BoardmanClark

Richard Verstegen, Attorney

1 SOUTH PINCKNEY STREET, STE. 410, P.O. BOX 927, MADISON, WI 53701-0927
Telephone 608-286-7233
Facsimile 608-283-1709
rverstegen@boardmanclark.com

MEMORANDUM

TO: John Forester, School Administrators Alliance

FROM: Mike Julka and Rick Verstegen

DATE: January 10, 2018

RE: 2017 Assembly Bill 693

You asked our firm to provide you with legal analysis of 2017 Assembly Bill 693 (AB 693). AB 693 proposes to make a number of significant changes to various provisions related to pupil records, pupil discipline, teacher contracts, and teacher leaves of absence. We begin this analysis by addressing the sections of the bill that give rise to the greatest concerns.

Sections 13 through 16 – Removal and Return of Students to the Classroom

Summary: Section 13 through 16 revise the existing statutory language under Wis. Stat. s. 118.164, regarding removal of pupils from class. Although these provisions do not substantively change the provisions related to removing the student from class, they make changes related to when the student may be returned to class. Specifically, this change permits the principal to return the student to the classroom only under certain conditions. Under existing law, the principal retains discretion to return the child to the classroom if, after weighing the interests of affected parties, readmission is the best or only alternative. Under the bill, the principal may return the child to the classroom only if any of the following applies: (1) the pupil has remained out of the classroom for one school day after the day of removal; (2) the teacher and principal have met with the pupil about the pupil's conduct and the teacher agrees to the pupil being readmitted to the class; or (3) the teacher voluntarily waives his or her rights to conditions (1) and (2) for return the classroom.

Analysis: This provision essentially allows any teacher to remove a student from the classroom for at least a full day if the student violates the code of classroom conduct. Therefore, if the code of classroom conduct restricts students from using their phone during classroom periods, tardiness, profanity, or general disruptive behavior, a student can be removed by the teacher for an entire school day without any ability by the principal to return the student to class. This provision will essentially allow teachers to control student behavior by simply removing them from class for an entire day without dealing with the problem in a more effective manner. Teachers with poor student management issues will essentially be able to remove any student (or many students) for minor violations of the code of classroom conduct. Teachers must be required to teach students and deal

with certain behaviors within the classroom without resort to removal and then administrators being burdened with numerous children every day without a classroom to attend because the teacher refuses to have the student back in class. Such removal and refusal to return to the classroom may also have an impact on any special education students under IDEA.

Sections 33, 34, and 35 – Suspension of a Student

Summary: These sections create new language making changes to student suspensions. Under these sections, under certain conditions, a teacher may request that the school board schedule a suspension hearing before the school board or before an independent hearing officer, if applicable. These provisions only apply to a teacher who has made a written request to the administrator that the pupil be suspended for a certain period of time and that request was denied. The administrator must have made a determination within 24 hours. The board is required to adopt this procedure as part of board policy. If the administrator denies this request, the school board president must approve or deny the teacher's request for a suspension hearing within 24 hours. If a suspension hearing is held, the school board may suspend a pupil for any of the reasons set forth under Wis. Stat. s. 120.13(1)(b)2. If the suspension occurs, it must not exceed 5 school days. These provisions also remove the ability for the school administrator to review the suspension and make a different decision, pursuant to Wis. Stat. s. 120.13(1)(b)4.

Analysis: There are some very serious concerns with these sections. These sections essentially allow a teacher to circumvent the administrator and pursue a suspension of a pupil with the school board. If the school board approves the suspension, there is no ability for the school administrator to review and reverse this decision. This change will substantially change the manner in which schools administer suspensions within schools. The principal is ultimately the individual who makes uniform decisions regarding moving forward with suspensions of pupils in the district. If each teacher (this term is not defined – substitute, part-time, counselor, temporary, etc.) is able to move forward with any suspension, then there will be serious issues with uniform discipline within the school. This may lead to many more suspensions being recommended and requiring a great deal of administrative time, not only for the principal, but also the school board president and school board.

Further, in many instances, suspensions may have a serious impact on the student, particularly a student who is covered under the IDEA, considering that there are limitations on suspensions on individuals before there is a change in placement. For students with disabilities suspended for more than ten days in a school year, individual education plans (IEPs) will have to be revised to reflect alternate services. This leads to increased cost, due process issues, and possible violations of free appropriate public education (FAPE) and lease restrictive environment (LRE).

