WYOMING SCHOOL BOARDS ASSOCIATION
2021 Convention

LEGAL UPDATE

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TRANSGENDER STUDENTS

NEW INTERPRETATIONS,
NEW COURT DECISIONS

TRANSGENDER STUDENTS

On June 16, 2021, the Office for Civil Rights (OCR) published a Notice of Interpretation to clarify its enforcement authority under Title IX over discrimination based on sexual orientation and discrimination.

TRANSGENDER STUDENTS

Title IX prohibits discrimination on the basis of sex in any education program or activity offered by a recipient of federal funds.

OCR enforces Title IX.

TRANSGENDER STUDENTS

The new interpretation is based on the U.S. Supreme Court's decision in *Bostock v. Clayton County*. This case was decided in 2020 under Title VII. The Court ruled that employment discrimination based on sexual orientation or gender identity violates Title VII of the Civil Rights Act.

TRANSGENDER STUDENTS

Based on the US Supreme Court's decision in *Bostock*, OCR now interprets Title IX's prohibition of discrimination on the basis of sex to include discrimination on the basis of sexual orientation or gender identity.

TRANSGENDER STUDENTS

OCR's rationale is that since both Title VII and Title IX prohibit discrimination based on sex, and since the US Supreme Court has held that Title VII prohibits discrimination on the basis of sexual orientation and gender identity, that same interpretation should apply to Title IX.

TRANSGENDER STATUS

Notice of Interpretation:

"…OCR will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance from the Department."

TRANSGENDER STUDENTS.

“This includes allegations of individuals being harassed, disciplined in a discriminatory manner, excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities and other education programs or activities… or otherwise treated differently because of their sexual orientation or gender identity.”

TRANSGENDER STUDENTS

This interpretation is consistent with recent case law.

Grimm v. Gloucester Cty. School Board, 972 F.3d 586 (4th Cir. 2020)

Denied Cert. July 2021 (the U.S. Supreme Court declined to hear the appeal of this case).

Transgender Students

The 4th Circuit Court of Appeals in *Grimm* struck down a school board policy that required students to use the bathroom that corresponded to their “birth assigned sex” (their biological sex).

Transgender Students

Grimm transitioned from female to male in high school. He was initially allowed to use the boys restroom for seven weeks, without incident. The Board adopted a policy requiring students to use the bathroom that corresponded to their birth assigned sex. The policy prohibited *Grimm* from using the boys restrooms.

TRANSGENDER STUDENTS

The school provided single-stall restrooms as an alternative for students with “gender identity issues”.

TRANSGENDER STUDENTS

The School Board also refused to amend their records to show that Grimm was a male, even though Grimm and his parents presented an amended birth certificate from the State of Virginia that reflected that Grimm was a male.

Transgender Students

The Court: “To be sure, many of us carry heavy baggage into any discussion of gender and sex.” Court focused on “fact-based understanding of what it means to be transgender.”

Transgender Students

Citing medical, public health and mental health sources, the Court noted that “Just like being cisgender, being transgender is natural and is not a choice. Being transgender is not a psychiatric condition, and implies no impairment in judgment, stability, reliability or general social…capabilities.”

Transgender Students

The Court noted that while students have a privacy interest in their body, the reality is that when a student goes into the bathroom, they enter a stall and close the door. The Court emphasized that Grimm used the boys restroom for seven weeks without incident, and that the school installed privacy strips and screens between urinals to increase privacy.

Transgender Students

The Court ruled that the school district's policy was not substantially related to the goal of protecting privacy, because privacy in the bathroom did not increase when Grimm was banned from the bathroom. In other words, the school presented no evidence that the privacy of other students was compromised by allowing Grimm to use the boys' bathroom.

Transgender Students

The Court concluded that the school district's "privacy argument is based upon sheer conjecture and abstraction."

The Court also noted that other Circuit Courts have struck down similar policies, and other Circuits have rejected challenges from cisgender students who claimed that sharing bathrooms with transgendered students violated their privacy.

Transgender Students

Describing the harm to Grimm, the Court compared the school district's bathroom policy to racial segregation.

Transgender Students

Relying in part on the Supreme Court's decision in Bostock, the Court held that the Board's policy constituted discrimination based on sex, and violated both the 14th Amendment's equal protection clause, and Title IX.

