

**WYOMING SCHOOL BOARDS  
ASSOCIATION  
2018 Convention**

**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](mailto:lawfirm@ckattorneys.net)*

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- Administration of Medication in Schools (Legal Pitfalls)
- Public Records Requests by Out-of-State Entities
- Legal Requirements for the 45-Day Hearing Rule
- Legal Issues Relating to Service Animals in Schools
- Rule Adoption Procedure under the APA
- Legality of Video and Audio Recordings in the Classroom
- School Resource Officer Agreements
- Sexual Orientation and Transgender Employment Discrimination Claims
- Recreation District Legal Requirements



An aspirin a day keeps the doctor away. Can school staff administer over-the-counter medication?

Board Policy, “ Administering Medicine to Students”, JLCD.

# *Assuring Safe Health Care in Schools and Alternate Settings*

Advisory opinion: School Nurses

Approved Date: July 2018

Originating Committee: Practice Committee

<https://nursing-online.state.wy.us/Resources/Assuring%20Safe%20Health%20Care%20in%20Schools%20and%20Alternate%20Settings%202018.pdf>

- The State Board of Nursing states all children could benefit by receiving the support and services of a registered professional nurse to optimize their safety, well-being and capacity for learning (**the irony**).

- It is within the scope of practice of an appropriately trained and competent RN to delegate to unlicensed, assistive personnel (UAP) certain tasks to assure the safest environment and to provide education.

The problem:

Medical care must be provided under the orders of a physician.

*Guidance for the Administration of Medication  
in Alternate Settings*

Advisory opinion: Medication Administration

Approved Date: July 2018

Originating Committee: Practice Committee

<https://nursing-online.state.wy.us/Resources/Guidance%20for%20the%20Administration%20of%20Medication%20in%20Alternate%20Settings%202018.pdf>

1. The American Academy of Pediatrics supports appropriate delegation of nursing services in the school setting. A registered nurse may use delegation as a tool to allow unlicensed, assisted personnel (UAP) to provide standardized, routine health services under the direction of the nurse and **on the basis of provider orders and registered nursing assessment of the unique needs** of the individual person and the suitability of delegation of specific nursing tasks.

? No provider orders for over-the-counter medication ?

The board determined providing education about medication to “friends of the family” (coaches, building secretaries?) is part of basic nursing education curriculum.

It is within the scope of practice of an appropriately trained LPN and RN to administer prescriptions and over-the-counter medications **as ordered by the provider** if the following criteria are met:

- A) There are institutional policies and procedures to guide this practice;
- B) The nurse has completed training and demonstrated continuing competency;
- C) The facility maintains documentation on training and competency for each nurse.
  - 1) If the nurse is providing training to unlicensed, assisted personnel, it is critical that records pertaining to training of those personnel be maintained

D) The medical care is provided **under the direction of a physician, APRN (Advanced Practice Registered Nurse) or PA (physician assistant) who may not be physically on site;**

E) The patient's condition is assessed prior to, during, and after the procedure -- administration to current standards of practice.

Standing orders –  
is that a practical solution?

## Parental consent

Not sufficient to permit an RN to administer even over-the-counter medications (Tums, Tylenol, Benedryl cream)

## Student self-administration

? Violation of student drug policy JICG?  
The possession of substances which are used in such a manner as to be dangerous to the student in any school building, on school grounds or at any school function is prohibited.

The State Board of Nursing, through its practice and education consultant, in an email dated October 22, 2018, stated:

“1) The standard of care for nurses requires all medications (whether over-the-counter or prescription) to have a provider’s order for administration to a patient;

- 2) A parent cannot waive the nurse's responsibility under the standard of care;
- 3) There is an exemption for nurses who need to administer emergency treatment;
- 4) Provider orders must be in a specific format including reason, dosage, time, frequency, etc.

## Resolution of dilemma

1. Have parents get provider orders specific as to the child, even for over-the-counter medication (practical?)

2) When over-the-counter medication would be helpful, have contact information to call the parents, who can come to school and administer the medication (practical ?)

3) Students self-administer so long as parents authorize and it is for a medication that does not violate the student drug policy (substances which are used in such a manner as to be dangerous to the student in any school building)

4) Nurses train other school staff – secretaries, coaches, etc. to administer medication while at school or on school activities.

