdown menu.

If you have other questions about SAM, contact the Federal Service Desk at 866-606-8220 from 8 a.m. to 8 p.m., Monday through Friday.

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## Title IX Trainings Available – Sign Up Today!

Due to popular demand, Thrun Law Firm is once again offering three different trainings to assist schools with their Title IX compliance: Comprehensive Title IX Sexual Harassment training, Title IX Coordinator training, and Title IX Investigator training. The Comprehensive Title IX Sexual Harassment training (or a similar training) is a prerequisite for both the Title IX Coordinator and Investigator trainings.

We still see many schools that do not have appropriately trained staff or have an inadequate number of trained individuals. We also frequently field requests for trainings that dive deeper into the role of the Title IX Coordinator and Investigator. These upcoming trainings presented by Thrun Title IX attorneys ensure that school staff are prepared to handle Title IX sexual harassment complaints. For a detailed description of each of the trainings, including the dates and times of the trainings, please see the attached order form. We hope to see you there!

THRUN LAW FIRM, P.C.

# Schedule of Upcoming Speaking Engagements

Thrun Law Firm attorneys are scheduled to speak on the legal topics listed below.
For additional information, please contact the sponsoring organization.
www.thrunlaw.com/calendar/list

| Date | Organization | Attorney(s) | Topic |
|---|---|---|---|
| February 2, 2023 | 2023 MNA Labor Relations Academy | Raymond M. Davis | Intersection Between a CBA and the Law |
| February 8, 2023 | Michigan School Business Officials | Raymond M. Davis | Collective Bargaining Basics webinar |
| February 9 & 10, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| February 10, 2023 | Special Education Administrators of Oakland County | Michele R. Eaddy | Special Education Legal Update |
| February 14, 2023 | Michigan Association of Administrators of Special Education | Thrun Law Firm Special Education Attorneys | Legal Update and Attorney Panel |
| February 17, 2023 | Thrun Law Firm, P.C. | Cristina T. Patzelt<br>Jessica E. McNamara | Comprehensive Title IX Training webinar |
| February 20, 2023 | Gratiot-Isabella RESD | Michele R. Eaddy | Section 504 |
| February 24, 2023 | Macomb ISD | Michele R. Eaddy | Special Education Legal Update |
| February 28, 2023 | Kent County Human Resources Group | Raymond M. Davis | Alphabet Soup for HR: ADA/FMLA/PMLA |
| March 8, 2023 | Thrun Law Firm, P.C. | Michele R. Eaddy<br>Jessica E. McNamara | Title IX Coordinator Training webinar |
| March 9, 2023 | MNA Spring Conference | Raymond M. Davis | Remember When: Bargaining and Administering Contracts Prior to the Reforms of 2011 – Will History Repeat Itself? |
| March 9, 2023 | MNA Spring Conference | Timothy T. Gardner, Jr. | Payment of Wages and Fringe Benefits Act – What's Important to Know |
| March 10, 2023 | MNA Spring Conference | Katherine Broaddus | Pandora's Box: Employment Considerations for Employing Retirees or Non-Certified Staff in Long-Term Roles |
| March 10, 2023 | MNA Spring Conference | Robert A. Dietzel | Legal Update |
| March 22, 2023 | Thrun Law Firm, P.C. | Cristina T. Patzelt<br>Jessica E. McNamara | Title IX Investigator Training webinar |

THRUN LAW FIRM, P.C.

# Schedule of Upcoming Speaking Engagements

Thrun Law Firm attorneys are scheduled to speak on the legal topics listed below. For additional information, please contact the sponsoring organization.
www.thrunlaw.com/calendar/list

| Date | Organization | Attorney(s) | Topic |
|---|---|---|---|
| April 6 & 7, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| April 11, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Tuesdays with Thrun webinars |
| April 18, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Tuesdays with Thrun webinars |
| May 2, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Tuesdays with Thrun webinars |
| May 8, 2023 | Michigan Pupil Accounting and Attendance Association | Lisa L. Swem | School Law Update |
| June 15 & 16, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| August 1, 2023 | UP Administrators Academy | Lisa L. Swem | School Law Update |
| August 10 & 11, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| October 5 & 6, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| December 7 & 8, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |

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# Registration Form

## Title IX Comprehensive, Coordinator, and Investigator Trainings

On August 14, 2020, amended Title IX regulations went into effect, significantly changing schools' obligations when addressing sexual harassment complaints. In the coming months, Thrun Law Firm is offering three different Title IX trainings to assist schools with their Title IX compliance.

1. **Comprehensive Title IX Sexual Harassment Training:** This comprehensive training is for all K-12 employees who will serve as Title IX Coordinators, Investigators, Decision-Makers, or Appeals Officers in the new Title IX Grievance Process. This session satisfies new training requirements and covers, among other topics, the new complaint, dismissal, investigation, decision, and appeal procedures, new documentation requirements, and the new definition of sexual harassment. The training will ensure that school officials responsible for implementing Title IX are well-versed on the new requirements, the new Grievance Process, and their roles in the process.

