

**WYOMING SCHOOL BOARDS
ASSOCIATION**

2022 CONVENTION

LEGAL UPDATE

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Agenda:

1. *Public complaints re: library books and curriculum materials*
2. *Recent litigation regarding free speech at board meetings*
3. *What to tell or not tell parents about student transgender status*
4. *Executive sessions: a refresher*
5. *CoVid litigation update*
6. *Prayer at school activities*
7. *New proposed Title IX regulations*
8. *Teacher Dismissal: Recent Wyoming Case*

COMPLAINTS ABOUT SCHOOL LIBRARY BOOKS

What authority do boards have to remove books from libraries?

Are there legal or constitutional limits on boards when considering book challenges?

Bd. Of Educ. v. Pico, 457 U.S. 853 (1982).

Board of Trustees of N.Y. school district attended a conference of a politically conservative organization of parents, where they obtained a list of “objectionable” books.

The board then directed the removal of nine books from the library. The press release described the books as “anti-American, anti-Christian, anti-[Semitic], and just plain filthy.”

The board then appointed a committee to recommend whether the books should be retained, taking into account the “educational suitability,” “good taste,” “relevance,” and appropriateness to age and grade level.”

The committee recommended keeping five of the books, and removing two books. The committee could not take a position on one book, could not agree on two, and recommended one be age restricted.



The board rejected the committee's recommendations, and decided that only one book should be returned to the library, and one should be available with parent approval. The board gave no reason for rejecting the committee's recommendation.



Issue: Does the First Amendment impose any limitations on the district's discretion to remove books from the school library?

The Court recognized that “local school boards must be permitted ‘to establish and apply their curriculum in such a way as to transmit community values,’ and that ‘there is a legitimate and substantial community interest in promoting respect for authority and traditional values...’”



“...however, we have necessarily recognized that the discretion of the States and local boards in matters of education must be exercised in a manner that comports with the First Amendment.”

“...we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.”

“...[School] officials cannot suppress ‘expressions of feeling with which they do not wish to contend.’ (quoting *Tinker*).



“...the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.”

“...we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”

“This would be a very different case if the record demonstrated that the [Board] had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record ...suggests the exact opposite.”



The Court reversed the District Court's grant of summary judgment for the school district, and remanded for a trial.

This was a plurality decision – there was no majority.

Multiple circuit courts of appeal and district courts have followed the Supreme Court's reasoning to reach similar results (including the 11th Circuit and 5th Circuit).

ACLU of Fla., Inc. v. Miami-Dade County Sch. Bd., 557 F.3d 1177 (Eleventh Cir. 2009).

The 11th Circuit upheld a board's removal of a book about Cuba because the book contained factual inaccuracies, including critical omissions about Cuba.

Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184 (Fifth Circuit, 1995).

The school board removed a book called “Voodoo & Hoodoo” which described the history and evolution of voodoo and hoodoo in African American communities in New Orleans.



The book included spells, tricks and hexes.

Despite two committee decisions to keep the book, the board voted to remove the book.

The key factor is the board's motivation in removing the book.

The 5th Circuit reversed the District Court's grant of summary judgment for the school district, and remanded for a trial.

Parents, Families & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888 (2012).

School District internet filter systematically blocked websites that expressed a positive viewpoint toward LGBT issues.



The filter categorized websites with negative views toward LGBT issues in its “religious” category, and did not block them.

The filter categorized websites with positive views toward LGBT issues in its “sexuality” filter, and blocked them.



The court found that the district's internet filter discriminates based on viewpoint, and that the district was engaging in intentional discrimination based on viewpoint.

The Court granted the plaintiff a preliminary injunction, and ordered the school district to discontinue its internet filter system as currently configured.



Policies:

WSBA Model Policy IJL: Library
Materials Selection and Adoption





The policy lists several responsibilities for the school library. Among those:

“To provide materials on opposing sides of controversial issues so that young citizens may develop, under guidance, the practice of critical reading and thinking.”

