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MEMORANDUM

TO: John Forester, School Administrators Alliance

FROM: Mike Julka and Brian P. Goodman

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RE: Analysis of 2021 Assembly Bill 963, "Parental Bill of Rights"

You asked our firm to provide you with legal analysis of 2021 Assembly Bill 963 ("the Bill" or "this Bill"). The Bill proposes to create a number of parental rights on a wide range of issues, all of which implicate school districts, including school boards, administrators, teachers, and other members of the school district community. We begin this analysis by addressing our general concerns with the Bill, and then by addressing each parental right being proposed by the Bill.

I. Overview.

A. Broad scope.

The Bill is staggering in its scope. It establishes that the state and any other government entity, which would include school districts, cannot "infringe on the fundamental right of parents to direct the upbringing, education, health care, and mental health of their children" except in the rarest of circumstances. While the Bill includes 15 enumerated rights, the Bill is clear that these enumerated rights are in addition to all rights granted to parents under the constitutions of this state and of the United States. Additionally, the bill states, "A parent of a child in this state has inalienable rights that are more comprehensive than those listed in [the Bill], unless such rights have been legally waived or terminated." The precise scope of the Bill is, therefore, undiscernible. Using the Bill, Parents could bring claims asserting potential infringement by a school district (or school official) on an alleged inalienable parental right that has never before been recognized by a court or agency.

The Bill states that a school district cannot "violate," "infringe," "interfere," or "usurp" these fundamental rights. These four terms are all used in different places throughout the Bill. Countless routine school actions might interfere to some extent on parental rights. For example, currently it is well-accepted that a parent cannot walk in the front door of a school and get their child out of class without following proper check-in and check-out procedures. The legal standard of review currently applied to such routine actions is generally the standard of reasonableness. However, the Bill imposes the highest possible legal standard of review on a school district by requiring that districts "demonstrat[e] that the infringement is required by a compelling governmental interest of the highest order as applied to the child, is narrowly tailored, and is not otherwise served by a less restrictive means." This legal

standard is comparable to the standard of review known as "strict scrutiny." In practice, strict scrutiny is such a high standard that school districts will rarely prevail under the standard. The use of the term "of the highest order" might even imply that courts should require school districts to provide an even more compelling governmental interest than is generally required under strict scrutiny. Under the Fourteenth Amendment of the U.S. Constitution, strict scrutiny is applied to laws that infringe on race and national origin. "Sex" is not even held to the level of strict scrutiny, but, for example, under this Bill, a parent's right to review instructional materials and outlines used by the child's school, would be held to a standard comparable to (or greater than) strict scrutiny. Even minor interferences on these rights would be subject to this high standard. It would be completely unworkable for school districts to operate if all decisions that had a minor effect on the rights proposed by the Bill were subject to strict scrutiny review by a court or agency.

The broad scope of the Bill also calls into question a variety of existing state laws. Parents could bring suit against a school district for following existing laws that now interfere with their newly established statutory parental rights. This could force schools to analyze and determine which existing laws are no longer valid due to this Bill. Such an approach will leave school districts scrambling to determine which laws to follow in the wake of all the potential inconsistencies between this Bill and existing law, as will be identified in greater detail below.

B. Lack of definitions.

The Bill lacks specific definitions throughout. Wisconsin Statutes Chapter 48 contains a definition of "parent" that is quite broad.

> "Parent" means a biological parent, a husband who has consented to the artificial insemination of his wife under s. 891.40, or a parent by adoption. If the child is a nonmarital child who is not adopted or whose parents do not subsequently intermarry under s. 767.803, "parent" includes a person conclusively determined from genetic test results to be the father under s. 767.804 or a person acknowledged under s. 767.805 or a substantially similar law of another state or adjudicated to be the biological father. "Parent" does not include any person whose parental rights have been terminated. . . .
>
> Wis. Stat. § 48.02(13).

This definition would seemingly give non-custodial biological parents the same rights under the Bill as custodial parents, provided that the parents' rights have not been terminated. This will likely place schools in the untenable position of facing lawsuits from parents of students when those parents disagree with each other. Such decisions have historically been the purview of family law court actions, not lawsuits against school districts.

The Bill also doesn't define "schools." The Bill could be interpreted as applying to public and private schools, and technical colleges and universities that enroll students prior to the students turning 18.

Examples of other terms that lack definition include "timely," "polls and surveys," "instructional materials and outlines," and many other terms as will be discussed in greater detail below. By not providing workable definitions, the Bill will require courts to interpret these terms. Until clear rulings are issued by courts, neither parents nor school districts will have any certainty regarding the scope of the Bill.