The teacher is also not limited on the type of incident for which he or she can move forward with a request for suspension. Also, the manner in which the request is provided and the timing of the 24 hours is not entirely clear in this provision. Finally, it is very problematic that, if the school board president agrees to schedule the suspension hearing, the bill indicates that the board president may either schedule the suspension hearing at the next regularly scheduled meeting or at a special meeting called for that purpose. Under this scheme, if the president does not schedule the hearing until the next regularly scheduled meeting, the delay in suspending the student may take

30 days or more to occur. Such a delay would cause significant problems, particularly because the proposed suspension would be so far removed from the alleged behavior.

Section 12 – Reports to Law Enforcement Agency of Violent Pupil Offenders

Summary: Section 12 creates a new provision requiring a report to law enforcement for certain acts by a pupil involving a physical assault or a violent crime in a school zone.

Analysis: Although it is certainly important to make sure employees are safe in schools from any assaults or violent crimes, we believe that there are a number of concerns with this provision. First, this provision seems to require a principal to contact law enforcement (within 24 hours after being informed of the incident) whenever the principal receives a request from an adult (not even an employee) or a victim of an incident (without specifying any age limit of the victim) that an incident involving a physical assault or violent crime allegedly committed by a student occurred. This provision removes any sort of discretion from the principal to discern whether the circumstances even constituted a physical assault or a violent crime. Further, all that triggers the principal to report is a request. There is no requirement that the request include all details of the incident. Therefore, in many instances, the principal may be required to contact law enforcement without knowing all of the details or, in some cases, where the principal believes that incident does not constitute physical assault or a violent crime as it is defined under the statute.

Second, although there is a reporting requirement by the principal within 24 hours of being informed of the incident, there is no requirement for the person to report this incident within a certain time frame. In some instance, the physical assault may have occurred many weeks, months, or years earlier; however, the principal is still required to report the incident within 24 hours to law enforcement. This may not only create additional administrative requirements for school district administration, but also for law enforcement.

Third, the definition of "physical assault" is very problematic. Under the definition, "physical assault" means "the knowing or intentional touching of another person, by use of any body part or object, with the intent to cause physical harm." This definition does not require any element where the act causes bodily harm or any element that the act is done without the consent of person harmed. *See* Battery at Wis. Stat. s. 940.19. Based on the current definition, there could be many unintended consequences. For example, an elementary school student playing basketball with another student could allege "physical assault" by being intentionally fouled by another student. If the student who was intentionally fouled believes that there was an intent to cause physical harm, the student can then request the principal to report the incident, the principal must then report it to law enforcement.

Fourth, if this statute is intended to be similar to mandating reports of child abuse under the law, then it certainly needs to be further amended. The child abuse reporting statute contemplates "suspected" child abuse, not, as this bill does, actual physical assault. Certainly, there are serious implications against any child who is claimed to have already committed a criminal act without any sort of presumption of innocence.

Fifth, this statute requires the "school board" to notify the teacher of law enforcement taking a student into custody for a crime before the pupil attends the teacher's next class. This provision

seems to require the actual school board to make this known to the teacher, which raises concerns about informing the school board about such an incident, especially in light of student confidentiality issues and concerns about board bias if this matter were to come before the school board for an expulsion. Further, it is not clear which teachers must be informed by the board (if a high school student, must each teacher be notified? what about substitutes?). In addition, the reporting of such incidents without a legitimate educational interest in knowing this information raises confidentiality concerns, especially when the incident alleged to have happened has not been fully investigated.

Sixth and finally, this provision raises serious concerns about the ability of principals and law enforcement to effectively deal with situations that may involve a criminal act. Certainly, there may be many instances where students are involved in incidents where their lack of maturity may result in them acting in an inappropriate manner, including striking or throwing an object at another student. However, principals and other administrators are specifically trained in dealing with these matters, especially in situations where the appropriate response may be counseling the student involved, rather than involving law enforcement. Certainly, administrators have an incentive in reporting certain incidents to avoid liability to the district, in ensuring his or her own job security, to comply with mandatory reporting, and in maintaining morale in the District. Further, administrators need to have the discretion to call law enforcement only in matters that require such actions. To remove discretion by the administrators may lead to administrators spending a great deal of time with law enforcement when the matter could have been handled in a different manner.