Transgender Students

The School District appealed this case to the U.S. Supreme Court. In July, the U.S. Supreme Court declined to review the case, leaving the 4th Circuit's decision to stand.

The school district agreed to pay $1.3 million to the ACLU in legal fees for representing Grimm in 6 years of litigation.

Transgender Students

Where does this leave school districts?

Current OCR enforcement and case law generally point to the same conclusion. Any refusal to accommodate a transgendered student's gender identity will likely be viewed as discrimination. School districts should generally allow transgendered students to use bathrooms and locker rooms that conform to their gender identity.

OUT OF DISTRICT, OUT OF MIND: OCR says “No”

Out-of-district placements of special education students can cost the district hundreds of thousands of dollars. Once the student is placed and district agrees to pay the enormous compensation, would you expect the residential facility to assume responsibility for FAPE?

Not so fast.

OCR says no.

1. School district remains responsible for FAPE.
2. School district remains responsible to make sure there the IEP is being implemented and reasonable progress is being made.
3. School district is responsible for discipline and compliance with seclusion and restraint.
4. It is more than nominal involvement (i.e., a representative attends an IEP meeting when and if called).

There are three types of out-of-district placements for which the resident district maintains responsibility for FAPE.

- IEP team placements
- Court-ordered placements
- Medically necessary placements

WDE guidance and legal interpretation of IDEA requirements include: for all three types of placements.

- If utilizing an electronic records management system, add designated residential treatment facility staff members as team members on the system
- Initiate action to develop, review, or revise the IEP
- Schedule a change of placement IEP meeting
- Send Notice of Meeting to required members of the IEP team
- Collaborate with residential treatment facility staff to develop a proposed IEP, ensuring that the IEP is reasonably calculated to enable the student to make appropriate progress, in light of his or her unique circumstances;

- Provide procedural safeguards and an explanation to the parent (s)
- Conduct the IEP meeting
- Write and disseminate the IEP
- Complete and send Prior Written Notice, noting the change of placement
- Evaluate student progress reports to ensure the student is making adequate or expected progress on annual goals. Reconvene the IEP team, as necessary

- Ensure the student receives FAPE throughout the placement
- Obtain consent for evaluation, as necessary. Develop an assessment plan
- Conduct required assessment(s), or arrange with a third party to conduct required assessment(s)
- Accurately report student data for IEP team-placed students on all WDE data collections.

The residential facility can assist with conducting the IEP meeting and writing and developing the IEP, as well as monitoring student progress and working with the district on assessments, but the primary responsibility remains with the district.

Court-ordered placements.

This is even a more difficult scenario due to rules and regulations such as are applicable in the boys' or girls' schools where students are sent for juvenile-related issues. Nevertheless, the responsibility as stated in the prior slide, remains with the district, which can be difficult to implement.

Districts are required to be given notice prior to such court-ordered placement and to be represented on the multi-disciplinary team. The representative of the district on that team is to be a member of the child's IEP team.

The representative on the child's multi-disciplinary team is responsible for making sure that the placement being considered by the Court has the resources and expertise to implement the child's IEP.

In the placement order, the Court is required to declare the child's school district of residency as it deems in the best interest of the child. If the order does not so specify, the school district of residency shall be where the child's parents reside.

Medically necessary placements.

When a parent places a child in a psychiatric residential treatment facility (PRTF) and the WDE has determined that the placement is medically necessary under W.S. 42-4-103(a)(xvi), the residential district maintains primary enrollment of the student and responsibility for FAPE.

The residential district must within seven (7) days of receiving notice of the PRTF notify the PRTF of the manner in which educational services will be provided.

If the district provides services or contracts with another district to provide services, the district continues to count the student in its ADM.

If the PRTF provides educational services, the resident district must eliminate the student from ADM.

Student Free Speech

Social Media New Guidance

Longstanding Principles

- Neither students nor teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. (*Tinker v. Des Moines*, 393 U.S. 503 (1969)).
- The classroom is a marketplace of ideas. "The Nation's future depends upon leaders trained through exposure to that robust exchange of ideas". (*Tinker v. Des Moines*, 393 U.S. 503 (1969)).
- At times when the student's parents cannot guide or discipline them, schools stand *in loco parentis*, or in the shoes of a student's parents. (*Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986)).
- Courts must apply the First Amendment rights of freedom of speech and expression in the context of the special characteristics of the school environment. (*Mahanoy Area. Sch. Dist. v. B.L.*, 141 S.Ct. 2038 (2021)).