   **Training Date:** Friday, February 17, 2023 from 10:00 a.m. – 3:00 p.m.

   **Cost:** $245 per person for retainer clients and $345 per person for non-retainer clients

2. **Title IX Coordinator Workshop:** This workshop will assist Title IX Coordinators who have previously completed comprehensive training on the new Title IX sexual harassment regulations in understanding their obligations under the new regulations. Thrun attorneys will take Title IX Coordinators from the initial sexual harassment report to completion of the new Title IX Grievance Process, including in-depth practical guidance on how to handle the initial triage meeting with the Complainant. Prerequisite: Completion of Thrun's Comprehensive Title IX Sexual Harassment Training or similar training.

   **Training Date:** Wednesday, March 8, 2023 from 1:00 p.m. – 3:00 p.m.

   **Cost:** $150 per person for retainer clients and $300 per person for non-retainer clients

3. **Title IX Investigator Workshop:** This workshop will assist school officials who have previously completed comprehensive training on the new Title IX sexual harassment regulations and would like to better hone their investigation skills. Thrun attorneys will walk through a hypothetical Title IX sexual harassment investigation step-by-step with attendees, while providing practical guidance, report drafting tips, and investigation strategies. Prerequisite: Completion of Thrun's Comprehensive Title IX Sexual Harassment Training or similar training.

   **Training Date:** Wednesday, March 22, 2023 from 1:00 p.m. – 3:00 p.m.

   **Cost:** $150 per person for retainer clients and $300 per person for non-retainer clients

To register for any of these sessions, please complete and return the form on the following page. Each attendee will receive an email with a Zoom link to the event after the order form has been processed.

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# Registration Form

Name of District/ISD/PSA: _____

Name of Person Submitting Form: _____

**(Please provide the name and email address for each person attending.)**

**Number of people attending virtual Comprehensive Title IX Training on February 17, 2023: _____**

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

**Number of people attending virtual Title IX Coordinator Workshop on March 8, 2023: _____**

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

**Number of people attending virtual Title IX Investigator Workshop on March 22, 2023: _____**

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

Attendee Name: _____ Email: _____

**The cost of the training session will be included on the District's/ISD's/PSA's monthly bill.**

_____ _____

Signature Date

Please return to:
Leaha Apsey (LApsey@ThrunLaw.com)
P.O. Box 2575, East Lansing, MI 48826
Phone: (517) 374-8777

# SCHOOL LAW NOTES

THRUN LAW FIRM, P.C.

FEBRUARY 24, 2023



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RAYMOND M. DAVIS
MICHELE R. EADDY
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MARGARET M. HACKETT (OF COUNSEL)

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WEST MICHIGAN


## Individual Privacy Exemption to FOIA Upheld and Explained

The Michigan Court of Appeals recently held that a public body may exempt an employee's identity from disclosure under the Freedom of Information Act (FOIA) when disclosure would provide "intimate, embarrassing, private, or confidential" information about the individual, and revealing the identity would fail to provide insights on the government's operations or activities. *Blackwell v University of Michigan Regents*, COA Docket No. 362565 (January 12, 2023).

Blackwell, a private citizen, submitted a FOIA request to the University of Michigan seeking disclosure of an anonymous report submitted to University officials alleging a sexual affair between the former University president and a subordinate employee. The University redacted the subordinate employee's name from the documents it disclosed. Blackwell challenged the name redaction and argued that the public's interest in knowing the name outweighed any invasion of privacy.

Before a public body may exempt information, such as an employee's name, from disclosure under the FOIA privacy exemption, the following elements must be met:

(1) the information must be of a personal nature; and
(2) public disclosure of the information must be a clearly unwarranted invasion of the person's privacy.

The court analyzed both elements of the privacy exemption in holding that revealing the employee's name would be an unwarranted invasion of privacy.

*Information of a Personal Nature*

The court noted that in the absence of special circumstances, an individual's name by itself is not considered personal information for FOIA purposes. To determine whether this employee's name constituted personal information, the court considered the contents of the anonymous report in conjunction with the release of the employee's name. The court concluded that revealing the employee's name, in light of the anonymous report's allegations that the employee was having a sexual affair with the University's then-president, would disclose "intimate, embarrassing, private, or confidential" details about the employee. Thus, the first element of the privacy exemption was satisfied.

*Unwarranted Invasion of Privacy – Core Purpose Test*

The court then followed a "core purpose test" by balancing the public interest in disclosure against the Legislature's interest in protecting privacy interests through the FOIA exemption. FOIA's core purpose was to shed light on government operations. The court noted that the allegations in the anonymous report did not pertain to the employee's work-related behavior or her role as an employee, but to the former president's behavior. The court found that

revealing the employee's name would not provide insights into government operations and so would not advance FOIA's core purpose. The court then held that the public interest in knowing the employee's identity did not outweigh the employee's privacy interests. Therefore, disclosing the employee's name would constitute a clearly unwarranted invasion of the employee's privacy.

Although Michigan courts routinely have held that FOIA is a pro-disclosure statute that must be interpreted broadly, disclosing an individual's name when connected to "intimate, embarrassing, private, or confidential" information should be made only when the public interest in understanding the operations of government outweighs the employee's privacy interests. The FOIA privacy exemption is both contextual and fact-specific. Before redacting or disclosing an employee's name who is connected to potentially intimate, embarrassing, private, or confidential information, school officials should consult with their legal counsel to assess the elements required by the Court of Appeals.

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## Off-Campus Student Misconduct: What Can School Officials Really Do?