Revised policy JLCD available.

Requires provider orders or parents to administer.

Optional policy allows for nurses to train staff to administer non-prescription meds without provider orders upon receipt of parent request.



# PUBLIC RECORDS REQUESTS

In the past few years, we have seen an increase in public records requests from non-profit advocacy groups. Some of these groups purport to be acting on behalf of the public.

The requests are often very broad and detailed, and ask for such things as:

- Lists of vendors, dates and amounts paid to vendors.
- Lists of expenses, vouchers, etc.

School boards may charge for copying costs, and for costs related to searching for electronic records.

The school board **MUST** adopt a policy which outlines the fees and costs for records.

There are three options for responses to these broad records requests:

1. Provide the requested records;
2. Send a letter informing the requester an estimate of the cost for the records;
3. Some districts have chosen to ignore the request. (Not recommended).

W.S. 16-4-205: Any person who knowingly or intentionally violates the provisions of this act is liable for a penalty not to exceed seven hundred fifty dollars (\$750.00).

The groups seeking these records will take the expenses out of context, and spin the facts to make it appear as though school district officials are wasting money, or school board members are not paying attention.

For example, expenses for hotels and restaurants outside of Wyoming are legitimate expenses when board members and employees travel to education-related conferences.

But those details do not show up on an expense report. The person requesting the records (and potentially the public) only sees that the school district paid for a dinner in San Antonio, or visits to “Dollywood” or “Fermento’s Beer & Winemaking Shop.”

Employees should understand that receipts and vouchers are public records, and that they need to be aware of the public perception.

Credit card bills: Does the board just pay the bill to the credit card, or does it want to review the itemized expenses?

Does the superintendent or business manager review the bills / invoices?

The Legislature is considering changes to the Public Records Act, including:

- the custodian of records would have to make the records available within 10 business days of receipt of the request, unless good cause exists preventing release within that time.

-each agency or political subdivision designate a person to serve as the “custodian”.

-in a proceeding in district court to determine whether a custodian has good cause to fail to release records within 10 days, the court may award attorney fees, and may order a waiver or refund of fees assessed, if the court finds the agency negligently failed to provide the records.

# **TEACHER TERMINATIONS**

Does 45 days means 45 days?

W.S. 21-7-110(d). “Within five (5) days after selection, the hearing officer shall set the date for hearing and notify the teacher and superintendent of the hearing date, time, and location. **In no event** shall the hearing commence on a date later than forty-five (45) days after notice” of termination/suspension.

Is it the teacher’s right to have the hearing within 45 days? Is it the District’s right to have a hearing within 45 days?

Does neither have the right because it is a statutory mandate?

Can it be commenced and immediately adjourned until a later date?

The Wyoming Administrative Procedures Act, W.S. 16-3-107(g), provides that in all contested cases the taking of depositions and discovery shall be available to the parties in accordance with the provisions of Rules 26, 28-37 of the Wyoming Rules of Civil Procedure.

How that does that impact the 45-day rule?

Can the parties waive the 45-day rule and consent to a continuance?

What are the ramifications?

*Laramie County School District No. 1 v. Kinstler*  
(2015).

On May 10 the parties waived the 45-day statutory deadline for commencing the hearing. The hearing was rescheduled for August 13 and 14. The hearing officer recommended accepting the superintendent's recommendation for termination and the board of trustees accepted the hearing officer's findings on September 17.

The board paid his salary from August 15, 2012 through the date the board acted on the recommendation to terminate him on September 17, 2012.

The teacher demanded salary for the entirety of the following year because the order was not entered until September and he began that year as a continuing contract teacher.

The Court specifically stated that there was an important issue that was not raised by the parties in the appeal regarding the mandatory 45-day deadline to commence the hearing.

The Court agreed with the school district and concluded the teacher was not entitled to his salary for the 2012-2013 academic year and the fact that the district agreed to pay him up through the date of the decision in September did not affect the Court's result.

## SUSPENSION:

In order to keep the teacher out of the classroom pending the termination hearing, the teacher must be suspended.