- “To provide materials representative of many religious, ethnic, and cultural groups and their contributions to our American heritage.”
- “To place principle above personal opinion and reason above prejudice in the selection of materials of the highest quality ...”

Policy IJLA: Complaint Procedure to Challenge Instructional And /Or Library Materials

The policy requires the district to first attempt to resolve the question through a meeting with the library, classroom teacher, principal and superintendent.



If the question is not resolved through that meeting, the complainant can file a written complaint.

The superintendent appoints a committee, which will include the librarian, principal, two teachers and three community members.



The material remains in use pending the final decision.

The review committee reads the challenged material, and meets with the complainant to hear the objections. The committee weighs the faults and values against each other and makes a decision.





The committee makes a decision and informs the complainant.

The policy should outline criteria for evaluating the materials.





For example, the board should consider the material as a whole (rather than specific excerpts), and may consider factors such as the educational suitability, vulgarity, irrelevance, age and grade level appropriateness and accuracy, among other things.



The complainant may ask that the matter be placed on the agenda for the next board meeting. The Board reviews the complaint and makes a decision.



Bottom line: The courts give boards discretion regarding library materials...

BUT a decision to remove books from libraries should be based on unbiased criteria related to educational reasons, with an eye toward providing multiple perspectives. Any decision to remove books based on a dislike of a particular idea or viewpoint would violate the First Amendment.

FREE SPEECH AT BOARD MEETINGS

Pollak v. Wilson, et al., Federal District Court for the District of Wyoming.

Plaintiff attended a school board meeting. Plaintiff was upset with the superintendent and the handling of various issues relating to CoVid, specifically, face-covering requirements even when mandated by the State. Pollak had previously indicated a demand that the defendant board members resign their positions. He also met with the superintendent to express his opposition to the face-covering requirement.

There were numerous very contentious meetings involving the public regarding the CoVid face-covering requirements. Plaintiff was very critical of the board's decision to require face coverings. The board did not limit or otherwise take action to prevent him from making his comments. Pollak attended a subsequent board meeting and signed up to speak during public comment. He did not identify the topic he wished to speak about. When it came his turn to speak, he indicated he wanted to discuss matters pertaining to the superintendent.

He was advised by the chairman that personnel matters were not a topic that was allowed during public comment. He immediately began to argue with the chairman about whether personnel could be discussed during public comment. He was advised that if he wanted to discuss personnel, he could do so during an executive session. Pollak continued to argue about whether he could discuss personnel. He refused to leave the podium. He was advised that board policy prohibited discussion about personnel during public comment.

The board ultimately had to recess the meeting and even then Pollak refused to leave the podium. Law enforcement were then called to assist the board in controlling the situation. Pollak was removed from the meeting by the police department. Pollak was later advised again that he could address the board during public comment on non-personnel matters, or if he wanted to discuss personnel, he could do so in an executive session.

Plaintiff moved for a preliminary injunction requesting the court to enjoin or prohibit the school board from not allowing him to speak about personnel matters during public comment. He claimed it violated his right to freedom of speech.

The school board policy stated “board meetings are conducted for the purpose of carrying out the official business of the school district. The meetings **are not public forum meetings, but are meetings held in public.**” Both parties conceded that school board meetings are non-public forums and that limited public forum analysis applied. Under that analysis, school districts are permitted to maintain reasonable restrictions on public comment provided they are viewpoint neutral.

Restrictions on discussing personnel to be considered viewpoint neutral would remove any issues pertaining to personnel whether they are positive **or negative** as a topic that may be discussed.



The district's policy also left open ample alternative channels for communication of the information.

The district argued that the policy prohibition against use of gossip, defamatory remarks, abusive, or vulgar language was necessary to ensure that school board meetings can be conducted in an orderly, efficient, and dignified manner and to prevent conduct that was detrimental to the purpose of the board meeting.

