<table>
<thead>
<tr>
<th>Time</th>
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<tr>
<td>8:55 – 9:00</td>
<td><strong>Welcoming Remarks</strong></td>
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<td>Lisa Tanselle, General Counsel, ISBA</td>
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<td>9:00 – 10:00</td>
<td><strong>Equal Protection: Past, Present &amp; Future</strong></td>
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<td>Séamus Boyce, Kroger Gardis &amp; Regas, LLP, Indianapolis</td>
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<td>Dr. Suzanne Eckes, Professor, Indiana University, Bloomington</td>
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<td>10:00 – 10:15</td>
<td><strong>Break</strong></td>
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<td>10:15 – 11:15</td>
<td><strong>Claims Against Schools and Their Employees: What Immunity Exists?</strong></td>
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<td>Kent Frandsen, Parr Richey Frandsen Patterson Kruse, Lebanon</td>
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<tr>
<td>11:15 – 12:15</td>
<td><strong>Complying with the Public Access Laws during a Pandemic</strong></td>
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<td>Luke Britt, Public Access Counselor, Indianapolis</td>
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<td>12:15 – 12:45</td>
<td><strong>Lunch</strong></td>
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<td>12:45 – 1:45</td>
<td><strong>T-Shirts, Protests, &amp; Social Media: When Can Administrators Regulate</strong></td>
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<td>Student Speech?</td>
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<td>Pat Shoulders, Ziemer Stayman Weitzel Shoulders, LLP, Evansville</td>
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<td>1:45 – 2:00</td>
<td><strong>Break</strong></td>
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<td>2:00 – 3:00</td>
<td><strong>Title IX: Sex-Related Claims – Part II</strong></td>
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<td>Jonathan Mayes, Bose McKinney &amp; Evans, Indianapolis</td>
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<td>3:00 – 4:00</td>
<td><strong>Recent Legal Developments</strong></td>
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<td>Julie Slavens, Senior Counsel/Director of Policy Services</td>
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<td>Lisa Tanselle, General Counsel</td>
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Please note that the Ethics Presentation for Attorneys will be held on Thursday, December 10, 2020, from Noon until 1:00 p.m. Alex Pinegar, Church Church Hittle + Antrim, will be the speaker.

Next School Law Seminar: June 2021
Equal Protection: Past, Present & Future

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We the People

Article 1.

Section 1. All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.

No Person shall be a Representative who shall not have attained to the Age of twenty-five Years, and been seven Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

The Number of Representatives shall be apportioned among the several States which shall have Sent Dors, according to their respective Numbers, adding to the whole Number three hundred and three, and dividing the remainder, as nearly as may be, among them, and the Congress shall determine the rule by which the States shall be divided.

When this enumeration shall be taken, in pursuance of the first Article, the whole Number of Persons in each State, which shall have been enumerated in such manner as the Congress of the United States shall direct, shall be taken for the basis of each State, and the Number of Representatives shall be proportioned accordingly.

The House of Representatives shall be annually elected.

The Electors shall have the Qualifications of the PERSONS from which they are chosen.

A Representative shall not be chosen for a longer Term than two Years, and for no second Term until an inter vals of two Years shall have elapsed since the last time he was elected.

No Person shall be a Representative who shall not have attained to the Age of thirty years, and been nine Years a Citizen of the United States, and who shall not, when elected, be an Inhabitant of that State in which he shall be chosen.

No Person holding any Office of Profit or Trust under the United States, shall be a Candidate for any Office under the same, unless he shall have ceased to hold the same, and been at least six Months absent from the service of the United States.

The Limitation of this Term to two Years is for the purpose of enabling the Congress to hold their Recounts; and is not intended to bind them to a future election. The Congress may, by law, determine the Eligibility of a Person to be a Candidate for the Office of President, and direct the time when the same shall be determined, and the time at which the Person shall give his Assent thereto, if elected.

The Congress shall determine the Office of President, and by a Joint Meeting of both Houses, sitting for that Purpose, shall give him the form of an Oath or Declaration, and he shall take the same before such Meeting.

Every Senator and Representative, before he enters upon the Execution of his Office, shall take the following Oath or Declaration:--

'I solemnly swear (or affirm) that I will faithfully execute the Office of President (or Representative) of the United States, and will to the best of my Ability, preserve, protect, and defend the Constitution of the United States.'

The Congress shall have power to enforce by appropriate Legislation the provisions of this article.
Agenda

- Legal Context and the Equal Protection Clause (EPC)
- The EPC and Race-based Classifications Involving Students and School Personnel
- The EPC and Sex-based Classifications Involving Students
- Other Notable EPC Decisions

Text: (317) 345-2459

What are your burning questions or concerns?
What is your experience and/or example of addressing EPC allegations?
Disclaimer

- You must weigh risks and make decisions.
- The audience for this is broad.
- Focuses on practical guidance pursuant to current standards.
- Does NOT provide comprehensive review.
- Does NOT cover local regulation.
- Does NOT cover your internal policy, procedure, guidelines.
- You should ensure compliance with ALL standards.
The Equal Protection Clause

- The EPC requires that “[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, §1).
- It has been interpreted to mean that all persons similarly situated should be treated alike.
- It protects against intentional and arbitrary discrimination and applies to public schools.
Legal Context: Different Levels of Scrutiny

- When courts analyze an EPC claim, there are three levels of judicial scrutiny (i.e., strict scrutiny, mid-level scrutiny, and rational basis).
- Race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest.
- Sex falls under mid-level scrutiny; the government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.
- The third level of judicial scrutiny is referred to as rational basis, which requires a legitimate government objective with a minimally rational relation between the means and the ends. Classifications based on disability fall under rational basis review.
Text: (317) 345-2459

What is your experience, example and/or prediction regarding race discrimination allegations?
Race-Based Classification: Brown v. Board

- Black students were not permitted to enroll in public schools because the schools were segregated by race. The student plaintiffs argued that these segregation laws violated the EPC.
- The plaintiffs lost at the lower courts under the separate but equal doctrine of *Plessy v. Ferguson*.
- The Supreme Court of the U.S. found that state segregated schools violated the EPC.


Can districts try to racially balance schools?

- A school district allowed students to apply to any high school in the district. Since certain schools often became oversubscribed when too many students chose them as their first choice, the district used a system of tiebreakers to decide which students would be admitted to the popular schools. The second most important tiebreaker was a racial factor intended to maintain racial diversity. If the racial demographics of any school's student body deviated by more than a predetermined number of percentage points from those of Seattle's total student population (approximately 40% white and 60% non-white), the racial tiebreaker went into effect.
- At a particular school either whites or non-whites could be favored for admission depending on which race would bring the racial balance closer to the goal.


Did this policy violate the EPC?
Teacher alleges school district lay off policy discriminates.

- When nonminority teachers were laid off over teachers of color, a displaced nonminority teacher alleged an EPC violation. The collective bargaining agreement stated that the teachers with most seniority would not be laid off.
- There was also agreement not to lay off a percentage of teachers of color that exceeded the percentage of minority teachers at the time of layoff.
- The lower courts upheld this latter policy because it was a way to remedy societal discrimination by providing role models for students of color.
- The Supreme Court of the U.S. reversed, finding no compelling state interest in this policy.

Race Discrimination & School Discipline

- Black students alleged that the school district deprived them of their equal protection rights when they were disproportionately treated when they were expelled and suspended more frequently.

- According to the federal district court in Louisiana, the Black students’ Equal Protection claims failed because they did not prove that they received harsher punishment than White students for the same disciplinary infractions.

EPC right to literacy? An interesting type of case to watch...

- Students in Detroit recently alleged that the EPC was violated when their access to literacy was denied and also when they experienced race-based discrimination. The students argued that their substandard academic performance related to having unqualified teachers, dangerous facilities and inadequate teaching-related materials, which deprives them of a basic right of literacy.

- Their EPC claim failed because they did not allege a proper comparator (e.g., plaintiffs did not demonstrate that defendants treat their schools differently from others in the state).

Gary B. v. Whitmer (2020)
Text: (317) 345-2459

What is your experience, example and/or prediction regarding race discrimination allegations?

Text: (317) 345-2459

What is your experience, example and/or prediction regarding sex discrimination allegations?
A transgender student challenges school restroom policy.

- A student alleges an EPC claim when he is not permitted to use the restroom that aligns with his gender identity.
- The court found that school officials did not have an exceedingly persuasive justification for denying the student a restroom that aligned with his gender identity.
- Applying the EPC and affirming a preliminary injunction, the Seventh Circuit held that the school district treated transgender students who fail to conform to sex-based stereotypes differently than other students.

See *Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017).
One year later, a federal district court in Indiana addressed the issue again. The school district policy did not allow a transgender student to use the restroom that aligned with his gender identity. The court reasoned that the school district was not able to offer an exceedingly persuasive justification for its practice of not permitting transgender students to use the restroom that aligned with their gender identities. The court also found that the *Whitaker* decision had put the school district on notice that its practice was a form of sex discrimination that implicated the Equal Protection Clause.


### How have other courts ruled on this matter?

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<tr>
<th>Case Name</th>
<th>Court/Jurisdiction</th>
<th>Legal Claim</th>
<th>Outcome</th>
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<tbody>
<tr>
<td>Grimm v. Gloucester Cnty. Sch. Bd., 2020</td>
<td>Fourth Circuit Court of Appeals (MD, SC, NC, VA, WV); Subsequent Federal District Court Included Here</td>
<td>Title IX and Equal Protection</td>
<td>District court denied the school district’s motion for summary judgment; transgender student alleged Title IX and equal protection claim.</td>
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<td>M.A.B. v. Bd. of Educ., 2018</td>
<td>Federal District Court in Maryland</td>
<td>Title IX and Equal Protection</td>
<td>District court denied the school district’s motion to dismiss the student’s claims; student sufficiently plead a Title IX and equal protection claim.</td>
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<td>Adams v. Sch. Bd., 2020</td>
<td>Eleventh Circuit Court of Appeals (AL, FL, GA)</td>
<td>Title IX and Equal Protection</td>
<td>Circuit court affirms district court’s decision granting student’s motion for preliminary injunction; school officials violated Title IX and Equal Protection Clause.</td>
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<td>Evancho v. Pine-Richland Sch. Dist., 2017</td>
<td>Federal District Court in Pennsylvania</td>
<td>Title IX and Equal Protection</td>
<td>District court granted two transgender students’ motion for a preliminary injunction on their equal protection claim. Did not decide Title IX issue. School district’s motion to dismiss denied.</td>
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<td>A.H. ex rel. Handling v. Minersville Area Sch. Dist., 2019</td>
<td>Federal District Court in Pennsylvania</td>
<td>Title IX and Equal Protection</td>
<td>The school district’s motion for summary judgment was denied for both the Title IX and equal protection claims (restroom on field trips).</td>
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<td>Bd. of Educ. v. U.S. Dep’t of Educ., 2016</td>
<td>Federal District Court in Ohio</td>
<td>Title IX and Equal Protection</td>
<td>Federal district court granted a transgender student’s motion for a preliminary injunction. School district’s subsequent motion for a stay was denied by the Sixth Circuit Court of Appeals (Boddi v. U.S. Dep’t of Educ., 2016).</td>
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Quote included in an amicus brief submitted to the Supreme Court of the U.S.

“Our experience has been that the fears of the adults rarely play out. The students are very affirming and respectful of their classmates. Most of the reaction that I’ve ever encountered has been in response to people’s fears, not the students’ experiences. The students’ experiences have been overwhelmingly positive. I have yet to be called into a situation to respond to an actual incident; I’ve only had to respond to fears, and the fears are unfounded” (Brief for School Administrators et al., 2017, p. 5).

Basketball players argue that policy requiring short hair violates EPC.

Parents challenged a high school policy that required boys playing interscholastic basketball to keep their hair cut short.

The court found a violation of the EPC because the policy did not apply to girls playing basketball, and that the school district provided no justification for this sex-based classification.

See Hayden v. Greensburg Cmty. Sch. Corp., 743 F.3d 569 (7th Cir. 2014).
How would EPC apply to dress codes?

A student claims sex discrimination when allegedly hazed on swim team.

- A freshman on the swim team alleged he was hazed for two years. He ultimately quit the team and left high school early. He argued that boys who participate in swimming at the high school can expect an entirely different experience than a member of the girls’ swim team in violation of the EPC.

