COLLINS & BLAHA, P.C.
ATTORNEYS AT LAW

EDUCATION LAW UPDATE

SPRING 2024

In Memoriam

We are sad to report that Patricia Poupard of our firm passed away on March 27, 2024. Patricia practiced in the area of employment law, and her expertise and insights played an integral role in many of our cases. Her friendship and dedication will be greatly missed.

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LEGISLATIVE UPDATE: NEW TITLE IX AND FLSA REGULATIONS, PUBLIC ACTS, AND PROPOSED BILLS

Title IX Final Regulations Are Released

The U.S. Department of Education (the "Department") released the 2024 Title IX Final Rule. The new regulations introduce several changes pertaining to sex discrimination. The unofficial version of the final regulations is now public.[1] The regulations, initially proposed in July 2022, have completed the necessary review procedures and will be **effective August 1, 2024**.[2]

As a result of the release of the 2024 Title IX Final Rule, school districts need to be cognizant of the effective and enforceable date as well as a number of significant changes, including:

- The new regulations are effective and enforceable starting August 1, 2024. Any incidents occurring before August 1, 2024, must be enforced pursuant to the current 2020 Title IX regulations, and any incidents occurring on or after August 1, 2024, must be enforced pursuant to the new regulations;

- Expanding the scope of the regulations to cover both sexual discrimination and sex-based harassment including discrimination and harassment based on sex stereotypes, sex characteristics, sexual orientation, and gender identity;

- Providing K-12 schools more flexibility and discretion regarding the grievance procedure for investigating complaints of sex discrimination, including but not limited to:

    - The return of the single investigatory model as an option;
    - Increased access to the informal resolution process by allowing schools to offer it any time prior to a determination, unless the complaint includes allegations that an employee engaged in sex-based harassment of a K-12 student or such a process would conflict with Federal, State, or local law;
    - Removal of the notice requirements to be in writing;
    - Providing the parties an equal opportunity to provide inculpatory/exculpatory evidence; to access the relevant evidence; and a reasonable opportunity to respond to the evidence.
    - Removing the requirement for schools to provide the parties the opportunity to review and respond to final investigative report. The 2024 Title IX Final Rule requires schools to *either* provide each party with an equal opportunity to inspect and review the evidence gathered *or* provide an accurate description of the evidence.

[1] Available at https://www2.ed.gov/about/offices/list/ocr/docs/t9-unofficial-final-rule-2024.pdf.

[2] Available at https://www.ed.gov/news/press-releases/us-department-education-releases-final-title-ix-regulations-providing-vital-protections-against-sex-discrimination.

Parties must be given a "reasonable opportunity" to respond to the evidence or the description of the evidence.
    - If any party requests access to the evidence, the school must provide the parties with an equal opportunity to access the evidence.
- Removing the requirement that an educational institution have "actual knowledge" before being required to remedy harassment, and now requiring schools with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity to respond promptly and effectively. Complaints may now be given as an oral ***or*** written request that objectively can be understood as a request for the school to investigate and make a determination about alleged discrimination.

- Expanding the scope of the regulations to cover pregnancy or related conditions for students, in addition to requiring reasonable modifications to school procedures, including but not limited to:

    - Breaks during class to express breast milk, breastfeed, or attend to health needs associated with pregnancy or related conditions, including eating, drinking, or using the restroom;
    - Access to a lactation space, other than a bathroom, that is clean and free from intrusion of others;
    - Intermittent absences to attend medical appointments;
    - Access to online or homebound education;
    - Changes in schedule or course sequence;
    - Extensions of time for coursework and rescheduling of tests and examinations; and
    - Allowing a student to sit or stand, or carry or keep water nearby;
- Revisions to key definitions, including broadening the definition of sexual harassment to include any "unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe ***or*** pervasive that it limits or denies a person's ability to participate in or benefit from" the school's education program or activity.