The decision:

Plaintiff's motion for preliminary injunction was denied. The court recognized the plaintiff contended that he had a constitutional right of free speech to discuss personnel matters during the board meeting. The court pointed out that plaintiff contended the prohibition against discussing personnel constituted viewpoint-based discrimination because allegedly a comment was jokingly made that discussion about personnel was not allowed unless it was favorable.

The court said there was not a sufficient showing that the board actually allowed favorable personnel matters to be discussed but not negative discussions about personnel. The court also pointed out that the evidence was that the plaintiff was stopped from speaking about personnel matters not because he was speaking negatively about personnel matters. In fact, he had been told he would not be allowed to speak about personnel matters before he ever began to speak.

The court concluded that speech about public employees constitutes protected First Amendment speech.

However, ...

The parties agreed that the board meeting was not a “designated public forum” but rather, was a “limited public forum” where the government allows selective access to some speakers or types of speech in a non-public forum but does not open the property sufficiently to become a designated public forum. In that scenario, the government may establish “time, place, or manner” restrictions so long as the restrictions are reasonable and are not an effort to suppress expression.

The government can also impose subject matter and speaker identity restrictions so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint-neutral.

For example, a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum.

Any government restrictions on speech in a limited public forum must only be reasonable in light of the purpose served by the forum and be viewpoint neutral.

The court concluded that the policy's restrictions on discussing personnel was viewpoint neutral and there was not sufficient evidence that positive comments were okay while negative comments were not.

The court concluded that the personnel restriction was reasonable given the school district's interest in keeping personnel matters from being discussed during public comment and further allowed a mechanism to bring personnel matters to the board during executive sessions. The court also concluded that the offensive language prohibition similarly was viewpoint neutral. It was considered a neutral prohibition to maintain civility and order.

This matter is currently on appeal to the Tenth Circuit Court of Appeals and was argued on Wednesday.

TRANSGENDER STUDENTS

**WHAT TO TELL, OR NOT TELL, PARENTS
OF TRANSGENDER STUDENTS**

Should a school keep information about a student's transgender status from the parents of the student?

Does a school have a duty to tell parents when their child elects to use a different name and pronoun?

John & Jane Parents I v. Montgomery Cnty. Board of Educ.,
August 18, 2022 (US District Court for the District of
Maryland).

The School District adopted “Guidelines for Student
Gender Identity.”

The Plaintiffs argued that the Guidelines were “expressly designed to circumvent parental involvement in a pivotal decision affecting their children’s care, health, education and future.”



The plaintiffs argued that the Guidelines instructed school personnel to withhold information from parents about their children's gender identity as expressed at school.



The plaintiffs claimed that the Guidelines violated the parents' rights to “direct the care, custody, education, welfare, safety and control of their minor children” under Maryland’s Constitution.

They also claimed the Guidelines violated their rights under the 14th Amendment.



The school Guidelines included the following provisions:

The introduction stated that the Guidelines “cannot anticipate every situation which might occur” and that “the needs of each student must be assessed on a **case-by-case basis.**”

In another section, the Guidelines stated:

“each student’s needs should be evaluated on a **case-by-case basis**, and all [gender support] plans should be evaluated on an ongoing basis and revised as needed.”



The Guidelines stated that one goal was to:
“Respect the right of students to keep their gender identity or transgender status private and confidential.”

“The principal, in collaboration with the student and the student’s family (**if the family is supportive of the student**), should develop a plan to ensure that the student has equal access and equal opportunity to participate in all program and activities...”

“The fact that students choose to disclose their status to staff members or other students **does not authorize school staff members to disclose a student’s status to others, including parents / guardians** and other school staff members, unless legally required to do so, or unless students have authorized such disclosure.”

“Unless the student or parent / guardian has specified otherwise, when contacting the parents / guardian of a transgender student...school staff members should use the student’s legal name and pronoun that correspond to the student’s sex assigned at birth.”