W.S. 21-7-102(a)(vi)(A)(II) mandates the suspension be with pay pending the outcome of a hearing.

This conflicts with the Supreme Court decision that Kinstler was not entitled to compensation for the 2012-2013 academic year.

W.S. 21-7-106(b). “If ordered by the board under 21-7-110(g), termination under recommendation shall be effective at the end of the school year in the year in which notice of termination is given.”

It would seem that if a hearing were postponed until the following school year, the recommendation was upheld, and the board in its order upholding the recommendation ordered the termination to be effective at the end of the year in which notice was given, there should be no compensation owed for the following school year.

It could be argued that because the termination was effective at the end of the prior year, there was no pay earned that was obligated to be paid under the suspension.

Extension beyond the 45-day period is risky and messy.

Unless the hearing can be scheduled in a time that allows a final board decision prior to the start of the following school year:

- 1) Consider objecting and making sure the objection is clearly reflected to any extension of time beyond the 45-day period and make sure you demand that the hearing start as required by the statute;

2) Alternatively, consider requesting that any consent to waive the statutory deadline (if that is even possible) be based upon an understanding that if the recommendation is upheld, there is no salary owed for the following school year;

3) If you do consent to a waiver and don't have a stipulation, consider whether you will pay salary during the period of the suspension or rely upon the statutory right of the board to make the termination effective at the end of the prior school year, which likely will result in a claim requiring the Supreme Court to settle the conflict between the required pay during suspension statute and the statute allowing the board to make the termination effective at the end of the prior school year.



# SERVICE ANIMALS

*Fry v. Napoleon Community Schools*, 137 S. Ct. 743 (2017). U.S. Supreme Court case decided February 22, 2017.





# Service Animals

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.

After Ehlena's first school refused to allow her to bring Wonder, the Frys enrolled Ehlena in different district which allowed Wonder to accompany Ehlena at school.

The Frys filed a lawsuit against the first school district, alleging discrimination in violation of the ADA and Section 504 of the Rehabilitation Act.

The U.S. Supreme Court found that in some cases, a claim for relief under the ADA and 504 may not necessarily require exhaustion of administrative remedies under the IDEA.

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.

“A public entity shall modify its policies, practices, or procedures to permit the use of a service animal by an individual with a disability.” 28 CFR 35.136(a).

The Americans with Disabilities Act regulations define 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

This includes a physical, sensory, psychiatric, intellectual or other mental disability.

“School districts must make reasonable modifications in policies, practices or procedures to permit the use of a **miniature horse** by an individual with a disability.” 28 CFR35.136(i).

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

Other species of animals, whether wild or domestic, trained or untrained, are not service animals. 28 CFR 35.104.

- No peacocks (Woman denied emotional support peacock on United Flight – January 31, 2018)
- No pigs (a pig was removed from a flight after it became “disruptive” – Nov. 2014).

- No monkeys (Man put on no-fly list after flying with his emotional support marmoset).
- No turkeys (In 2016, a passenger was allowed to fly with his emotional support turkey.)
- No ducks (Woman on flight brought her emotional support duck, named “Daniel Turducken Stinkerbutt.”)

-No hamsters (In Nov. 2017, a passenger claimed that a Spirit Airlines employee suggested she flush her emotional support hamster down the toilet.)

The work or tasks performed by the animal must be directly related to the individual's disability.

For example: an animal can assist a blind student with navigation; or alert a deaf individual to the presence of people or sounds; or assist an individual during a seizure.

School officials may ask an individual who wishes to use a service animal only two questions:

1. Whether the animal is required because of a disability; and
2. What task or work the animal has been **trained** to do.

Questions school officials may **NOT** ask:

Questions regarding the nature or extent of the disability; and

A request that the individual provide a certificate establishing the dog's qualifications.

- Can you require proof of rabies vaccination?

- *Hillsboro (OR) Sch. Dist. 1J (OCR 2012):*

An Oregon school district required a parent-volunteer to provide: a description of the need for the service animal; certifications of training; proof of **vaccinations**; and proof of insurance for injury and damage caused by the animal.

The parent provided a response to the two questions allowed under the regulations – that the animal is required because of a disability, and the task the animal is trained to perform.