- Requiring all non-confidential K-12 employees to notify Title IX coordinators when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX;

- Limiting the Title IX coordinator's ability to initiate a complaint to situation where they determine that "the conduct as alleged presents an imminent and serious threat to the health or safety of the complainant or other person, or that the conduct as alleged prevents the recipient from ensuring equal access on the basis of sex to its education program or activity";

- Permitting dismissal of complaints under specific circumstances:

    - The school is unable to identify the respondent after taking reasonable steps to do so;
    - The respondent is not participating in the school's education program or activity and is not employed by the school;
    - The complainant voluntarily withdraws any or all of the allegations in the complaint; or
    - The school determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX.

- Requiring educational institutions to use the "preponderance of the evidence" standard instead of a standard of their choice when evaluating claims of sexual harassment and sex-based harassment unless the educational institution uses the "clear and convincing evidence" standard for the evaluation of all other types of claims of harassment and discrimination;

- Requiring educational institutions to address a sex-based hostile environment under its education program or activity even when some conduct alleged to be contributing to the hostile environment occurred outside the school's program or activity or outside the United States;

- Allowing complaints to be submitted by former students and employees;

- The final regulations do not include new rules governing eligibility criteria for athletic teams.

It is prudent to note that the final regulations are **not in effect currently** and have no effect on school districts' obligations under Title IX. The final regulations regarding sex discrimination will **go into effect August 1, 2024.** Therefore, any incidents occurring before August 1, 2024 must be enforced pursuant to the current 2020 Title IX regulations, and any incident occurring on or after August 1, 2024, must be enforced pursuant to the new regulations.

New Overtime Rules From the Department of Labor

The United States Department of Labor (the "DOL") recently released a new rule that will entitle more salaried employees to overtime pay under the Fair Labor Standards Act (the "FLSA"). The new rule increases the salary threshold required to qualify as an exempt employee under the FLSA for overtime pay purposes for executive, administrative, or professional employees.

Pursuant to the FLSA, employees are generally entitled to overtime pay unless an express exemption applies. One of the exemptions provides that any employee employed in an executive, administrative, or professional capacity, including employees in academic administrative personnel roles or teachers in elementary or secondary schools, are generally not entitled to overtime pay. 29 USC 213(a)(1). Under the current regulations, the executive, administrative, or professional employee exemption only applies to employees whose salary is at least $684 per week, or an equivalent of $35,568 per year. See 29 CFR 541.200(a).

With the release of the DOL's new rule, **starting July 1, 2024,** administrative employees will only qualify for the administrative exemption if the employee receives a salary of **at least $844 per week, or an equivalent of $43,888 per year. Starting January 1, 2025**, the threshold will

"…final regulations are not in effect currently and have no effect on school districts' obligations under Title IX." The final regulations regarding sex discrimination will go into effect August 1, 2024.

be raised to a salary of **at least $1,128 per week, or an equivalent of $58,656 per year.** On July 1, 2027, the DOL will update the salary threshold required to meet the exemption under the FLSA. See 29 CFR 541.600(a), amended, effective 07/01/2024.

According to a statement from the DOL, the purpose of updating the earnings thresholds is "so they keep pace with changes in worker salaries, ensuring that employers can adapt more easily because they'll know when salary updates will happen and how they'll be

calculated."[3] Due to the new rule, fewer employees will meet the salary threshold required to be exempt under the executive, administrative, or professional employee exemption, as the required salary threshold will be raised. As such, **more employees will be entitled to overtime payments under the FLSA.**

It is prudent to note that the DOL's updated regulations **do not affect the status of teachers under the FLSA because teachers are specifically exempt from the salary threshold requirements.** See 29 CFR 541.600(e). Therefore, the DOL's final rule raising the salary threshold required to exempt executive, administrative, or professional employees from overtime payments does not apply to teachers; the new regulations only affect employees of school districts that meet the requirements of an executive, administrative, or professional employee **outside of teachers**.

Public Act 224 of 2023 – Teacher and Administrator Appeal of Year-End Evaluations

Public Act 224 of 2023 ("PA 224") requires school districts to provide non-probationary teachers and school administrators who received a rating of "needing support" with options to appeal their evaluation and rating. Districts must provide these teachers and administrators with the option to request a review of the evaluation and rating, the option to go to mediation, and the ability to demand to use the grievance procedures or an applicable collective bargaining agreement ("CBA") or contract to appeal their evaluation and rating. PA 224 goes into effect on July 1, 2024.

