LEGAL UPDATE

TRACY COPENHAVER &
SCOTT KOLPITCKE
COPENHAVER, KATH, KITCHEN & KOLPITCKE, LLC
P.O. Box 839
224 North Clark Street
Powell, WY 82435
(307) 754-2276
(307) 754-4744 fax
lawfirm@ckattorneys.net
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• Transgender Students in Schools
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Since our legal update last year, several courts have issued rulings in cases involving transgendered students.

In addition, the Office for Civil Rights (OCR) issued “guidance” to school districts which directed school districts on how to address issues with transgendered students. This resulted in more litigation.
On May 13, 2016, the OCR and the US Department of Justice issued a “Dear Colleague” letter.

OCR also issued “Examples of Policies and Emerging Practices for Supporting Transgendered Students.”
OCR and the DOJ determined that the letter is “significant guidance”.

According to OCR and DOJ, Title IX of the Education Amendments of 1972 prohibits “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status.”
“As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities...”
OCR and DOJ interpret this to mean that a school “must not treat a transgender student differently from the way it treats other students of the same gender identity.”
According to OCR, Title IX requires that once a student or the parents notify the school administration that the student will assert a gender identity that differs from previous representation or records, the school will begin treating the student consistent with the student’s gender identity.
A student is not required to provide proof of medical diagnosis or treatment, and a student is not required to provide identification documents consistent with their gender identity.

Requiring students to produce identification documents “may violate Title IX”.
TRANSGENDER STUDENTS

“A school’s failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX”.

“...a school must treat students consistent with their gender identity even if their education records or identification documents indicate a different sex.”
“...transgender students must be allowed to participate in such activities and access such facilities consistent with their gender identity.”
TRANSGENDER STUDENTS

Restrooms and locker rooms:

“A school...**must** allow transgender students access to such facilities consistent with their gender identity. A school **may not** require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.”
TRANSGENDER STUDENTS

Athletics:

Schools can sponsor sex-segregated athletic teams when selection for such teams is based upon competitive skill or when the activity involved is a contact sport. A school may not ... adopt or adhere to requirements that rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex or others’ discomfort with transgender students.
TRANSGENDER STUDENTS

THE RESPONSE TO OCR’S LETTER:
-May 16 Press release from Governor Mead.
-May 20 letter from Superintendent Balow to Wyoming superintendents and principals.
-Several lawsuits against OCR, DOJ. In July, Wyoming jointed nine other states in a lawsuit in federal court in Nebraska.
TRANSGENDER STUDENTS

CASES

There are at least 13 different cases pending involving issues of transgender students, gender identity and students.
Texas v. United States: 13 states sued DOJ and DOE in May. In August, the Federal District Court in TX issued an injunction preventing the implementation of the “Dear Colleague” letter.

The Court found that the DOJ and DOE policies violated rule-making procedures because they did not provide for notice and comment.
The District Court in Texas also found that the DOJ and DOE interpretations violated Title IX, and exceeded Congressional authority.

The U.S. has appealed the District Court’s decision to the 5th Circuit Court of Appeals.
TRANSGENDER STUDENTS

*Gloucester County School Board v. G.G.*, 822 F.3d 709 (4th Cir. 2016).

GG attends high school at Gloucester High School in Virginia. He was born as a biological female, and is a transgendered boy.
GG has been diagnosed with gender dysphoria, a medical condition “characterized by clinically significant distress caused by an incongruence between a person’s gender identity and the person’s birth-assigned sex”.

GG underwent hormone therapy, and legally changed his name to a male name.
Before his sophomore year, GG told the school that he was a transgender boy. The school initially allowed GG to use the boys restroom for approximately 7 weeks without incident, until the school district adopted a policy banning him from doing so.

GG and his mom sued the school district in Federal Court, and argued that the school district’s policy violated Title IX, as interpreted by the OCR / DOE. The Federal Court dismissed GG’s claim, and the school appealed.
The 4th Circuit reversed the District Court.

The 4th Circuit found that current law and regulations under Title IX are ambiguous because they do not address transgender students. Therefore, the Court found that OCR’s interpretation of Title IX was entitled to deference.
The school district has appealed the 4th Circuit’s decision to the U.S. Supreme Court. On August 3, 2016, the U.S. Supreme Court granted a stay, allowing the school district to implement its policy prohibiting GG from using the boys’ bathroom. On October 28, the U.S. Supreme Court accepted the case.
Where does this leave us?
- DOJ and OCR interpret Title IX to require deference to a student’s gender identity.
- Federal Court in Texas ruled that OCR’s position violates federal law.
- 4th Circuit Court of Appeals ruled in favor of a transgender student, and upheld OCR’s interpretation.
- Several other court cases pending.
DISCRIMINATION BASED ON SEXUAL ORIENTATION

On June 28, the Equal Employment Opportunity Commission announced a “Landmark Settlement” in one of its first lawsuits involving sexual orientation discrimination.

The business, IFCO Systems, paid $202,200 to settle the lawsuit.
DISCRIMINATION BASED ON SEXUAL ORIENTATION

In the case, a lesbian employee complained that her supervisor repeatedly harassed her by making comments such as “I want to turn you back into a woman” and “You would look good in a dress”. Just days after the employee complained, IFCO fired her.
DISCRIMINATION BASED ON SEXUAL ORIENTATION

EEOC press release announcing settlement:

“Title VII of the Civil Rights Act of 1964 prohibits discrimination because of sex and retaliation. EEOC has concluded that harassment and other discrimination because of sexual orientation is prohibited sex discrimination.”
“Addressing emerging and developing issues, especially coverage of lesbian, gay, bisexual and transgender individuals under Title VII’s sex discrimination provisions, is one of six national priorities identified by EEOC’s Strategic Enforcement Plan.”
Congress has not amended Title VII to specifically include sexual orientation and transgendered people as protected classes.