Tinker v. Des Moines: The Traditional Framework

- In 1965, small group of students demonstrate objections to Vietnam War by wearing black armbands to school.
- School administration adopted policy that students would be asked to remove their armband and, if student refused, they would be suspended until willing to return to school without armband.
- United States Supreme Court determined school policy violated the students' First Amendment Rights.

Mary Beth and John Tinker

Tinker v. Des Moines: The Traditional Framework

- The First Amendment protects the rights of students to express personal views at school, unless it is shown that their speech:

1. Materially disrupts school, ***or***
2. Interferes with the rights of other students, ***or***
3. That school officials can demonstrate reasonable grounds to forecast such material disruption or interference.

Tinker v. Des Moines: The Traditional Framework

1. **<u>"Materially Disrupts School"</u>**

- A student's personal speech does not become "disruptive" and subject to prohibition merely by attracting the attention or disagreement of fellow students or other members of the school community.

Tinker v. Des Moines: The Traditional Framework

3. **“That school officials can demonstrate reasonable grounds to forecast such material disruption or interference”**

- To meet the “reasonable expectation” standard, school officials must identify specific facts that lead them to reasonably predict substantial disruption or material interference. Remote or unsubstantiated apprehension of disturbance won’t do.
- School officials may not ban a student’s personal expression if their forecast of disruption is based only on generalized concern that the speech may give offense.

Legal Update: *Mahanoy Area Sch. Dist. v. B.L United States Supreme Court (2021)*

- Student did not earn a spot on her school's varsity cheerleading squad or her preferred softball position on her school's softball team.
- During the weekend, while at a convenience store, B.L. and her friend posted a Snapchat story on B.L.'s Snapchat account.
- Snapchat story showed the friends with middle fingers raised and with the caption: "F*** school f*** softball f*** cheer f*** everything."
- B.L. was suspended from the junior varsity cheerleading squad for using profanity in connection with a school extracurricular activity.

Photo by Danna Singer of the Washington Post

Legal Update: *Mahanoy Area Sch. Dist. v. B.L*

- The United States Supreme Court was asked to decide whether *Tinker* applied to off campus student speech.
- Outlined three considerations that diminish school's ability to regulate off campus speech:

1. Schools rarely stand *in loco parentis*, falls to parental control;
2. If schools could regulate both on and off-campus speech, that includes all speech a student utters in a 24-hour day, particularly problematic regarding political and religious speech; and
3. Schools are "nurseries of democracy" and have an interest in protecting unpopular expression, especially when it takes place off-campus.

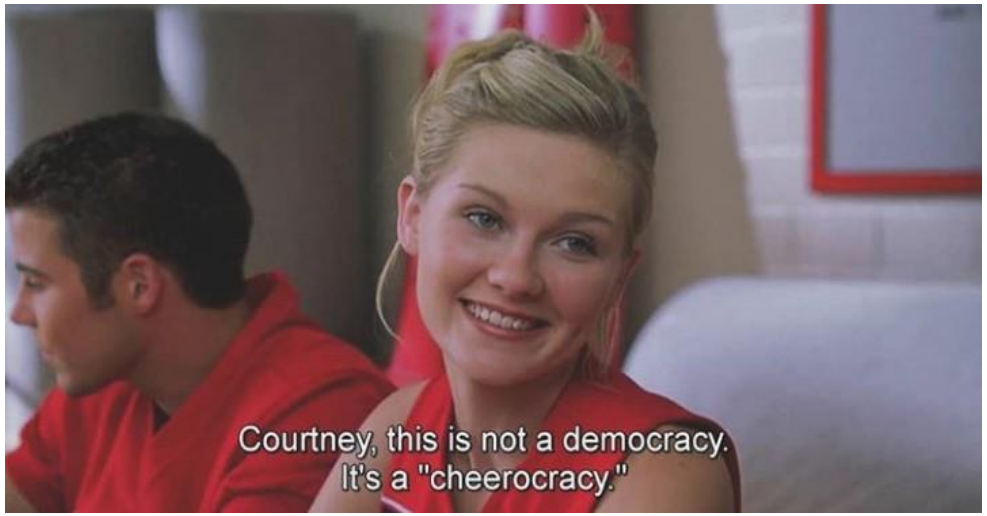
Legal Update: *Mahanoy Area Sch. Dist. v. B.L*

- The Court found the school violated B.L.'s First Amendment Rights:

1. Her speech did not rise to fighting words or obscenity;
2. Occurred outside school hours, off campus;
3. The school did not stand *in loco parentis*;
4. She did not target the school or individual members at the school;
5. The speech was transmitted on her personal cell phone;
6. The audience was only her circle of Snapchat friends; and
7. Did not cause a "substantial disruption" of school activity or threaten harm to the rights of others as outlined in *Tinker*.