PA 224 also removes the provision that limits a teacher to request a review no more than twice in a three-school year period. Any teacher who would like to request a review must do so in writing within 30 calendar days after the district informs them of the rating. After receiving the request for review, the superintendent must review the evaluation and rating, making appropriate changes based on the review. Districts are then obligated to provide teachers with a written response regarding the superintendent's finding no more than 30 days after receiving the request for review and before making any modifications.

Beginning July 1, 2024, if the superintendent's written response to the request for review does not resolve the matter, the non-probationary teacher or their collective bargaining representative may request mediation, as provided for in the Public Employment Relations Act ("PERA"). Teachers or administrators desiring mediation must submit a request in writing within 30 calendar days after the teacher receives the superintendent's written response regarding the review. Districts then have 15 days to schedule a request for mediation after receipt of a request.

Beginning July 1, 2024, a non-probationary teacher who receives two consecutive ratings of "needing support" may demand to use the grievance procedures of applicable CBA or employment contracts to review their evaluation and rating. If the CBA or employment contract does not contain a grievance procedure requiring binding arbitration, a teacher may file a demand for binding arbitration with the American Arbitration Association ("AAA").[4] A demand

[3] DOL, *What the Overtime Rule Means for Workers*, (April 23, 2024), available at https://blog.dol.gov/2024/04/23/what-the-new-overtime-rule-means-for-workers.

[4] Under PA 224, the arbitration will be subject to the Uniform Arbitration Act and must adhere to the following: 1) the arbitrator must be selected through procedures administered by the AAA in accordance with its rules, and 2) the arbitrator must have the authority to issue any appropriate remedy.

for the use of grievance procedures must be filed within 30 calendar days after receiving the written response from the superintendent.

Proposed Senate Bills 567 and 568 – New Screening for Dyslexia Requirements

Two proposed Senate bills, which would amend the Revised School Code to require new screenings for characteristics of dyslexia, passed in the Michigan Senate in March 2024 and are currently being reviewed by the Michigan House of Representatives.

Senate Bill 567 would require that all pupils be screened for characteristics of dyslexia and difficulties in learning. This would include all K-3 pupils, including both in-state and out-of-state transfer students who have not previously been screened. Pupils in grades K-3 would be screened at least three times a year, while pupils in grades 4-12 will be screened if they demonstrate certain behaviors of dyslexia.

If the screening indicates that a pupil shows signs of dyslexia, Senate Bill 567 requires that the district provide a Multi-Tiered System of Support ("MTSS") to the pupil and notify the pupil's parent or legal guardian. The new legislation would require that the district prescribe the standards and requirements for each MTSS tier and modify the pupil's reading intervention plan requirements.

Senate Bill 567 further requires the Michigan Department of Education ("MDE") to develop expertise in order to provide technical assistance to schools and update its lists of approved valid and reliable dyslexia screening assessments for selection and use by districts. Senate Bill 567 also modifies the responsibilities of literacy coaches and requires all personnel providing reading intervention or instruction in grades K-12 to receive professional development regarding dyslexia. Senate Bill 568 would prohibit the MDE from approving a preparation program unless the program discussed dyslexia, instructional accommodations, and the MTSS framework with teachers.

It is prudent to note that under these Senate bills, school districts may continue to use their screening tests for dyslexia if they satisfy the requirements. **Senate Bills 567 and 568 are not currently in effect and thus have no effect on school districts' obligations regarding dyslexia at this time**.

If you have any questions regarding the above Title IX regulations, FLSA regulations, or new legislation, do not hesitate to contact our office.

UNITED STATES SUPREME COURT: NEW STANDARD FOR TITLE VII JOB TRANSFER DISCRIMINATION CLAIMS

The Supreme Court of the United States recently changed the standard for harm that a plaintiff must prove in a claim brought under Title VII alleging a discriminatory job transfer. *Muldrow v City of St. Louis, Missouri*, 601 U.S. ____ (2024). In this case, the Court reversed the lower courts' rulings and established that a showing of "significant

harm" is not necessary for Title VII claims involving a job transfer. Instead, only a showing of "some harm" pertaining to their employment conditions is sufficient.