Wyoming has not amended its discrimination laws to include sexual orientation and transgender status.
DISCRIMINATION BASED ON SEXUAL ORIENTATION

As with the OCR / DOJ, the EEOC has authority to interpret and enforce laws adopted by Congress.
The recent Tenth Circuit Court case of A.M. v. Holms provides some new information and some practical considerations to the use regarding search and seizure situations.

In the appeal to the Tenth Circuit Court of Appeals, two separate lawsuits involving the same student were consolidated.
First incident: The first lawsuit named the SRO, the principal, and physical education teacher as defendants. It arises from an incident in May of 2011 where physical education teacher contacted SRO complaining that student F.M. had been generating fake burps in class, which caused his classmates to laugh and which also interrupted class proceedings.
She requested the SRO to remove the student from the learning environment. He had been previously requested to sit in the hallway but he would stick his head back into the classroom and burp, disturbing the class.

The SRO informed student that he would be arresting student for interfering with the educational process of violation of New Mexico statute and a petty misdemeanor.
Principal imposed a one-day suspension on F.M. SRO, after conducting a pat-down search and handcuffing F.M., transported him to the juvenile detention center. Student did not return to school.
The second incident took place in November of the following school year. A student approached a teacher to report having witnessed a potential drug transaction on campus. The student recounted having seen approximately five other students carrying small baggies containing what appeared to be marijuana. These individuals seemed to be exchanging money for drugs. Though unsure of the observed students’ identities, the reporting student gave . . . a location in the hallway where the incident took place.
Problem: Lack of identity of the students? Would generally knowing who hung out in that area and/or knowing who looked like drug dealers be grounds?

SRO retrieved the school’s security camera footage. Assistant principal recognized the five students involved in the suspicious transaction, which again included student F.M.
The school attempted to contact parents of all students to inform them their children would be searched. All parents were contacted except the school could not reach F.M.’s parent.

Several adults, including the principal, assistant principal, and SRO were present during the search. One of the adults videotaped F.M.’s search and interview using a Lapel camera.
F.M. emptied his pockets and produced $200 in cash, including a $100 bill.

F.M. was asked if he had anything he was not supposed to have. He acknowledged that he had a marijuana leaf belt buckle, which was a violation of the dress code. A search of his backpack produced, among other things, a red bandanna and the belt buckle, both of which items violated CMS prohibition of bandannas, “gang-related clothing and apparel displaying inappropriate messages or symbols”.
F.M., who was wearing several layers of clothing, was asked to partially disrobe and he complied, removing his shoes, jeans, a short sleeve shirt and (a pair of athletic shorts?). He was still wearing a long sleeve shirt and boxer shorts. The additional search yielded no evidence of drugs.
When F.M.’s mother was contacted, she was extremely upset with the school and told them that F.M. left home carrying $200 that morning. F.M. was not disciplined for drug trafficking. F.M. incurred a 3-day in-school suspension for violating the dress code, general disruptive conduct, and gang-related activity. F.M. did not return to school again after November 8, 2011.
SRO was sued for handcuffing student while affecting arrest, asserting a Fourth Amendment violation of his civil rights, asserting a Fourth Amendment violation for search and seizure under both claims and alleged that the second search was in violation of his First Amendment rights because of his public complaints about the way the school handled his first arrest, and further claiming that his Fourth Amendment rights were violated the second time as being an unlawful strip search.
Court findings: Neither the principal nor the assistant principal violated F.M.’s Fourth Amendment right to be free from an unlawful search and seizure. In the Court’s opinion, based on the evidence they had: 1) the search of F.M. was justified at its inception because school administrators perceived “a moderate chance of finding evidence of wrong-doing”; and 2) that the search was conducted in a manner that was reasonably related . . . to the circumstances which justified the search in the first place.
Factors include student report, conduct viewed on the videotape, cash in the student’s pocket, and a marijuana leaf belt buckle, none of which alone likely would have created a reasonable basis for a search.

The Court held that: “There is no need to establish the veracity of an informant” when “there is a sufficient independent corroboration of the informant’s information”.

The Court concluded that “the record demonstrates articulable and particularized indicia of a sufficient probability of wrongdoing by F.M. This plainly satisfies the TLO’s courts controlling formulation of the school search rubric”.
The Court also rejected a characterization of the search as a “strip search”. It said “the video unequivocally shows that F.M. was only prompted to remove outer clothing and that he was wearing additional layers of non-intimate street clothing underneath the removed items. The majority pointed out that F.M. was at all times covered by at least one pair of pants (athletic shorts), one shirt, and underwear”. It said: “The search of F.M. can therefore only be fairly characterized as implicating outerwear even though it involved more than one layer of clothing”.

Interestingly, there was no claim to violation of privacy based upon video taping or removal of outer clothing, apparently because the student was not required to remove his athletic shorts or tee shirt.

If student had been required to remove all clothing but underwear, it is very possible a different interpretation could have been made as to whether it was a strip search. It is not known whether the Court would have found that unlawful.
Plaintiff had also asserted an equal protection claim which was denied because she was not able to demonstrate that F.M. was treated differently from other similarly situated students.

The SRO was not liable for use of excessive force because there was not evidence that F.M. suffered any actual physical or emotional injury, nor was it proven that merely because he was a minor it was inappropriate to use handcuffs.
The Court pointed out that the manner of handcuffing is essential to establishing the claim.

Clearly, the age and manner in which the handcuffs are placed on the student and the manner in which the arrest is handled are factors a court will consider.
Regarding the First Amendment retaliation claim, the majority concluded that the assistant principal had qualified immunity on the ground that there was no evidence that her conduct was substantially motivated by the parent’s exercise of her First Amendment rights. There was no particularized evidence to support the claim for liability.
Lessons:

1. District personnel and SRO should use only such force and action toward students as are reasonable under the circumstances.
2. Students should all be treated equally.
3. The more intrusive the search, the more evidence there needs to be to support the belief that the search will render the object being searched for.