Many school officials have received this dreaded Monday morning phone call: Over the weekend, two students engaged in misconduct off school grounds and parents want to know what the school is going to do about it.

Whether the school has authority to discipline students involved in off-campus misconduct is a highly fact-specific inquiry that depends on the nature of the misconduct and the nexus between it and the school. A school does not have the authority to discipline solely because a student committed the misconduct.

To discipline students for off-campus misconduct, the school must be able to show that the misconduct directly impacted the school. Without this nexus, courts likely will overturn any discipline imposed.

*Student Expression*

Speech (including a social media post) that is not a "true threat" or did not create a substantial disruption is subject to First Amendment protections and cannot result in discipline. School officials may discipline students if their expressive activity creates a substantial disruption of the educational environment or if school officials can reasonably forecast a substantial disruption.

Courts generally are reluctant to authorize schools to discipline students for off-campus speech. In 2021, the U.S. Supreme Court ruled that the First Amendment protected profane Snapchats sent by a high school cheerleader from her personal phone to friends while off-campus and outside school hours. Accordingly, the school could not lawfully discipline the student for the messages.

The U.S. Supreme Court, however, identified examples of off-campus student speech where school officials may, depending on the circumstances, be authorized to impose discipline, including:

- serious or severe bullying or harassment targeting particular students;
- threats directed at teachers or other students;
- failure to follow rules about lessons, assignments, computer use, or other online school activities; and
- breach of school security devices.

In considering whether discipline for off-campus speech is permissible, the U.S. Supreme Court identified three features that school officials should carefully consider:

1. For off-campus speech, the school will rarely stand "*in loco parentis*" (i.e. in the place of a parent) and likely will not have authority to discipline;
2. Courts should be more skeptical of schools regulating off-campus speech, especially off-campus religious or political speech, because it suggests that all of a student's speech in a given day could be regulated by the school; and
3. Schools have an interest in protecting a student's unpopular expression, especially when that speech occurs off-campus.

Ultimately, school officials should exercise caution when policing off-campus student expression, including social media posts, as doing so may violate a student's First Amendment rights.

*Criminal Sexual Conduct*

The Revised School Code (RSC) grants authority to schools to suspend or expel a student who commits off-campus criminal sexual conduct (as defined by Michigan's Penal Code) against another student within the district. It also mandates, subject to the seven mitigating factors, the permanent expulsion of a student who "pleads to, is convicted of, or is adjudicated for criminal sexual conduct" against another student in the district.

If a student commits criminal sexual conduct against another district student – even if off campus and with no nexus or impact on the school setting – school officials must comply with the RSC's discipline provisions.

Exclusively off-campus criminal sexual conduct does not implicate Title IX, as Title IX's jurisdiction is

limited to a school's educational program or activity. As is the case with all off-campus misconduct, if some part of the misconduct flows into the school setting, then Title IX or related board policies may be implicated.

*Closing Thoughts*

There is no bright-line rule for disciplining students for off-campus misconduct. Instead, we recommend that school officials carefully review the facts underlying the misconduct, including who was involved, what occurred, and what impact the misconduct had on the school setting. As always, please contact a Thrun student issues attorney if you have questions about off-campus misconduct.

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## Section 504 Turns 50

President Richard Nixon enacted the first comprehensive federal law prohibiting disability discrimination when he signed the Rehabilitation Act of 1973 into law on September 26, 1973. Unlike most previously enacted disability discrimination laws, Section 504 of the Act created legally enforceable rights for individuals with disabilities, rather than relying solely on the creation of vocational programs and support agencies.

Section 504 states that "no otherwise qualified individual with a disability in the United States shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance." This short but powerful statement meant that entities receiving federal financial assistance had to alter buildings, change rules, and modify mindsets so that an individual with a disability could access the entities' programs or activities. For the first time, for example, a public school that had stairs leading to the entrance was required to alter the building by adding a ramp to ensure that students with mobility impairments could access the building.

*What Obligations Does Section 504 Impose on Public Elementary and Secondary Schools?*

Section 504 does not require that schools produce the same result or level of achievement for every student with a disability as compared to a similar student without a disability. Instead, it mandates that the student with a disability have the same opportunity to achieve the result or level of achievement. There is no guaranteed right to success, but Section 504 requires a level playing field so that students with disabilities have an equal opportunity to succeed. Speaking of playing field, note that Section 504 applies to nondiscrimination based on disabilities in extracurriculars, field trips, and other non-academic activities at schools.

Section 504 imposes child find and free appropriate public education obligations that are similar to those found in the Individuals With Disabilities Education Act (IDEA). Under Section 504, an "appropriate education" means the provision of regular *or* special education and related aids and services that are designed to meet the individual educational needs of disabled students as adequately as nondisabled students' needs are met. In addition, schools must have a Section 504 Coordinator and a published Section 504 Procedural Safeguards Notice.

In an educational setting, Section 504 is often seen as secondary to the Americans with Disabilities Act (ADA) and the IDEA. To the contrary, Section 504 is a complex and broad-reaching law that has guided courts in the interpretation and enforcement of the other two laws. Section 504 encompasses the work of both the ADA and the IDEA because it prohibits schools from discriminating against students with disabilities (for example, exclusion from a program or different treatment due to disability) and provides for a specially designed education that meets students' individual needs.