C. Concerns regarding remedies.

The Bill provides that a parent or guardian may bring a lawsuit against a "governmental body or official" (however a court might define such terms) based on any violation of the rights set forth in the Bill.

A parent or guardian may also raise a violation of this Bill in court or before an administrative tribunal of appropriate jurisdiction as a claim or defense. This could mean that parents could claim at an expulsion proceeding that their child cannot be expelled because they weren't informed of certain disciplinary actions taken against or threatened against their child prior to the expulsion proceeding. This Bill might also allow a parent to require a district to provide a specific educational placement of a child in a special education hearing due to the Bill's creation of a right for parents to determine the educational setting of their child.

A parent or guardian who successfully asserts a claim under this subsection may recover declaratory relief, injunctive relief, reasonable attorney's fees and costs, and any other appropriate relief. The Bill specifically exempts claims under this Bill from the caps on attorneys' fees set forth in Wis. Stat. § 814.04(1). Defending, resolving, and paying judgments for, even unintentional, violations of this Bill will pose a significant expense to school districts. District insurance policies might also have to be adjusted, with the potential of increased premiums for coverage for the broad range of claims that might be brought under the Bill.

Finally, the Bill allows the state Attorney General to bring actions to enforce the Bill. It is unclear what remedies would be available to the Attorney General in such an action.

II. Specific Sections of The Bill.

A. The right to determine the religion of the child.

The First Amendment of the U.S. Constitution already protects a person's right to freely exercise their religion. Article I, Section 18 of the Wisconsin Constitution also protects a person's right to worship according to the dictates of conscience, and no interference with the rights of conscience shall be permitted.

If this section of the Bill is not entirely redundant with the protections of the state and U.S. constitutions, it raises the question as to whether this section is intended to expand those constitutional protections. For example, could this section be used by a parent to sue a school district claiming that a neutral rule of general applicability (e.g., a school dress code,

tardiness, etc.) violates their child's religion? This would call into question almost every school rule that has even a minimal impact on a child's religion.

B. The right to determine the type of school or educational setting the child attends.

Parents already have the right to determine if their children will attend private or public school, or whether to homeschool their children. However, it is uncertain how this Bill would interact with the state's open enrollment and non-resident enrollment statutes. Those statutes might be deemed to interfere with this section of the Bill. A parent might claim that this Bill requires schools to accept students, tuition free, even if the open enrollment statute would permit schools to deny the student. This would fundamentally disrupt the operations of schools and potentially result in a flood of requests to attend certain schools. The property taxpayers within such a school district would likely have to absorb the additional costs in such a situation.

Additionally, a parent might assert that they have determined that the appropriate educational setting for their child is to be in a permanent virtual setting provided by the child's school of residence and might assert that this requires all teachers of the child's classes to livestream their classes every day. A similar assertion might be raised by parents to demand that their child have a certain teacher, be in a certain school building, be placed in a certain grade level, or even require the school to provide their child with one-on-one instruction or a one-on-one aide.

This section of the Bill could also interfere with school districts' obligations under the Individuals with Disabilities Act. Currently, that law (and state special education laws) outlines a careful, detailed process for collaboratively establishing proper educational plans for students and contain detailed dispute resolution processes. This section of the Bill could grant parents a mechanism by which to do an end run around the special education process.

It is also unclear if this section of the Bill would prevent schools and the state from enforcing the compulsory attendance law if a parent decides that the proper educational setting for their child is no educational setting at all, not even homeschooling.

C. The right to determine medical care for the child, unless specified otherwise in law or court order.

In general, parents already have the right to determine medical care for their child. However, this section of the Bill raises the possibility that a parent could refuse to allow a student to see the school nurse or prohibit the school from contacting an ambulance in an emergency. Similarly, this Bill could allow a parent to demand that their child be permitted to continue to play in a football game even if a coach or athletic trainer determines that the student is not well enough to play. What if the child has a suspected concussion or head injury? State law requires a coach, official, or health care provider to remove a student from a youth athletic activity in such a situation. Wis. Stat. § 118.293(4)(a). Does this section of the Bill control over that statute?