District Court of Appeals upheld the denial of a student’s motion to suppress evidence of a firearm found during a search of the student’s book bag by school resource officer.
The search was based on an anonymous tip. The appellate court’s majority concluded that given the reduced expectation of privacy (back pack), the moderate intrusiveness of the search (only the back pack), and the gravity of the threat (use of a fire arm), and the reduced level of reliability necessary to justify a protective search, the decision to search the student’s book bag was reasonable under the Fourth Amendment.
Generally an anonymous tip will not justify a search.
Ziegler v. Martin County School Dist., 11th Circuit Court of Appeals.

The high school prom was scheduled to begin at 8:00 p.m. and continue until 12:00 a.m. Prom tickets state that no students will be admitted after 10 p.m. Students who desired to attend prom were required to sign a zero tolerance form confirming that no form of tobacco, alcoholic beverages or drugs would be permitted on property owned by the school district and also prohibited any form of profanity.
As a condition of entering the prom, students knew they would be required to pass a breathalyzer test before entering the prom if school officials had reason to suspect they or their guests had consumed alcohol.
Approximately 37-40 students, including guests, arrived at the prom on a party bus. The party bus had been rented from a limo company.

The party bus arrived at the bus at approximately 10:15 p.m. After the students exited the bus, the students were detained and told their bus would be searched. The limo driver consented to give the school a right to search.
A champagne bottle was found on the bus. The bus driver said the champagne belonged to a student passenger. Student passenger stated the bottle did not belong to them.
Comment: There was no reasonable suspicion to search the bus merely because it arrived late or was referred to as “party bus”, however, the search was not of students but rather, of a vehicle owned by another company who consented to the search.
All students were advised they would be detained until they could be breathalyzed.

The only person certified to administer the breathalyzer had already gone home. Because of testing of other students, there was not sufficient breathalyzer testing equipment and staff had to go to another school to obtain additional mouth pieces.
Students were required to stand together and not speak. They stood in the rain for awhile. Some students who got tired of waiting asked to be able to just go home and were not allowed to do so. Students had to wait 45 minutes for the school to get the breathalyzer equipment. Even when students were breathalyzed and found to have no alcohol, they were not allowed to go to the prom; they were not allowed to go home; and were required to stand in line until everyone was tested.
The breathalyzer test of the last student on the bus was completed at 11:55 p.m. 38 students were breathalyzed. All passed with 0.0 blood alcohol content. The students were upset that they were required to miss their prom for what they considered no reason.
School’s rationale for detaining all students was that they did not deem it fair to allow students to go into the prom ahead of others based upon their position in line. The test took 4-5 minutes per student. The lawsuit included a charge of violation of Fourth Amendment search and seizure as well as First Amendment because some students were punished when they became frustrated with the procedure and used profanity. There was a claim of failure to properly train staff and officers regarding the Fourth Amendment.
The Court determined that if the students had arrived prior to the 10 p.m. deadline, it is likely they would not have been searched and suggested that the school could have denied them entrance for arriving late.

The Court held that securing order in the school environment sometimes require that students be subjected to greater controls than those appropriate for adults.
Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.
Students contend they had a legitimate expectation of privacy in the party bus for the duration of the rental, which was from 5:30 until 11:30. The Court, however, determined there was no dispute that the students did not expect additional transportation on the party bus once they arrived at the prom.
Student must establish he/she had a legitimate expectation of privacy in the place searched. In this case, the students had removed all their personal belongings from the bus and none objected when they were told the bus would be searched.

In the public school setting, the State is responsible for maintaining discipline, health and safety and defendants had a legitimate governmental interest in conducting the breathalyzer tests.
With regard to the testing, the Court held: “When government officials need to conduct breathalyzer or urine tests on students, the testing must be accomplished in a reasonably expeditious time period; once exonerated by the test, the student must be free to go.”
Qualified Immunity:
The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.
Comment:
With regard to the students who asserted a First Amendment claim when they were suspended for cursing while waiting on the breathalyzer, the Court concluded that it is a highly appropriate function of the public school education to prohibit the use of vulgar and offensive terms in public discourse. Nothing in the Constitution prohibits the State from insisting that certain modes of expression are inappropriate and subject to sanctions.
First Amendment rights of students must be applied in light of the special characteristics of the school environment. It was perfectly appropriate for the school to make the point to pupils that vulgar speech and lewd conduct is wholly inconsistent with the fundamental values of public school education.
1. Orientation.
   a. Important policies (i.e., bullying, discrimination, FERPA, confidentiality, sexual harassment, computer use).

2. Specific jobs such as custodial, secretarial, or food service, paraprofessionals, all have their own unique issues that substitutes need to be trained on, specifically including 504 issues they may need to be aware of, allergies, emergencies, emergency action plans, etc.
Yes, Calvin?

Miss Wormwood, I'm a fierce advocate of the separation of church and state.

Nevertheless, I feel the need for spiritual guidance and comfort as I face the day's struggles.

So I was wondering if I could strip down, smear myself with paste, and set fire to this little effigy of you in a non-denominational sort of way.

Boy, what a touchy subject!
Kennedy v. Bremerton School District:

In August, former assistant football coach Joe Kennedy filed a federal lawsuit against the Bremerton School District (BSD) after it fired him. BSD fired Kennedy after he continued to pray with students after football games.
After football games, Kennedy would pray at the 50 yard line, and students would often join him. BSD asked him to pray in a private location.

Initially Kennedy complied, and then resumed the practice. When he refused to comply with BSD’s directive to stop, he was placed on administrative leave.
Kennedy filed suit against BSD in Federal Court in Washington. He alleges religious discrimination and retaliation.

BSD’s position: “Employees have a right to private religious observances, but they may not indirectly encourage students to engage in religious activity (or discourage them from doing so), or even engage in action that is likely to be perceived as endorsing (or opposing) religious activity.”
Kennedy sought an injunction against BSD, ordering BSD to stop discriminating against him, and ordering BSD to reinstate him as coach.