Section 6 – Teacher Access to Behavioral Records

Summary: Section 6 creates a new section in the state pupil records law (Wis. Stat. s. 118.125(2)(dm)). In short, this provision requires the school district clerk or his/her designee to make available to a person (who is employed by the district that the pupil attends and who is required by the department under s. 115.28(7) to hold a license) the behavioral records of a pupil who is enrolled in the person's class. Similar provisions are included related to charter school governing boards and private schools. This section also now generally provides immunity if the school board, governing board, or private school refuses to disclose the records.

Analysis: There are a number of concerns with this provision. At the outset, it is important to note that the existing statutory section immediately before this new section requires that pupil records be made available to a person employed by the district that the pupil attends and required by the department under s. 115.28(7) to hold a license, but only if that person also has been determined by the school board to have legitimate educational interests to the record. *See* Wis. Stat. s. 118.125(2)(d). This requirement is similar to restrictions under FERPA. In contrast, section 6 above does not require any legitimate educational interest to access the record before the person can have access to the record. Thus, section 6 provides unfettered access to records to persons who have a pupil in his or her class, without any showing of a legitimate educational interest to that record. This provision contradicts the provisions in FERPA and raises serious student privacy concerns.

Also, although Section 6 is limited to "behavioral records," it is important to note that "behavioral records" is a very broad category. It not only includes the records identified in the definition itself, but also includes any other record that is not otherwise a progress record. Thus, all records (that

are not under the limited definition of progress records) are behavioral records. Therefore, section 6 provides a person who has a pupil enrolled in the person's class to a very broad range of pupil records, not only related to physical assault issues, but other issues that may be contained in a pupil record that the person may not have a legitimate educational interest (custody issues, concerns with different teachers, testing data, student discipline issues within other classes, etc.).

Further, it is not clear under Section 6 what it means for the person to have the pupil "enrolled in [his/her] class." If it is a high school student, does a study hall teacher have access to all of the student's records? What about a long-term substitute? What about a music teacher at an elementary school? It seems that this provision needs to be more clearly defined.

Summary Of The Above Analysis

We strongly believe that the bill will cause a significant cultural change in the State's schools. As mentioned above, the current culture within schools is to address many student issues, even some that may potentially be less serious criminal matters, within the school itself without contacting police. Of course, law enforcement should be contacted in many manners involving more serious matters, and law enforcement certainly has a presence within schools as many schools have sought to have police resource officers within their schools. However, to involve law enforcement on many matters, particularly giving teachers and others the authority to require administrators to report matters to law enforcement, is a significant culture change from handling many of these matters locally and internally as counseling matters within the school, or as discipline matters within the school. School administrators and law enforcement are the individuals with significant training regarding student discipline and criminal prosecution matters, and this bill would remove that experience and training and require additional time and resources for schools on such matters.

Following is our analysis regarding the remaining sections of the bill.

Sections 1 and 32 – Notice of Teacher Rights and Protections

Summary: This provision requires the Department of Public Instruction (DPI) to include on its Internet site a summary of the laws governing the rights and protections afforded to a public school teacher under state and federal law. It then states that the state superintendent shall annually provide electronic notice to each school board of this summary and shall "include" in the summary "all of the following." "All of the following" includes the new protections afforded under the bill (under subsections (a) through (h)), but also includes "[a]ny other information the department considers relevant" under subsection (i). Section 32 requires the school board to provide this notice to teachers as part of its board duties (under newly created Wis. Stat. s. 120.12(29)).

Analysis: This provision is a new requirement for DPI to include the "rights and protections" afforded to a public school teacher. However, this provision is very vague in terms of what laws need to be summarized in this notice. Of course, it must include summaries of the new protections under the bill. However, what other rights and protections should or must be included? Is this completely left to DPI's discretion in terms of what it believes is relevant? Notice of the right to be free of discrimination under Wis. Stat. s. 118.20? Protection for good faith attempts to prevent suicide by a pupil under Wis. Stat. s. 118.295? Notice of the right to

be free of discrimination on the basis of sex under Title IX? The overall scope of this provision is very unclear and could result in a very cumbersome requirement for DPI to put together such a notice. Further, Section 32 does not clearly indicate how often this notice must be provided to teachers and how it should be provided to teachers from the board.