OCR found that the school district violated 504 and the ADA when it required the parent to provide “information such as certifications of training, **proof of vaccinations** and insurance...”

“Placing this unnecessary burden on the parent had the effect of subjecting the parent to discrimination on the basis off her disability.”

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).

In addition, the animal can be excluded if it poses a **direct threat to the health or safety** of others.

The school district is not responsible for the supervision and care of a service animal.

28 CFR 35.136(e).

Wyoming Statute: W.S. 35-13-201:

“Any blind, visually impaired, deaf, hearing impaired person or other person with a disability may be accompanied by a service animal in any facility of a public entity in accordance with 28 C.F.R. 35.136 and any place of public accommodation in accordance with C.F.R. 36.302(c).”

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).**

- *Riley v. Sch. Admin. Unit #23*, 67 IDELR 8 (D. N. H. 2016).

The school district did not need to assign a handler so that a student could bring his dog to school. The student needed support to walk. He could not hold his service dog's leash or give verbal commands. As a result, the student could not serve as the handler, and the School did not have to allow the dog.

- *School Admin. Unit #23 (NH), 62 IDELR 65 (OCR 2013):* A student with a seizure-alert dog was entitled to bring the animal to school. Additionally, according to OCR, the district was responsible for training an adult to **command** the dog in the school setting as a “reasonable accommodation for the student.”

*United States v. Gates-Chili Central School District*, 198 F. Supp. 3d 228 (W.D. N.Y. 2016).

Student and parents filed a lawsuit against the school district claiming the school district discriminated against the student because the school district required the family to provide an adult dog handler to accompany the student and service dog.

The Court agreed with the school district that the regulations did not require the school district to provide handling services for the dog.

The Court held that if the only assistance the student requires is to untether the dog, or occasional reminders to give commands to the dog, then the dog is under the control of the student.

On the other hand, if the school personnel must issue commands to the dog, then the student cannot be considered in control of her service dog.

**RULE OR POLICY – DOES IT  
MATTER FOR ADOPTION  
PROCEDURES?**

No, it does not matter whether you call it a policy or a rule, as to whether you must comply with the APA rule-adoption procedure.

Yes, it may make a difference if it is a policy or rule that is not required to be adopted pursuant to the APA. Then board policies generally have an adoption procedure different from an administrative regulation.

The Wyoming Administrative Procedures Act defines a rule as an “agency statement of general applicability that implements, interprets and prescribes law, policy, or describes the organization, procedures, or practice requirements of any agency”.

“Rule” does NOT include “statements concerning only the internal management of an agency and not affecting private rights or procedures available to the public”.

Internal management encompasses a wide variety of topics, including curriculum, schedules, student discipline, employee requirements, employee benefits, etc.

Most policies and rules do not affect the private rights or procedures available to the public.

Arguably, policies that only apply to employees or only apply to students do not implicate the private rights or procedures available to the public.

Rights, however, guaranteed by the Constitution to all persons would clearly seem to be rights available to the public. The First Amendment rights, rights to be free from illegal search and seizure, and other constitutional rights are more likely to be interpreted as rules under the APA.

If a rule, then the adoption of the rule/policy or the amendment or repeal thereof are subject to the procedures mandated by the APA.

No agency rule is valid or effective against persons nor may it be invoked by the agency for any purpose until it has been filed with the registrar of rules and made available for public inspection as required by the Act.

Procedure: Give at least 45 days notice of intended action, including:

- Time, place and location where interested persons may present their views on the intended action
- Statement of the terms and substance of the proposed rule or issues involved.

- If an amendment, a citation to the rule being amended or repealed
- If a new rule, a statement of authority for its adoption
- The place where interested persons may obtain a copy
- A statement that the proposed rule change meets minimum substantive state statutory requirements
- A concise statement of the principal reasons for adoption of the rule.

You must afford all interested persons reasonable opportunity to submit data, views or arguments orally or in writing for a minimum of 45 days from the date of notice of intended action.

In the case of substantive rules, there is an opportunity for an oral hearing if requested by 25 persons or a governmental subdivision.

If requested to do so, the agency must, if requested prior to adoption or within 30 days thereafter, issue a concise statement of the principal reasons for overruling the consideration argued against the adoption.