D. The right to review all medical records related to the child, unless specified otherwise in law or court order.

Parents already have the right to review all education and pupil records maintained by a school district that directly relate to their children under Wis. Stat. § 118.125 and the federal Family Educational Rights and Privacy Act (FERPA). While these laws provide exceptions to disclosure of certain treatment records and patient health records, these exceptions generally do not apply to a child's parents, who generally have access to these records. *See* Wis. Stat. §§ 146.81(5), 146.83(1c). However, this section of the Bill might be construed to overrule the confidentiality established by Wis. Stat. § 118.126. That state law creates an obligation for a school psychologist, counselor, social worker and nurse, and any teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities, to keep confidential information received from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs (with certain exceptions). Overruling this statute could result in fewer students seeking treatment for alcohol or other drugs because they fear their parents will find out.

E. The right to determine the names and pronouns used for the child while at school.

Wisconsin common law and statutes provide a process whereby a minor can change their name without parental consent through a court process. *See* Wis. Stat. § 786.36. This Bill might overrule this statute with respect to schools, creating the odd situation where a student would be called by one name for all legal purposes, but not called that name in school. Additionally, the federal Department of Education, Office for Civil Rights (OCR), takes the position that schools must address students by the name consistent with their gender identity. Compliance with this Bill, if it became law, could lead to investigations by OCR of Wisconsin school districts. The school districts would be torn between compliance with state law and compliance with the interpretation of federal agencies.

This issue, in particular, poses the risk that schools will be forced to navigate family disputes. If one parent requests one name be used for their child at school and the other parent requests a different name, this will force the schools to make a decision that could subject them to litigation filed by the dissatisfied parent. By contrast, the current best practice is for school districts to refer parents to a family law court proceeding to resolve the dispute.

F. The right to review instructional materials and outlines used by the child's school.

Under federal law, parents already have the right to review instructional materials, including teacher's manuals, films, tapes, or other supplementary material used as part of the educational curriculum of a student. 20 U.S.C. § 123h(c)(1)(C)(i). Additionally, these materials and outlines are generally available to parents under the state Public Records Law. However, this section of the Bill could be interpreted to create a greater obligation to provide these materials and outlines to parents. For example, this right could mean that these

materials and outlines must be provided to parents for free regardless of the costs of locating or copying the records. Additionally, it is unclear if this right would require school districts to provide these materials and outlines to parents under different timeframes than what is currently required by the state Public Records Law ("as soon as practicable and without delay.")

Wisconsin Statutes § 118.019 already requires school districts to give parents an outline of the human growth and development curriculum used in their child's grade level, along with giving parents the right to inspect the complete curriculum and instructional materials, so this Bill is redundant on this particular subject area.

G. The right to access any education-related information regarding the child.

Parents already have the right to review all education and pupil records maintained by a school district that directly relate to their children under Wis. Stat. § 118.125 and FERPA. However, this section of the Bill uses the term "education-related information" rather than "records." Information could be interpretated much more broadly than "records." Information could require teachers to provide their personal notes about a student and even require them to create records based on their thoughts and opinions about a parent's child. Are a teacher's thoughts and opinions, even when they haven't been reduced to formal documentation such as in a report card, subject to this section of the Bill? If so, teachers could easily be over-burdened by numerous requests by all the parents of their students requesting regular updates on how their child is doing in class. Additionally, because interference of these rights is subject to strict scrutiny, a teacher might be in violation if they didn't immediately respond to such a request from a parent.

It isn't clear how this right would be balanced by a school's legal obligation to maintain the confidentiality of education and pupil records maintained by a school district that directly relate to other children. For example, if there was a detailed incident report that identified a parent's child as being involved in a fight with a special education student, would that parent have a right to view the incident report that contains information about the other student's special education identification and related private information? That could violate the Individuals with Disabilities Education Act in addition to Wis. Stat. § 118.125 and FERPA.

H. The right to advanced notice of any polls or surveys instituted by the child's classroom.

20 U.S.C. 1232h(a) (the Protection of Pupil Rights Amendment, or PPRA) requires school districts to obtain the prior written consent of a parent prior to allowing a student to submit to a survey analysis or evaluation that reveals information concerning:

(1) political affiliations or beliefs of the student or the student's parent;
(2) mental or psychological problems of the student or the student's family;
(3) sex behavior or attitudes;
(4) illegal, anti-social, self-incriminating, or demeaning behavior;

(5) critical appraisals of other individuals with whom respondents have close family relationships;
(6) legally recognized privileged or analogous relationships, such as those of lawyers, physicians, and ministers;
(7) religious practices, affiliations, or beliefs of the student or student's parent; or
(8) income (other than that required by law to determine eligibility for participation in a program or for receiving financial assistance under such program),

The consent process requires school districts to permit the parent to inspect these surveys prior to providing consent.