In *Muldrow*, Sergeant Jontonya Muldrow's newly appointed St. Louis Police Department commander decided to transfer her from a position as a plainclothes officer in the Department's specialized Intelligence Division to a uniformed position in a different area of the Department. Muldrow was highly respected by her colleagues. However, the new Intelligence Division commander sought to replace Muldrow with a male police officer. Throughout their time working together, the commander would at times refer to Muldrow as "Mrs." instead of her "Sergeant" title. The commander stated that he placed the male police officer in Muldrow's position because the male police officer was a "better fit" for the Division's "very dangerous" work. Muldrow claimed that the Department transferred her from her plainclothes position to a uniformed position because she is a woman.

Although Muldrow's pay and rank remained the same after the transfer, other components of her employment changed dramatically. As a uniformed officer, Muldrow no longer worked in close proximity with high-ranking officials. Furthermore, the department revoked her access to an unmarked take-home vehicle, and her schedule shifted from consistent hours to a rotating schedule which sometimes involved weekend shifts. Muldrow stated that the transfer removed her from a "premier position" to an administrative role with far less prestige.

The lower courts dismissed Muldrow's claims of sex-based discrimination, as Muldrow was required to show that her transfer "effected a 'significant' change in working conditions producing 'material employment disadvantage.'" *Id.* at *3. The Supreme Court took a different approach when interpreting Title VII and vacated the lower court's holding. In its ruling, the Supreme Court held that an individual does not need to show that they endured "significant" harm, as requiring "significant" harm would be adding a threshold that Congress did not include in the law. This new holding now requires that individuals alleging a discriminatory job transfer under Title VII **need only show some harm resulting** from the employment transfer.

By overturning the United States Court of Appeals for the Eighth Circuit's holding, the Supreme Court turned to previous case law, pointing out that it is difficult for courts to determine whether harm resulting from an employment transfer is "significant." Therefore, the new test articulated by the Court states that "an employee challenging a job transfer under Title VII must show that the transfer brought about **some harm** with respect to an identifiable term or condition of employment, but that harm **need not be significant**." *Id.* at *1-2.

It is prudent to note that the Supreme Court's decision only affects Title VII discrimination claims for alleged discriminatory job transfers. Due to the Court's holding, it is likely that more employees will allege discriminatory job transfers, as the threshold for harm is now lower. Therefore, school districts should carefully consider the reasons for any job transfer and the impact of the transfer.

Please do not hesitate to contact our office if you have any questions regarding public employees' rights under Title VII or the effect of this ruling.

New Supreme Court Test for Determining Public Official State Action on Social Media

The Supreme Court of the United States recently articulated a new test for determining when public officials engage in state action on social media. The Court's decision is important because if a public official's actions on social media meet the criteria of the test, then the actions will be regarded as state action, and thus may be subject to constitutional challenges. The test provides that a public official's speech is attributable to the State only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when the official spoke on social media. *Lindke v Freed*, 601 US 187 (2024). With respect to the first prong, the official must have derived authority from the State—via written law or longstanding custom—to speak on the matters about which the official posted. With respect to the second prong, the official must have spoken in furtherance of the official's responsibilities. Factors that influence the analysis under the second prong are labels designating social media pages as personal or official, and the content and function of each post.

In *Lindke v Freed*, James Freed, the city manager of Port Huron, Michigan, had a Facebook page that any Facebook user could follow and view. Freed's Facebook page included professional and personal information such as his position as city manager for Port Huron, the Port Huron city website, the city's general email for administration and staff, the address of the city hall, and his status as husband and father. On his page, Freed made personal posts, which included photos of his daughter and dog, Bible verses, and updates about home-improvement projects. Freed also posted about his job and included updates about visiting local high schools, press releases and financial reports, COVID-19 counts, and weekly hospitalization numbers.