Section 504 has specific requirements for school officials. For Thrun Policy Service subscribers, Board Policy 5603 and the accompanying forms in the Administrative Guidelines and Forms Manual address Section 504 compliance. A Thrun special education attorney can assist you with any Section 504 issues that arise.

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## Nationwide Social Media Litigation

Seattle Public Schools, Pittsburgh Public Schools, and others have recently joined nationwide litigation against Facebook, Instagram, Snapchat, Tik-Tok, and other social media platforms. The lawsuit asserts that social media companies targeted minors to maximize profits despite knowing the severe detrimental effects excessive social media use causes to minors. Research confirms that social media use is associated with increased rates of depression, anxiety, eating disorders, suicide, and property damage.

Frantz Law Group (Frantz), the California law firm representing at least 123 Michigan schools in the nationwide litigation against Juul and other vaping product manufacturers, is also representing schools in the social media litigation. As it did with the vaping litigation, Frantz has requested that Thrun Law Firm determine whether Michigan schools are interested in joining the social media litigation and, if so, to facilitate contact with Frantz. School districts, intermediate

school districts, and public school academies are eligible to join the social media litigation.

The social media litigation seeks monetary compensation for past damages incurred by schools related to the social media epidemic created by the defendants, as well as anticipated future damages.

For past damages, the litigation seeks reimbursement for costs associated with social media use, such as property damage caused by students engaging in social media trends and any lost state aid caused by social media suspensions and expulsions. For future damages, the litigation seeks compensation for appropriately handling social media-related issues going forward, including funds for counselors and educational programming.

As with the vaping litigation, Frantz will seek a court order restricting discovery to a questionnaire. Until that order is granted, however, schools will be required – with assistance from Frantz – to respond to written questions and document requests from the defendants. Frantz estimates that school staff time related to this litigation will not exceed 10 hours. Frantz informed us that this litigation is not expected to require school staff to appear in court or to participate in depositions.

Aside from discovery, the terms for participating in the social media litigation are the same as those for participating in the vaping litigation. Frantz will represent schools on a contingency fee basis, meaning Frantz will not charge any fees or costs unless there is a financial recovery. Frantz will receive 25% of any recovery. Thrun will receive a portion of that 25%. If there is a recovery, schools would reimburse Frantz out of the recovery for costs incurred by Frantz during the litigation, such as court filing costs and expert witness fees.

Thrun can arrange for Frantz to make a free presentation to your board about the litigation. To join the litigation, your board must approve a resolution and a Frantz Attorney Fee Client Contract. The contract has already been reviewed and revised by Thrun. To obtain a copy of the resolution and contract, or if you would like more information about the litigation, please contact Thrun attorney Piotr Matusiak at pmatusiak@thrunlaw.com.

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## Administrator Nonrenewal Deadlines Quickly Approaching

Revised School Code Section 1229 establishes deadlines, timelines, and procedural requirements for nonrenewing an administrator's (but not a superintendent's) expiring employment contract. Because the statutory nonrenewal timeline requires at least 90 days lead time before the employment contract's termination date (i.e., April 1 for a contract ending June 30), we recommend starting the nonrenewal process no later than March 15 for contracts that will expire on June 30. Failure to follow the statutory nonrenewal process will result in an automatically renewed administrator contract for one additional year.

Nonrenewing the contract of an administrator other than a superintendent requires a multi-step process. To start that process, at least 90 days before the employment contract's termination date, the superintendent or designee must notify the administrator in writing that a recommendation is being made to the board that it "consider" the administrator's nonrenewal. The administrator may request that the board consider the matter in closed session. The board may convene in a closed session only at the affected administrator's request.

The board then must review the recommendation and decide whether to consider the administrator's nonrenewal. All decisions must be made in an open session. If the board decides to consider the administrator's nonrenewal, it must, in open session, approve a resolution that includes specific reasons the board is considering nonrenewal. A board may only nonrenew an administrator's contract for a reason that is not arbitrary or capricious.

Next, the board must notify the administrator that it has decided to consider nonrenewal by providing the administrator a copy of the resolution and a written statement of the underlying reason(s) for nonrenewal, if not already listed in the resolution. The board must provide these documents to the administrator at least 30 days before the meeting at which the board will determine whether to nonrenew.

Before making the nonrenewal determination, the board must provide the administrator an opportunity to meet with a majority of the board at a duly called board meeting to discuss the stated reason(s) for nonrenewal. Notice of this opportunity must be provided to the affected administrator. The meeting may occur in closed session at the administrator's request; although the board must vote to nonrenew in open session.

A nonrenewal determination must be made at least 60 days before the administrator's contract expires (i.e., by May 1 for a contract ending June 30), and the school must provide the administrator with notice of the determination within that same 60-day period.

Nonrenewing a superintendent's contract is less complicated. RSC Section 1229(1) requires only that the board take action and notify the superintendent of nonrenewal in writing at least 90 days before the superintendent's contract expires.

School officials should review individual employment contracts for all administrators for any additional terms that could complicate or preclude nonrenewal. For example, a contract may contain additional notice requirements or an "evergreen" clause, which could perpetually extend a contract without affirmative board action.