- The court found that a jury could at least infer that there was no hazing in the girls’ program. Thus, summary judgment for the school district was denied because there was a question of fact regarding whether the girls’ team engaged in hazing too.

- The student had also claimed that he was discriminated against based on gender stereotypes under the EPC. He was unable to demonstrate a custom or practice of discrimination based on gender stereotypes. 

Cheerleader alleges sex-based stereotypes.

- A student provided enough evidence to create a genuine issue of material fact as to whether the cheerleading coach singled her out for not conforming to sex-based stereotypes both while she was a member of the cheerleading team and while serving as the school mascot.
- The student alleged that the coach said that she was not “pretty” enough or “girly” enough. It was suggested that the female student grow her hair longer so that she would not appear as “butch.” The school district’s motion for summary judgment as to the student’s EPC claim against the coach was denied.


Male dancers allege EPC violation for sex-based stereotypes.

- An Eighth Circuit Court of Appeals decision examined a matter involving two boys who were denied the opportunity to participate on their high schools’ athletic competitive dance teams.
- The athletic league had a rule that limited participation of a school’s competitive dance team to female students. The boys claimed that the athletic league violated their rights under Title IX as well as the Equal Protection Clause.
- They were granted injunctive relief, which allowed them to participate on the all-girls’ dance teams.

*D.M. v. Minn. State High Sch. League*, 917 F.3d 994 (8th Cir. 2019)
What is your experience, example and/or prediction regarding sex discrimination allegations?

What is your experience, example and/or prediction regarding other forms of EPC allegations?
Another Noteworthy EPC Case: Plyler v. Doe

- A state law in Texas permitted the state to withhold state funds from local school districts for educating students who were undocumented. This state law was challenged as a violation of the EPC.

- The Supreme Court of the U.S. found that this law severely disadvantaged students who were undocumented and denied them a right to an education. In striking down this state law, the Court did not find that there was a substantial state interest for this law (Plyler v. Doe, 1982).

- The Court observed that undocumented students should receive the free public education that was offered to all children within the state’s borders.
Equal Protection Checklist

- When developing and implementing policies and practices, education leaders must be sure that they have a justification for treating groups differently than others.

- In your DEI initiatives, be thoughtful about EPC implications before getting too far down the road.

- For employment, cast the net wide for recruitment. But ensure you are an equal opportunity employer.

- Be particularly careful with differences based on race and sex.

- Follow strict scrutiny if you are using race as a differentiator. What is your compelling interest? How will you demonstrate what you would like to do is necessary to serve that interest?

- Follow mid-level scrutiny if you are using sex as a differentiator. What is your important interest? How will you demonstrate what you would like to do is substantially related to serve that interest?

- For transgender students, follow Whitaker and JAW cases.

- If you are using a differentiator triggering rational basis scrutiny, what is your legitimate interest? How will you demonstrate what you would like to do is rationally related to the interest?

- Follow your data closely for how your policies and practices disproportionately affect different classes. But be careful about addressing the disproportionality through policies and practice that create EPC exposure.
Overview
The Equal Protection Clause (EPC) of the Fourteenth Amendment has been at issue in a variety of significant education law-related cases. From race-based discrimination claims and beyond, court opinions involving the EPC have influenced school policies and addressed issues of equity. The EPC requires that “[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws” (U.S. Const. amend. XIV, §1). This clause has been interpreted to mean that all persons similarly situated should be treated alike. Thus, when school officials create policies that classify one group of students differently than another group of students, there may be equal protection concerns. For example, when Black students were prohibited from enrolling in public school as a result of state-sponsored segregation, they alleged that these laws violated the EPC. The U.S. Supreme Court found that state segregated public schools violated the EPC (Brown v. Board of Education, 1954).

Legal Context: Different Levels of Scrutiny
Depending on the classification at issue, courts analyze the EPC claims under three levels of judicial scrutiny (i.e., strict scrutiny, mid-level scrutiny, and rational basis). Race falls under strict scrutiny, which requires both a compelling governmental objective and a demonstration that the classification is necessary to serve that interest. Sex falls under mid-level scrutiny; the government must demonstrate that the classification based on sex serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives. The third level of judicial scrutiny is referred to as rational basis, which requires a legitimate government objective with a minimally rational relation between the means and the ends. Classifications based on disability fall under rational basis review. Thus, it is more difficult for a school to make a race-based classification (strict scrutiny review) than a disability-based classification (rational basis review).

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**Classifications Based on Race**

*Brown v. Board of Education* is the most well-known equal protection case addressing a race-based classification. Since that time, the EPC has been relied upon in a variety of other cases involving allegations of race discrimination. We summarize a few relevant recent cases; the *Madison* and *Gary B* decisions are not binding in Indiana.

**Student Discipline.** The EPC has been at issue in student discipline cases involving racial disproportionality claims. In one case, Black students in Louisiana alleged that the school district deprived them of their equal protection rights when they were treated differently than White students because they were expelled and suspended more frequently (*Madison v. Morehouse Parish Superintendent*, 2014). According to the federal district court, the Black students’ equal protection claims failed because they did not prove that they received harsher punishment than White students for the same disciplinary infractions.

**Access to an Education.** Students in Detroit recently alleged that the EPC was violated when their access to literacy was denied and also when they experienced race-based discrimination. The students argued that their substandard academic performance relates to unqualified teachers, dangerous facilities and inadequate teaching-related materials, which deprives them of a basic right of literacy. Their EPC claim failed because they did not allege a proper comparator (e.g., plaintiffs did not demonstrate that defendants treat their schools differently from others in the state). (*Gary B. v. Whitmer*, 2020).

**Teacher Lay Offs.** The EPC has also been invoked when educators claimed that they were not treated similarly. For example, a Michigan school district had a collective bargaining agreement stating that the teachers with most seniority would not be laid off, except that at no time would there be a greater percentage of teachers of color laid off than the percentage of teachers of color employed at the time of the layoff. This lay off provision was created to preserve the impact of a hiring policy whose goal had been to increase the percentage of teachers of color in the school district. The lower courts upheld the policy because it was a way to remedy societal discrimination by providing role models to students of color. The U.S. Supreme Court reversed, finding that these lay- provisions were not narrowly tailored enough to promote a compelling state interest in this policy as required by the EPC (*Wygant v. Jackson Board of Educ.*, 1985).
Classifications Based on Sex
When public schools impose sex-based classifications in schools, the EPC has also been at issue. We review a few cases involving sex-based discrimination allegations involving athletics and others involving transgender students. All of the cases, with the exception of *D.M. v. Minn. State High Sch. League*, are binding in Indiana.

**Hair Length.** In one illustrative case, parents challenged a high school policy that required boys playing interscholastic basketball to keep their hair cut short. The Seventh Circuit found a violation of the EPC because the policy did not apply to girls playing basketball, and that the school district provided no justification for this sex-based classification (*Hayden v. Greensburg Cmty. Sch. Corp.*, 2014). The court reasoned that hair-length policy applies only to male athletes, and there is no facially apparent reason for having this type of policy. Specifically, girls playing interscholastic basketball have the same needs as boys do to keep their hair out of their eyes while also projecting a positive team image. As such, the court found that this rather obvious disparity within the policy gave rise to an inference of a discriminatory practice.

**Primetime Slots.** In another case, a member of the girls’ basketball team raised the issue that half of her games were scheduled on Mondays through Thursdays, while the boys’ team had nearly all of their games scheduled on primetime nights (Friday and Saturday nights) (*Parker v. Franklin Cnty. Cmty. Sch. Corp.*, 2012). The plaintiff’s mother and her basketball coach had requested that the high school’s athletic director schedule more of the girls’ games during the primetime slots. The athletic director explained that there had been an agreement between the school and the Eastern Indiana Athletic Conference (EIAC), which prevented her from modifying the schedule. Specifically, school corporations enter into two- or four-year contracts for play with the EIAC. The athletic director further clarified that some of the other athletic directors declined to rearrange the schedule and that if she moved the girls to a more opportune time, the girls would have few opposing teams to play. This case addressed Title IX and the EPC.

With regard to the Title IX claim, the Seventh Circuit vacated the lower court’s dismissal, holding that the Title IX claim survived summary judgment because a jury could determine that the present disparity was substantial enough to deny equal athletic opportunity and that the school corporation had not gone far enough to remedy the harmful effects of this disparity. The court held that there were no other sports that offset the disadvantage to girls caused by the basketball schedule. With the EPC claim, the district court granted summary judgment to the school district on the basis of sovereign immunity. However, the Seventh Circuit held that the school district should not be immune and therefore remanded this issue back to the district court to examine the equal protection argument (*Eckes*, 2017).

**Dance Teams.** In addition to the decisions discussed above, other federal courts have weighed in on similar sex-based discrimination EPC issues in athletics. To illustrate, male plaintiffs had argued that the EPC had been violated when they were not permitted to join the school’s dance team (*D.M. v. Minn. State High Sch. League*, 2019). The boys sought injunctive relief, which would allow them to participate on the all-girls’ dance teams. In a unanimous decision, the three-judge panel for the Eighth Circuit Court of Appeals reversed (based on the equal protection claim) and directed the district court to enter a preliminary injunction. The court
did not find that the athletic league presented an exceedingly persuasive justification to prohibit
the boys from joining the dance teams. It reasoned that the figures provided by the athletic
league regarding girls’ opportunities were problematic. In fact, girls were not underrepresented
in Minnesota. For example, data submitted to the court actually suggested that boys had been
slightly underrepresented in high school athletics in Minnesota in both 2016-2017 and 2017-
2018. As a result, the athletic league failed to show that the underlying problem it sought to
address by creating an all-girls’ dance team existed. Without a problem to remedy, the athletic
league did not have an “exceedingly persuasive” justification to exclude the boys (Eckes &
McCall, 2019).

Transgender Students. In recent years, transgender students have alleged a violation of
the EPC (and Title IX) when they have not been permitted to use the restroom that aligns with
their gender identity. Courts within our jurisdiction have found EPC concerns when transgender
students have not been permitted to use the restroom that aligns with gender identities (J.A.W. v.
Evansville Vanderburgh Sch. Corp., 2020; Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of
Educ., 2017). In fact, all courts across the country that have addressed the matter in the K-12
context have generally ended in a favorable result for transgender students (see e.g., Adams v.
Sch. Bd., 2020; Grimm v. Gloucester Cnty. Sch. Bd., 2020;). Specifically, when examining the
EPC claims, courts have not found that school officials had an important governmental reason
(or an exceedingly persuasive justification) for denying students a restroom that aligned with
their gender identity. We highlight the two cases from our jurisdiction.

In Whitaker v. Kenosha Unified School District (2017), a transgender male student’s motion for
injunctive relief was granted after he challenged his high school’s policy. The student, who had
been diagnosed with gender dysphoria, had used the male restroom for six months without
incident before the school changed course. The student alleged that denying him access to the
male restroom caused him depression, raised medical concerns, and that he contemplated suicide
due to the stress he experienced.

When affirming the grant of the preliminary injunction, the Seventh Circuit found that it would
cause irreparable harm to deny the student access to the male restroom because the use of the
boys’ restroom was necessary for both his transition and his emotional well-being (Whitaker v.
Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 2017). The court was clear that the student
sufficiently demonstrated a likelihood of success of his Title IX claim under a sex-stereotyping
theory. When examining the Equal Protection Clause claim, the court also observed that because
the school’s classification was based on sex, heightened scrutiny applied and that school officials
did not demonstrate an exceedingly persuasive justification for its policy. The court also held
that issuing a preliminary injunction for the transgender student would not harm the privacy
interests of the other students; the court noted that the school district’s fears were “speculative”
and “based upon conjecture” (p. 1052). It is also important to highlight that Whitaker was not a
full decision of the merits of the case. After the appellate court upheld the district court’s
decision to grant the student’s motion for a preliminary injunction, the district eventually settled
with the student for $800,000 (Fortin, 2018).

Shortly after the Whitaker decision, there was a similar case that arose in an Indiana school
district. In this case, J.A.W., a transgender student, filed a motion for a preliminary injunction in
February 2018. At the preliminary injunction hearing in 2018, the district’s superintendent testified that the student could not use the male restroom because he was biologically female. He also stated that if J.A.W. would have legally changed his birth certificate to indicate he was male, then he could have used the boys’ restroom. He explained, however, that even if the birth certificate was changed, he would not be permitted to use the boys’ restroom if his use of the male restroom caused a disruption.