In September, the Court held a hearing on that motion, and denied the request for an injunction. Kennedy has appealed to the 9th Circuit Court of Appeals.
RELIGION IN SCHOOLS


For decades, Concord High School in Indiana performed its “Christmas Spectacular” holiday show. The first 60 minutes (prior to the intermission) included secular performances from several bands and choirs.
After the intermission, the show included a segment that ran approximately 20 minutes. That segment, was entitled: “The Story of Christmas” Each of the songs during the segment was a religious hymn, or a song with Christian influence.
A narrator recited portions of the story of Jesus’ birth from the Bible. During the last 12 minutes of the show, a nativity scene appeared, with students portraying Mary, Joseph, shepherds, angels, and three wise men. The nativity scene, with the student performers, remained on stage until the end of the show.
RELIGION IN SCHOOLS

Joe Doe (father) and Jack Doe (student) filed a lawsuit in Federal Court. They sought an injunction preventing the school from using the live nativity scene. They alleged that it violated the First Amendment’s Establishment Clause.
RELIGION IN SCHOOLS

After the lawsuit was filed, the school removed the Bible verse readings, and added songs pertaining to Chanukah and Kwanzaa.

Despite the changes, in December 2015, the Court issued an injunction, preventing the school from including a nativity scene with live performers.
According to the Court, the “nativity scene is emphasized in a manner unlike any other aspect of the show.” The Court noted the disproportionate length of time the nativity scene was on stage, together with other factors, “increased the likelihood that it could be seen as conveying a message of endorsement [of Christianity]”. Thus, the show was likely to violate the Establishment Clause.
The Court held that the addition of the segments on Chanukah and Kwanzaa actually placed greater emphasis on the nativity scene, because of the way they were presented.

The segments on Chanukah and Kwanzaa were much shorter than the Christmas portion, and did not include live performers.
RELIGION IN SCHOOLS

After the injunction, the nativity scene included mannequins instead of live performers, and was on stage for less than two minutes.

In September 2016, the Court ruled that the December 2015 show (after the issuance of the injunction) did not violate the Establishment Clause.
The Court also noted that the school did not present any arguments defending its shows prior to 2015. The Court ordered the parties to supplement the arguments to determine whether the school would resume the show as presented prior to 2015, or cease presenting the old format.
“...it is not per se impermissible to portray a live nativity scene with student performers, so long as the totality of the circumstances of such a performance do not convey an endorsement of religion.”
RELIGION IN SCHOOLS

Holiday programs in December may include religious music and themes, but they should not dominate the program.

It is not necessary to give equal time to each holiday or religion; but a school cannot place disproportionate emphasis on one religion (i.e. including a live depiction of a nativity scene, and not including such a depiction of other holidays).
Electrical media is rapidly replacing verbal communication.

It also has the effect of creating documents, most of which fall under the Public Records Act.
Attorneys have, prior to filing litigation or while contemplating litigation, made requests for public records as a form of discovery in advance of filing litigation.

These requests are extremely broad and expansive, frequently generating thousands of documents.
Responding to these requests can be very onerous, involving numerous staff, considerable time and expense.

All documents generally have to be reviewed by someone to determine if they contain confidential and/or privileged information.
W.S. 16-4-202(d)
Electronic record inspection and copying shall be subject to the following:

1. The reasonable costs of producing a copy of the public record shall be borne by the party making the request. Costs may include the cost of producing a copy of the public record and the cost of constructing the record, **including the cost of programming and computer services.**
What is included as a cost of programming and computer services?
Non-electronic documents. W.S. 16-4-204. Any member of the public may request that he/she be furnished copies, printouts or photographs for a reasonable fee to be set by the official custodian.

Generally this means the actual charge of copying the document.
Remember: In order to legally charge a fee, the custodian of the public record (school district) must first adopt a policy or resolution authorizing the assessment of fees and charges.
W.S. 16-4-204(a)
Nothing in this section shall be construed as authorizing a fee to be charged as a condition of making a public record available for inspection.
Cheyenne Newspapers, Inc. v. the Bd. of Trustees of Laramie Co. School Dist. No. 1.

On February 11, 2014, LCSD#1 received a public records request from the Cheyenne Newspapers, Inc. to inspect “all email on school board topics to, among or from school board members since December 1, 2013”.
The emails exist primarily in electronic records. The newspaper requested that the district make available the email for inspection without cost (they did not ask for copies).
To respond, an IT network engineer had to create a series of computer commands to locate email boxes, filter the results, and output the results into another mailbox for export. The process took several hours of the engineer’s time. In addition, the Superintendent’s executive assistant had to copy emails between board members and with the Superintendent, receive emails from board members from their personal computers, and forward them to IT.
The district advised the newspaper that the records were available for pick-up on a CD and that the charge was $110.00, which the district had expended for 4 hours of IT time.
The newspaper filed a lawsuit and sought an order ordering that the district could not charge plaintiff for any work required to make the requested records available for inspection nor to charge for any copy that the newspaper could make itself of the requested documents.
They also sought an injunction preventing the district from charging for staff time for any future inspection or copying of records other than fees for the actual cost of the CD or paper copies at a cost of not more than $.20 for the CD or $.10 per page for any record of which a copy is requested.
The District Court granted summary judgment to the school district and against the newspaper regarding its requests.

The matter is now before the Wyoming Supreme Court.
The State of Wyoming Department of Administration and Information, in accordance with its rule-making authority, recently adopted “Uniform Procedures, Fees, Costs and Charges for Inspecting, Copying and Producing Public Records”. The rule specifically sets forth procedures to determine when fees will be charged and the amount of fees to be charged. The rule takes a rather liberal view of what constitutes “cost of programming and computer services”.
It is a very good model for a school district policy. We have created a new school district policy modeled after the state rule and regulation for school district consideration which will be disseminated through the WSBA policy service and/or available to other WSBA members on request. It appears that other state agencies are going to adopt the same policy and that anyone objecting to the school district policy would have to essentially argue and prove that the state’s own rules and regulations violate the law.
The School Facilities Department:

Now you see it; now you don’t.
Senate File 92 passed by the 2016 Legislature reorganized the State capital construction entities into a State Construction Department.