Finally, an administrator's teacher tenure rights also must be considered. If the administrator has a current teaching certificate and has earned teacher tenure in the nonrenewing school, that administrator may have residual tenure rights. That may include the right to be placed in a teaching position for which the administrator is certified and qualified.

School officials are encouraged to verify whether an administrator has an active teaching certificate and track the expiration dates of each administrator contract to avoid an unintentional contract renewal.

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## Bargaining for a Zipper Clause

School officials preparing to negotiate successor collective bargaining agreements should review their contracts to determine if any contract contains a "zipper clause". As explained by the Michigan Employment Relations Commission (MERC), a zipper clause provides that the contract is the full agreement of the parties and that, while it is in effect, neither party can be required to engage in further collective bargaining regarding any matter not covered by the agreement. Such a clause avoids disputes and demands to bargain over issues that regularly arise during the contract's term.

Schools should negotiate for the inclusion of a zipper clause in their collective bargaining agreements. As a zipper clause limits future bargaining obligations, unions generally are reluctant to add them. If the contract currently contains a zipper clause, the union may propose removing the language during contract negotiations, but school officials should not agree to remove the clause.

Below is sample zipper clause language:

> This Agreement shall constitute the full and complete commitments between both parties and may be altered, changed, added to, deleted from, or modified only through the voluntary, mutual consent of the parties in written and signed amendment to this Agreement.
>
> The parties acknowledge that during negotiations which resulted in the Agreement, each had the unlimited right and opportunity to make demands and proposals as to any subject matter not removed by law from the area of collective bargaining, and the understanding and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement. Therefore, the Board and the Association, for the life of this Agreement, each voluntarily and unqualifiedly, waive the right, and each agree that the other shall not be obligated to bargain collectively as to any subject or matter not specifically referred to or covered in this Agreement.

If you have questions about zipper clauses or other bargaining matters, please contact a Thrun labor and employment attorney.

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## What Is In There? Understanding Pre-Bond Construction Service Proposals

While preparing for a school bond election to finance a construction project, you may receive a proposal from an architectural or construction management firm for certain pre-bond services. Those services often include helping prepare a Michigan Department of Treasury preliminary qualification application and providing bond campaign assistance.

Many times, proposals include unwanted terms and conditions. Proposals also may include post-bond implementation services, undesirable limitation of liability provisions, extensive markups on reimbursable expenses, and other hidden fees. The proposed fee structure may be based on a percentage of an overly broad "cost of work" definition. For example, the cost of work may be defined to include other consultant fees, overhead, and unused contingencies, which in turn could cause an otherwise apparently reasonable percentage-based fee to balloon.

School officials may feel pressured to sign a proposal to obtain pre-bond services as soon as possible, especially when the proposal commits the construction firm to delay charging for services until bond passage. Importantly, a signed proposal may constitute a valid contract. Such a proposal could remove contractual protections and standard contractual provisions (e.g., from an AIA contract) affecting the post-bond implementation and construction services.

Schools that sign disadvantageous proposals can have difficulty negotiating acceptable final contract terms. Accordingly, such proposals should first be reviewed by legal counsel. To have your pre-bond and implementation services proposal reviewed, please contact a Thrun construction attorney.

## Common Debt Funds: A Point of *Compounding* Interest

We often receive inquiries from school officials looking to create a common debt fund for investment purposes.

Michigan law generally prohibits the commingling of funds of multiple districts for investment purposes. Revised Municipal Finance Act Section 705 and RSC Section 1223(3) provide an exception to this general rule, allowing a general powers school district to establish and maintain one common debt retirement fund to make authorized investments. To do so, the board must authorize the treasurer, by resolution, to combine the money for permissible investments. Notably, intermediate school districts have no comparable legal authority.

Any debt retirement funds placed into a common debt fund must relate to bonds "of similar character." Neither the statutes nor case law expressly define "of similar character." A reasonable interpretation would permit voted debt retirement funds to be aggregated, but funds from voted and non-voted bond debt retirement funds should not be commingled. The "character" of debt retirement funds is likely not affected by qualification to participate in the School Loan Revolving fund or specific credit enhancements, such as bond insurance.

Even if permissibly commingled for investment purposes, such a debt fund should still provide an internal allocation of fund proceeds to the respective bond issues associated with the fund.

If authorized by a board resolution, the treasurer may invest money deposited in debt retirement funds, building and site funds, sinking funds, or general funds. Keep in mind that a general powers school district may only purchase the permitted investments listed in RSC Section 1223. Similarly, intermediate school districts are subject to the restrictions of RSC Section 622. Thrun policy subscribers are advised to review their Policy 3204, which governs the investment of funds and applies both to ISDs and general powers school districts.

If your district desires to establish a common debt fund or has questions about the "character" of your bond debt retirement funds, please contact a Thrun finance attorney. Our firm regularly prepares the necessary board resolutions, and we are happy to discuss other considerations, such as audit requirements and federal tax law implications.