Also, this provision, like many others in the bill, does not provide a clear definition of "teacher" under the law. Does this include school counselors, school psychologists, or interpreters? It may lead to confusion in administration if this term is not clearly defined. For example, under Wis. Stat. s. 118.22, "teacher" is specifically defined to mean "any person who holds a teacher's certificate or license issued by the state superintendent or a classification status under the technical college system board and whose legal employment requires such certificate, license, or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1st class."

Section 2 – School Performance Report

Summary: This provision requires school districts to include additional information about student suspensions and expulsions within its school performance report required under Wis. Stat. s. 115.38. The law already requires districts to report the reasons for which pupils are suspended or expelled, according to categories specified by the state superintendent. However, the bill also requires that districts specifically report incidents involving physical assaults on teachers, physical assaults on other employees, physical assaults on students, and physical assaults on other adults not employed by the school district.

Analysis: From our understanding, the "categories specified by the state superintendent" for reasons for which pupils are suspended or expelled already includes a category for assault. Therefore, if the DPI already includes "assault" as a category, it is not clear why this provision is necessary. It seems to create additional recordkeeping for schools when filling out their report to (1) identify whether the assault is a "physical assault," as that term is defined under the draft and (2) identify whether the "physical assault" was committed against a teacher (which is not defined), a school employee, a student, or an adult not employed by the school district. So, there appears to be additional recordkeeping and additional statutory interpretation needed in this instance for school districts, which may create additional administrative time.

Also, this provision does not identify whether the physical assault on a "student" must be a student within the district, or whether this includes students who are outside of the district. Further, there may be instances where there may be a physical assault on an individual who does not fall within the categories of student, teacher, employee, or non-employee adult; for example, as stated, if the assault is on a minor who is not a student in the District, the statute may not apply to such assaults.

Sections 4 and 5 – Charter Schools and Pupil Records Law

Summary: Sections 4 and 5 relate to applicability of the pupil records law (Wis. Stat. s. 118.125) to charter schools. Section 4 defines a "governing board" under the pupil records law, as "the governing board of a charter school established under s. 118.40(2r) or (2x)." Section 5 indicates that the pupil records law is applicable to governing boards.

Analysis: There appears to be a number of concerns with these (and other related) sections. First, although it is not clear whether the state pupil records law applies to charter schools, we believe that we have often interpreted the law to apply to charter schools. Certainly, the Family and Educational Right to Privacy Act (FERPA) applies if the charter school is receiving federal financial assistance. This provision makes clear the state pupil records' law's applicability to charter schools. *See* Wis. Stat. s. 118.40(7)(b) ('Except as otherwise explicitly provided, chs. 115 to 121 do not apply to charter schools."). However, the definition of "governing board" is limited to charter schools established under Wis. Stat. s. 118.40(2r) or (2x), and, from our reading of the statute, charter schools can be established in other ways than under (2r) and (2x).

Second, under Section 5, the heading reads: "Public Records Laws Applicable to Independent Charter Schools." We believe the heading meant to state "pupil records" rather than "public records." We also believe that the word "independent" is not necessary in the heading, unless it is intended to refer to some specific type of charter school. Also, although this provision indicates that all of the pupil records' duties and responsibilities of a school board and school district clerk apply to a governing board, the overall application of such duties and responsibilities are likely not easily transferable. It would be better to go through the pupil records law in detail to determine which provisions should apply to governing boards and then add the words "governing board" to those specific provisions. Certainly, the application of the pupil records law to "governing boards" is further complicated by the fact that, in several newly created provisions and amendments under the bill, the bill actually includes the words "governing boards" in those provisions, but does not make those changes to other parts of the pupil records law. From our perspective, this failure to go through the pupil records law in some detail adds additional confusion to an already confusing law.