This Act combines the construction management program currently within the Department of Administration and Information with the School Facilities Department to create the State Construction Department.
The Act generally provides that all personnel, functions, equipment, funding, contracts and rules of existing entities are transferred to the State Construction Department. Construction-related functions are transferred to the new Department.

The Act provides that the director of the new department will be appointed by the Governor subject to confirmation by the Senate and creates two divisions within the new department: the School Facilities Division, and State Construction Division.
The Governor is given flexibility to move funds and personnel as necessary from the two entities to the new department. The State Construction Department will function as the administrative arm of the State Building Commission (for construction-related oversight) and the School Facilities Commission.
Capital Construction Concern.

1. With decreased revenue, it appears it is likely the State may start providing greater scrutiny to the manner in which districts maintain their buildings and systems and utilize major maintenance funding. Districts should keep track of attempts to modify regulations or procedures to decrease the flexibility of school districts in deciding how to best use major maintenance funding.
2. As a result of the consolidation of the State Capital Construction Department with the School Facilities Department, project managers who were already spread thin may be spread thinner and required to dedicate time to other non-school projects, giving less access to schools.
In expending funds appropriated by the Legislature for projects submitted by the Commission, the school district board of trustees must incorporate a “collaborative committee process” advisory to the board. The statute provides that: “The collaborative committee process for remedy development may include project stakeholders comprised of students, parents, teachers, principals, district administration, school board of trustee members, representative legislators, at-large members of the community, and others.
Although advisory to district boards, the collaborative committee shall assist the boards with informing the respective community and in developing community-based input into project development.
At least one district has come under criticism and allegations that it violated state statute by failing to establish a collaborative committee to advise in site selection for a new school. There is no mandatory appointment process or appointment requirements and what only appear to be suggestions as to who could be on the committee.
Remember to implement the committee process and avoid this issue.
CHANGES TO BIDDING LAWS
FURNITURE / MOVABLE EQUIPMENT
In the 2016 Budget Session, the Legislature amended the law applicable to bidding furniture and movable fixtures.

The former law prohibited bidding specific products, brands or manufacturers.
W.S. 16-6-1001(a)(ii)(A)(I) and (II) now allows state agencies (including school districts) to “specify suggested individual brands or manufacturers, provided that similar products that meet or exceed specifications and that have been approved by the agency shall be accepted as substitute bid items.”
CHANGES TO BIDDING LAWS

However, specified products shall not be bid if they are unavailable to any responsible Wyoming resident suppliers. Such products shall not be used in a bid package that would exclude responsible Wyoming resident suppliers from submitting a bid on the final bid package.
One part of the statute that did not change: Waiver.

These requirements may be waived for furniture or movable equipment upon a written determination that the furniture or movable equipment requirements are so specialized or unique and uncommon that failure to waive the requirement would materially impair the functionality of the project.
AMERICANS WITH DISABILITIES ACT:
THE NEW BATTLE GROUND

ADA
Americans with Disabilities Act
The Council of School Attorneys reports that they have information regarding as many as 350 recent complaints filed with OCR alleging failure to make web sites accessible to individuals with disabilities.
Public entities cannot discriminate against people with disabilities in their programs or activities. That has been interpreted to include websites in the same way that public facilities must be accessible to wheelchairs – even if a school district does not enroll any students who use wheelchairs.
Accessibility means more than just the parts of a district website that are public-facing or accessible by students or families. Districts have seen accessibility concerns raised about Internet web interfaces as well. These might include internal systems that teachers use to submit grades or that are accessed by potential job applicants.
The Department of Education, in its regulations providing guidance on the implementation of the Every Student Succeeds Act, which is the successor to the No Child Left Behind Act, specifically authorized schools to give required notices to the public via their websites for important things such as school report cards or proposed changes in policy. Advocates would like to see specific accessibility language added to those sites.
As of July 2016, OCR has 227 investigations open involving the issue of accessibility of online courses, distance learning, websites, and remote applications. The results of many of those investigations are consent agreements with school districts and states to fix their websites.
The Department of Justice said it was interested in putting out rules on website accessibility. In April, instead of releasing those proposed rules, the Department of Justice withdrew them and said it is seeking more detailed public comment on website and technology accessibility in light of technological advances over the past six years.
A blind parent in Seattle, in partnership with the National Federation of the Blind, sued a school district over its inaccessible website and the district estimated that it would cost between $665,400 and $815,400 to fix the problems, train staff, pay the lawyers, and pay $5,000 in damages to the parent.
Two other school districts, one in Alaska and one in New Mexico, entered into settlement agreements with the Education Department over website accessibility. Both of those districts said they were already in the process of getting new web vendors so they didn’t anticipate substantial additional costs.
Section 508 of the Rehabilitation Act of 1973 requires institutions that receive federal funding, including public k-12 schools, to provide software and website accessibility to people with disabilities.

https://youtu.be/KxhRV18m-d8
Example:
Blind people, those with low vision, and people with other disabilities that affect their ability to read a computer display, often use screen readers and refreshable Braille displays to access the information displayed on a web page. A screen reader is a computer program that speaks the text that appears on the computer display.
A refreshable Braille display is an electronic device that translates text into Braille characters that can be read by touch. Both technologies read texts. They cannot translate images, charts, color-coded information, or other graphic elements on a web page into speech or Braille even if words appear in the image.
Steps that might help make your site ADA compliant:

1. Evaluate your current website.
   - Take a good look at how your current website measures up to accessibility standards. Sometimes significant improvements can be made with simple design tweaks. Other times, a larger scale overhaul is necessary.
2. Add descriptive captions to images.