The school district argued that the Whitaker decision was distinguishable from this situation. For example, school officials noted that in Whitaker, the transgender student presented two different expert reports that spoke to how the school policy specifically harmed the student, whereas in J.A.W., the three expert reports submitted addressed harm to transgender students in general (J.A.W. v. Evansville Vanderburgh Sch. Corp., Proposed Findings of Fact by Evansville, 2018). The school district also argued that Whitaker was not “a mandate requiring school corporations to allow unemancipated minors who profess to be transgender access to the restrooms of their choosing on the strength of nothing more than their own demands” (J.A.W. v. Evansville Vanderburgh Sch. Corp., 2018, p. 1036). School officials specifically contended that if they relied on students’ subjective, internal sense of gender it would cause chaos. Thus, they needed an objective basis in order to decide whether to allow a student to use a restroom that aligned with his gender identity (e.g., a birth certificate) (J.A.W. v. Evansville Vanderburgh Sch. Corp., Proposed Findings of Fact by Evansville, 2018).

The court agreed that Whitaker did not hold that schools are prohibited from requiring some evidence that access to the restroom is a medical necessity, but found the district’s argument to be “irrelevant” (J.A.W. v. Evansville Vanderburgh Sch. Corp., 2018, p. 1036). This argument was irrelevant because the district’s stance was that J.A.W. needed to obtain a birth certificate indicating that he is male before he could use the male restroom, which as the court observed, was likely legally impossible to do. Thus, the court found the current situation to be indistinguishable from Whitaker and, as such, J.A.W. established a likelihood of success on the merits under Title IX. Likewise, the court found that J.A.W. demonstrated a probability of success on his equal protection argument because the record presented to the court did not support that there was a student safety issue or that the need to prevent disruption is an exceedingly persuasive justification for the restroom policy. In 2018, the court entered a preliminary injunction, which allowed J.A.W. to use the male restroom (J.A.W. v. Evansville Vanderburgh Sch. Corp., 2018).

After the preliminary injunction was issued in 2018, the school district proceeded with a second motion to dismiss. J.A.W. pursued a partial motion for summary judgment, and the school district also filed a cross motion for summary judgment (J.A.W. v. Evansville Vanderburgh Sch. Corp., 2019). J.A.W. continued to argue that his rights were violated under both Title IX and the Equal Protection Clause. The school district contended that it lacked notice that J.A.W. had been diagnosed with gender dysphoria. The court addressed both the Title IX and equal protection claims in 2019. Relying on the Seventh Circuit’s Whitaker decision, the court granted J.A.W.’s motion for summary judgment in part and denied the school district’s motion on the Title IX claim. According to the court, a violation occurred whether or not school officials knew that
J.A.W. was affected by its policy. The court also found that the *Whitaker* decision put the district on notice that its practice was a form of sex discrimination that implicated the Equal Protection Clause. The court reasoned that the school district was not able to offer an exceedingly persuasive justification for its practice. Thus, the court granted J.A.W.’s motion for partial summary judgment and denied the district’s motion. For both the Title IX and Equal Protection Clause claims, the court ruled that a jury needed to decide whether J.A.W. was entitled to damages (*J.A.W. v. Evansville Vanderburgh Sch. Corp.*, 2019) (Eckes, 2019).

**Classifications and Undocumented Immigrants**

A state law in Texas permitted the state to withhold state funds from local school districts for educating students who were undocumented. This state law was challenged as a violation of the EPC. The U.S. Supreme Court found that this law severely disadvantaged students who were undocumented immigrants and denied them a right to an education. In striking down this state law, the Court did not find that there was a substantial state interest for this law (*Plyler v. Doe*, 1982). The Court observed that undocumented students should receive the free public education that was offered to all children within the state’s borders.

**Final Thoughts**

In sum, the EPC influences policies and practices in public schools. When creating school policies, district leaders must be sure that they have a justification for treating groups of students differently than one another. When developing and implementing policies and practices, education leaders must be sure that they have a justification for treating groups differently than others.

**References**

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In 2011, the Indianapolis Star featured Séamus as a “Rising Star” for his work as a lawyer, and the Indianapolis Business Journal’s Indiana Lawyer identified Séamus as an “Up & Coming Lawyer” for Indiana. Beginning in 2012, Séamus has been recognized annually by the Super Lawyers publication.

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Claims Against Schools and Their Employees: What Immunity Exists?

Kent Frandsen, Parr Richey Frandsen
Patterson Kruse, Lebanon
TORT IMMUNITIES OF PUBLIC SCHOOLS AND THEIR OFFICIALS AND EMPLOYEES

Kent M. Frandsen

December 2020
Presentation Outline

• Overview of Indiana Tort Claims Act and the Act’s immunities that are available to schools and their public officials and employees
  – Special pre-suit notice requirement applicable to civil claims against schools
• Other immunities and heightened burdens of proof that benefit public schools with respect to liability
• Steps to take in the event of an incident that could give rise to a claim or receipt of a claim or lawsuit
• Potential liability for COVID-related claims
Immunities in General

- Immunities are exemptions from duties, liability or service that are otherwise imposed by law. Black’s Law Dictionary (11th Ed. 2019)

Examples of common immunities:
  - Governmental, Qualified, Prosecutorial,
  - Legislative, Judicial, Quasi-Judicial, Executive,
  - Marital, Parental and Testimonial
English Common Law

• Because at English common law the King could do no wrong, the sovereign had no potential civil liability to the citizenry.
  – In essence, absolute immunity existed.

• But over time, American society identified circumstances in which federal, state and local units of government can and should have tort liability, so the need for limited immunities arose.
Origin of Federal and State Tort Claims Acts

- In 1948, Congress enacted the federal Tort Claims Act allowing damage claims against agencies and instrumentalities of the federal government; now codified at 28 USC §§ 2671.

- In 1974, our General Assembly enacted a similar law allowing tort claims against state and local units of government and public officials; now codified at IC §§ 34-13-3.

These Acts were the first comprehensive codification of the circumstances under which public bodies can be held liable in tort to private individuals and businesses.
Overview of Ind Tort Claims Act

- The Indiana Act applies only to claims or suits in tort; IC § 34-13-3-1(a)
  - wrongful acts or omissions that result in bodily injury, death or property damages;
  - does not apply to claims in contract, civil rights, eminent domain or other statutory remedies;
Ind Tort Claims Act (Cont’d)

- Protections of the Act are afforded to state and local units of government, political subdivisions, members of their governing bodies, committees, employees acting within the scope of their employment, attorneys and medical providers acting on behalf of entity, and volunteers; public and charter schools are covered; IC § 34-6-2-110
Ind Tort Claims Act (Cont’d)

- Advance written notice of the claim is a precondition to filing a tort suit against a governmental body or public official; IC § 34-13-3-8 and -10
  - As to schools notice must be served within 180 days of the incident, unless claimant is a minor; IC § 34-13-3-8
  - Suit may not be filed until the claim is denied; IC 34-13-3-13
Special Pre-Suit Notice Required for Claims Against Schools

• Effective July 1, 2018, schools must receive notice of the claim and the relief requested before suit can be filed. IC §§ 34-13-3.5 Can one notice satisfy both statutes?
  2018 Act does not apply to teacher termination or collective bargaining disputes
  – Failure to give this notice will result in dismissal of the suit without prejudice
Ind Tort Claims Act (Cont’d)

- Punitive damages are not recoverable under the Act; IC § 34-13-3-4(b)

- Under current law, maximum recovery is $700,000 per person and $5,000,000 for all claims from single occurrence; IC § 34-13-3-4(a)
Ind Tort Claims Act (Cont’d)

- Officials and employees may not be sued individually absent specific, pleaded allegations of criminal, malicious, or willful and wanton misconduct or conduct beyond the scope of the employee’s duties or calculated to benefit the employee personally; IC § 34-13-3-5
Ind Tort Claims Act (Cont’d)

• Governmental entity must defend an employee joined in the lawsuit if the act or omission complained of was within the scope of the employee’s duties; and

• The employee has no personal liability for claims arising out of the scope of their duties; IC § 34-13-3-5
Ind Tort Claims Act (Cont’d)

• Governmental units are authorized by the Act to purchase insurance coverage for their potential liability. IC § 34-13-3-20
  – Important that they do so
  – Consider retain a consultant to assist in pricing coverage and avoiding gaps in coverage
Immunities under Ind Tort Claims Act

With respect to governmental bodies, public officials and employees, most immunities from tort liability are created by the Act itself.

In the school setting, the immunities commonly in play will arise from:
Tort Claim Act Immunities

• The performance of a discretionary function, typically policy-making and its application; IC § 34-13-3-3(7)

Martinsville Schs. v. Jackson, 9 N.E.3d 230 (Ind. Ct.App. 2014) (school shooting case; principal’s development of school safety plan held insufficient to satisfy requirements for discretionary-function immunity)
Tort Claims Act Immunities (Cont’d)

• The natural condition of unimproved property; IC § 34-13-3-3(1);


• The adoption of a school policy or failure to enforce the policy; IC § 34-13-3-3(8)
Tort Claims Act Immunities (Cont’d)

- Failure to make an adequate inspection of non-school owned facilities; IC § 34-13-3-3(12)

- Unintentional misrepresentation; IC § 34-13-3-3(14)

- Harm resulting from the reasonable administration of student discipline or a restraint and seclusion plan; IC § 34-13-3-3(20)
Tort Claims Act Immunities (Cont’d)

- The initiation of a judicial or administrative proceeding (e.g., employee termination, student expulsion, small claims suit.) IC § 34-13-3-3(6)
Tort Claims Are Not Subject to Comparative Fault Act

Tort claims against schools and their personnel are not subject to Indiana’s Comparative Fault Act, IC § 34-51-2-2

Common law defenses of contributory negligence and incurred risk are an absolute bar to a recovery from the school. Bowman v. McNary, 853 N.E.2d 984 (Ind. Ct.App. 2006)
Statutory Immunities in School Setting Apart From Tort Claims Act

Communications between school counselors or psychologists and students are privileged. IC § 31-32-11-1(4) and - (5)

A school counselor is immune from disclosing privileged or confidential communication from a student. IC § 20-28-10-17
Statutory Protections in School Setting Apart From Tort Claims Act

Immunity from civil liability for persons who report suspected child abuse or participate in investigation of such a report; IC § 31-33-6-1

Law presumes the person was acting in good faith. However, the immunity does not attach if person acted with gross negligence or wanton or willful misconduct. IC §§ 31-33-6-2 and -3
Statutory Immunities in School Setting Apart From Ind Tort Claims Act

Public officials and employees have “Qualified (Good Faith) Immunity” from civil liability while performing a discretionary function, as long as the conduct does not violate clearly established constitutional or statutory rights at the time of the act or omission.
Examples of Qualified Immunities in School Setting

First grade teacher patted a student’s rear end in directing into her seat; parent’s battery claim rejected; conduct was deemed a reasonable exercise of classroom management and not a violation of a clearly established right

Examples of Qualified Immunities in School Setting

Special education student was paddled after mother chose that punishment in lieu of two-day suspension; paddling resulted in bruising; school officials entitled to qualified immunity because acting within scope of duties and corporal punishment is lawful in Indiana.