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## Impending "Critical" Change to Statewide School Safety Information Policy

The RSC's statewide school safety information policy is amended as of March 29, 2023, to include "critical incident mapping data" in the information that a school board must provide to appropriate law enforcement agencies. The amendment states:

> (b) "Critical incident mapping data" means information provided in an electronic or digital format to assist law enforcement or emergency first responders in an emergency. The information provided must include, but is not limited to, all of the following:
>
> (i) Accurate floor plans overlaid on or current aerial imagery of a school building or school plan.
> (ii) Site specific labeling that matches the structure of the school building, including room labels, hallway names, external door or stairwell numbers, locations of hazards, key utility locations, key boxes, automated external defibrillators, and trauma kits.
> (iii) Site specific labeling that matches the school grounds, including parking areas, athletic fields, surrounding roads, and neighboring properties.
> (iv) Gridded overlay with x/y coordinates.

The critical incident mapping data (along with the building plans, blueprints, and site plans required previously) must meet the following requirements:

- be compatible with software platforms used by law enforcement agencies that provide emergency services,
- be provided in a printable format,
- be verified for accuracy through a walkthrough of a school building and school grounds, and
- be oriented true north.

Schools should review their safety and emergency plans with local law enforcement to ensure that they provide the required critical incident mapping data. Thrun policy subscribers are advised to review their Policy 3402, which governs school safety and security and requires a review by the board in conjunction with a law enforcement agency every two years that is then reported to the Michigan Department of Education.

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## Save the Dates: 2023 Tuesdays with Thrun Webinar Series

As part of our service to retainer clients, Thrun Law Firm will conduct a series of 1-hour webinars on three Tuesdays this spring. The "Tuesdays with Thrun" webinar series will be offered at no charge to our retainer clients.

Webinars will be held on the following dates and times and will cover the following topics:

- Tuesday, April 11, 2023
  - 9:00 - 10:00 a.m.: Employee Misconduct Investigations
  - 10:00 - 11:00 a.m.: Getting a Handle on Student Handbooks
  - 11:00 a.m. - 12:00 p.m.: Cash Flow Borrowing
- Tuesday, April 18, 2023
  - 9:00 - 10:00 a.m.: Disability Accommodations Post COVID-19
  - 10:00 - 11:00 a.m.: Student Speech in Light of *Mahanoy*
  - 11:00 a.m. - 12:00 p.m.: Board Member Elections
- Tuesday, May 2, 2023
  - 9:00 - 10:00 a.m.: Employee Speech on Social Media
  - 10:00 - 11:00 a.m.: Special Education Common Pitfalls
  - 11:00 a.m. - 12:00 p.m.: Follow the Money: Contracting Basics, Boosters, and Educational Foundations

A link to register for this webinar series will be provided to Thrun retainer clients in an upcoming E-Blast. We look forward to seeing you (virtually) at one or more of our webinars.

THRUN LAW FIRM, P.C.

# Schedule of Upcoming Speaking Engagements

Thrun Law Firm attorneys are scheduled to speak on the legal topics listed below. For additional information, please contact the sponsoring organization.
www.thrunlaw.com/calendar/list

| Date | Organization | Attorney(s) | Topic |
|---|---|---|---|
| February 24, 2023 | Macomb ISD | Michele R. Eaddy | Special Education Legal Update |
| February 28, 2023 | Kent County Human Resources Group | Raymond M. Davis | Alphabet Soup for HR: ADA/FMLA/PMLA |
| March 2, 2023 | MASA Region 6 | Lisa L. Swem | School Law Update |
| March 8, 2023 | Thrun Law Firm, P.C. | Michele R. Eaddy<br>Jessica E. McNamara | Title IX Coordinator Training webinar |
| March 9, 2023 | MNA Spring Conference | Raymond M. Davis | Remember When: Bargaining and Administering Contracts Prior to the Reforms of 2011 – Will History Repeat Itself? |
| March 9, 2023 | MNA Spring Conference | Timothy T. Gardner, Jr. | Payment of Wages and Fringe Benefits Act – What's Important to Know |
| March 10, 2023 | MNA Spring Conference | Katherine Broaddus | Pandora's Box: Employment Considerations for Employing Retirees or Non-Certified Staff in Long-Term Roles |
| March 10, 2023 | MNA Spring Conference | Robert A. Dietzel | Legal Update |
| March 13, 2023 | Jackson ISD | Lisa L. Swem | Section 504 |
| March 22, 2023 | Thrun Law Firm, P.C. | Cristina T. Patzelt<br>Jessica E. McNamara | Title IX Investigator Training webinar |
| April 6 & 7, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| April 11, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | *Tuesdays with Thrun* webinars<br>Employee Misconduct Investigations (9:00 a.m. – 10:00 a.m.)<br>Getting a Handle on Student Handbooks (10:00 a.m. – 11:00 a.m.)<br>Cash Flow Borrowing (11:00 a.m. – 12:00 p.m.) |