The Court granted the school district's motion to dismiss on all of the plaintiff's claims.

Among other things, the Court found that the Guidelines did not mandate that the school exclude parents because the Guidelines actually encouraged family involvement in the development of the transgender plan.



The Court noted that the Guidelines emphasized using a case-by-case basis to evaluate each student's needs.



The Court acknowledged that the Guidelines required the school staff to protect student privacy and confidentiality, including obtaining the student's consent before disclosing their gender identity to their parents.

The Court held that the Guidelines “neither mandate nor encourage the exclusion or distrust of parents, but aim to include parents and other family in the support network...”

“In reality, the Guidelines instruct [school] staff to keep a student’s gender identity confidential until the student consents to the disclosure out of concern for the student’s well being, and as part of a more comprehensive gender support plan that anticipates and encourages eventual familial involvement...”

In its decision, the Court relied in part on *Arnold v. Board of Education of Excambia County, Alabama*, a 1989 11th Circuit case: a student who sued after she claimed that the school coerced her into not telling her parents she was pregnant, and into getting an abortion.

The 11th Circuit in *Arnold* held:

“We are not...constitutionally mandating that counselors notify the parents of a minor who receives counseling regarding pregnancy. We hold merely that counselors must not coerce minors to refrain from communicating with the parents.

The decision whether to seek parental guidance, absent law to the contrary, should rest within the discretion of the minor.”

The Court in *Montgomery* applied this same rationale, and held that there is **no Constitutional or statutory mandate for the school to tell parents about the transgender status of their student.**



What if a staff member refuses to use the name or pronoun chosen by the student?

What if staff insist on telling parents about their student's transgendered status, even though the student has not consented to that disclosure?



August 31, 2022: A Kansas school district paid a \$95,000 settlement to a teacher who was disciplined for refusing to comply with the district's directives on transgender students. The teacher claimed the district's policy, which prohibited her from communicating to parents about the transgender status of their student, violated her religious freedom rights.



The parties agreed to the settlement after the court granted the teacher's request for an injunction regarding the district's policy which prohibited teachers from communicating a student's preferred name and pronouns to parents.



The parties had agreed to a compromise regarding the student's name and pronouns. The teacher agreed to use the student's preferred name, but not the student's preferred pronoun.



The teacher could avoid using the student's preferred pronouns, as long as they did not use pronouns for any student.

The court ruled that the school district's policy of prohibiting teachers from communicating a student's transgender status to parents violated the teacher's First Amendment right to free exercise of religion.



The school district's policy stated that FERPA may prohibit the disclosure of a student's transgender status to parents.

The court noted that the school district's position on FERPA was misleading.





FERPA does not prohibit the District from communicating with parents about their student's name and pronouns.

FERPA does just the opposite: it mandates that the school district make education records available to parents.





The court granted an injunction which prevented the school district from disciplining the teacher for referring to a student by her preferred name and pronoun in communications with the parents during the course of her duties.



So where does that leave schools?

Evaluate these situations on a case-by-case basis, and consult legal counsel.

The cases on these issues are very fact-specific.



Encourage, but do not require, students to tell their parents about their transgender status.

Have a conversation with the student to develop a plan to include the parents.



What if the parents know about their student's transgender status, and direct the school to use a name and pronoun different from what the student says?

Defer to the parents, unless the student is 18 or older.





EXECUTIVE
SESSION

**EXECUTIVE SESSIONS: A
REFRESHER**



Definitions:

- “Action” means the transaction of official business of an agency, including a collective decision, a collective commitment or promise to make a positive or negative decision, or an actual vote upon a motion, proposal, resolution, regulation, rule, order, or ordinance at a meeting.
- “Meeting” means an assembly of at least a quorum of the governing body of an agency which has been called by proper authority of the agency for the express purpose of discussion, deliberation, presentation of information, or taking action regarding public business.
- “Assembly” means communicating in person, by means of telephone or electronic communication, or in any manner such that all participating members are able to communicate with each other contemporaneously.