Statutory Immunities for Schools Apart From Ind Tort Claims Act

Schools may, but are not required to, implement a system of notifying parents when students are absent without a valid excuse. But if they have made a reasonable effort to contact the parents regarding the absence, they are immune from liability for any damages suffered by the parent by reason of the lack of notice. IC § 20-33-2-47

Also see Murray v. Indpls. Public Schs, 128 N.E.3d 450 (Ind. 2019)
Statutory Protections for Schools Apart From Ind Tort Claims Act (Cont’d)

Immunity from civil liability in fulfilling legal obligation to report incidents of battery, threats, intimidation, and alcohol or drug offenses occurring on or near school property. IC §§ 20-33-9-1, -8, -14

However, immunity is lost if the person making the report acts maliciously or in bad faith; -15
Statutory Protections for Schools Apart From Ind Tort Claims Act (Cont’d)

Schools, their employees and boards are immune from liability for damages to students or family members as a result of a student’s mental health issue that has not been disclosed to the school by the parents or from liability arising from referrals made by the school for treatment or evaluation; IC § 34-20-28-1
Immunity from liability for one who rescues a child from a locked motor vehicle reasonably believed to be in danger provided the person attempts to contact law enforcement and stays with the child until help arrives; IC § 34-30-29-1
Statutory Immunities in School Setting Apart From Ind Tort Claims Act

School personnel have qualified immunity from liability for disciplinary action necessary to promote student conduct that conforms with an orderly and effective educational system if the action taken was in good faith and reasonable. IC § 20-33-8-8
Not Quite Immunity, but Heightened Burden of Proof

Absent gross negligence, wanton or willful misconduct, school officials have no civil liability arising from:

the gratuitous rendering of emergency medical care or first aid; IC § 30-34-12-1

school personnel who perform cardiopulmonary resuscitation, a Heimlich maneuver, or remove a foreign body from an airway; IC § 30-34-14-8
Not Quite Immunity, but Heightened Burden of Proof (Cont’d)

Assisting a student in the application of topical, non-aerosol sunscreen product while on school property or at a school event; IC § 20-34-3-22

Authorizing designated school personnel to administer medication to students with permission of parents or guardians provided adequate training is received and record-keeping is maintained; IC §§ 30-34-14-1
Not Quite Immunity, but Heightened Burden of Proof (Cont’d)

Negligence in selecting, training or supervising volunteers who provide services in the course of sports or leisure activities; IC § 34-30-19-1

So long acting in good faith, disclosing educational records of a student without parental consent in a health and safety emergency; IC § 20-33-7-4
Handling of Incidents, Claims and Lawsuits

In the event of an incident that could lead to a claim:

- Authorize a staff person to investigate
- Obtain and preserve evidence
- Photograph scene and those involved
- Identify all potential witnesses
- Create an incident file
- Keep public statements to a minimum
- Notify school’s liability insurer
Handling of Incidents, Claims and Lawsuits (Cont’d)

Upon receipt of notice of claim:

- Compare what has been claimed with what your investigation indicated
- Supplement your investigation as needed
- Notify school attorney and insurer
  Insurer often conducts own investigation
  Fully cooperate with insurer’s investigation
Handling of Incidents, Claims and Lawsuits (Cont’d)

- Upon receipt of suit papers;
  - Provide copy to your school attorney
  - Forward copy to your insurer
  - Confirm that a response to complaint if being timely filed
  - Insurer will normally retain its own counsel to defend suit; school’s regular attorney can participate to extent necessary or desirable
Handling of Incidents, Claims and Lawsuits (Cont’d)

Coordinate the insurance defense counsel’s ability to meet with school personnel to prepare response to suit, needed discovery and case preparation

Insurer will normally retain control over settlement decisions

Keep school board as informed as they wish to be
Potential COVID Liability

Liability claims for harm allegedly arising from mishandling of COVID pandemic are possible

Advance written notice required

Liability should be covered under your general liability insurance

Make sure someone is the designated resource
Potential COVID Liability (Cont’d)

• Claims could fall within discretionary-function area or operational/ministerial area
  Big picture policy judgments or operational details
• Stay in touch with directives of CDC and local health department
• No clear answers and public is divided as to the proper response; result is school officials will have considerable discretion
Potential COVID Liability (Cont’d)

- Chances for special legislation affording schools with COVID-related immunity

Political debate
Wise policy?
Whose interests should take priority – the convenience of school districts and insurers or the health and safety of students, family members, employees and the general public?
Liability Shield Is a Stumbling Block as Lawmakers Debate Relief

Athletes have joined workers who believe legal protections for corporations are not warranted. Senate Republicans support a shield but the White House has been noncommittal.

By Ana Swanson and Alan Rappeport

Aug. 5, 2020

WASHINGTON — Calls to protect corporations and schools from legal blame if workers fall ill from Covid-19 contracted on the job have incited a growing backlash as Congress and the White House negotiate over liability protections in economic relief legislation.

Businesses, hospitals, schools and the trade groups that represent them have pushed for any relief package to include protections from Covid-related lawsuits. But so far, there has been little sign of a surge in litigation as the economy reopens, and prominent voices have opposed such a measure, arguing that liability shields are unfair to workers and that businesses must take responsibility to keep them safe.

The issue has spilled into the world of sports. On Wednesday, College Athlete Unity, an organization that represents thousands of athletes at universities, wrote a letter to the N.C.A.A. and the Big Ten Conference urging them to revise plans for resuming fall sports. Among the proposals was to ban the use of Covid-19 waivers.

The players’ associations for the N.F.L., N.B.A., N.H.L., Major League Baseball and Major League Soccer have made a similar plea. In a letter to top Republican and Democratic lawmakers last Friday, they said that inserting liability protections in the legislation would be wrong.

“There is still much that is unknown about this disease, how it spreads, and the long term consequences of exposure,” they wrote, arguing it was unclear how such legislation would affect safety agreements that have been made between employers and employees. “It makes little sense during these uncertain times to both ask employees to return to work and, at the same time, accept all the risk for doing so.”

Some businesses — including salons, amusement parks, gyms and even President Trump’s campaign rallies — have required those who come in their doors to promise not to sue if they contract the virus. But a Republican proposal would offer a much bigger shield: It would provide five years of legal protection for businesses, hospitals, schools and nonprofits that make “reasonable efforts” to comply with government standards to protect their workers and customers from coronavirus-related lawsuits.

Neil Bradley, executive vice president and chief policy officer of the U.S. Chamber of Commerce, said lawsuits have already been filed, and the number will grow as the economy continues to reopen.

“The right thing to do is provide an incentive for employers and universities to make sure they are adopting the right public health measures and give them the confidence that, having done so, they are not going to be dragged into court and second-guessed years from now,” he said.

The Republican proposal would funnel all coronavirus-related work claims into the federal courts, where plaintiffs would have the right to bring personal injury and medical liability suits until 2024, or the coronavirus is no longer a public health emergency, whichever comes first.

But those suits would face a high bar. Plaintiffs would need to prove that their illness resulted from gross negligence or willful misconduct on the part of the employer, not just carelessness or a lack of resources, like protective equipment. It would also limit lawsuits relating to coronavirus testing and personal protective equipment, if that equipment meets the standards of the Food and Drug Administration.

Damages would be capped, and there is a provision that would make some employees think twice about suing: Those who bring claims without merit could be subject to punitive damages and civil penalties of up to $50,000.

Many unions and workers’ rights advocates have objected to the proposal, saying that it would result in negligent behavior on the part of businesses and schools and lead to more coronavirus cases and more deaths.
The issue remains a contentious one in Washington, even as Senate Majority Leader Mitch McConnell, the majority leader and a Republican of Kentucky, insists that he will not allow any legislation to pass without the protections he has outlined.

"This is not just liability protection for businesses — they're included along with everyone else dealing with this brand-new disease," Mr. McConnell told CNBC late last month. "Unless you're grossly negligent or engage in intentional misbehavior, you'll be covered. And it will be in a bill that passes the Senate."

The White House has been noncommittal, however. President Trump has said he is focused on eviction protections and unemployment benefits. And in a briefing on July 31, the White House press secretary, Kayleigh McEnany, said a liability protection provision was Mr. McConnell's priority and reiterated Mr. Trump's focus on unemployment.

However, an aide to Mr. McConnell said on Wednesday that the White House had indicated that it also viewed liability protection as a "red line" that must be part of any agreement.

Congressional Democrats have argued that the administration should focus instead on strengthening workplace protections through the Occupational Safety and Health Administration, and it remains unclear whether they could be enticed to accept some version of a liability waiver.

House Speaker Nancy Pelosi said last month that a liability shield could force workers to choose between their health and their financial well-being.

"If you get sick, you have no recourse because we've given the employer protection," Ms. Pelosi, Democrat of California, said on "Face the Nation" on July 26. "And if you don't go to work because you're afraid of being sick and you have that job opportunity you don't get unemployment insurance. This is so unfair."

Polls have shown conflicting results on the public's embrace of such a shield. A survey for the American Association for Justice, a group representing plaintiffs' lawyers, showed nearly two-thirds of the public opposed such protections, while a U.S. Chamber of Commerce-funded poll found that 61 percent supported congressional protections from coronavirus-related lawsuits.

Julia Duncan, the senior director of government affairs at the American Association for Justice, said liability protections would take away an important tool for some of the country's lowest-paid workers, who are disproportionately people of color, to secure more protections from big employers such as Amazon, Tyson Foods and McDonald's.

"Bringing a lawsuit is the only leverage they have to say, 'I would like to be treated safer, I would like to be provided protective equipment, I would like to be provided time to wash my hands,'" Ms. Duncan said. "And if these lawsuits go away, companies like Amazon and Tyson are going to be able to do anything and not be held to account."

Other critics of the proposal say it could infringe on the rights of states, which typically regulate these kinds of legal protections. Many states, including Kentucky, Alaska and Missouri, have already expanded legal protections for businesses or offered expanded workers' compensation to essential workers who contract coronavirus at work.

"Whatever happened to conservatives' belief in states' rights?" Amy Dru Stanley, a history professor at the University of Chicago, wrote in an op-ed in The Washington Post.
Opponents of the provision, including the American Association of Justice, also argue that the United States has not yet seen a profusion of coronavirus-related lawsuits, because the requirements for bringing such a suit are already high. Companies that act reasonably are protected from such lawsuits, and plaintiffs have to prove that they contracted the coronavirus at the place of business, not somewhere else, they say.

"I think the purpose of this bill, to inoculate employers from this pandemic of litigation, sounds like a solution in search of a problem," said Paul Matiasic, a lawyer who is representing a widow, whose husband worked at a Safeway distribution center and died after contracting the virus, in a case against the grocery chain. "I think trial lawyers have been very discerning in terms of what cases they've brought."

A widely cited tally kept by the law firm Hunton Andrews Kurth shows that through Aug. 3 there have been nearly 4,000 legal complaints related to Covid-19, including disputes over business interruption insurance and rent delinquencies. So far, just 75 of those have been related specifically to exposure to Covid-19 at work or wrongful death. However, that number fails to capture workers' compensation insurance claims that employees are filing when they get sick, according to Torsten Kracht, a partner at the firm.

Mr. Bradley, the Chamber of Commerce vice president, said some trial lawyers had already started advertising about coronavirus-related lawsuits. "You're not advertising to attract clients to sue someone unless you think there's an opportunity to sue," he said.

Ms. Duncan, of the trial lawyers group, said the protections in the Republican proposal — although confined to coronavirus cases — would be a victory for businesses seeking to take liability cases away from the states. "If they could get a sweeping corporate federal immunity language enacted, albeit using this specific crisis to do it, they will all of a sudden achieve this thing they wanted for 30 years," she said.

The fight over liability protection follows battle lines drawn decades ago between the business associations and the Republican Party on one side, and trial lawyers, unions and Democrats on the other. But this time it has drawn schools and universities into the mix.

In early July, the School Superintendents Association, the National School Boards Association and the Association of Educational Service Agencies sent a letter to Congress arguing for the liability protections.

"Any such litigation would disrupt the school district's budget, a budget already likely to have been squeezed in response to the pandemic and related state and local funding cuts," the letter said.

Luke Broadwater and Emily Cochrane contributed reporting.

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He has also served as the panel chair in over 300 medical malpractice proceedings administered by the Indiana Department of Insurance. Mr. Frandsen is a certified civil mediator and has conducted over 300 civil mediations. He has also served as an arbitrator for the American Arbitration Association in both construction and tort disputes.