After Freed began making posts during the COVID-19 pandemic, Port Huron citizen, Kevin Lindke, began posting on Freed's Facebook page various comments criticizing the city's approach to handling the pandemic. Initially, Freed deleted Lindke's comments, but ultimately blocked Lindke's access to the page. Lindke then sued Freed, alleging Freed violated Lindke's First Amendment rights.

Although the Court did not decide whether Freed violated Lindke's First Amendment rights, the Court articulated a test for making such determinations. The Court held that **a public official's social-media activity constitutes state action only if the official (1) possessed actual authority to speak on the State's behalf, and (2) purported to exercise that authority when the official spoke on social media**.

With respect to whether Freed had authority under the first prong of the test, the Court provided that "the alleged censorship must be connected to speech on a matter within Freed's bailiwick;" that is, **Freed must have derived authority from the State – via written law or longstanding custom – to speak on the matters about which he posted**. As an example, the Court provided that if Freed had posted a list of local restaurants with health-code violations, had deleted

Lindke's comments on those posts, and if public health was not within the portfolio of the city manager, then Lindke would have had no First Amendment claim because Freed would have had no state authority to speak on health-code violations.

With respect to whether Freed purported to exercise his authority under the second prong of the test, the Court provided that **Freed must have used his speech in furtherance of his official responsibilities**. The Court provided the following as an example **in the school district context**:

> A school board president announces at a school board meeting that the board has lifted pandemic-era restrictions on public schools. The next evening, at a backyard barbecue with friends whose children attend public schools, he shares that the board has lifted the pandemic-era restrictions. **The former is state action** taken in his official capacity as school board president; **the latter is private action** taken in his personal capacity as a friend and neighbor. While the substance of the announcement is the same, the context—an official meeting versus a private event—differs. He invoked his official authority only when he acted as school board president. [*Id.* at 201-02 (emphasis added).]

The Court also provided that **labels indicating that the social media page is personal entitles public officials to a heavy presumption that all posts are personal**. The Court provided that because Freed's page was designated as neither personal nor official, it could be considered a page for mixed use, and categorizing posts that appear on an ambiguous page like Freed's is a **fact-specific undertaking** in which the posts' content and function are the most important considerations.

The Court added that when there is doubt as to whether the official is purporting to exercise state authority in specific posts, additional factors might cast light—for example, **an official who uses government staff to make a post** will be hard pressed to deny that he was conducting government business.

Lastly, the Court noted that **the nature of the technology matters to the state-action analysis**:

> Freed performed two actions to which Lindke objected: He deleted Lindke's comments and blocked him from commenting again. So far as deletion goes, the only relevant posts are those from which Lindke's comments were removed. Blocking, however, is a different story. Because blocking operated on a page-wide basis, a court would have to consider whether Freed had engaged in state action with respect to any post on which Lindke wished to comment. The bluntness of Facebook's blocking tool highlights the cost of a "mixed use" social-media account: **If page-wide blocking is the only option, a public official might be unable to prevent someone from commenting on his personal posts without risking liability for also preventing comments on his official posts.** A public official who fails to keep personal posts in a clearly designated personal account therefore exposes himself to greater potential liability. [*Id.* at 204 (emphasis added).]

In light of the Court's decision in *Lindke v Freed*, it would be prudent for school officials to unambiguously and

conspicuously **designate their social media pages as personal** and to **limit their posts regarding official business.**

If you have any questions about First Amendment implications in the school setting or the new decision from the Supreme Court, please do not hesitate to contact our office.

ICYMI: Legal Updates, Case Law on Special Education

U.S. Department of Education's 2025 Budget Request Addresses Special Education Teacher Shortage

The United States Department of Education's (the "Department's") Fiscal Year 2025 Budget Request includes initiatives to address the widespread shortage of special education teachers. The Department indicated that for the 2023-2024 school year, 43 states reported a shortage of qualified special education personnel, characterizing it as the greatest shortage area. U.S. Department of Education, *Fiscal Year 2025 Budget Summary*, p 28.[5] States have also reported shortages of special education personnel such as speech language pathologists and psychologists.