W.S. 16-4-403.

- (a) All meetings of the governing body of an agency are public meetings, open to the public at all times, except as otherwise provided. **No action** of a governing body of an agency shall be taken except during a public meeting following notice of the meeting in accordance with this Act. Action taken at a meeting not in conformity with this Act is null and void and not merely voidable.

An executive session is not a public meeting.

Executive Sessions. W.S. 16-4-405.

A governing body of an agency may hold executive sessions not open to the public:

- To consider the appointment, employment, right to practice or dismissal of a public officer, professional person or employee, or to hear complaints or charges brought against an employee, professional person or officer, unless the employee, professional person or officer requests a public hearing. The governing body may exclude from any public or private hearing during the examination of a witness, any or all other witnesses in the matter being investigated.

Student/parent complaint or complaint from a co-employee:

1) This should be dealt with to the extent possible through the normal chain of command. Only when the matter cannot be resolved with the teacher, principal/supervisor and/or ultimately the superintendent should it come to the board. Parents/staff who want to come to the board and bypass the superintendent should normally be directed to try to resolve the matter through their supervisor and then superintendent first.

The employee against whom the complaint is made has the right to request a public hearing – in other words, that the complaint be made in public so they can hear the complaint and presumably be given the right to respond to it.

Better option is to notify the employee against whom the complaint is made that the board will consider the complaint in an executive session and invite the employee into executive session. This minimizes the risk of defamation, slander, libel, and violation of confidentiality if it is dealt with in executive session versus a public board meeting.

- Evaluations and/or other information relating to the employment performance of an employee discussed with the board in executive session by the supervising administrator or superintendent may be considered as receiving information regarding employment and is appropriate for an executive session and does not mandate the employee be notified and given an opportunity to require that be done in public.

- Just because a matter could impact the employment of one or more employees does not necessarily make it an executive session item.

Example: Should the school district continue to offer a welding program as a vocational ed program? While ultimately that could impact the employment of the welding teacher(s), it is not a consideration of their employment at that point. The discussion should be held in public.

- On matters concerning litigation to which the governing body is a party or proposed litigation to which the governing body may be a party.
- When considering the selection of a site or the purchase of real estate when the publicity regarding the consideration would cause a likelihood of an increase in price.
- To consider or receive any information classified as confidential by law.

- To consider accepting or tendering offers concerning wages, salaries, benefits and terms of employment during all negotiations.
- To consider suspensions, expulsions or other disciplinary action in connection with any student as provided by law.



- To consider accepting or tendering offers concerning wages, salaries, benefits and terms of employment during all negotiations. Merely because there is an issue regarding employee benefits such as health insurance plans, etc., most likely does not equate to consider accepting or tendering offers concerning wages, salaries, benefits, and terms of employment, particularly when this is just a board decision and is not part of any formal negotiations.

- The same would be true regarding changes to the salary schedule. Although even if there is just an informal meet and confer process with requests to change the salary schedule and when there are no binding negotiation requirements, that might allow for the issue to be discussed in executive session.

- Typically using “personnel” as the reason for an executive session suggests you are going to be talking specifically about one or more individuals identified in the discussion and which will impact their employment. An issue that may impact all employees, a large group of employees, or a department, is not really an executive session item.

A motion to hold executive session which specifies any of the reasons set forth in paragraphs (a)(i) – (xi) shall be sufficient notice of the issue to be considered in an executive session.

This suggests the motion should reference one of those items. Normally a reference to personnel will get you by if no one complains. Technically it should be more specific, such as to consider the employment of personnel.

•It is normal to want to discuss controversial issues, and specifically those divisive to the community, in executive session, but that is not the purpose of executive sessions and those discussions are not legal to be held in executive session unless consistent with one of the lawful reasons for an executive session. On the other hand, if there are threats of litigation, that can be discussed in executive session or, if the board wants to receive legal advice about controversial issues, then those items could be discussed with your attorney in executive session as there is an attorney-client privilege which is confidential as a matter of law and allows for executive sessions.