There are additional requirements for rules adopted to comply with federal law or regulation.

Each agency is required to file in the office of the registrar of rules (county clerk) a certified copy of each rule adopted. State agencies must file within 75 days of adoption. The statute does not give a date for non-state agencies. There is required to be noted on the rule a citation of the authority by which the rule was adopted.

Each rule, amendment or repeal adopted is effective after filing.

Rules governing contested case hearings are required to be adopted and filed as a rule.

Armed Employees. The Legislature in its legislation referred to the requirement that schools adopt rules applicable to arming staff. Did they mean a rule as defined by the APA?

What about searches?

The conservative approach versus the practical approach.



# **VIDEO AND AUDIO RECORDINGS**

Many school districts now have video cameras in school hallways, common areas, and on school buses.

Some schools across the country are considering putting video cameras in classrooms. There are legal concerns and risks to doing this.

FERPA (Family Educational Rights & Privacy Act).

*Bryner v. Canyons School District*, 351 P.3d 852  
(Ct. of Appeals, UT, May 2015).

Parents sought a video of an altercation between their child and other students at middle school.

The school denied the request, citing FERPA.

The Utah Court of Appeals agreed with the trial court that the surveillance video was a “student record” and not subject to disclosure.

The Court agreed with the US Department of Education’s Family Policy Compliance Office that:  
“a parent may only inspect a school videotape showing his or her own child engaged in misbehavior if no other students are pictured.”

The Court ruled that the parent could only inspect the video if:

- 1) The parent obtained the consent of the parents of the other students involved in the altercation; or
- 2) The School District redacted or blurred the images of the other students - at the expense of the parent requesting the video.

W.S. 7-3-702(a): “...no person shall intentionally... Intercept, attempt to intercept, or procure any other person to intercept or attempt to intercept any wire, oral or electronic communication...”

- (b): Nothing in subsection (a) ...prohibits:

(iv) Any person from intercepting an oral, wire or electronic communication where the person is a party to the communication or where one (1) of the parties to the communication has given prior consent to the interception...

Does this effectively restrict audio recordings in classrooms?

- Teacher consent

If law enforcement requests a copy of a video recording, you should advise the officer, deputy or agent you want to cooperate, but you need to consult with legal counsel. If the video constitutes a student record, you will have to tell the officer they need to get a warrant.

- Personally identifiable information retained as a school record ?

If a member of the media or a member of the public requests a video, whether you can release it depends on what the video shows.

The video **MAY** be a public record, depending on the circumstances.

Special education classrooms: ? Confidentiality.  
IDEA and FERPA.

Is a video recording made by a body camera worn by a SRO a student record?

Whose record is it?

W.S. 16-4-203(d): “The custodian shall deny the right of inspection of the following records:

(xviii) Information obtained through a peace officer recording...”

*Newcomb v. Humansville R-IV School District,  
908 SW 2<sup>nd</sup> 821 (1995).*

Teacher was terminated for performance issues, specifically including classroom management. Teacher asserted that the school district caused substantial disruption in her classroom, making it impractical to maintain control in part due to the administrators coming into the classroom and using video cameras which she claims intentionally caused disruption.

The video cameras were used as part of a professional development plan. The videotaping occurred only on three occasions and the Court concluded that there was a status of disorder in her class and that there was not evidentiary support for her claim that the administration intentionally caused disorder.

Occasional use of video camera may be more disruptive than a permanently-based video camera.

Videotaping as part of an agreed-upon professional development plan would seem to seldom form the basis for a claim that the administration substantially disrupted the teacher's classroom.

*Badertscher v. Liberty-Benton School District Bd. of Education*, 29 N.E.3d 1034 (2015).

The Board of Education terminated high school teacher's employment based solely on an incident in which an unsupervised student engaged in misconduct. The trial court overturned the determination.

Teacher taught vocational agriculture and the area where he taught consisted of two rooms: a classroom and a separate room which contained heavy machinery and other tools.

The teacher left his classroom to assist four students who had unexpectedly showed up and requested to take an exam early which required that he set up some machinery. The teacher left his classroom unattended for approximately six minutes, during which a student applied a choke hold or “sleeper” hold to two other students in the classroom.