• Any images on your site need to include all text in the code or descriptive captions. Remember: color-blind people and screen readers cannot differentiate based on color alone. Therefore, do not use color as a navigational tool and add a text equivalent to every image.
3. Audio and video accessibility.

• If your website includes video, provide synchronized captioning and audio Podcasts should include transcripts.
4. Avoid dictating colors and font settings.

- Enable users with low vision to be able to specify the text and background colors as well as the font sizes needed to see web page content.
5. Be keyboard friendly.

- Include headings, lists, and other structural elements. This allows navigation with a keyboard. This is essential for people who cannot use a mouse.
6. Make sure forms and files are accessible.

- Any files on a website such as documents, PDFs, etc. should be accessible for users with screen readers or other assistive technology. They should be able to fill out and submit all forms. Post documents in a text-based format such as HTML or RTF (Rich Text Format), in addition to PDF.

- Text-based formats are the most compatible with assistive technologies.
7. Minimize blinking, flashing, or other distractive features.

- If included, make sure that moving, blinking or auto-updating objects or pages may be paused or stopped.
8. Build in “skip navigation”.

- Include “skip navigation” link to allow users to skip over repetitive elements and get to the main content of the page.
9. Ask the public about accessibility.

• Do outreach to people.

• Ask them: how is our Website? Can you use it? Do you have problems with it?

• This helps identify problems not only for disabled people, but also for non-disabled people in using your website.
Districts should explicitly require that accessibility be a requirement when they are seeking website vendors, however, don’t rush to throw money at consultants expecting them to fix everything and think the problem is solved. Sometimes this sets up the district for a huge bill in consulting services for not a lot of return.
The school district should contact the State Department of Education and ask for their help and financial backing in revamping school websites to comply with accessibility guidelines.
The responsibility is school district-wide.

Is a school secretary uploading a scanned version of a school lunch menu that cannot be read by a screen reader?

Is a history teacher posting inaccessible Powerpoint presentations as study guides for her students?

These people may not think of themselves as Web-content creators, but they are.
HELP.
There are several online resources available that can help you create a more accessible website. Submit your URL to the following website to find out if your existing website is ADA-compliant: http://achecker.ca/checker/index.php

See handout for some available resources.
PROPOSED PLAN OF ACTION FOR ACCESSIBLE WEBSITES:

- Agree that your web page will be accessible and create a process for implementation.
- Ensure that all new and modified web pages and content are accessible.
  - Check the HTML. HTML tags are specific instructions understood by a web browser or screen reader. Make sure accessible elements are used, including ALT tags, long descriptions, and captions as needed.
• If images are used, include photos, graphics, scanned images, or image maps. Make sure to include ALT tags and/or long descriptions for each.
• If you use online forms and tables, make those elements accessible.
• When posting documents on the website, always provide them in HTML or a text-based format.
• Develop a plan for making your existing web content more accessible. Determine which pages should be given high priority for change.

• Ensure that in-house staff and contractors responsible for web page and content development are properly trained.

• Provide a way for visitors to request accessible information or services by posting a telephone number or email address on your Home page.
• Establish procedures to assure quick response to users with disabilities who are trying to obtain information or services.

• Periodically enlist disability groups to test your pages for ease of use.
1. When navigation links are used, people who use a screen reader must listen to all the links before proceeding. A skip navigation link provides a way to bypass the row of navigation links by jumping to the start of the web page content.
2. All images and graphics need to have ALT tag or long description.

3. Use ALT tags for image maps and for graphics associated with the image map so that a person using a screen reader will have access to the links and information.
4. Some frozen images contain content that cannot be described with the limited text of an ALT tag. Using a long description tag provides a way to have as much text as necessary to explain the image so it is accessible to a person using a screen reader but not visible on the web page.
5. Text links do not require any additional information or description if the text clearly indicates what the link is supposed to do. Links such as “click here” may confuse the user.
6. When tables with header and row identifiers are used to display information or data, the header and row information should be associated with each data cell by using HTML so a person using a screen reader can understand the information.

7. A link with contact information provides a way for users to request accessible services or to make suggestions.
Consider adding language to the system’s procurement requests and contracts requiring vendors to provide specific information about the compliance of their products and services with federal laws (such as the Americans with Disabilities Act) and accessibility guidelines, and requiring vendors to indemnify the school system for discrimination complaints resulting from inaccessibility of their products.
PROPOSED LEGISLATION:
STUDENT DIGITAL DATA PRIVACY
Proposed House Bill No. 14T: Student Digital Privacy

In 2016, the Legislature considered a bill to protect student digital accounts. The bill made it a misdemeanor for any school employee or official to ask or require a student to disclose his or her passwords, user names and other information to access that student’s digital accounts. That bill failed, but did pass out of committee with a strong vote in favor of passage.
Proposed HB 14T is a similar bill. It does NOT impose criminal penalties or sanctions.

The bill still prohibits school employees from requiring students to disclose passwords and user names, and also prohibits school employees from requiring students to disclose the content of their accounts, even if they do not disclose the passwords.
The bill also prohibits imposing any disciplinary penalty on a student for refusing to disclose information regarding a digital information account.
A digital information account is defined as “an electronic service or account used to communicate or store digital assets”.

The term “assets” is not defined.

Presumably, “assets” include photos, images and other information ??
The bill does allow a school employee to request or receive WRITTEN or electronic consent from a student if the student is at least 18, or is emancipated, or from the student’s parents to see the contents of a digital information account WITHOUT requiring disclosure of the user name or password.
The bill also allows a student to “self-disclose” a user name or password, if the student has been provided “advance notice that the disclosure is voluntary”.