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Reported Appellate Decisions of Interest

- Benefiel v. Wright Hardware, 128 N.E.3d 458 (Ind. App. 2019) [reversing a defense verdict in wrongful death action based on improper admission of expert testimony]

- Boyland v. Castle Farms, Inc., 71 N.E.3d 81 (Ind. App. 2017) [upholding a trial court's judgment in boundary dispute awarding title to land through adverse possession]

- SCI Propane v. Frederick, 15 N.E.3d 1015 (Ind. 2015) [in a case of first impression, reversing decisions of the trial court and Court of Appeals which awarded multi-million dollars of attorney’s fees to plaintiff in wrongful death action]

- Pope v. Central Indiana Power, 937 N.E.2d 1242 (Ind. App. 2010) [affirming a directed verdict for electric utility in a negligence case arising from power outage]


- Porter Dev. v. First Nat’l Bank, Valparaiso, 866 N.E.2d 775 (Ind. 2007) [reversing trial and Court of Appeals denial of attorney fees to a bank which initiated an interpleader action]

- Babyback’s Int’l v. Coca-Cola Enterprises, 841 N.E.2d 557 (Ind. 2006) [rejecting the use of part performance and promissory estoppel as exceptions to Indiana’s statute of frauds in the multi-year contract setting]
· Biomet v. Barnes & Thornburg, 791 N.E.2d 760 (Ind. App. 2003) [in a case of first impression, reversing decisions of trial court and Court of Appeals and adopting the “continuous representation” rule to toll the statute of limitations in legal malpractice actions]

· Jay County REMC v. Wabash Valley Power Assn., 692 N.E.2d 905 (Ind. App. 1998) [affirming issuance of injunction prohibiting an electric distribution cooperative from withdrawing as member of a generation and transmission cooperative]

· Lueder v. NIPSCO, 633 N.E.2d 1340 (Ind. App. 1997) [reversing a defense verdict based on incorrect jury instructions in negligence action involving injuries from a power line contact]

· Bradley v. Eagle-Union Schools, 647 N.E.2d 672 (Ind. App. 1995) [rejecting a landowner’s challenge to school district’s right to engage in pre- eminent domain testing of land]

· Lantis v. Astec Industries, 648 F.2d 1118 (7th Cir. 1981) [reversing a defense verdict in a products liability case based on incorrect jury instructions]

Professional and Community Associations

Long active in community affairs, he was a founding director of The Community Foundation of Boone County and has served as president of Ulen Country Club, Crooked Stick Golf Club, the Boone County Economic Development Corporation, Greater Lebanon Community Vision Committee, and Boone County Chamber of Commerce.

Mr. Frandsen is a member of the American Association for Justice. He has served on the ethics and land use committees of the Indiana State Bar Association and the board of the Indiana Trial Lawyers Association. He is now a member of the Defense Research Institute and the National Council of School Board Attorneys. Between 1999 and 2002, he was one of two public board members of the Indiana CPA Society. He currently serves on the Executive Committee of the Indiana Council of School Attorneys and serves as chair of its Amicus Committee.

Since 2009, Mr. Frandsen has hosted a weekly radio show, WHAT’S UP, BOONE COUNTY (91.1 FM) in which he has conducted over 500 interviews of individuals who affect the quality of life in the community. Among his guests have been then-Butler Men’s Basketball Coach Brad Stevens (a Boone County native) and Mitch Daniels, once as Governor of Indiana and once as President of Purdue University.


Honors/Awards

Upon graduation from Indiana University, Mr. Frandsen was awarded the Branch McCracken Memorial Scholarship for post-graduate studies.

Mr. Frandsen has been named an Indiana SuperLawyer each year since 2005.

In 2002, Mr. Frandsen was presented with the Chairman’s Award for outstanding service to the Indiana CPA Society. That same year he and his wife Charlotte received the Philanthropists of the Year award from The Community Foundation of Boone County. In 2007, he received the Isaac Grainger award for volunteer service to the United States Golf Association.

An avid golfer, Mr. Frandsen was captain of the Indiana University golf team in college. He has been the Indiana State Amateur champion three times and in 1990 was inducted into the Indiana Golf Hall of Fame.

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Complying with the Public Access Laws during a Pandemic

Luke Britt, Public Access Counselor, Indianapolis
INDIANA PUBLIC ACCESS LAWS

Presented by
Luke Britt, Indiana Public Access Counselor
A fundamental philosophy of the American constitutional form of representative government is that government is the servant of the people and not their master.

Accordingly, it is the public policy of the state that all persons are entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees.

Providing persons with the information is an essential function of a representative government and an integral part of the routine duties of public officials and employees, whose duty it is to provide the information.
INDIANA OPEN DOOR LAW (“ODL”)

“...It is the intent of this chapter that the official action of public agencies be conducted and taken openly, unless otherwise expressly provided by statute, in order that the people may be fully informed...” IC 5-14-1.5-1.
BASIC RULE

• Majority
• Governing Body
• Official Action
• Public Business
• 48 Hours Notice
• Must be open to the public
REQUIRED NOTICE

- 48 business hours in advance
- Date, time and place where Governing Body will meet
- Generally no requirements to publish in newspaper (public hearings are different than public meetings)
- Annual notices are permitted
- Emergency meetings are exception to notice requirement
- **Must** post at principal place of business or meeting location – mere website or newspaper notice is insufficient
- Special meetings of County Executives IC 36-2-2-8 (must state specific subject matter)
- Prohibition on serial meetings
EXAMPLE OF PUBLIC NOTICE

Notice of Public Meeting:
Xavier Town Council
Wednesday, July 16, 2016
5:30 p.m.
City Hall, Room 104
123 Main Street, Xavier, Indiana
EXECUTIVE SESSIONS

- The “exception” to meetings that are open to the public
- Notice must include statutory purpose(s) for the meeting excluding the public.
- Meeting minutes or memoranda must include certification that only the topics permitted under the ODL for executive session were discussed.
- Should be irregular
- NO FINAL ACTION
Notice of Executive Session
Xavier Town Council Executive Session
Wednesday, November 16, 2011
5:00 p.m.
City Hall, Room 104
123 Main Street
Xavier, Indiana

The Council will meet to discuss a job performance of an individual employee as authorized under
I.C. 5-14-1.5-6.1(b)(9)
COMMON EXECUTIVE SESSIONS

• To discuss:
  – records classified as confidential by state or federal statute
  – the alleged misconduct of an employee
  – strategy with respect to pending litigation or litigation threatened in writing

• To receive information and interview prospective employees
NAVIGATING 2020

- Public Hearings
- Collective Bargaining
- Virtual Meetings
- Executive Orders and PAC Guidance
- Public Records Law Changes
ACCESS TO PUBLIC RECORDS

“Public record” means any writing, paper, report, study, map, photograph, book, card, tape recording, or other material that is created, received, retained, maintained, or filed by or with a public agency and which is generated on paper, paper substitutes, photographic media, chemically based media, magnetic or machine readable media, electronically stored data, or any other material, regardless of form or characteristics.

Indiana Code § 5-14-3-2(n)
RESPONDING TO APRA REQUESTS

Time frames for responding to APRA Requests depend on the manner in which the public agency receives the request.

- If requestor is **physically present** in the office, the agency has 24 hours to respond.
- If the request is made by **mail or by facsimile**, the public agency has 7 days from the date it was received.
- Important: Production of documents is not required in these time frames, but within a reasonable time.
- Copy fees
All records must be provided within a “reasonable period of time” after the request is received.

- Factors considered:
  - How broad is the request
  - Where are the records located
  - How much redaction is necessary
  - Busy time at the agency
  - Common sense factors

- What I like to see:
  - Communication – Status Updates
  - Piecemeal disclosures
REASONABLE PARTICULARITY

- A request from the public must be reasonably particular – a subjective standard

- Two conflicting cases
  - Can you find it?
  - Are there objective elements in the query?

- What I like to see:
  - No blanket denial
  - Cooperate to narrow request
THREE CATEGORIES OF PUBLIC RECORDS

THE GOOD

THE BAD

THE UGLY
THE GOOD: DISCLOSABLE RECORDS

- Meeting Minutes
- Budgets
- Invoices
- Receipts
- RFPs
- Contracts
THE BAD: CONFIDENTIAL PUBLIC RECORDS

- Some Personal Health Information
- Trade secrets
- Student records
- Social Security Numbers
- Those declared confidential by state statute or federal law
THE UGLY: DISCRETIONARY PUBLIC RECORDS

Investigatory records of law enforcement agencies
Attorney work product/client communication
Deliberative material
Personnel files of public employees
A public record includes electronic media that is created received, retained, maintained, or filed by or with a public agency.

Electronic mail must be available for inspection and copying by the governing body unless an exception to disclosure, based on the content of the email, applies.

Electronic mail must be maintained in accordance with records retention schedules, pursuant to I.C. 5-15.

Most agencies have their own retention schedules.
DENIALS

- If a request is made orally, the agency may deny the request orally.
- If request is made in writing, the agency must deny the request in writing.
- Before the trial court, the burden is on the agency to demonstrate that the denial complied with the APRA.
- Court may review the records in-camera; the court may review the records if redaction of the record has occurred.
Consequences

- Complaint to Public Access Counselor
- Lawsuit

Penalties

- Court action seeking order to produce records and potentially order to pay attorney’s fees
- Fines for knowing and intentional withholding of public records or violation of the ODL
- Bad press and damage to public perception

You were so preoccupied with whether or not you could, you didn’t stop to think if you should.
COMMON MISCONCEPTIONS OF AGENCIES

- Offering to allow inspection is sufficient.
- Everything can be redacted
- Denials do not have to be explained
- Any document containing confidential information may be omitted from public records response
COMMON MISCONCEPTIONS OF CITIZENS

• A public agency should:
  • Answer questions under APRA
  • Give me immediate access
  • Keep public records forever
  • Handle public records requests before handling other matters of the public agency
  • Keep public records in a format that is most convenient for me.
Public Access Handbook:

Public Access Counselor Website:
http://www.in.gov/pac/

Contact Information:
Indiana Public Access Counselor
402 W. Washington St, W470
Indianapolis, IN 46204
317.234.0906
pac@opac.in.gov

The End
Bio

- Luke H. Britt was appointed by Governor Mike Pence to serve as Indiana's Public Access Counselor in August of 2013, a non-partisan office dedicated to preserving the access rights of the public and educating government officials on their responsibilities under Indiana’s access laws. Britt was reappointed in 2017.

- Now the longest-serving PAC in state history, he previously served as an attorney and operations manager for the Indiana State Department of Health and as an attorney for the Indiana Department of Child Services after beginning his career in private practice in Johnson County, Indiana.

- Britt received his undergraduate B.A. degree in Journalism from Franklin College in Franklin, Indiana (2002); an M.B.A. from the University of Indianapolis (2015); and a J.D. from the University Of Detroit Mercy School Of Law in Detroit, Michigan (2005) and is admitted to the Indiana bar.

- He regularly guest lectures on journalism, civics and law at Indiana universities and colleges. He is a board member of the Indiana Oversight Committee on Public Records and the Indiana Mental Health Advisory Council as well as several local non-profit boards in the private sector.
T-Shirts, Protests, & Social Media: When Can Administrators Regulate Student Speech?

Pat Shoulders, Ziemer Stayman Weitzel Shoulders, LLP, Evansville
T-SHIRTS, PROTESTS, & SOCIAL MEDIA: WHEN CAN ADMINISTRATORS REGULATE STUDENT SPEECH?

PATRICK A. SHOULDERS
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I HOPE I DON'T GET KILLED FOR BEING BLACK TODAY.
UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF INDIANA  
SOUTH BEND DIVISION  

D.E., a minor child, by his mother and  
next friend, Davon Eades,  

Plaintiff.  

v.  

No. 3:20-cv-977  

DR. JON LIPPE, in his individual and  
official capacity as the Principal of  
Manchester Jr-Sr High School;  
DOREY MOBLEY, in her individual  
and official capacity as Assistant  
Principal of Manchester Jr-Sr High  
School,  

Defendants.  

Complaint for Injunctive and Declaratory Relief and Damages  

Introduction  

1. D.E. is a Junior at Manchester Jr-Sr High School. He is one of the few students at  
the school who identifies as Black. At the beginning of the school year he wore a t-shirt  
that said on its front, “I HOPE I DON’T GET KILLED FOR BEING BLACK TODAY.”  
Even though the t-shirt did not cause disruption and other students regularly wear “Blue  
Lives Matter” and “MAGA” apparel supporting police and President Trump,  
respectively, and some students wear apparel adorned with Confederate flags,  
defendants prohibited D.E. from wearing his shirt. This violated the First Amendment
Lawsuit filed for Manchester HS student over ‘I hope I don’t get killed for being black today’ T-shirt

INDIANAPOLIS (WANE) — The American Civil Liberties Union of Indiana filed a lawsuit Monday on behalf of a Manchester High School student claiming the school violated his First Amendment rights back in August when he was sent home after refusing the take off a t-shirt he was wearing printed with the message, “I hope I don’t get killed today for being black.”

According to the ACLU, Dondre Eades, a junior, chose to wear the shirt to school as a way to protest systemic racism that is behind shootings that have taken place and to personalize the issue to his classmates and school.