Legal Update: *Mahanoy Area Sch. Dist. v. B.L*

"Our representative democracy only works if we protect the 'marketplace of ideas.' This free exchange facilitates an informed public opinion, which, when transmitted to lawmakers, helps produce laws that reflect the People's will. ***That protection must include the protection of unpopular ideas, for popular ideas have less need for protection***." (emphasis added).



Legal Update: *Mahanoy Area Sch. Dist. v. B.L*

- What *Mahanoy* DID NOT do:

1. Did not provide a definition of “off campus speech”.
2. Did not create general rule for when off campus speech must give way to a school’s need to prevent substantial disruption of learning-related activities or to protect individuals in the school community (only outlined the three considerations).
3. Did not overturn *Tinker*.

Legal Update: *Mahanoy Area Sch. Dist. v. B.L*

- The Court recognized instances that may trigger a school's regulatory interest in off campus speech:

    1. Serious or severe bullying or harassment targeting individuals;
    2. Threats aimed at teachers or other students;
    3. Failure to follow rules concerning lessons, writing of papers, use of computers, or participation in online school activities; and
    4. Breaches of school security devices.

Pending Case: *C.G. v. Siegfried* *Colorado Federal District Court* (2020)

- The Colorado Federal District Court issued its decision before *Mahanoy* was decided.
- The case is currently on appeal to the 10th Circuit Court of Appeals.

Pending Case: *C.G. v. Siegfried* *Colorado Federal District Court* (2020)

- On a Friday evening, four high school friends were at a thrift shop.
- One of the students took a picture of the friends wearing wigs and hats, one which looked like a World War II helmet.
- Student posted a Snapchat story of the picture with the caption **"Me and the boys bout to exterminate the Jews."**
- Members of the Jewish community contact police and the school indicating students were afraid to return to school.
- Student was initially suspended and later expelled.

Pending Case: *C.G. v. Siegfried* *Colorado Federal District Court* (2020)

- The Court found that applying *Tinker* to off campus speech properly protected both students' constitutional rights and the evolving nature of the school environment.
- "Social media has become part of [the school] environment, whether its engagement is on-or off-campus."
- Relied on *Tinker*'s foreseeable, substantial disruption requirement .
- Found it must be expected that most social media use will reach campus.
- The post was materially and substantially disruptive because it interfered with the school's work and collided with the other students' right to be secure.

Pending Case: *C.G. v. Siegfried* *Colorado Federal District Court* (2020)

- C.G. appealed the Colorado Federal District Court's decision to the 10th Circuit Court of Appeals.
- The National School Board Association authored an *amicus* brief in support of the administration; the Wyoming School Board Association joined that *amicus* brief.
- The *amicus* brief argues that *Mahanoy* did not overturn *Tinker* and that the District Court's decision should be upheld.
  - Unlike *Mahanoy*, the social media post in this instance targets a traditionally persecuted group and threatened violence.
  - *Decision pending

POLITICAL SPEECH IN SCHOOLS:

A NEW ERA

What if a staff member wears a shirt to school that says:

“Protect our borders:

or

“Trump is a bigot”?

What if an employee wants to hang in their classroom a Gay Pride banner or flag?

What if they want to post a sign that says “Black Lives Matter”?

What do you do when a staff member chooses to utilize a substantial amount of class time to criticize the policies of our federal government, such as FMLA leave being unpaid?

ACADEMIC FREEDOM

Policy Update

Paragraph added:

Speech on political issues and candidates can be highly controversial and divisive. The school and staff while fulfilling duties as a school district employee, will retain the position of neutrality on political issues and candidates and respect the varying viewpoints of the public.

See policy GBIB.

Policy GBIB, Political Campaigns/Activities.