For one of the students – a special needs student – the hold lasted approximately 47 seconds and caused the student to lose consciousness for 5-10 seconds. When the teacher returned, he was unaware that the choke hold took place. Later in the day, students expressed concern for the health of the student.

Administrators reviewed the surveillance video from the classroom.

The hearing officer ultimately concluded that he saw nothing in the video that rose to a level of good and just cause for termination as the teacher was not aware of the student's misconduct.

There was never any discussion nor issue about the legality of the use of the video camera.

It can be used as evidence of misconduct.

It can be used as evidence to defend a claim against misconduct.

Video cameras are frequently used in special education rooms, and particularly severely disabled or ED rooms. They can be a useful tool for the IEP team to plan interventions, behavior plans, and IEPs.

They could be used and viewed by parents whose children assert mistreatment by staff.

They could and have been used by teachers to defend against claims by students and/or parents of misconduct.

If used for evaluations, there ought to be a clear plan, clear notice to staff and students, and thought as to who will have access to the video, how long the video will be maintained, and how the video will be operated (i.e., for specific class settings, all day, randomly, etc.).

*Doe v. Knox County Bd. of Education.*

ROTC instructor was found liable for damages to a freshman female student. Teacher had arranged for a sleepover at the gymnasium before an ROTC activity that was to begin early the next morning.

There were cameras in the gymnasium.  
The teacher disabled the cameras the  
night of the sleepover.

? Discipline for disabling or interfering  
with cameras ?

Student cell phone video ?

Reasonable suspicion to conclude that it contains evidence of a violation of school policy or law.

## Examples:

Gymnasium camera video footage of P.E. teacher having students climb across monkey bars. Sexual harassment claim.

Video footage of a teacher encouraging students to make a bomb.

Bus video of student misconduct.

Video footage of SRO and teacher  
interrogation of student for child abuse  
charge and for later liability claim for  
alleged assault and battery and improper  
restraint of child.

W.S. 16-4-203(d). The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

(iii) Personnel files (staff discipline video evidence)

(viii) School district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability of any student except to the person in interest or to officials appointed to supervise him (special ed?).

## Special education?

(xi) Records or information **compiled solely** for the purpose of investigating violations of and enforcing internal personnel rules or personnel policies, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.



# SRO AGREEMENTS

School Resources Officers (SRO's) potentially have access to confidential student information.

FERPA regulates and limits the information which schools can share with SRO's, and also limits how SRO's use that information.

FERPA only allows schools to disclose personally identifiable information (PII) to “school officials” with a legitimate educational interest.

Are SRO’s “school officials”?

Yes, **IF** they meet certain conditions. (34 CFR 99.31 and 99.33).

School districts can share PII with consultants or contractors from other agencies if they meet these criteria:

- that party performs a service or function for which the school district would otherwise use employees (i.e. student discipline),

**AND**

-the party receiving the information (the SRO) is under the direct control of the agency or institution with respect to the use and maintenance of education records.

-the information is disclosed on the condition that the SRO will not disclose the information to any other party without consent of the parent.

This means that the SRO cannot release the information to other officers in the police department.

-The SRO must only use the information for the purposes for which the disclosure was made (i.e. to promote school safety and the physical security of students).

The SRO must have a legitimate educational interest (a need to review the record to carry out their responsibility).

SRO'S are NOT “law enforcement units.”

This term has a specific definition under the regulations, and certain conditions are attached to school districts that designate law enforcement units.

The written agreements between the school district and the city / town / county should define the scope of expectations for the SRO, and should define the limits on the SRO's access and use of education records.

Does the school district expect the SRO to:

-enforce local and state laws on school property? Or will the SRO refer those issues to the police department?

-maintain the physical security and safety of the school?

-assist with investigation and discipline of students?

The SRO agreement should be consistent with school district policy.

For example, school district policies generally require parents to be notified before a law enforcement officer interviews a student / suspect for criminal behavior. Student should be interviewed by staff first for discipline.

A city police officer serving as an SRO has jurisdiction to investigate student-related disciplinary matters, regardless of whether the student lives in town / city limits, or outside the limits of the town or city.