Minutes of an executive session are required to be recorded but not published, even when no action is taken. Minutes of executive session shall be confidential and produced only in response to a valid court order.

The minutes should contain sufficient information to validate that the purpose of the discussion in executive session was in compliance with law. The names of employees or students discussed may and should be included in the minutes so as to verify the legitimacy of the executive session. They are not, however, available to the public and would not violate confidentiality.

Keep in mind that while the minutes of executive session are confidential, they can be subpoenaed during litigation and generally are. Do not include anything in executive session minutes that you would not want to be seen if the minutes are subpoenaed.

Just as with minutes of regular meetings, minutes of executive sessions are not required to be detailed or include specifics as to conversations. A reference to the general topic discussed sufficient to confirm the executive session is appropriate is all that is required.

W.S. 16-4-408. Penalty.

Any member or members of an agency who knowingly violate the provisions of this Act shall be liable for a civil penalty not to exceed \$750.00 except as provided in this subsection. Any member of the governing body of an agency who attends or remains at a meeting knowing the meeting is in violation of this Act shall be liable under this subsection unless minutes were taken during the meeting and the parts thereof recording the member's objections are made public or at the next regular public meeting the member objects to the meeting where the violation occurred and asks that the objection be recorded in the minutes.



COVID LITIGATION UPDATE: RECENT CASES

Courts in Wyoming have recently decided two cases regarding COVID protocols and mask requirements.

CALENTINE V. SHERIDAN CO. SCHOOL DIST. #2

Plaintiffs sued Sheridan Co. School Dist. #2 and challenged the school district's authority to adopt mask mandates and quarantine and isolation protocols for COVID.



The court granted summary judgment to the school district.

The court held that school districts have broad authority under Wyoming law.



W.S. 21-3-110(a)(i) states:

“The board of trustees in each school district shall prescribe and enforce rules, regulations and policies for its own government and for the government of the schools under its jurisdiction. Rules and regulations shall be consistent with the laws of the state...”



The court relied on this statute and Wyoming case law to find that the school board had authority to adopt the mask and quarantine protocols.

The court quoted from an earlier Wyoming Supreme Court decision to support its conclusion.

“...the fundamental right to an opportunity for an education does not guarantee that a student cannot temporarily forfeit educational services through his own conduct.”



The court also held that the mandates did not violate the parents' right under the Wyoming Constitution to make health care decisions for their own children.

Wyoming Constitution, Article I, Section 38:

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.



The legislature may determine reasonable and necessary restrictions on the rights granted under this section to protect health and general welfare of the people...”



The court noted that numerous other courts have found that face covering requirements do not amount to medical treatment.



The court noted that school districts have authority enact other polices and rules related to promoting health and safety: tobacco-free zones, playground rules, health lunches, requiring helmets during sports.

The court cited a Montana Supreme Court decision:

“Implementing mandatory masking policies in setting with high COVID-19 levels is ‘no more a ‘medical treatment’ for a virulent disease than a motorcycle helmet is a treatment for a head injury.’”

MURPHY, ET AL. V. GOSHEN COUNTY SCHOOL DISTRICT 1, ET AL.

Plaintiffs (parents of several students) sued Goshen Co. Sch. Dist. #1, claiming that their COVID 19 mask mandates and protocols violated their constitutional right to make their students' health care decisions.

Plaintiffs sought an injunction against the mandates.

October 18, 2022: The court granted the school district's motion to dismiss the plaintiff's claims.

The plaintiffs filed their lawsuit against the school district on March 14, 2022. The school district had rescinded its mandatory mask policy in November 2021, and its protocols on March 8, 2022.

The court agreed that it lacked jurisdiction because there was no genuine controversy since the school district had rescinded its policies before the plaintiffs filed their lawsuit.