This policy establishes guidelines for the participation of students and employees in political campaigns, partisan or non-partisan election activities, and distribution of political or partisan material.

Requires neutrality as to all political campaigns and issues, recognizes the rights of staff to participate in political campaigns and political issues outside of school and the right of students to pursue an education conducted in a suitable academic environment free from disruption.

Employees while acting in the capacity of a school district employee, shall not engage in any political activity during the school day, during work hours, or at school activities, including conversations with intent to persuade, distributing or displaying political materials or wearing any garment or apparel that is considered political or partisan in nature.

Distribution of political materials is governed by policy GBIA. The policy designates school facilities as non-public forums. It allows for temporary designation of facilities for public forum debate upon approval of the Superintendent and subject to reasonable time, place and manner restrictions and ensuring equality of treatment of all candidates and issues if a public forum is created.

Policy GBIA, Distribution of Non-School-Sponsored Material on School Premises by Students and Employees.

Purpose is to protect the exercise of students' and employees' free speech rights, taking into consideration the educational objectives and responsibilities of the school district.

Non-school-sponsored material includes all material or objects intended for distribution except school newspapers, employee newsletters, literary magazines, yearbooks, and other publications funded and/or sponsored or authorized by the school. Examples of non-school-sponsored material include leaflets, brochures, buttons, badges, flyers, flags, petitions, posters, and underground newspapers, whether written by students or employees or others, and tangible objects.

The policy designates certain material as prohibited for distribution, including material that is obscene, libelous or slanderous, advocates violence or other illegal conduct, etc.

The policy sets forth provisions for time, place and manner of distribution restrictions.

Distribution which is regulated includes dissemination of material by means of handing out free copies, selling or offering copies, posting or displaying material or placing material in internal staff or student mailboxes.

Sexual Har 

re Than Training

In looking back as to what districts have done since the new Title IX regulations were implemented and significant training has been provided, there is still work to do.

Update your website. You must provide the Title IX Coordinator information as well as a link or manner in which a district staff member can be contacted for access to the Title IX training materials. Many districts have still not complied with this.

Train “ALL”

Despite the training, we are still finding administrators who don’t stop to consider that a student or parent complaint may constitute a Title IX and attempt to conduct a hurried investigation and make disciplinary decisions contrary to your policy. Remind administrators that is not consistent with your policy.

Not all complaints, even if there is a sexual component, constitute a Title IX violation. The definition of sexual harassment under Title IX requires the conduct to be severe, pervasive and objectively offensive and effectively deny a person equal access to the school's educational program or services.

That, however, does not mean remedial action and/or disciplinary action is not taken. Similarly, the victim may insist that a formal complaint not be filed or pursued.

An ounce of prevention is worth a pound of cure $$$$.

Doing nothing is not an option, even if the reported incident does not amount to sexual harassment under Title IX or the victim insists that a formal complaint not be filed or investigated. The district cannot do nothing. In order to preserve as an affirmative defense against a sexual harassment claim, the district will be required, even if a Title IX investigation is not mandated but a Title VII sexual harassment claim is filed, to show that it took prompt, effective, remedial action.

“I don’t want to file a complaint”.

Teacher and student spending too much time together. Law enforcement took over the investigation. Initial investigation did not support the charge.

Victims who report but don’t want an investigation have to be informed that the district has to look into it and will do whatever is required to prevent retaliation.

Where there is smoke, there is fire. Recent litigation and/or threatened litigation included conduct allegedly initiated with teachers meeting behind closed doors with a student.

Always talk to the involved parties and document that both confirm there is nothing inappropriate. Don’t just speak to the staff member.

Follow up is required. In most cases you can use other policies such as bullying or harassment, or even if there is not a specific policy, inappropriate conduct should never be tolerated.

Take supportive measures.

Communicate with the student and parents what the district is doing. Even if investigation is taken over by outside authorities, communicate what precautions the district is taking to avoid further possibility of misconduct.

School Board Meeting Disruptions

https://youtu.be/C2dj59Db1C4

FACE MASKS

COVID: MANDATES, PROTOCOLS, LIABILITY AND….CONFUSION!

COVID ISSUES:

-Recommendations / Guidance

-Liability Issues

-Exemptions (Medical and Religious)

-OSHA Vaccine Mandate ETS

FEELING THE PRESSURE?