**BODY-WORN CAMERAS:** Is footage from a body-worn camera on a law enforcement officer an education record?

Generally, no. Peace officer video recordings are not maintained by school districts, so they are not an education record subject to FERPA.

W.S. 16-4-203(d)(xviii): Generally prohibits the disclosure of information obtained through a peace officer recording (although there are exceptions).

The school district should discuss whether the SRO's body-worn camera should be active or inactive while in the school.

This issue should be addressed both in the SRO agreement, and in the law enforcement agency's policy.

The SRO agreement should prohibit the officer from activating the camera in special education settings.

The agreement should also indicate that if the SRO makes a recording, the school district can obtain a copy of the video recording.

W.S. 16-4-203(d)(xviii)(A):

“The custodian shall allow the right of inspection to law enforcement personnel or public agencies for the purpose of conducting official business or pursuant to a court order.”

Some law enforcement agencies adopt policies which require officers to keep cameras inactive while in sensitive places such as hospitals and schools (with exceptions).

The SRO agreement should state that the law enforcement agency is responsible for maintaining, storing and paying for the body-worn cameras and the recordings.



# SEXUAL ORIENTATION AND TRANSGENDER EMPLOYMENT DISCRIMINATION

- Title VII of the Civil Rights Act of 1964 makes it unlawful for employers to discriminate on the basis of a person's "race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a).
- This law does not explicitly mention discrimination based on sexual orientation, transgender status or gender identity.

Courts have generally interpreted Title VII to not apply to claims of discrimination based on sexual orientation and transgender status.

The EEOC and some recent court decisions have interpreted Title VII to apply to claims of discrimination based on sexual orientation and transgender status.

*Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7<sup>th</sup> Cir. 2017):

An openly lesbian part-time instructor at a community college alleged that she was denied full-time positions, and eventually non-renewed, because of her sexual orientation. She alleged that she was discriminated against on the basis of sex, and her firing violated Title VII.

The 7<sup>th</sup> Circuit acknowledged that its own precedent, and the precedent of other Circuits, have previously accepted as settled law the idea that “Congress had nothing more than the traditional notion of ‘sex’ in mind when it voted to outlaw sex discrimination...” (i.e. Title VII did not apply to discrimination based on sexual orientation).

The 7<sup>th</sup> Cir. noted that the question is not whether the court can “amend” Title VII to add sexual orientation as a protected class. The question is whether discrimination based on sex includes discrimination on the basis of sexual orientation.

- The 7<sup>th</sup> Cir. held that “discrimination on the basis of sexual orientation is a form of sex discrimination.”
- The Court described the plaintiff’s claim as “no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction and policing.”

- “The discriminatory behavior does not exist without taking the victim’s biological sex...into account. Any discomfort, disapproval, or job decision based on the fact that the complainant...dresses differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex.”

“The logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases...”

*Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2<sup>nd</sup> Cir. 2018) (decided February 26, 2018; petition for certiorari pending with the U.S. Sup. Court).

A gay skydiving instructor filed a lawsuit against his former employer, alleging he was fired because of his sexual orientation.

- Like the 7<sup>th</sup> Circuit, the 2<sup>nd</sup> Circuit overruled its precedent, and concluded that “Title VII prohibited discrimination on the basis of sexual orientation ‘because of ...sex.’”
- The Court concluded that “sexual orientation discrimination is motivated, at least in part, by sex, and is thus a subset of sex discrimination.”

- *Bostock v. Clayton County Board of Commissioners*, 723 Appx 964 (11<sup>th</sup> Cir. 2018).
- In May, the 11<sup>th</sup> Circuit summarily affirmed the dismissal of a Title VII discrimination claim based on sexual orientation.
- The 11<sup>th</sup> Circuit declined to review the case *en banc*. This case is docketed for appeal.

- *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, (6<sup>th</sup> Cir. 2018). (Decided March 7, 2018; petition for certiorari pending with U.S. Supreme Court).
- The Plaintiff is a transgendered woman who was fired after she told the owner of a funeral home that she would transition from being a male to a female.