This section of the Bill would broaden this federal law to apply to any survey. However, the Bill does not define what constitutes a "poll" or "survey." A teacher's poll of the classroom to determine what toppings to order for a pizza party could potentially qualify as a survey requiring advanced notice under this Bill. This would quickly become unworkable.

I. The right to request notice of when certain subjects will be taught or discussed in the child's classroom.

This section of the Bill seems to give parents the right to request notice when any subject, as determined by the parent, will be taught. Every parent of a student in a classroom could have a different list of subjects for which they want prior notice. A high school social studies teacher might have to give advanced notice to 100 different parents about various subjects that various parents want advanced notice of. The term "subject" is undefined. It could be interpreted as meaning specific courses, like health class, or more broadly as the subject of any class discussion on a given day. This section of the Bill will also likely inhibit teachers from organically discussing relevant current events if they haven't yet been able to provide this advanced notice to the parent. Further, teachers would not be allowed to answer certain questions from students if the subject of the question is the basis for a parent's request for advanced notice. This section of the Bill will likely create educational problems for teachers and other students on a regular basis.

J. The right to opt out of a class or instructional materials for reasons based on either religion or personal conviction.

Current law already requires the State Superintendent to "[p]romulgate rules providing for the reasonable accommodation of a pupil's sincerely held religious beliefs with regard to all examinations and other academic requirements." Wis. Stat. § 115.28(31). The regulations implementing this statutory section require school boards to develop such policies that include annual notifications to parents of such accommodations, as well as a complaint procedure which may be initiated by parents or guardians. Wis. Admin. Code PI ch. 41. It is difficult to understand how this proposed parental right would be interpreted in this existing legal context.

In addition, under current law, parents have the right to exempt students from instruction in human growth and development for any reason. Wis. Stat. § 118.019(4). This section of

the Bill would greatly expand a parent's ability to exempt their children from instruction to any class or instructional material based on personal conviction. "Personal conviction" isn't defined, and school districts would likely struggle to administer requests based on personal conviction other than merely having a parent self-certify that they have such a personal conviction. In practice, this will likely allow parents to essentially pick and choose which classes and units of instruction their student will participate in, regardless of state graduation requirements, districts' statutory obligation to provide instruction on certain subjects, applicable educational standards, and state testing obligations.

This right to opt out might also require schools to provide alternative education to students during the period that the child has been opted out. Such alternatives would also require parental consent, but in some situations, there may not be any appropriate alternative. For example, if a parent opts a child out of the instruction of evolution, the district would not be able to agree to provide instruction in creationism because such instruction would likely be inconsistent with educational standards and raises First Amendment legal concerns. In these situations, the student might simply not be able to receive any instruction at all.

K. <u>The right to visit the child at school during school hours, consistent with school policy, unless otherwise specified in law or court order.</u>

This right under the Bill is likely workable for school districts because of the language "consistent with school policy." However, the term "visit" is vague. Even in the absence of a policy, could a district remove a parent that interferes with instruction? Additionally, the Bill might allow a parent to pull a student out of a class for a social visit, such as might happen with a parent who has limited periods of physical placement with the child. Even though a school board could limit these situations through carefully written policy, it puts a significant burden on districts to ensure there are no gaps in that policy, or they will risk lawsuits from parents.

L. <u>The right to engage with locally elected school board members of the school district in which the child is a student, including participating at regularly scheduled school board meetings.</u>

This section of the Bill is particularly vague. The state Open Meetings Law permits the public to provide input at properly noticed periods of public comment. However, school boards have the discretion as to whether to have a period of public comment at a given board meeting. Wis. Stat. § 19.84(2). While a board is permitted to discuss any matter raised by the public during public comment period, it has the statutory obligation to provide public notice of every board meeting. The trend of applicable case law urges board members to take a cautious approach to discussing matters raised by the public that are not otherwise on the public notice for the board meeting. *Id.*; *see, e.g., Buswell v. Tomah Area Sch. Dist.*, 2007 WI 71. State law also requires school boards to hold public hearings in certain situations, which would be a form of engagement between parents and school board members. This section of the Bill might prohibit the board from placing reasonable time limits on public comment at board meetings, because such limits might not survive strict scrutiny. If so, parents could

prevent school boards from conducting business just by refusing to end their public comments.

This section of the Bill might broaden the right to engagement beyond these board meetings and hearings. It might require board members to respond to all emails from parents within a certain time period. It might also require board members to respond to concerns from a parent raised while the board member is at a grocery store and the parent decides to confront the board member.