The ACLU claims the shirt did not violate any of the rules in the school’s Student Handbook, and had not caused any disruption among his fellow students.

Back in August, Dondre Eades, told WANE 15 that the school accused him of wearing the shirt to start a fight. However, he said that wasn’t the case and none of his fellow students or teachers commented on his shirt, only the principal and vice principal. Eades was asked to change his shirt and refused, as he felt strongly that he had the right to wear the shirt and to share the message. His mother then picked him up, and he was removed from school for the remainder of the day.
“Manchester Community Schools supports equal treatment of all persons regardless of race. We encourage student expression on social issues in a manner that promotes positive conversation and better understanding. Any such expression that threatens to disrupt or distract other students must be addressed to ensure the safe operation of the school. Manchester Community Schools is committed to working with its students on appropriate ways to address issues of racial equality.”

DR. TERESA GREMAUX, SUPERINTENDENT OF MANCHESTER COMMUNITY SCHOOLS
The ACLU disagrees.

“Schools cannot selectively choose which social issues students can support through messages on their clothing,” said Ken Falk, legal director at the ACLU of Indiana. “Students do not lose their constitutional rights at the schoolhouse doors. The refusal of the school to allow D.E. to wear his t-shirt is a violation of his right to free speech.”

The ACLU alleges that students at Manchester Jr-Sr High School regularly wear “Blue Lives Matter” and “MAGA” apparel supporting police and President Trump, respectively, and some students wear apparel adorned with Confederate flags.

Indiana student sues school after being told to take off 'I Hope I Don’t Get Killed for Being Black Today' shirt

Student allegedly told by school's principal the t-shirt "is not going to fly"

By: Shakkira Harris

MANCHESTER — A Manchester Jr-Sr High School student is suing the school after he was told he couldn't wear a t-shirt that read: "I Hope I Don’t Get Killed for Being Black Today."

The student, only identified by his initials, was forced to leave school one day in August after he refused to remove the shirt with that message, according to the American Civil Liberties Union of Indiana.

The ACLU filed the lawsuit Monday in U.S. District Court for the Northern District of Indiana in South Bend. The lawsuit claims that the student's First Amendment rights have been violated.
The ACLU's submitted complaint explains that the student, who is reportedly one of few Black students in the school, "is acutely aware of the many incidents where young Black men have been fatally shot by law enforcement authorities. To protest what he perceives as the systemic racism that is behind the shooting and to personalize the issue to his classmates and school, he wore a t-shirt to the school in August of 2020."

When the student was sent to the administration's office in August, Manchester's principal Dr. Jon Lipp allegedly told the student his t-shirt "is not going to fly" and demanded he remove it or he would need to go home, according to the filed complaint. The student didn't remove his shirt because he "believes that the message of the t-shirt is an important one to transmit to students and staff and that the t-shirt makes an extremely important statement." The student's mom was called to pick him up, and he was not allowed back for the rest of the day.

The student's shirt didn't violate the school's student handbook and did not cause class disruption, the ACLU said. Further, the ACLU reports that Manchester students regularly wear "Blue Lives Matter," "MAGA," and Confederate flag-adorned apparel. The ACLU reports the student has been subjected to racial epithets in the school from fellow students in the past and that the school denying his ability to wear the shirt only further causes him harm.

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Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.
SUBSTANTIAL DISRUPTION

- A group of students wore black armbands to school as a means of protesting the Vietnam War.
- Having caught wind of the planned protest, school officials had adopted a policy banning armbands just days before.
- When the students refused to remove their armbands, they were suspended.
• Wearing of the armbands was “closely akin to ‘pure speech’” which is entitled to comprehensive protection under the First Amendment.

• “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

• “The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas…”

• The prohibition adopted by the school officials was unconstitutional as the record did not demonstrate any facts to reasonably forecast “substantial disruption of or material interference with school activities….”
VULGAR AND LEWD SPEECH IN THE SCHOOL ENVIRONMENT

Bethel Sch. Dist. V. Fraser, 478 U.S. 675 (1986)
Fraser Facts

- A high school student was disciplined for delivering a speech containing sexual innuendos at a school assembly.
- Some students reacted to the speech by hooting, yelling, and making graphic gestures simulating sexual acts.
- The speech was deemed to have violated a school rule prohibiting “conduct which materially and substantially interferes with the educational process…including the use of obscene, profane language or gestures.”
Fraser Cont’d

- “The undoubted freedom to advocate unpopular and uncontroversial views in schools…must be balanced against society’s countervailing interest in teaching students the boundaries of socially appropriate behavior.”

- “[T]he constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.”

- “Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent’s would undermine the school’s basic educational mission.”
SCHOOL SPONSORED SPEECH

**Hazelwood Facts**

- Student staff members of a school newspaper claimed their First Amendment rights had been violated when a school official removed stories on the topics of student pregnancy and the impact of divorce from the school’s publication.

- The official removed the stories due to concerns about the pregnant students’ abilities to remain anonymous, as well as the divorced couple’s lack of opportunity to respond or consent to the publication.
Hazelwood Cont’d

• SCOTUS determined that the student newspaper was not a public forum, but rather a part of the school’s curriculum.

• “The question whether the First Amendment requires a school to tolerate particular student speech - the question we addressed in Tinker - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.”

• “A school must be able to set high standards for the student speech that that is disseminated under its auspices…and may refuse to disseminate student speech that does not meet those standards.”
BONG HITS 4 JESUS

Free speech not only lives, it rocks!
Promotion of Illegal Drug Use

*Morse v. Frederick*, 551 U.S. 393 (2007)

- Student was disciplined for unfurling large banner bearing the message “BONG Hits 4 JESUS” in front of news cameras present for the Olympic Torch Relay.
- The school principal allowed students and teachers to witness the relay during school hours as an approved class or school trip.
- The student claimed the message was “nonsense meant to attract television cameras.”
- However, the school district determined the display of the banner violated a Board policy prohibiting “public expression that...advocates the use of substances that are illegal to minors....”
Morse Cont’d

• Consistent with the principles set forth in *Tinker*, *Fraser*, and *Hazelwood*, the Court held “that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”

• “Deterring drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”
Social Media

Two high school students were suspended from extracurricular activities for posting “raunchy photos” to social media during a summer sleepover.

The school determined that the students violated a provision of the student handbook that states, “If you act in a manner in school or out of school that brings discredit or dishonor upon yourself or your school, you may be removed from extra-curricular activities for all or part of the year.”
Smith-Green Cont’d

• The photos constituted protected expression, because even though “[n]o message of lofty social or political importance was conveyed…none is required.”
• Images were not obscene under the Miller test.
• The speech at issue took place off-campus, so Fraser did not apply.
• Applying Tinker, the court ruled for the students, finding that the record did not support a reasonable forecast of substantial disruption.
After failing to make her school’s varsity cheerleading team, a student posted a picture of herself with the caption “fuck cheer.”

The student was suspended from junior varsity cheerleading for violating team and school rules requiring “respect for [their] school, coaches…[and] other cheerleaders” and prohibiting “foul language.”
• While acknowledging the challenges posed by the “‘omnipresence’ of online communication” the Court held that the speech was clearly off-campus and not school-sponsored.

• In breaking from the approaches adopted by other circuits, the court held that “Tinker does not apply to off-campus speech--that is, speech that is outside school-owned, -operated, or supervised channels and that is not reasonably interpreted as nearing the school’s imprimatur.”

• Petition for certiorari filed on August 28, 2020.
Confederate Flag Clothing

*Hardwick v. Heyward, 711 F.3d 426 (4th Cir. 2013)*
**Heyward Facts**

- South Carolina middle and high schools disciplined a student for wearing t-shirts bearing the Confederate flag on several occasions spanning multiple school years.
- The school had recently experienced conflicts between students caused by Confederate flag clothing or accessories.
- Further, the school district and the surrounding area had a history of racial tension that had been intensified due to previous events involving the Confederate flag.
“[T]his case is, at its core, a student-speech case governed by *Tinker*....”

“Because school officials are far more intimately involved with running schools than federal courts are ‘it is axiomatic that federal courts should not lightly interfere with the day-to-day operation of schools.’”

“As long as school officials reasonably forecast a substantial disruption, they may act to prevent that disruption,...and we will not second guess their reasonable decisions.”
Lewd Speech, Substantial Disruption, or Awareness?


Student sought an injunction permitting her to wear a bracelet sold by a breast cancer awareness organization which bore the phrase “I ♥ boobies.”

School rules prohibited students from wearing bracelets that contained “messages that are solicitous, profane, [or] obscene.”

The evidence in the record revealed “a low maturity level at the school. Male high school students said the word ‘boobies’ in the halls and in the classroom, conveying a sexual message rather than supporting breast cancer awareness.”

“School officials, who know the age, maturity, and other characteristics of their students better than federal judges, are in a better position to decide whether to allow these products in their schools.
Kneeling for the National Anthem

This Photo by Unknown Author is licensed under CC BY-SA-NC Creative Commons Legal Code
In order to express his “personal feelings and concern about racial injustice in our country,” a high school student athlete knelt during the National Anthem prior to two football games.

After one of the games, students from the other school responded with racial slurs, threats, and harassing other students.

The school subsequently adopted rules and drafted a policy prohibiting kneeling or other forms of protest during sporting events.

Cont’d

• *Tinker* applied, because the act of kneeling was not “vulgar, lewd, or absence,” nor could it be considered “school-sponsored speech.”

• Even when taking into account the reaction from the other school’s students, the district court determined that the student-athlete’s speech was “unlikely to cause a substantial disruption of or material interference with school activities or interfere with other students’ rights.”
What result can we expect in *D.E. v. Lippe, et al*?
What result can we expect in *D.E. v. Lippe, et al*?

- D.E’s shirt, like the armbands at issue in *Tinker*, is closely akin to pure speech.
- What D.E. wears to class is clearly not school-sponsored speech, nor can this shirt reasonably be interpreted as lewd or promoting illegal drug use, making the exceptions set forth in *Fraser*, *Hazelwood*, and *Morse* inapplicable.
- Accordingly, this case will likely boil down to whether the school has a reasonable belief that the shirt is likely to cause a substantial disruption to the educational environment.
Questions?
• **Patrick A. Shoulders** has practiced law in his hometown of Evansville, Indiana, for more than 40 years. A *magna cum laude* graduate of the IU McKinney School of Law, Pat has represented K-12 public schools in Southern Indiana for much of his career and has served as a Trustee of Indiana University since 2002. A distinguished trial practitioner, Pat has been elected to the American College of Trial Lawyers, the American Board of Trial Advocates, and the Federation of Defense and Corporate Counsel. He is a popular speaker on law related topics and was presented the Lifetime Achievement Award by the Indiana Continuing Legal Education Forum for “Excellence in Continuing Legal Education.”

• **Matthew S. Koressel** graduated *cum laude* from the IU McKinney School of Law in 2018. He received his undergraduate degree in History from Indiana University in 2015. Prior to joining ZSWS, Matt worked as a Deputy Attorney General for the State of Indiana, representing the state agencies and their employees in both state and federal courts. Matt focuses his practice on general civil litigation.
Title IX: Sex-Related Claims – Part II

Jonathan Mayes, Bose McKinney & Evans, Indianapolis
Changes to Title IX

Jon Mayes
Bose McKinney & Evans LLP
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(317) 684-5245
New Rules

• Effective August 14, 2020
• Actual rules and no longer “Dear Colleague Letters”
  ▪ Informal Best Practices vs. Formal Legal Requirements
• Implements as law many of the 2001 guidance
Sexual Harassment

• “Sexual harassment”: conduct that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school corporation’s education, work programs, or activities.

• Include *quid pro quo* harassment, which was included in the prior rules, as well as four new categories of conduct now considered per se sexual harassment--sexual assault, dating violence, domestic violence, and stalking.
Obligation

- A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent.
Geographical Limitations

• Use of “in the United States” may limit Title IX obligations as well as liability regarding student trips

• Code of conduct, study abroad agreements or bullying statute may impact response
Actual Knowledge

• “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school.”
Actual Knowledge

• “Actual knowledge”: means a mandated reporter has notice of “sexual harassment or allegations of sexual harassment.”