Sections 7-10, 20-24, 26-30 – Maintenance of Behavioral Records

Summary: These sections (particularly sections 7-10) relate to maintenance of behavioral records by a school board or charter school under the state pupil records law and by a private school. In particular, these sections (particularly sections 8-10) make certain changes related to the retention requirements related to behavioral records, specifically extending the duration for which behavior records must be maintained under Wis. Stat. s. 118.125(3).

Analysis: Again, there are a number of concerns with these sections. First, as noted with a previous section above, the title under Section 7 includes the term "independent" charter school, but the adjective "independent" may need to be removed because we do not believe that this term has any legal significance and may be confusing.

Second, under existing law (Wis. Stat. s. 118.125(3)), school districts are permitted to only maintain behavioral records of a pupil for one year after the pupil ceases to be enrolled at the school, unless the pupil specifies in writing that his or her behavioral records may be maintained for a longer period. Under the bill, school boards and governing boards of charter schools must maintain such records for as long as the pupil remains enrolled in a school in the school district or the charter school and until the pupil has graduated from high school in the school district or charter school. Further, Section 9 has created a new provision that requires a school board or governing board to maintain behavioral records until the pupil has attained age of 21 under certain conditions (specifically if (1) the pupil was enrolled in but is not currently enrolled in a school in the school

district or charter school; (2) the pupil has not graduated from a school in the school district or from the charter school; and (3) neither the pupil nor the pupil's parent or guardian nor another school or school district nor a court has submitted to the school board or governing board the written notice required in [Wis. Stat. s. 118.125(4), which requires transfer of records upon written notice]). Section 10 creates Wis. Stat. s. 118.1255, which sets forth certain similar retention requirements for private schools under the parent choice law.

The bill does seem to clarify that a district does not need to destroy behavioral records one year after a pupil moves from the elementary school to the middle school within the same district. This change seems to indicate that districts must maintain these records until the student graduates or until they are 21 under certain conditions. If the student transfers to another school, the records may then remain at the school district until the student turns 21, unless the conditions above are met. However, despite this clarification, this change presents a number of concerns. Under prior law, the district would have been required to destroy these records within one year of the student being enrolled in this district. This change requires districts to maintain records for an additional period of time, which may add additional retention requirements for districts. The change also adds specific criteria that districts will need to apply in every instance with each particular pupil. This change makes it more similar to the retention requirement for progress records (5 years after ceasing to be enrolled at the school). However, it is still not consistent with the progress record retention requirements, and therefore, there are still administrative issues because of the differing retention requirements for different pupil records. This change is significant and will require the Public Records Board to change the records retention schedule applicable to school districts. Like the existing law, there is also some conflict with the IDEA, and there will still need to be some balancing with the retention requirements under this law and those under the IDEA. The IDEA gives parents the right to request destruction of personally identifiable information concerning their child when such information is no longer needed to provide the child with services. However, the district, not the parents, generally has discretion in making a determination about when records are no longer needed. It would be beneficial if the bill made efforts to be consistent with the IDEA. FERPA does not contain any retention requirements.

Third, the new provision under Section 10 (which creates Wis. Stat. s. 118.1255) appears a little unclear at first, but it seems to incorporate the retention requirements under newly created provisions under Sections 20 and 21 and Sections 26 and 27, which appear to set the same retention requirements as noted above. Sections 22, 23, and 24 appear to create new provisions or amend existing provisions under Wis. Stat. s. 118.60 related to records, to make it more consistent with the pupil records law. Sections 28, 29, and 30 appear to create new provisions or amend existing provisions under Wis. Stat. ch. 119 related to records, to make it more consistent with the pupil records law.

Sections 3, 11, 36, 37, 38, 39, 40, 41, 42, and 43 – Law Enforcement Agency Records

Summary: These provisions make adjustments to various sections related to sharing of law enforcement agency records. Many revisions to these sections are minor changes to the statutes to ensure its application to charter schools. The primary revision occurs in Section 42, which requires a law enforcement agency to disclose certain records to schools after a student is taken into custody following a belief that the pupil was committing or had committed a felony or

misdemeanor under Wis. Stat. s. 939.632(1)(e)3. (violent crime in a school zone). The law enforcement agency must provide any information to the district following the act and within 24 hours after ascertaining the public school, charter school, or private school the pupil attends.