The owner of the funeral home acknowledged that he fired the plaintiff because she was “no longer going to represent himself as a man” and “wanted to dress as a woman”.

The 6<sup>th</sup> Circuit held that the funeral home  
“engaged in unlawful discrimination ...on the  
basis of her sex...”

Quoting a U.S. Supreme Court decision, the 6<sup>th</sup>  
Circuit noted that “Congress intended to strike  
at the entire spectrum of disparate treatment  
of men and women resulting from sex  
stereotypes.”

The Court concluded that the funeral home “discriminated against [the plaintiff] on the basis of her sex, in violation of Title VII.”

The Court also specifically held that “discrimination on the basis of transgender and transitioning status violates Title VII.”

According to the Court, “it is analytically impossible to fire an employee based on that employee’s status as a transgender person without being motivated, at least in part, by the employee’s sex.”

“Here, we ask whether [the Plaintiff] would have been fired if [she] had been a woman who sought to comply with the women’s dress code. The answer quite obviously is no. This, in and of itself, confirms that [the Plaintiff’s] sex impermissibly affected [the Defendant’s] decision to fire [the Plaintiff].”

“Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status...”

In its decision, the 6<sup>th</sup> Circuit also rejected the funeral home's defense that he was protected by his sincerely held religious beliefs.

“...we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under the [Religious Freedom Restoration Act.]”

- “We hold that, as a matter of law, tolerating [the Plaintiff’s] understanding of her sex and gender identity is not tantamount to supporting it.”
- “...as a matter of law, bare compliance with Title VII – without actually assisting or facilitating [the Plaintiff’s] transition efforts – does not amount to an endorsement of [her] views.

At this point, three Circuit Courts have overruled their precedent, and held that Title VII applies to claims of discrimination based on sexual orientation or transgender status.

The 11<sup>th</sup> Circuit affirmed its precedent.

Three of the cases are being appealed to the U.S. Supreme Court.

# RECREATION DISTRICTS

W.S. 18-9-201. Governing body of a school district may establish a system of public recreation as provided by W.S. 18-9-101 and appoint a board of trustees to control, maintain and supervise the properties.

W.S. 18-9-102 provides that the board as established under 18-9-101 shall organize and upon filing the certificate of organization, is a body corporate empowered to sue and be sued.

It is a separate, legal entity in and of itself.

The board may adopt reasonable rules and regulations for the governance of the property within the area.

The recreation board may allocate money and expend funds allocated for recreational purposes (not educational purposes).

A school district may levy up to one mil for a recreation district for facilities and systems of public recreation.

W.S. 18-9-202.

(b) Recreation board shall manage, operate and regulate the recreational systems and may take any steps necessary to ensure the safe, economic and enjoyable operation of the system (not the school board and not school staff).

W.S. 18-9-202.

(c) Any monies accruing from a tax levy made by the governing body (school board) **shall be credited to the board** (recreation board) and may be expended by them for maintenance, improvement, development, operation, management and conduct of the (recreation) system and properties.

As separate legal entities, the school board and the recreation board must respect their separate identities for financial as well as liability reasons. Agreements to share facilities, share or employ staff, need to be in writing and specific.

Recreation boards can't use recreation mil money for non-recreational purposes. Just as school boards can't enter into long-term agreements binding future boards financially, neither can recreation boards.

If the school district is going to provide a facility or is going to provide an instructor, manager, or any other personnel, including maintenance or custodial, there should be an agreement specifying responsibilities and how the school district will be compensated for the use of school district personnel or facilities for non-school public recreational activities.

Recreation boards need to have their own separate insurance or, at a minimum, be included and pay for a rider onto the school's liability insurance.

Recreation boards as public entities should comply with public meetings and public records laws.

There is generally a way to make legal, desired agreements between recreation districts and school districts. They do, however, need to be properly structured and formalized.

# Questions?

Copenhaver, Kath, Kitchen &  
Kolpitzke, LLC  
(307) 754-2276

[lawfirm@ckattorneys.net](mailto:lawfirm@ckattorneys.net)

[tracy@ckattorneys.net](mailto:tracy@ckattorneys.net)

[scott@ckattorneys.net](mailto:scott@ckattorneys.net)

WSBA – Legal Services