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| April 18, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | *Tuesdays with Thrun* webinars<br>Disability Accommodations Post COVID-19 (9:00 a.m. – 10:00 a.m.)<br>Student Speech in Light of *Mahanoy* (10:00 a.m. – 11:00 a.m.)<br>Board Member Elections (11:00 a.m. – 12:00 p.m.) |
| April 25, 2023 | MSBO | Daniel R. Martin | Recent Developments in Labor and Employment Law (9:30 a.m. – 10:30 a.m.) |
| April 25, 2023 | MSBO | Ryan J. Nicholson | A Year in the Life of a Business Official: From Budget Hearings to Election Deadlines (10:30 a.m. – 11:45 a.m.) |
| April 25, 2023 | MSBO | Timothy T. Gardner, Jr.<br>MaryJo D. Banasik | Bargaining Threats for 2023 (10:55 a.m. – 11:50 a.m.) |
| April 25, 2023 | MSBO | Robert A. Dietzel | Legal Update (1:10 p.m. – 2:00 p.m.) |
| April 25, 2023 | MSBO | Timothy T. Gardner, Jr. | Collective Bargaining: Innovations and Advanced Strategies (1:15 p.m. – 2:15 p.m.) |
| April 26, 2023 | MSBO | Christopher J. Iamarino | Campaign Finance Act Fundamentals (9:20 a.m. – 10:20 a.m.) |
| April 26, 2023 | MSBO | Michael D. Gresens | Cash Flow and Short-Term Borrowing Options (9:20 a.m. – 10:20 a.m.) |
| April 26, 2023 | MSBO | MaryJo Banasik | Collective Bargaining Basics (9:20 a.m. – 10:20 a.m.) |
| April 26, 2023 | MSBO | Fredric G. Heidemann | Sinking Funds: Initial Planning, the Election Process, and Lawful Expenditures (10:40 a.m. – 11:40 a.m.) |

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| April 26, 2023 | MSBO | Cathleen M. Dooley | Payroll Processing and Legal Compliance (10:40 a.m. – 11:40 a.m.) |
| April 26, 2023 | MSBO | Robert A. Dietzel<br>Piotr M. Matusiak | Pupil Accounting Fundamentals (10:40 a.m. – 11:40 a.m.) |
| April 27, 2023 | MSBO | Katherine Wolf Broaddus | Everything You Need to Know About Employment Contracts (8:20 a.m. – 9:20 a.m.) |
| April 27, 2023 | MSBO | Cathleen M. Dooley | Legal, Equity, and Ethical Issues in Technology (8:20 a.m. – 9:20 a.m.) |
| April 27, 2023 | MSBO | Jeffrey J. Soles | Construction: Dealing with Shortages (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Kirk C. Herald | The Fundamentals of Contracts and Competitive Bidding (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Michael D. Gresens | Getting to Know the L-4029 and Other Matters Related to Setting Millage and Renewing Millage (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Ryan J. Nicholson | Booster Clubs and Support Groups: Limiting Potential Liability (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Erin H. Walz | Legal Update (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Daniel R. Martin | Grievance Management: Effective Strategies for Collective Bargaining Agreement Disputes (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Timothy T. Gardner, Jr. | Collective Bargaining: Innovations and Advanced Strategies (9:40 a.m. – 10:40 a.m.) |
| April 27, 2023 | MSBO | Ryan J. Murray | Unemployment Claims 101 (2:00 p.m. – 2:30 p.m.) |

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| May 2, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | *Tuesdays with Thrun* webinars<br>Employee Speech on Social Media (9:00 a.m. – 10:00 a.m.)<br>Special Education Common Pitfalls (10:00 a.m. – 11:00 a.m.)<br>Follow the Money: Contracting Basics, Boosters, and Educational Foundations (11:00 a.m. – 12:00 p.m.) |
| May 8, 2023 | Michigan Pupil Accounting and Attendance Association | Lisa L. Swem | School Law Update |
| June 15 & 16, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| August 1, 2023 | UP Administrators Academy | Lisa L. Swem | School Law Update |
| August 10 & 11, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| October 5 & 6, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |
| December 7 & 8, 2023 | Thrun Law Firm, P.C. | Thrun Law Firm, P.C. Attorneys | Thrun Board Policy Implementation 2-part webinar |

# Pennfiled MS - Mechanical Equipment Buyout
# Bid Package #03A
### Project Cost Approval - Recap
### Tuesday, April 18, 2023

## Middle School - Mechanical Equipment

| Bid Day Contractor Cost | | Buyout Cost |
|---|---|---|
| Subcontractor Bid Day | $ | 1,031,107 |
| **MS Mechanical Equipment** | **$** | **1,031,107** |
| **Construction Support, Contingency & Owner Allowances** | | |
| Field Supervision<br>GC's / Const. Support / Insurance / Permits / Safety / Cleanup / Dumpsters / Contingency | | |
| **Sub Total** | **$** | **-** |
| **MS MECHANICAL EQUIPMENT TOTAL** | **$** | **1,031,107** |
| **BOE Recommend to Award $** | **$** | **1,031,107** |

Client: **Pennfiled MS - Mechanical Equipment Buyout**
Project: **Pennfiled MS - Mechanical Equipment Buyout**
Location: **Battle Creek, MI**
Architects: **Kingscott**