How does this work if a student voluntarily gives this information to a teacher or principal?
If an employee does access a student digital information account, the bill requires the officer or employee to notify the parent as soon as practical, and in no event more than 24 hours after the content has been viewed or access granted to the account.
Does this open the door to liability? Do school officials have to choose between protecting students from a potential threat (knowing they might be sued) vs. avoiding liability for accessing student digital accounts?
Concerns:

1. The Constitution and case law already define when school officials can search student belongings (reasonable suspicion).
2. Is this being abused in Wyoming? What is the bill trying to fix?
3. State and federal laws require schools to investigate bullying, harassment and intimidation. Parents expect schools to investigate threats of violence if schools become aware of them. This bill unnecessarily hampers the ability of school officials to do their jobs.

4. Legal liability?

5. No exception for imminent threats of harm?
Every Student Succeeds Act
EVERY STUDENT SUCCEEDS ACT

- This legislation replaces No Child Left Behind Act and creates a new course of accountability that will change the way teachers are evaluated and how the poorest performing schools are pushed to improve.
The new law continues the federally mandated requirement for statewide reading and math exams, but limits the time students spend on testing and diminishes the high stakes for under-performing schools. It turns more decision-making power back to the states.
States are given flexibility beyond using testing results to consider additional performance measures, such as graduation rates.
The legislation eliminates the federal mandate opposed by teacher unions that teacher evaluations be tied to student performance on the statewide tests. Districts may still consider scores and performance as factors but are not required to do so.
The bill says the federal government may not mandate or give states incentives to adopt or maintain any particular set of academic standards, such as Common Core.
The bill provides for more transparency about test scores, meaning parents and others in the community will get a better look at how students in their states and in local schools are doing.
The legislation requires that test scores be broken down by race, family income, and disability status. Essentially the changes bar the federal Education Department from telling states and local districts how to assess school and teacher performance.
NEW LEGISLATION:
STATEWIDE STUDENT ASSESSMENT

- House Bill 0019.
Prior law:

• Administer the statewide summative assessment in grades 3-8 in reading and math and in grades 4 and 8 in science.

• Administer a computer adaptive college placement assessment in grade 12.

• Administer benchmark adaptive assessments in reading and math at least twice annually for grades 2-8 and once in grade 1.
New Legislation Modifications:

a. The statewide summative assessment is to be administered in grades 3-10 in English language arts and math, and in grades 4, 8 and 10 in science.

b. Eliminates the restrictions on item types for statewide summative assessment

c. Limits the administration time for statewide summative assessments to 1% of all teacher-pupil contact hours.
d. Requires the statewide summative assessment be comparable to student performance in other states.

e. Requires the Wyoming State Board of Education to secure interim assessments for school districts aligned to the student content in performance standards and the summative assessment that school districts have the option of administering.
f. Eliminates the requirement for administration of the college placement exam in grade 12.

g. Replaces “job skills assessment” with career readiness assessment.

h. Eliminates the requirement for administration of benchmark adaptive assessments by school district.
i. Modifies the Wyoming Accountability in Education Act to reflect the grades and subjects modified by the Act and eliminates performance on the standardized college readiness test in grade 11 from the readiness growth and equity measures of school level performance ratings.
Fair Labor Standards Act
The U.S. Department of Labor (DOL) adopted new regulations defining the exemptions from the minimum wage and overtime requirements.

The regulations revise the “white collar” exemptions, which dictate which employees are exempt from the minimum wage / overtime requirements of the Fair Labor Standards Act.
FLSA CHANGES

In other words, these changes affect whether an employer can pay an employee a fixed salary (exempt), or whether they must pay an employee according to the overtime and minimum wage requirements (non-exempt).
FLSA CHANGES

The major change is to the salary threshold requirement.

The current salary threshold is $455 / week ($23,660). Employees who receive at least this amount, in addition to meeting other specific requirements, qualify for an exemption (professional, administrative, executive, and certain computer employees).
Effective December 1, 2016, the minimum salary threshold requirement will be $913 per week ($47,476 per year) (100%+ increase).

Any exempt employees that are currently paid a salary LESS than $47,476 will NOT be exempt after December 1.
In addition, the salary threshold amount will automatically increase every three years, beginning January 1, 2020. Each update will raise the threshold to “the 40th percentile of full-time salaried workers in the lowest wage Census region”. This is estimated to be $51,168 in 2020.
Compensation for Coaches: An Update

Purdham v. Fairfax County School Board, 637 F.3d 421 (4th Cir. 2011).

Safety and security assistant for school also served as high school golf coach. He sued the school claiming a violation of the FLSA minimum wage and overtime laws.
The school district paid coaches according to minimum wage and overtime requirements for a time after learning of FLSA related litigation against other school districts.

In 2006, the School District decided non-exempt employees could no longer coach, due to complications with documenting coaches’ hours.
In 2007, school decided its coaches were “volunteers”, and abandoned its policy prohibiting non-exempt employees from coaching.

The employee sued the school district, claiming he was not exempt.
Two requirements for “volunteer” exception:

1. The individual receives no compensation or is paid expenses, reasonable benefits, or a nominal fee to perform the services for which the individual volunteered; and
2. Such services are not the same type of services which the individual is employed to perform for such public agency.
The DOL regulations define a “volunteer” as “an individual who performs hours of service for a public agency for civic, charitable, or humanitarian reasons, without promise, expectation or receipt of compensation for services rendered.”

29 CFR 553.101(a).
“Volunteers may be paid expenses, reasonable benefits, a nominal fee, or any combination thereof, for their service without losing their status as volunteers.” 29 CFR 553.106(a).

It is critical that the volunteer offers his or her services “freely and without pressure or coercion, direct or implied, from an employer.” 29 CFR 553.101(c).
FLSA CHANGES

An individual may NOT be deemed a volunteer if the individual is “otherwise employed by the same public agency to perform the same type of services as those for which the individual proposed to volunteer”. 29 CFR 553.101(d).
The determination of whether an employee is a volunteer should take into account the totality of the circumstances surrounding the relationship between the individual providing services and the employer. *Purdham.*
What is a “nominal fee”? Factors in determining whether a given amount is “nominal”:

- distance traveled and the time and effort expended by the volunteer;
- whether the volunteer agreed to be available around-the-clock, or only during a certain specified period of time;
- whether the volunteer provides services as needed, or throughout the year.
The “nominal fee” inquiry should be made by examining the “total amount of payments made ... in the context of the economic realities of the particular situation.”