Analysis: This provision seems to provide an additional avenue for school districts to obtain information from law enforcement related to limited incidents involving students on campus. We believe that this provision would be good to provide schools with additional information.

Sections 17, 18, and 25 – Terminating Contracts without Penalty for Physical Assaults

Summary: Section 17 contains minor revisions to the teacher contract statute. Section 18 includes a new provision related to teacher contracts, allowing teachers to terminate their contract without penalty if the teacher is the victim of physical assault or a violent crime, as defined above. The teacher, however, must provide the school board with a law enforcement report documenting the incident within 2 months of the incident. Section 25 includes similar provisions as it applies to school districts under Wis. Stat. ch. 119.

Analysis: Again, this provision is problematic because of the definition of physical assault noted above. Incidents that result in a teacher terminating his or her contract should be very serious in nature. Certainly, teachers who are the victim of a serious incident to their health or safety should be given special consideration concerning whether they should be subject to penalties for leaving the District before the end of the contract. However, the termination should be a last resort, and perhaps the language could include a provision requiring the teacher to meet with administration prior to termination to identify any means to address the situation short of termination. If termination is necessary, the board could then give significant weight to the alleged physical assault in not enforcing any penalties under the contract. However, it should be clear that the teacher may be liable for other amounts that he or she may owe under the contract (e.g., tuition reimbursement that the district paid and the teacher owes). This provision also seems to suggest that the teacher must have been the victim of the physical assault or violent crime; however, it is not clear whether the student or other individual alleged to have engaged in the conduct must have been convicted of the crime in order for the termination without penalty to be effective.

It is also important to note that valid liquidated damages clauses are not "penalties." Under common law, all liquidated damages provisions fall into two categories: liquidated damages or penalties. If the stated amount is a fair attempt to estimate actual damages likely to result from a breach of the contract, then the clause will be held enforceable and result in liquidated damages. If the stated amount is inserted in the contract to punish the defaulting party, and the amount bears no relationship to actual damages, the clause will be construed as a penalty and will not be enforceable. Therefore, it is incorrect for the bill to identify valid liquidated damages clauses in contracts as "penalties," because they are not intended as penalties, but as enforceable estimates of actual damages that result from the breach.

Finally, it is worth noting that the bill does not establish any sort of deadline for the teacher to resign under this provision after any such physical assault or violent crime. Under the draft, the teacher could seek to resign several weeks, months, or even years after any allege assault or violent crime, and the bill would permit the resignation without penalty.

Sections 19 and 31 – Leave of Absence for School Employees

Summary: Section 19 and 31 provides a leave of absence for any public school and charter school employee or teacher who is the victim of a physical assault or violent crime. Special provisions apply depending on whether inpatient care was required. These provisions also state that the school board is entitled to the right of subrogation for reimbursement to the extent that the employee may recover the "reimbursed items in an action or claim in tort against any 3rd party." The provisions also state that "[a] repayment made under this subsection shall be limited to the total sum credited to the injured employee or teacher as damages for pay and fringe benefits actually received in the settlement of any claim caused by the negligence of the third party."

Analysis: Section 19 seems to be unnecessary. If a teacher suffers a serious medical condition, the teacher should in most instances be entitled to medical leave under the state or federal Family and Medical Leave Act (FMLA). It is recognized, however, that there are circumstances where a teacher may not be eligible for under the FMLA based on the number of employees at his or her worksite.

Again, in these circumstances, this provision is not clear whether there must be actual conviction of someone that a physical assault or violent crime occurred, such that the individual is the victim and entitled to leave. Further, in such circumstances, arguably workers compensation may be implicated. It is not clear what sort of third party action that this section contemplates, but, if it is an action against the student or parent, then it may be unlikely that such actions will be the first response of any teacher. Instead, the first response may be to take action against the District.

Conclusion

Please contact us if you have any questions regarding the above analysis.

It is our experience that schools and their administrators vigorously attempt to strike the appropriate balance between securing the best interests of students, while at the same time being ever-mindful of the necessity to provide a safe teaching environment for their professional staff. Each school is different, even in many instances in the same school district. That is why an attempt to legislate solutions to very individualized issues in schools causes us to raise the legal and policy issues set forth above. For all of the above reasons, we recommend that School Administrators Alliance register in opposition to the bill.