To address the shortages in this field, the Budget Request would increase funding to the Personnel Preparation Program by $10 million. The Personnel Preparation Program focuses on training programs to increase the number of special education personnel and improve qualifications. The Department predicts that these investments in leadership personnel will produce more than 15,500 additional service providers over the next five years. *Id* at 31.

Additionally, the Budget Request would invest $5 million into a new grant program called "Graduate Fellowships to Prepare Faculty in High Need Areas at Colleges of Education." This program is designed to address "critical teacher pipeline issues" in a variety of areas, including special education. *Id*. at 14.

Sixth Circuit Considers Provision of Special Education Services for Dual-Enrolled Students

On December 21, 2023, the United States Court of Appeals for the Sixth Circuit decided two cases concerning a district's obligation under the Individuals with Disabilities Education Act ("IDEA") to implement a "dual-enrolled" student's Individualized Education Program ("IEP"). In *Holland v Kenton County Public Schools*, a high school student's IEP indicated that he would take four classes at the district high school, and four elective automotive-technician classes at a community college through the high school's dual-enrollment program. 88 F4th 1183 (CA 6, 2023). The IEP provided that a special education teacher would accompany the student to his math and English classes at the high school. The IEP also provided for individualized behavioral support in the school's resource classroom.

[5] *Available at* https://www2.ed.gov/about/overview/budget/budget25/summary/25summary.pdf.

Before the student's senior year, his parents enrolled him full-time at the community college.

The district informed the student's parents that the community college would not allow district staff to provide services to the student in its classrooms. The district proposed that the student return to the high school for part of the day to receive services under his IEP. Alternatively, if the student wished to attend the community college full time, he could come to a district high school to receive special education services to support him in his college courses. The parents rejected this offer, claiming that the district violated IDEA by failing to implement the student's IEP at the community college. The Sixth Circuit disagreed.

The Sixth Circuit reasoned that school districts "do not have an obligation, generally speaking, to provide [special education and related services] to high school students when they enroll in dual-credit courses offered at postsecondary institutions", as **"[IDEA] does not require the state to provide services at the postsecondary level**." *Id.* at 1187 (emphasis added). The court additionally noted that the school district had offered the student several options to receive services while he was at the community college, and that taking classes full-time at the community college was not part of the student's IEP.

Similarly, in *Bradley v Jefferson County Public Schools*, a high school student with an IEP was accepted into a program that allowed high school students to live at a state college campus, take free undergraduate courses, and receive both high school and college credit for their coursework. 88 F4th 1190 (CA 6, 2023). The Kentucky Department of Education prevented the district from providing the student with his IEP supports while attending the program. The student's parents brought suit.

The Sixth Circuit agreed with the district court's determination that IDEA "does not obligate Kentucky school districts to provide support services at universities, as opposed to the student's high school, in the context of dual-credit classes." In its determination that the program is "postsecondary," the court noted, in part, that the program is located on a college campus rather than a high school, that the high school students take classes with undergraduate students pursuing postsecondary degrees, and that the students live in a dorm at the college.

In both *Holland* and *Bradley*, the court found that the district did not violate IDEA when it did not provide special education services to a high school student while dual-enrolled in a postsecondary institution. However, the Sixth Circuit emphasized that state law governs whether an education is "secondary" or "postsecondary," and thus whether it is covered under IDEA. In both cases, the court determined that the education provided through the college program was postsecondary under Kentucky law. As both decisions relied on the court's interpretation of Kentucky law, it is unclear how the Sixth Circuit would rule on a similar set of facts involving a Michigan school district. However, the court's analysis indicates that whether a district is obligated under IDEA to provide special education supports to students while dual-enrolled depends on the court's interpretation of the dual-enrollment program as "secondary" or "postsecondary" education.

Please contact us at Collins & Blaha, P.C. if you have any questions regarding special education.

Michigan Court of Appeals: New "Sexually Hostile Educational Environment" Claim Under ELCRA

The Michigan Court of Appeals recently held that schools may be vicariously liable under the Elliott-Larsen Civil Rights Act ("ELCRA") for a "sexually hostile educational environment" resulting from student-on-student harassment. *Jane Doe v Alpena Public School District,* 345 Mich App 35 (2022). The Michigan Supreme Court heard oral arguments to consider the application for leave to appeal on March 13, 2024, and a decision from the Court is expected in the upcoming months.