The court found that the plaintiff's claims were moot.

PRAYER IN SCHOOLS: HAS THE FRAME WORK CHANGED?



Kennedy v. Bremerton Sch. Dist., Supreme Court of the United States decided June 27, 2022.

A high school football coach lost his job after he knelt at mid-field after a game to pray. He sued the school district for infringing upon his rights under the free exercise clause of the First Amendment alleging the district failed to act pursuant to a neutral and generally applicable rule.

The district had allowed a long-time history of coaches being allowed to lead students and coaching staff in prayer in the locker room following completion of the game and coaches, specifically including Mr. Kennedy, had provided inspirational talks to students that included overtly religious references.



The district sent Mr. Kennedy a letter directing him not to engage in either of these activities. Mr. Kennedy complied.

However, Mr. Kennedy sent a written request asking for permission to allow him to kneel on the 50-yard line on his own even when athletes had left or were headed to the locker room or to the bus, suggesting he did not intend it to be for the players. The district rejected the request and directed him not to engage in even that conduct.

The coach established the infringement because his speech was private, not government, speech as the prayers were not ordinarily within the scope of his duties as a coach and the school district could not show that its actions in terminating the coach were essential to avoid a violation of the establishment clause by the school district.

The court determined a violation of the establishment clause does not occur automatically whenever a school fails to censor **private religious speech** and there was no evidence that students were coerced to pray.

A majority of the court concluded that the free speech clauses of the First Amendment protect an individual engaging in a **personal religious observance** from government reprisal. The Constitution neither mandates nor permits the government to suppress such religious expression.

The majority determined that Mr. Kennedy had a sincere motivated religious exercise involving giving thanks through prayer on the playing field at the conclusion of the game and that it did not involve leading prayers **with the team**. The district disciplined Mr. Kennedy **only** for his decision to persist in praying quietly **without his students** after three games.



The court concluded the district's policies/actions were neither neutral nor generally applicable.

The district alleged that it could not allow an on-duty employee to engage in **religious** conduct even though it allowed other on-duty employees to engage in personal, secular conduct.

Did Mr. Kennedy offer his prayers in his capacity as a private citizen, or did they amount to government speech attributable to the district?

The court concluded Mr. Kennedy did not engage in speech “ordinarily within the scope” of his duties as a coach. He did not speak pursuant to government policy and was not seeking to convey a government-created message. He was not engaged in speech the district paid him to produce as a coach.

Simply put, Mr. Kennedy's prayers did not "owe their existence" to Mr. Kennedy's responsibilities as a public employee.

Mr. Kennedy's prayers occurred during the post-game period when coaches were free to attend briefly to personal matters and students were engaged in other activities. His speech did not occur within the scope of his duties as a coach.

The district is not allowed through its staff or otherwise to coerce students to pray. The district suggested that **any** visible religious conduct by a teacher or coach should be deemed without more and as a matter of law impermissibly coercive on students. The court rejected this argument.



The decision was approved by five justices, although two of the justices filed separate concurring opinions. One justice agreed in part and dissented in part and three other justices dissented.

This case really does not significantly change the landscape for prayer at schools. The district directed the coach not to engage in pre- and post-game prayers with the students. The district directed the coach not to engage in motivational speech using overtly religious expression. The coach complied with both.

Rather, this case solely dealt with an issue where a coach wanted to personally pray while he was not required to be exercising coaching duties on the football field, even without students, even though students could if they chose to, pray alongside him. The court concluded that speech was not government speech; it could not reasonably be concluded to be prayer endorsed by the school district and it was not coercive on students.

As such, that conduct did not violate the school district's obligation under the First Amendment and restriction against establishing religion.

PROPOSED CHANGES TO TITLE IX SEXUAL HARASSMENT REGULATIONS

In 2020, the US Department of Education (DOE) proposed new regulations, definitions and procedures for investigating claims of sexual harassment under Title IX.