# AWARD & COST ANALYSIS OF CONTRACTORS

**TRIANGLE ASSOCIATES, INC.**
**Construction Managers**
**Triangle Associates, Inc.**

| WC # | WORK CATEGORY<br>TITLE | LOW BIDDER & APPARENT LOW BIDDER | ACCEPTANCE 1 = YES 0 = NO | UNIT COST | ACCEPTED COST | PROPOSED CONTRACT AMOUNT | NOTES & COMMENTS |
|---|---|---|---|---|---|---|---|
| **231A** | **RTUs & AHUs** | | | | | **$ 298,180** | |
| | **RTUs & AHUs** | **Trane** | | | | | |
| | 1. Air Handling Units & Roof Top Units | | 1 | $ 268,495 | $ 268,495 | | |
| | 2. Fan Coils | | 1 | $ 21,128 | $ 21,128 | | |
| | 3. VRF Fan Coil Units & VRF Heat Pump Cond. Units | | 1 | $ 38,826 | $ 38,826 | | |
| | 10. Branch Circuit Controllers | | 1 | $ 1,401 | $ 1,401 | | Part of VRF System |
| | Exclude Sales Tax | | 1 | $ (18,670) | $ (18,670) | | To be carried as use tax by installer |
| | ALTERNATE - Prepayment Discount | | 1 | $ (13,000) | $ (13,000) | | |
| **231B** | **Unit Ventilators** | | | | | **$ 487,200** | |
| | **RTUs & AHUs** | **Trane** | | | | | |
| | 4. Unit Ventilators | | 1 | $ 259,371 | $ 259,371 | | |
| | 5. Heat Pump Units | | 1 | $ 278,579 | $ 278,579 | | |
| | Split System Air Conditioner (2 tons) | | 0 | $ 3,242 | $ - | | |
| | Split System Air Conditioner (4 tons) | | 0 | $ 5,777 | $ - | | |
| | Split System Air Conditioner (5 tons) | | 0 | $ 6,124 | $ - | | |
| | Split System Air Conditioner (10 tons) | | 0 | $ 7,225 | $ - | | For AHU/RTU |
| | Split System Air Conditioner (20 tons) | | 0 | $ 11,717 | $ - | | For AHU/RTU |
| | Split System Air Conditioner (25 tons) | | 0 | $ 13,696 | $ - | | For AHU/RTU |
| | Split System Air Conditioner (50 tons) | | 0 | $ 34,179 | $ - | | For AHU/RTU |
| | Outdoor Condensing Unit (1.5 tons) | | 0 | $ 5,209 | $ - | | |
| | Exclude Sales Tax | | 1 | $ (30,450) | $ (30,450) | | To be carried as use tax by installer |
| | ALTERNATE - Prepayment Discount | | 1 | $ (20,300) | $ (20,300) | | |
| **231C** | **Boilers & Associated Equipment** | | | | | **$ 245,727** | |
| | **Boilers & Associated Equipment** | **RL Deppman** | | | | | |
| | 6. Boilers | | 1 | $ 209,925 | $ 209,925 | | |
| | 7. Air/Dirt Seperator | | 1 | $ 9,899 | $ 9,899 | | |
| | 8. Pumps | | 1 | $ 18,825 | $ 18,825 | | |
| | 9. Side Stream Filters | | 1 | $ 4,770 | $ 4,770 | | |
| | 11. Hydronic expansion Tanks | | 1 | $ 2,309 | $ 2,309 | | |
| | | | | | | | |
| | **TOTAL** | | | | | **$ 1,031,107** | |

# Pennfiled MS - Mechanical Equipment Buyout
# BID TABULATION

| | |
|---|---|
| BID DATE: | 4/18/2023 |
| LOCATION: | Battle Creek, MI |
| CM JOB#: | 7-22008-0C |
| ARCH. JOB#: | 0 |

| WORK CATEGORY NUMBER | WORK CATEGORY TITLE | ADDENDA (Y/N) | BIDDER | BASE BID | BP 231A | BP 231A | BP 231A | BP 231B | BP 231B | BP 231C | BP 231C | BP 231C | BP 231C | BP 231C | BP 231C | NOTES |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | | | | | AHU & RTUs | Fan Coils | VRF Fan Coils & Heat Pumps | Unit Ventilators | Condensing Units | Boilers | Air/Dirt Seperator | Pumps | Side Stream Filters | Branch Circuit Controllers | Hydronic Expansion Tanks | |
| 231A | AHUs, RTUs, Fan Coils | Y | Carrier | $ 466,985.00 | $ 360,251.00 | | $ 106,734.00 | | | | | | | | | |
| 231A | AHUs, RTUs, Fan Coils | Y | PECO | $ 216,500.00 | $ 216,500.00 | | | | | | | | | | | |
| 231A | AHUs, RTUs, Fan Coils | Y | TRANE | $ 329,850.00 | $ 268,495.00 | $ 21,128.00 | $ 38,826.00 | | | | | | | $ 1,401.00 | | |
| | | | | | | | | | | | | | | | | |
| 231B | Unit Ventilators & Condensing Units | Y | Boilhouse | $ 362,000.00 | | | | $ 293,600.00 | $ 68,400.00 | | | | | | | |
| 231B | Unit Ventilators & Condensing Units | Y | TRANE | $ 537,950.00 | | | | $ 259,371.00 | $ 278,579.00 | | | | | | | Includes Condensing Units |
| | | | | | | | | | | | | | | | | |
| 231C | Boiler Assembly | Y | ETNA | $ 232,150.00 | | | | | | $ 232,150.00 | | included | | | | |
| 231C | Boiler Assembly | Y | PECO | $ 220,000.00 | | | | | | $ 220,000.00 | | | | | | |
| 231C | Boiler Assembly | y | RL Deppmann | $ 245,727.08 | | | | | | $ 209,924.52 | $ 9,899.34 | $ 18,824.54 | $ 4,770.00 | | $ 2,308.68 | |
| TOTALS | | | | | | | | | | | | | | | | |