29 CFR 553.106(f).
A nominal fee should:

1. Not be a “substitute for compensation”;
2. “Must not be tied to productivity”; and
3. “Should be examined by the total amount of payments made ... in the context of the economic realities of the particular situation.”
The coach’s stipend in *Purdham* was $2,114.

The stipend was fixed, regardless of the amount of time and effort.

The amount of the stipend was less than the minimum wage, and considerably less than his wage as a security assistant ($25.69 per hour).
The coach was free to spend as much, or as little time as he chose on coaching activities such as clinics, scheduling off-season activities, try-outs, and reviewing player performance. Therefore, the amount did not compensate for services, and was not tied to productivity.
FLSA CHANGES

Coaches must not receive additional amounts for making the play-offs, winning a championship, or for successful performances.

Have coaches sign a “volunteer” form acknowledging their volunteer status.
The Wyoming Legislature passed Senate File 97 during the 2016 Budget Session, and Governor Mead signed the bill into law.

The law requires the Attorney General to establish a call center to receive “information related to school and student safety issues and assist in the delivery of that information ... to allow for the coordination of local law enforcement, emergency response personnel and school district officials.”
The bill requires that the identity of the parties reporting information shall remain unknown, and states that all records or information related to the operation of the call center are confidential and shall not be a public record.
The bill authorizes the Department of Homeland Security to transfer security funds, and two full-time positions to the Attorney General to comply with this law.
Website:  safe2tellwy.org

Phone number:  1-844-996-7233 (844-wyo-safe)

Safe2Tell Wyoming is also available through mobile apps.

The apps and website allow the reporting party to upload photos and social media posts.
Calls to Safe2Tell are answered 24 hours a day, 7 days a week by Wyoming Highway Patrol dispatchers.

Callers can remain confidential.

WHP dispatchers contact appropriate local law enforcement agency and/or school officials.
State law specifically protects confidentiality of the caller, AND any records generated. Records of calls or reports are NOT subject to the Public Records Act.
What can be reported?

Concerns about fighting, bullying, substance abuse, dangerous behaviors, threats, depression, suicide, self-injury, violence or criminal behavior. People can report behaviors or threats they see or hear in person or online.
Questions and information about Safe2Tell:

Safe2Tell Director: Bill Morse
(307) 256-3532
Fry v. Napoleon Community Schools, 788 F.3d 622 (6th Cir. 2015), on appeal to the U.S. Supreme Court.

On October 31, 2016, the U.S. Supreme Court heard arguments in the Fry case.
Ehlena Fry was born with spastic quadriplegic cerebral palsy. She has a specially trained service dog (Wonder).

Wonder helps Ehlena with her mobility, and assists her with physical tasks such as using the toilet and retrieving dropped items.
The school refused to allow Wonder to be at school. The school reported that the IEP included a human aide who provided one-on-one support.

The school eventually allowed Wonder to come to school for a trial period. At the end of the trial period, the school told the Frys that Wonder would not be permitted to attend school.
The Frys home-schooled Ehlena, and eventually enrolled her in a different district which did not oppose Wonder going to school.

The Frys filed a lawsuit against the school district, alleging violations of the ADA and Section 504 of the Rehabilitation Act.
SERVICE ANIMALS

The District Court dismissed the Frys’ claims on the basis that they did not exhaust their administrative remedies under the IDEA.

The 6th Circuit Court of Appeals affirmed the District Court’s dismissal of the Frys’ claims.

The Frys have appealed to the U.S. Supreme Court.
Note: At one point, the original school apparently objected to Wonder on the basis that some students or staff members may have allergies to dogs, or may be afraid of dogs.

The U.S. Department of Justice, Civil Rights Division, has issued guidance that states: “Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.”
“When a person who is allergic to dog dander and a person who uses a service animal must spend time in the same room or facility, for example, in a school classroom or at a homeless shelter, they both should be accommodated by assigning them, if possible, to different locations within the room or different rooms in the facility.”
The guidance does not suggest what to do if there is no other classroom.

The Americans with Disabilities Act defines a service animal as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability…”

28 CFR 35.104
“Emotional support, therapy, comfort and companion” animals are not service animals as defined by the ADA.

“A public entity shall make reasonable modifications in policies, practices, or procedures to permit the use of a miniature horse by an individual with a disability if the miniature horse has been individually trained to do work or perform tasks for the benefit of the individual with the disability.” 28 CFR 35.136.
SERVICE ANIMALS

There are circumstances when a service animal can be excluded, including if the animal is not housebroken or is out of control and the handler does not take action to control it.

28 CFR 35.136(b).
A public entity can prohibit the use of a service animal if allowing such use would “fundamentally alter” the nature of the service or program.
SERVICE ANIMALS

Wyoming Statute: W.S. 35-13-201:
“Any blind, visually impaired, deaf, hearing impaired person or other person with a disability, subject to the conditions and limitations established by law and applicable alike to all persons: has the same right as an able-bodied person to the full and free use of the streets, highways, sidewalks, walkways, public buildings, public facilities and other public places.”
W.S. 35-13-203 (criminal penalty):

Any person denying or interfering with admittance to or enjoyment of the public facilities enumerated in W.S. 35-13-201 or otherwise interfering with the rights of the blind, deaf, hearing impaired person or other person with a disability is guilty of a misdemeanor and may be fined not more than seven hundred fifty dollars ($750).
QUESTIONS?

Copenhaver, Kath, Kitchen & Kolpitcke, LLC
(307) 754-2276
lawfirm@ckattorneys.net
tracy@ckattorneys.net
scott@ckattorneys.net

WSBA – Legal Services