• Important distinction between K-12 and higher ed
  ▪ In the K-12 context, all employees are now mandatory reporters.
  ▪ Colleges and universities have more flexibility in this regard and can determine for themselves which employees have “authority to institute corrective measures” such that their knowledge of a sexual harassment complaint is “actual knowledge” for Title IX purposes.
• “Accordingly, if an athletic coach is an employee of an elementary and secondary school, then that coach would have actual knowledge if the coach has notice of sexual harassment or allegations of sexual harassment”
Actual Knowledge

- Think of all employees in a school—custodians, administrative assistances, etc.
- Be sure they know how to report these up the chain
- Similar to DCS reporting protocols
Education Program or Activity

• “Education program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs”
Student Communications

- What about student social media/texting?
  - OCR previous 2010 Dear Colleague Letter addressing bullying and harassment. The Department’s 2010 guidance made a passing reference that harassing conduct may include “use of cell phones or the internet,” and the Department’s position has not changed in this regard.
  - But the new regulations supply an important limiter
Student Communications

• “These final regulations apply to sexual harassment perpetrated through use of cell phones or the internet if sexual harassment occurred in the recipient’s education program or activity.”

• “For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.”
Student Communications

• Be aware of actions off campus that bleed into interactions in the educational program
  ▪ EXAMPLE: Social media exchange then produces conversations in school building.
• Even if act is not a Title IX issue, it may be code of conduct/bullying issue.
Removal of Student

- Allows for removal of students based on individualized safety and risk analysis
  - Due process must be given before removal
  - Special ed still requires manifestation determination
Complaint Process

- Screening of complaint
- Equal opportunity to parties
- Not restrict ability of parties to discuss allegations
- Applies due process
- Reasonably prompt timeframes
Complaint Screening

“If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient’s code of conduct.”
Complaint Process

• Innocent until proven guilty
• Right to “advisors” during meetings and proceedings
• If live hearing, provide to the party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings with a party, with sufficient time for the party to prepare to participate
Complaint Process

• If no live hearing, parties must be able to send questions to parties/witnesses, receive answers, allow for follow-up questions
• Preliminary report prior to hearing summarizing evidence
• Written determination must be provided simultaneously to parties
Supportive Measures

• Must document no deliberate indifference and reason for no supportive measures

• “[N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed”

• Supportive measures are confidential unless impair ability to provide supportive measure
Supportive Measures

“Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.”
Complaint Process

- Decision-maker cannot be Title IX coordinator or investigator
- Process will be more similar to expulsion hearings
Appeals

• Appeals allowed:
  ▪ Appellate decision-maker(s) must be different
  ▪ Notice of appeal to all parties required
  ▪ Both parties afforded opportunity to submit written statements on appeal
  ▪ Written appellate decision to parties
Mediation

• Informal resolution:
  ▪ Mediation
  ▪ Notice of informal process
  ▪ Voluntary, written consent
Training

• Title IX coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must receive training on the following:
  ▪ Definition of sexual harassment
  ▪ Scope of education program or activity
  ▪ How to conduct an investigation
  ▪ How to conduct grievance process
  ▪ How to conduct hearings, appeals or mediations
  ▪ How to serve impartially
Training

- Training for decision-makers if live hearings:
  - Technology training
  - Relevance of questions
  - Evidence

- Training for investigators:
  - Relevance

- Training must also address sex stereotypes, promote impartial investigations/adjudications
Final Thoughts

• Knowledge by any school employee—make sure they all are aware of how to report
• Complaints must be dismissed up front
• More formal process for handling complaints
• Report must address no deliberate indifference and how requested supportive measures are “clearly unreasonable”
Recordkeeping

- Records must be maintained for 7 years
  - Each investigation
  - Appeals
  - Informal resolutions
  - Training materials
Decisions for School Corporations

• Evidentiary standard (preponderance of the evidence vs. clear and convincing)
• Decision-maker (one vs. panel; internal vs. external)
• Who is serving as investigator, Title IX coordinator, etc.
Helpful Resources

https://sites.ed.gov/titleix/policy/
Questions and Answers
Recent Legal Developments

Lisa Tanselle, ISBA General Counsel
Julie Slavens, ISBA Senior Counsel/ Director of Policy Services
Recent Legal Developments

December 11, 2020

I. Indiana Supreme Court

1. Plaintiff failed to preserve a substantive challenge to a trial court’s decision and therefore the court acted within its discretion when it denied a motion for reinstatement.

**Smith v. Franklin Township Community School Corporation**, 151 N.E.3d 271 (Ind. 2020).

A student was injured when his vehicle was struck by a school bus. The student informed the school of his intent to file a claim for damages shortly thereafter but waited to file the negligence suit until nine days before the statute of limitations expired. In the meantime, the General Assembly enacted the Claims Against Public Schools Act (CAPSA), which requires a plaintiff to meet certain notice requirements. The school corporation filed a motion to dismiss, alleging the student failed to provide the CAPSA notice. The court dismissed the lawsuit without prejudice. The student filed a motion to reinstate his case, citing Trial Rule 41(F). The school asserted the plaintiff had not met the rule’s requirements for setting aside a dismissal. The trial court summarily denied the motion for reinstatement. The Court of Appeals reversed.

The Supreme Court found that the trial court’s decision to dismiss the suit without prejudice due to CAPSA was a final, appealable order. However, the case was effectively dismissed with prejudice because the statute of limitations had expired months earlier. The Court noted that the plaintiff could have filed an appeal to challenge the dismissal, but he did not do so. Instead, the student attempted to reinstate the complaint under Trial Rule 41(F). The Court concluded the student’s use of Rule 41(F) to collaterally attack the trial court’s decision was impermissible.
II. Indiana Court of Appeals

1. IEERB’s conclusion that the collective bargaining agreements of four school corporations contained impermissible language was reversed.


Pursuant to its authority to review collective bargaining agreements for compliance with the bargaining law, the Indiana Education Employment Relations Board (IEERB) determined that the agreements of four school corporations contained language related to ancillary duties that was not allowed by statute. The teacher associations of the four school corporations filed a joint petition for review with the trial court, which was denied. On appeal, the teacher associations maintained that the parties are permitted to negotiate compensation for ancillary duties. IEERB acknowledged that the parties may bargain wages for ancillary duties but may not bargain as to what constitutes an ancillary duty. The Court of Appeals found that the associations and school employers agreed as to what constituted an ancillary duty and bargained the compensation therefor, as authorized by law. In the opinion of the appellate court, “identifying agreed-upon ancillary duties is not the same as bargaining them.” Additionally, the court noted that the school employers were willing to bargain the ancillary duties and therefore the court could not agree with IEERB’s conclusion the language interfered with the employers’ rights.

2. Applicant for a vacant city council position had standing to file complaint.


Four persons applied for a vacant position on the Muncie City Council. Applicant Hampton received the most votes and therefore was appointed to fill the vacancy. Applicant Barber challenged the appointment after discovering that Hampton had been convicted of two prior felonies and therefore was ineligible to hold the position. Hampton asserted that his felony convictions had been reduced to misdemeanors following his successful completion of probation. He further argued that Barber did not have standing to file the complaint. The trial court ruled in favor of Barber. Hampton appealed to the Court of Appeals, again asserting that Barber did not have standing and that IC 3-8-5-1(e) was unconstitutional as applied to him.

The appellate court concluded that Barber was a proper person to file the complaint pursuant to IC 34-17-1-1 and IC 34-17-2-1. Specifically, the court concluded that Barber had a personal interest in the office since he was a resident of Muncie and would again apply for the position should another vacancy occur. As to Hampton’s claim that IC 3-8-5-1 was unconstitutional as applied to him, the court refused to consider the claim since Hampton failed to raise the issue before the trial court.
3. School corporation was not negligent when it denied a student the benefit of early college credits. Additionally, the school corporation was not subject to the Deceptive Consumer Sales Act.


Parents of a gifted student chose to enroll their child in a high school within the school corporation based on representations that students would have opportunities to take classes at Butler University, for credit, if academically eligible. During the second semester of the student’s sophomore year, the parents insisted that the student be enrolled in a college math class and that IPS pay for the class. The school corporation refused the parent’s request and the parents sued, filing a complaint sounding in negligence, breach of contract, and deceptive practices. The trial court ruled in favor of IPS on all claims.

The Court of Appeals concluded IPS did not have a duty to provide the student with college level classes and that the school fulfilled its duty by offering classes that enabled the student to graduate with a Core 40 Diploma with Academic Honors. Therefore, the school corporation was not negligent. As to the breach of contract claim, the court found that there was never a discussion of the payment of college classes, let alone an agreement that the school would pay for the classes. Lastly, the appellate court concluded the school corporation was not subject to the statutory requirements of the Deceptive Consumer Sales Act and thus reversed the trial court’s conclusion on that issue.

4. Court of Appeals concludes that the decision of the athletic trainers board to suspend a trainer’s license was supported by substantial evidence and that the board and the Indiana Professional Licensing Agency are not amenable to a Section 1983 suit.

*Melton v. Indiana Athletic Trainers Board*, 156 N.E.3d 633 (Ind. App. 2020). An athletic trainer employed by a hospital and assigned to work for a public school corporation was terminated after it was discovered that she had a sexual relationship with a student athlete. The State of Indiana filed an administrative complaint with the Indiana Athletic Trainers Certification Board, alleging that the trainer had violated professional standards. While the Board initially determined that the trainer’s license should be suspended for at least seven years, as a result of litigation, the Board subsequently determined that the license should be suspended for three years. The trainer appealed that decision, alleging the decision was arbitrary and capricious and asserting violations of Section 1983. The Court of Appeals concluded while the Board members in their official and individual capacities were persons for purposes of Section 1983, the Board members in their official capacities could only be sued for prospective relief. Since the trainer requested an injunction, which is directed to prospective action by the Board, they could not be sued in their official capacities. Additionally, because the Board members were performing a quasi-judicial function in determining the appropriate sanction for the trainer, they were absolutely immune from liability in their individual capacities. As to the trainer’s claim that the Board’s decision was arbitrary and
capricious, the appellate court concluded the decision was supported by substantial evidence.

5. Basketball coach did not breach the duty of care to an athlete injured during practice.

**In the Matter of C.G. v. Union North United School Corporation, ___ N.E.3d ___**

A student athlete was injured during basketball practice when the coach blocked a layup by another student athlete, which resulted in the basketball striking the student on the temple and causing a concussion. The parents filed suit against the school corporation, alleging negligence on the part of the coach. The trial court found that the coach did not breach any duty to the student by blocking the shot and that the student could not satisfy the factors necessary to demonstrate reckless conduct.

The appellate court noted a limited new rule that applies to sports-injury cases: a sports participant breaches no duty as a matter of law by engaging in conduct ordinary in the sport but may breach a duty by injuring someone intentionally or recklessly. Finding that blocking a shot is ordinary in basketball, the court opined the student would have to prove that the coach’s actions were intentional or reckless. The student attempted to argue that the coach was a non-participant. The court first noted that this argument was not made at the trial court level, but still considered it, and found it unpersuasive. Finally, because the student acknowledged in her deposition that she did not believe the coach intentionally struck her with the basketball, the court concluded the student failed, as a matter of law, to demonstrate a breach of duty.

6. Casino employee failed to prove the existence of a reasonable accommodation at the time she was terminated and therefore failed to meet her burden of proof in her disability discrimination claim.

**Belterra Casino v. Yufen (He) Dusan, ___ N.E.2d ___**

An employee of the casino was placed on medical restrictions due to a back injury. The casino gave the employee a list of open positions and told her to work with human resources. She was also advised that she would be terminated if she could not find a new position within 30 days. The employee did not apply for any new position and was eventually terminated. She filed a complaint with the Indiana Civil Rights Commission. The Commission concluded the casino failed to provide the employee with a reasonable accommodation. The casino appealed.

The Court of Appeals focused on whether the casino failed to reasonably accommodate the employee. The court opined that the employee had the burden of demonstrating that a vacant position to which she could have been reassigned existed. The Commission had concluded that the employee could have performed the essential functions of some of the vacant positions "with the help of co-workers." The appellate court noted that having another person performs the essential functions of a job is generally deemed
unreasonable. Therefore, since the employee failed to prove the existence of a position that she could fill, the court concluded her disability claim failed.

III. Indiana Tax Court Decisions

None to Report.

IV. United States Supreme Court Decisions

A. Decisions

None to Report.

B. Certiorari Granted


Whether states and local governments have standing to challenge presidential memo on excluding noncitizens from the base population for purposes of apportioning seats to the House of Representatives; whether the memo is a permissible exercise of the president’s discretion.