“I’ll sue you if you don’t do more to protect my health / my student’s health”.

“I’ll sue you if you make my student wear a mask”.

There are lawsuits all over the country (including in Wyoming) against school districts on these and other COVID-19 related issues.

STATE AND CDC GUIDANCE

Anybody with symptoms of COVID (or other infectious illness), and anybody who tests positive for COVID should stay home for 10 days.

Close contacts: Fully vaccinated close contacts do not need to quarantine at home after an exposure, but should wear masks.

CDC recommendations (continued)

Close contacts who are not fully vaccinated should get tested, and should quarantine for 14 days after exposure, subject to alternatives to shorten the quarantine to 10 or 7 days if combined with testing and a negative test result.

REALITY: Districts in Wyoming and around the country have adopted variations of these guidelines, trying to find a balance between protecting students and staff from COVID, and trying to keep kids in school.

Can school districts be liable for a person who claims they were infected by COVID at school?

W.S. 35-4-114(d): Provides immunity for entities from liability for damages in an action involving a COVID-19 liability claim unless the person seeking damages proves that the entity took actions that constitute gross negligence or willful or wanton misconduct.

In addition, any acts or omissions constituting the basis for a COVID-19 liability claim must be proven by clear and convincing evidence.

This is a higher burden of proof that the plaintiff must prove to succeed on their claim.

What constitutes “gross negligence or willful and wanton misconduct” in the context of a pandemic?

In addition, the Wyoming Governmental Claims Act provides general immunity for government entities in Wyoming from tort claims.

REMINDER: CHECK YOUR LIABILITY COVERAGE. IS THE COVERAGE CONSISTENT WITH THE GOVERNMENTAL CLAIMS ACT?

Even if the plaintiff in a damages claim survives the immunity defenses, they have to prove by clear and convincing evidence that the harm they suffered was caused by the school district's gross negligence.

In other words, the plaintiffs have to prove that they were infected while at school, and that the school district's gross negligence caused it.

Can school districts be liable for mandates or protocols (masks, quarantines, etc.)?

-School districts are being sued for NOT adopting mandates (especially by students who have medical conditions which placed them at higher risk of infections).

-School districts are being sued for adopting mandates and protocols.

Issue will be decided by the courts.

Opponents of school mandates argue that they violated Wyoming Constitution and statute.

Article 1, Section 38:

- (a) Each competent adult shall have the right to make his or her own health care decisions. The parent, guardian or legal representative of any other natural person shall have the right to make health care decisions for that person.
- . . .
- (c) The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect the health and general welfare of the people or to accomplish the other purposes set forth in the Wyoming Constitution.

However, the Wyoming Constitution also requires schools to provide students with a safe environment for an education:

“There is little doubt that the safety and welfare of students in the state are of utmost importance. Article 7, Sec. 9 of the Wyoming Constitution requires that the legislature create and maintain ‘a thorough and efficient system of public schools’”.

"…implicit within the constitutional guarantee of "a thorough and efficient system of free schools" is the need for a safe and secure school environment. A school cannot fulfill its basic purpose of providing an education without such an environment."

RM v. Washakie County Sch. Dist. No. One (2004).

The Wyoming Legislature has delegated to school boards broad authority to:

“Prescribe and enforce rules, regulations and policies for its own government and for the government of the schools under its jurisdiction.”

The Wyoming Supreme Court has recognized the broad authority of local school boards to adopt rules and regulations, and has recognized that students' rights to attend school are subject to the conditions :

"Educational services are provided with reasonable conditions because the Wyoming constitution requires that ***all*** students receive an equal opportunity to a quality education." (RM v. Washakie Co. Sch. Dist. No. One).

“The actual receipt of educational services is accordingly contingent upon appropriate conduct in conformity with state law and school rules.”

In other words, a student's right to attend school is not unconditional. School boards can adopt regulations and impose conditions on students because of the obligation to provide a safe education for ALL students.

Several courts in other states have already ruled in favor of school districts in lawsuits seeking to overturn school district mask mandates and protocols.

The courts will decide the extent of the board’s authority to adopt mask mandates and quarantine protocols.

Exemptions.

Medical exemptions to mandates should be considered. If a staff member or student has a medical condition which may result in health problem from complying, and is documented by their health care provider, you may have to find an accommodation.