This case arises from a pattern of incidents between two students, Jane Doe and John Roe, throughout their time in elementary school and middle school. While attending Besser Elementary School in the Alpena Public School District (the "District"), both students were assigned to the same fourth grade classroom. John Roe was placed on an Individualized Education Program ("IEP") and received special education services, which included a full-time instructional aide. During the 2016-2017 school year, two major incidents took place.

In February of 2017, Jane Doe reported to the school that she was inappropriately touched by John Roe. John was given a three-day out-of-school suspension for this incident. Later, in May of 2017, John again touched Jane aggressively in inappropriate areas. John was given an eight-day out-of-school suspension and upon his return, was assigned to a different classroom and separate lunch period. However, after this second occurrence, Jane transferred to a different elementary school within the District for the rest of the fourth and fifth grade.

In 2018, both students started sixth grade at Thunder Bay Junior High School in the District. The school administrators were told that Jane was to have no contact with John. Despite this, Jane and John rode the same bus on the first day of school. During the next few months, Jane would see John in the hallways while walking to class. Ultimately, Jane transferred from Thunder Bay to a private school because of her concerns regarding John. Jane Doe's mother filed suit against the school district under ELCRA. Jane's mother alleged that the school district created a sexually hostile educational environment by failing to prevent, or take remedial measures to prevent, further harassment.

The Michigan Court of Appeals held that student-on-student sexual harassment is actionable under ELCRA. ELCRA prohibits educational institutions from engaging in gender-based discrimination, specifically preventing them from denying the individual full and equal enjoyment of the public service because of their sex. In applying ELCRA, the court stated, **"[w]e hold that schools do exercise a measure of control over students such that they may be vicariously liable for hostile educational environment discrimination arising from student-on-student harassment."** *Id.* at 46 (emphasis added). The court noted that this type of claim under ELCRA was a case of first impression.

A school district may avoid vicarious liability for these claims if it investigates and takes

prompt and appropriate remedial action upon notice of the student's behavior. In this case, Jane was unable to demonstrate that the District failed to take prompt and appropriate remedial actions once notified of John's behavior. According to the court, the District's response to John's behavior towards Jane, such as the issued suspensions and the communication with John's instructional aide to ensure that the two students stayed separate, were "preventative and appropriate measures to ensure that further incidents did not occur." *Id.* at 48. Jane Doe's mother appealed this decision the Michigan Supreme Court.

The Michigan Supreme Court held oral arguments to consider the application for leave to appeal to address two main issues: (1) whether Jane Doe stated a cause of action under ELCRA, and (2) if she did, whether she established a genuine issue of material fact as to that claim. The Court will likely issue a decision on the application within the next few months.

Please do not hesitate to contact our office if you have any questions regarding students' rights under ELCRA or the impact of this ruling.

FOIA Interpretations by the Michigan Court of Appeals

The Michigan Court of Appeals has addressed 2 key questions under Michigan's Freedom of Information Act ("FOIA"): (1) whether individually held teacher materials are subject to disclosure, and (2) whether public entities are required to respond to a defective FOIA request.

As discussed below, **the Michigan Court of Appeals has held that school districts are not obligated to supply individually held teacher materials, and public entities are not required to respond to defective FOIA requests.**

Teacher Materials are Not Subject to FOIA Disclosure

In *Litkouhi v Rochester Community School District*, the Michigan Court of Appeals held that school districts are not obligated to supply teacher materials under FOIA. Unpublished per curiam opinion of the Court of Appeals, issued February 22, 2024 (Docket No. 364409).

Carol Beth Litkouhi (the "Parent") filed suit alleging a violation of FOIA by the Rochester Community School District (the "District"). Litkouhi is a parent within the District who requested records related to an ethnic and gender studies course. The Parent received a description of the course and was informed that she could speak with one of the teachers of the course. The teacher provided the Parent with a course syllabus. The Parent then requested additional materials through a FOIA request including teacher training materials, lesson plans, assigned readings, and assignments used to evaluate students.