Those regulations required separate, independent Title IX coordinators, investigators, decision makers and appeals decision makers.

Layered, complex process with several steps and time frames.





June 23, 2022, the DOE proposed new Title IX sexual harassment regulations.

The 60 day comment period began on July 12, 2022, and closed on September 12, 2022.





New regulations likely will not go into effect until the 2023-2024 school year.



Highlights of proposed changes:

Current Regulation: Grievance process applies only to claims of sexual harassment.

Proposed Regulation: Grievance process applies to all claims of sex discrimination.

Current Regulation: Sexual harassment defined as conduct that is so **severe, pervasive and objectively offensive** that it effectively denies a person equal access to the education program.

Proposed regulation: Sexual harassment is conduct that is sufficiently **severe or pervasive** that, based on the totality of the circumstances, and evaluated **subjectively and objectively**, it denies or limits a person's ability to participate in or benefit from the educational program.



The proposed regulation is much broader, and will likely encompass conduct that currently would not be defined as sexual harassment.

Current regulation: Parties must have two separate 10-day period to review and comment on 1) the evidence from the investigation and 2) the decision maker's final report.

Proposed regulation: Eliminates these periods, in favor of a period to review a summary, and a reasonable period to respond.

Current regulations: The Title IX coordinator, investigator and decision maker must be separate individuals.

Proposed regulations: The Title IX decision maker may be the same person as the Title IX coordinator or the investigator.

Proposed Regulations: Expand training requirements beyond the Title IX team (coordinator, investigators, decision maker) to include all school district employees.

Proposed regulations: Title IX prohibits discrimination based on sexual orientation, gender identity and sex characteristics. The regulations would prohibit policies that prevent a student from participating in a school district's education program or activity consistent with their gender identity.



But ... the DOE announced that it will engage in separate rule making in the future to address Title IX's application to athletics.

Rules are not final, and we do not know what the final rules will say.

TEACHER DISMISSAL: 2022 WYOMING CASE

*Bd. Of Trs. Sch. Dist. No. Two v. Earling, 503 P.3d
629 (February 9, 2022).*

Continuing contract teacher with 15 years of experience received a recommendation for dismissal after superintendent discovered approximately approx. 50 images on a school iPad with nude photos of teacher and his wife, screen shots of text messages with sexual content, and memes with profanity and sexually explicit jokes.

The teacher said that the images had inadvertently synched with his personal iPhone because he used his Apple ID to sign into both devices. He told the superintendent he was not aware of this, and had not used the iPad to teach.



Teacher requested a hearing, and the OAH found that the district did not prove that the teacher violated policies.

The school board found that the district had proved that the teacher violated school policies, and approved the recommendation for dismissal.



Wyo. Sup. Court reversed the Board. The district did not prove that the teacher violated any clear standards of conduct.

The Court said that the policies did not prohibit using a personal Apple ID on school computers.

The Court found that the policies **did not prohibit the mere existence of inappropriate material on school computers.**



The Court further found that the district did not show how this conduct related to the teacher's fitness as a teacher.

The Court noted that no students saw the images, and the risk of that happening was low.



“...the superintendent presented no evidence to otherwise connect the allegations to [the teacher’s] fitness or ability as a teacher. To the contrary, the record shows that [the teacher] received good evaluations for his teaching performance and had been recommended without conditions each year.”

“He had no prior performance or disciplinary issues. [The superintendent] ...agreed that, but for this issue, [the teacher] was “the kind of person and teacher that [he] would have wanted to continue working in the District.”



Lessons:

Review your policies. Computer use policies should address use of personal ID's and accounts.

Policies should also address searching for, viewing, downloading, and possessing explicit material.



The policies should also define what material is prohibited.

“Sexually explicit” should be defined.



Relationship to fitness as a teacher:

“No harm, no foul?”

So if a teacher violates clearly established standards, but a student never sees it, then can you dismiss?

QUESTIONS?

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