Religious exemptions:

Staff or students may request a religious exemption based on 1) the First Amendment to the U.S. Constitution (the “free exercise” clause); and 2) Title VII of the Civil Rights Act (which prohibits discrimination on the basis of religion).

Religious exemptions must be based on a “sincerely held religious belief”.

What is a sincerely held religious belief?

29 CFR 1605.1: “In most cases whether or not a practice or belief is religious is not at issue. However, in those cases in which the issue does exist, the Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views.”

“The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee…”

In other words, even if an employee does not belong to an organized religious faith or group, or if their beliefs are inconsistent with the group to which they belong, that does not necessarily undermine their "sincerely held religious belief."

In many cases, it will be very difficult to question an employee's sincerely held religious belief.

The law requires employers to reasonably accommodate the religious beliefs of the employee, unless the employer demonstrates that the accommodation would result in an undue hardship to the conduct of its business. (29 CFR 1605.2).

The courts have provided conflicting decisions on whether denying religious exemptions violated the Constitution and Title VII.

Consult legal counsel regarding religious exemption requests.

OSHA VACCINE MANDATE

On November 5, OSHA adopted an “Emergency Temporary Standard” (ETS). The ETS requires employers with more than 100 employees to require their employees to get the COVID-19 vaccine.

The OSHA rule is 490 pages.

Does this apply to public entities, including school districts, in Wyoming?

Wyoming is one of 22 states with an approved state plan. The plan was approved in 1974. For the plan to be approved by OSHA, it has to be at least as effective as the Federal law.

Because Wyoming has an approved state OSHA plan, that means that it generally applies to both private and public employers.

BUT…

Wyoming has not yet adopted the new ETS. Wyoming has thirty days from the date of the new rule to adopt it.

Will Wyoming adopt the new rule?

If Wyoming does not adopt the new rule…then what?

Best Holdings v. OSHA (5th Circuit Court of Appeals):

On November 6, 2021, the 5th Circuit granted an emergency stay against the enforcement of the ETS.

The Court cited “grave statutory and constitutional issues with the mandate.”

The stay has nationwide effect.

The mandate is currently NOT enforceable in Wyoming.

Federal Department of Transportation

New Regulations

DRUG & ALCOHOL
CLEARINGHOUSE

New Department of Transportation regulations relating to drug and alcohol testing of bus drivers now mandates reporting to and checking the Clearinghouse regarding bus driver drug and alcohol incidents.

CDL Drug and Alcohol Clearinghouse creates a central report of violations of the U.S. Department of Transportation's controlled substance and alcohol testing program for holders of CDLs. School districts are required to comply with Clearinghouse federal regulations under 49 C.F.R. 382, subpart (g).

District is responsible for checking the Clearinghouse for violations before hiring a prospective CDL driver.

The applicant CDL driver must create an account with the Clearinghouse and grant electronic consent through the Clearinghouse for the district to access it.

Districts are to check the Clearinghouse annually for violations by all currently employed CDL drivers. The annual check requires a limited query preceded by a signed, written, time-framed specific consent from the CDL driver.

The school district may outsource both pre-employment and annual Clearinghouse inquiries but responsibility remains with the district and the district is liable for compliance by the vendor.

District may not allow a driver to perform any safety-sensitive function, including driving commercial vehicles, if the results of a Clearinghouse query demonstrate that the driver has a verified positive, adulterated, or substituted controlled substance test result; has an alcohol confirmation test with a concentration of .04 or higher, has refused to submit to a test, or that an employer has reported the driver used alcohol on duty, before duty or after an accident, or used controlled substance in violation of applicable federal regulations.

There is a 3-year record retention period for each query and all information received in response thereto.

WSBA optional policy EEAEB, Drug and Alcohol Clearinghouse, sets forth a very detailed policy with Clearinghouse requirements, including reporting, records retention, and driver consent requirements.

Reporting requirements are extensive and set out in detail in that policy, as are the Clearinghouse registration requirements set forth in that policy

WSBA also has an optional regulation EEAEA-R which can be a regulation adopted in conjunction with your transportation personnel mandatory drug and alcohol testing policy which simply incorporates the requirement to comply with the Clearinghouse regulations without going through them in detail, but clearly puts district staff on notice of the obligations to familiarize themselves with those regulations and comply. That modified regulation does not set forth the actual requirements like the separate policy.

Questions?

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