The District granted the request in part, providing the parent with "teacher training materials and references for the course." The District stated that it was unable to provide other materials as there were no responsive records known to exist for the lesson plans,

readings, viewings, or assignments. The Parent then sent an additional FOIA request to the District. The second request mirrored the first, with an additional request of any teacher prompts posted to Flipgrid or Google classroom. The District granted the request in part, stating that some of the information was already provided in the previous request. The Defendant denied the request for teacher prompts, stating they did not knowingly possess any records of such information, thereby certifying that the public records requested did not exist. The Parent then reached out to the District's superintendent to appeal the partial denial of the request, and the superintendent agreed that the FOIA response was accurate. After the response from the superintendent, the Parent filed suit against the District.

The District filed a motion for summary disposition for failure to state a claim and no genuine issue of material fact. The trial court granted summary disposition for the District.

The Michigan Court of Appeals reviewed the case and affirmed the trial court's decision by holding that the District's motion for summary disposition was properly granted. *Id.* at 13. The Court explained that the definition of a public body in the FOIA statute **does not include public school teachers**. *Id.* at 10. Subsection (i) of MCL 15.232(h) provides that "state-level employees in the executive branch" are subject to the definition of a public body. However, subsection (iii), which covers local-level government, does not provide any language regarding employees. The court reasoned that if the legislature intended to include employees, the legislature would have included employees within the definition of the statute for "public bodies." Because individual employees are not included in the definition under the statute, the court held that **public school teachers do not qualify as a public body and their individually held records are not mandated to be disclosed under FOIA.**

Defective FOIA Requests and Subsequent Responses

The Michigan Court of Appeals recently held that public entities, including school districts, do not have an obligation to respond to defective Freedom of Information Act ("FOIA") requests.

The Michigan Freedom of Information Act specifies what must be included in a written FOIA request. See MCL 15.233(1). A request from a person, other than an individual who qualifies as indigent under section 4(2)(a), must include the requesting person's complete name, address, and contact information, and, if the request is made by a person other than an individual, the complete name, address, and contact information of the person's agent who is an individual. An address must be written in compliance with United States Postal Service addressing standards and contact information must include a valid telephone number or electronic mail address.

Until recently, Michigan courts have not addressed what is required of a public body when a person makes a request that does not conform to the requirements of MCL 15.233(1). However, the Michigan Court of Appeals addressed this issue in *Davis v Secretary of State*, unpublished per curiam opinion of the Court of Appeals, issued November 14, 2022 (Docket No. 363793). In this case, the plaintiff alleged that he had e-mailed a request to defendant under FOIA, but that defendant failed to respond to the request. The Court of Claims held that plaintiff had submitted a defective FOIA request because he had not included his postal address as required by MCL 15.233(1), so defendant had no duty to respond. The

Court of Claims rejected plaintiff's argument that his own noncompliance was a mere technicality that should be overlooked, granting summary disposition to the defendant.

Regarding whether the public body had to respond to the plaintiff, the Michigan Court of Appeals stated that the statute "specifies what must be included in the written request," and "provides a deadline for a public body to respond to a proper request following its receipt of that request." *Id.* The court stated that the plaintiff's FOIA request plainly violated the content requirements of the statute and thus the Court of Claims correctly found the request to be defective.

The court further stated that "[n]othing in the statute specifies what, if any, obligation a public body has to respond to a defective FOIA request[.]" *Id.* In declining to adopt plaintiff's proposed construction, the court held that the proposed construction of the FOIA as requiring a prompt response to even defective requests would render the content requirements set forth in MCL 15.233(1) meaningless and thus held that the Court of Claims did not err by granting defendant summary disposition on this claim.

Accordingly, it is likely that a public body, including school districts, would not have to respond to a FOIA request that does not conform to the requirements of MCL 15.233(1) with a writing of any kind, including emails. However, it would be prudent to respond to the person making the FOIA request and bring attention to the fact that their request is defective.

Please do not hesitate to contact our office if you have any questions regarding recent case law interpreting the Freedom of Information Act.