M. The right to be notified of the creation of or updates to a security or surveillance system at the child's school.

This section of the Bill is vague. A school district might be able to comply with this section merely by providing notice of the "creation" or "update" to a security or surveillance system without providing any more detail. However, if a court finds that such notice is not sufficient, providing additional details could undermine the purpose of the system and create safety issues for the entire school community. Currently, the state Public Records Law would allow records custodians to apply the balancing test to requests for records regarding school safety plans which would allow schools to keep certain security details confidential. Additionally, to comply with existing state and federal wiretapping laws, anyone who is subject to audio surveillance will generally be provided with notice that such surveillance is in progress, making this section of the Bill redundant in this regard.

N. The right to be informed of any disciplinary action taken against or threatened against the child.

This section of the Bill does not provide a definition of "disciplinary action." On its face, "disciplinary action" would cover a very wide range of responses to student conduct. Without a definition in the Bill, a district might be able to define this by board policy (such as is currently the case with "discipline" under the statutory grievance process for personnel matters). Any definition would likely have to satisfy strict scrutiny though, which would be very challenging without keeping the definition of "disciplinary action" extremely broad. Additionally, by including any disciplinary action that is "threatened" against a child, this Bill makes the notice obligation even broader. The teacher, the student, and the parent might all have different perspectives on whether a given incident was a disciplinary action or threatened disciplinary action. If a teacher told a student to please stop talking without raising their hand or the student will be placed in time out, would that be threatened disciplinary action? If so, teachers might be obligated to report dozens of incidents of threatened discipline on a daily basis. The burdens imposed by this section of the Bill might actually deter teachers and administrators from taking disciplinary action or threatening disciplinary action which could potentially have a negative effect on successful classroom management.

Under current law, parents are already notified of suspensions, expulsions, and the use of restraint or seclusion. The effect of this section of the Bill would seemingly be to expand the

existing notice obligations of these more significant disciplinary issues to even very minor and routine classroom disciplinary matters.

O. <u>The right to be timely informed of any acts of violence or crimes occurring on grounds of the child's school.</u>

This section of the Bill fails to establish a standard for when a "crime" occurs. Technically, a crime is only determined to have been committed when a defendant is convicted (or admits to guilt in court). School districts would not be able to track the progress of every court action regarding crimes occurring on school grounds in order to provide parents with notice at that point. The intent of the language of this section might be to require schools to notify parents any time there is a potential crime on school grounds. What if it turns out that there was no crime following police investigation and/or prosecution? This parental right would require school districts to provide premature notice that has the effect of raising unnecessary concerns about safety within the school district community. Additionally, low-level crimes, such as disturbing the peace, technically occur all the time at school, but schools routinely do not treat those as criminal matters. Instead, they handle them through internal disciplinary measures. This Bill could blur the line between criminal matters and routine school discipline matters.

Similarly, what constitutes an "act of violence?" For example, if a third grader gets pushed too hard during a game of tag at recess is that an "act of violence?" Would the parents of every child at that school need to get notice of that? How specific would the notice have to be? Schools would have to balance the specificity of the notice with their obligations to maintain the privacy of the students involved. However, given that this parental right is subject to strict scrutiny, a school could face a lawsuit if it limited the specificity of the notice to maintain student privacy.

Additionally, the Bill requires that the notice be "timely" and does not specify the format for the notice. If the crime happens on a weekend evening during the summer, when school is not in session, is it acceptable for an email notice not to go out to parents during the following week? A school district could also arguably comply with this notice by placing the notice on a bulletin board in the front office.

Finally, the Bill does not clarify who is obligated to notify parents. Arguably, this obligation could apply to law enforcement, the district attorney's office, and the school. Having all three of these institutions providing notice would be inefficient, but it might be the easiest way for each of these institutions to comply with the Bill and avoid lawsuits.

III. Conclusion.

One of the fundamental principles of education is connection and collaboration between parents and teachers, principals, and other district officials. This Bill will destroy the spirit of collaboration that is so essential to educational success. This Bill will make it extremely difficult for districts to manage and deliver a successful education to all students. This Bill will create divisions and pit district officials against parents and even turn parents against

other parents. Every parent will have a slightly different perspective on exercising these parental rights. Even in an intact marital family, parents might disagree on these rights, forcing school districts to attempt to mediate familial disputes to avoid legal action.

Finally, if the Bill becomes law, schools would have to individualize their approach to each family based on each parental request. Parents that are more assertive in threatening or enforcing their rights under the Bill will be able to control the educational environment for other families. This has the possibility of creating equity issues for students with families that are less assertive in exercising their rights.