2. Fulton v. City of Philadelphia, 19-123

Whether plaintiffs can only succeed by proving a particular type of discrimination claim; whether Employment Division v. Smith should be revisited.

C. Certiorari Denied

1. Parents for Privacy v. Barr, 20-62

Whether parents’ rights to direct the upbringing of their child and students’ rights to privacy are violated by being compelled to use restrooms in public schools that allow students of a different biological sex to use the same restrooms.
V. Seventh Circuit Court of Appeals Decisions

1. School principal did not act with deliberate indifference and therefore the school corporation was not liable for sexual harassment.

**Johnson v. Northeast School Corporation**, 972 F.3d 905 (7th Cir. 2020).

A student alleged that she was raped off campus by two classmates. The student’s grandmother contacted the principal, advised him that she had reported the alleged crime to police, and that she did not want the student interviewed by school officials. The principal confirmed that the police were investigating the allegation and decided to issue a no-contact order between the victim and one of the alleged perpetrators of the rape. Eventually the victim asked to be placed in homebound schooling during the morning in order to avoid seeing the male student. The school agreed to the request, and also allowed the student to attend school for her afternoon classes. In the meantime, the police concluded their investigation and the prosecutor decided to not file criminal charges. The principal contacted the grandmother again, asking if the school could initiate its own investigation and she again refused to allow the student to be interviewed.

A few months later, the student reported to the principal that she was being harassed at school. The principal investigated each allegation and took some steps to address the allegations. The student eventually withdrew from school and sued the school corporation, alleging sex discrimination in violation of Title IX. The district court granted summary judgment in favor of the school corporation.

The Seventh Circuit stated that the student had to demonstrate that the school was deliberately indifferent to the sexual harassment. While the court was skeptical that the conduct described by the student rose to the level of severe, pervasive, and objectively offensive sexual harassment, the court concluded that the school corporation was not deliberately indifferent to the harassment. Specifically, the court found that it was not unreasonable for the principal to defer to the police and the department of child services since criminal charges were a possibility, and that he took reasonable steps to address each subsequent allegation of harassment made by the student. Thus, the court concluded the school corporation did not violate Title IX and was not liable for the alleged sexual harassment.

2. Court rejects employee’s claim that he was fired because of his sexual orientation and in retaliation for his discipline of a subordinate employee.

**Marshall v. Indiana Department of Correction**, 973 F.3d 789 (7th Cir. 2020).

Marshall had been employed at the Indiana Department of Correction for over 20 years...
and generally received good reviews. Marshall identified as homosexual. In 2015 he was arrested for operating a vehicle while intoxicated and reprimanded. In 2016 he was accused of being intoxicated and acting inappropriately at a law enforcement conference. Later that year, Marshall confronted a subordinate employee about unethical disclosures of confidential investigation materials. The next day that employee accused Marshall of sexually harassing him on two separate occasions. Those allegations were investigated by the State Personnel Department and led to a decision to terminate Marshall. He sued the Department, alleging that he was dismissed because of his sexual orientation in violation of Title VII.

The Seventh Circuit noted that Marshall would have to prove that he belonged to a protected class, that he met the employer’s legitimate expectations, that he suffered an adverse employment action, and that another similarly situated employee who was not in the protected class was treated better by the Department. While the parties disputed whether Marshall was meeting the expectations of his employer, the circuit court concluded his claim failed because he could not show that a similarly situated employee who was not homosexual was treated better than he. While Marshall attempted to argue two other supervisors were treated more favorably, the court found they were not similarly situated employees because they did not have the same level and type of authority that Marshall had over his employee.

As to the retaliation claim, the court concluded it failed because Marshall failed to show that he was engaged in statutorily protected activity. Marshall’s exposure of his subordinate employee’s breach of confidentiality was not protected by Title VII.

### 3. Employee was dismissed from the police academy because of his conflicting and untruthful answers and not because of an actual or perceived disability.

**Sandefur v. Thomas Dart and Cook County, Illinois**, 979 F.3d 1145 (7th Cir. 2020).

A corrections officer applied for and was accepted into the police academy. On the first day of training, an instructor noticed a handicapped parking placard in the officer’s car. He initially said it was his wife’s placard but subsequently said that he also used it due to osteoarthritis. The police academy conducted a formal investigation to ensure that the officer was medically cleared to participate in the physical training. As a result of his conflicting statements, the lead investigator concluded the officer had demonstrated an inability to provide truthful answers to basic questions and that the officer should be dismissed. He was dismissed from the police academy and returned to his position as a corrections officer. He sued the county, alleging a violation of the Americans with Disabilities Act (ADA). The district court granted summary judgment to the county. The officer appealed to the Seventh Circuit.

On appeal, he asserted that the county wrongly regarded him as having a disability. The circuit court found that given the officer’s conflicting statements about the handicapped parking placard and the importance of a police officer being honest and obeying the law, it was only natural, and not a violation of the ADA, for the sheriff’s office to seek further information and clarification. The court further concluded that the undisputed facts showed that the decision to dismiss the officer from the policy academy was based on his
inability to give honest and consistent answers to legitimate questions, and not because of any actual or perceived disability.

4. Postal worker was not a qualified individual with a disability and therefore his claims of disability discrimination failed.

**Vargas v. Louis DeJoy, Postmaster General, ____ F.3d ____ (7th Cir. 2020), 2020 WL 6857397.**

A mail carrier with plantar fasciitis was placed on work restrictions by his doctor that prohibited the carrier from lifting or carrying items weighing more than 15 pounds. The carrier asked that his route be structured to cut out lifting and carrying heavy loads and/or that he be assigned less strenuous work. The postmaster general refused his requests and the employee sued under the Rehabilitation Act, alleging disability discrimination. The district court granted summary judgment in favor of the postal service.

The Seventh Circuit affirmed. In the opinion of the court, carrying bundles of mail weighing more than 15 pounds was an essential function of a mail carrier’s job. Furthermore, the employee’s requested accommodations were not reasonable in that an employer does not need to reshuffle staff and resources in order to accommodate an employee nor does an employer have to create light duty work where none exists. Since the employee could not perform the essential functions of the job, with or without a reasonable accommodation, he was not a qualified individual under the Rehabilitation Act.

VI. Indiana Federal District Court Decisions

VII. Other Federal Court Decisions

A. Circuit Court Decisions

1. Teacher’s claim of disability discrimination fail.

**Lyons v. Katy Independent School District,** 964 F.3d 298 (5th Cir. 2020).

Lyons was a physical education teacher for the school district and had coached several athletic teams over the years. In 2014 the principal announced that all physical education teachers would be required to coach three sports. Lyons met with the principal and expressed her preference to coach only two sports, but never stated that she was unwilling to coach three sports. Over the summer, Lyons had lap band surgery and was unable to attend the summer sports camps. In July, the in-school suspension teacher resigned and the principal reassigned Lyons from her physical education position to the in-school suspension position. Lyons filled suit, alleging that she was reassigned on the basis of a perceived disability. The district court granted summary judgment in favor of
the school corporation and the teacher appealed. The Fifth Circuit noted that the Americans with Disabilities Act prohibits discrimination against employees who have a disability, had a disability, or are regarded as having a disability. The court further noted that a person may not be “regarded as” having a disability in cases where impairments are transitory and minor. The Act’s definition of a transitory impairment is one with an actual or expected duration of six months or less. Finding that there were no facts in dispute regarding the transitory and minor nature of the teacher’s impairment, the court affirmed the district court’s grant of summary judgment.

2. Nurses’ advocacy for diabetic students constituted protected activity and therefore their allegations of retaliation under the Americans with Disabilities Act and the Rehabilitation Act were allowed to proceed.


During at least two different school years, two nurses of the school district debated parents of students with diabetes as to the care and management of the condition. In one case, the nurses reported the parents to the department of child services, alleging neglect on the part of the parent. In another case, the nurses refused to follow the wishes of the parents. The principal told the nurses that they were to do what the parents wanted, regardless of their medical training. One nurse was suspended for five days, while the other nurse’s contract was not renewed. They both sued, alleging retaliation under the Americans with Disabilities Act and the Rehabilitation Act. The district court granted the school’s motion for summary judgment. The circuit court reversed, after finding that the nurses’ advocacy for the diabetic students constituted protected activity and therefore satisfied the element of their prima facie case of retaliation.


Lenzi v. Systemax, Inc., 944 F.3d 97 (2nd Cir. 2019)

Female executive provided enough evidence at the motion for summary judgment stage to overcome dismissal, the circuit court found. Thus, the court vacated the lower court’s decision to grant summary judgment for the employer. The appellate court found the employee provided evidence she was being paid less than her male executive director coworkers even though they were not doing the same work. The appellate court ruled after reviewing case law a claim for discrimination for pay based upon sex under Title VII does not have to be based upon equal pay for equal work as a claim under the Equal Pay Act. Under the Title VII pay discrimination claim, a plaintiff must show discrimination in pay was based upon the sex of the employee. In this case, the appellate court found the employee did as her male counterparts while not doing the same work were paid a salary higher than the company’s benchmark for the positions and she was paid significantly
lower than the benchmark. Based upon this evidence, the court found the employee met her prima facie case burden.

With respect to her pregnancy discrimination claim, the plaintiff provided evidence she was fired within two weeks of telling her supervisor she was pregnant. In addition, while she had received numerous positive evaluations, emails showed up in her personnel file indicating poor performance. She was not told of such emails. The court found this was sufficient evidence to make a prima facie case. When a claim is status-based, as it is under the Pregnancy Discrimination Act, the plaintiff does not have to show she was treated differently from male employees but only that the discrimination was based upon her status, i.e., being pregnant. (At the appellate level, the plaintiff dropped her Equal Pay Act claim.)

4. Facebook page created by an elected official is an open public forum where the official asked for citizens to comment on any topic, used her office contact information, included the seal of the governmental agency, and did not restrict the use of the public comment area to specific topics.

**Davison v. Randall**, 912 F.3d 666 (4th Cir. 2019)

Randall was chair of the county board of supervisors and created a Facebook page containing information on her office, her contact information, and the board’s function. There was no personal information shared on this site. The page title referred to it being the chair’s page. On the page, information was posted about the board of supervisors’ actions and upcoming meetings and decisions. One section allowed and encouraged members of the public to post comments on the topics or areas of public concern. Randall and one of her aides maintained and controlled the content of the page. Davison often reviewed the page and would post comments. He posted a comment that accused school officials of conflicts of interest and financial transactions. Randall removed the comment as she did not think it was accurate and should not be on the Facebook page. After a few hours, she rethought her actions and reposted the comment. Davison sued for violation of his First Amendment free speech rights. He argued the page was essentially a public forum and by removing his remarks, Randall engaged in viewpoint discrimination. The District Court agreed. Randall appealed.

The appellate court affirmed the decision of the lower court on the free speech claim. The court found the Facebook page was an official page of the chair as it only contained information relating to the board of supervisors. It contained the official seal of the board and its title indicated it was the official page for the chair. The page allowed for public comments with an open invitation for any citizen to comment on the board’s business. As such the court found the page was no different from a public park which has been deemed an open forum for free speech purposes. The court then turned to review the actions of Randall. It found she had engaged in viewpoint discrimination as there were other comments posted about the board with respect to school matters and thus the only reason she removed Davison’s comment was she did not like the content of the post. In so ruling, the court also found Randall was acting under the color of state law as she was acting in her capacity as chair of the board and as an elected official with respect to the content of the page. Randall argued she created the page as a citizen as well; the court
did not agree with this argument as she had a separate Facebook page for her personal life and all matters on the chair page related to the board and her position as chair.

The court also ruled the board itself was not liable as it did not have a policy or custom relating to members creating social media pages as a member of the board. This case contains an excellent analysis of the municipal liability jurisprudence under a section 1983 claim.

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<th>5. School’s peace officer’s knowledge of a teacher’s sexual abuse of a student was not actual knowledge for Title IX liability. Power to arrest is not corrective action relating to the school’s duty to address sexual harassment in the school setting under Title IX.</th>
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<td><strong>Doe v. Edgewood Independent School District</strong>, 964 F.3d 351 (5th Cir. 2020)</td>
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Doe was sexually abused by a peace officer and later her chemistry teacher while attending high school. Both employees were eventually arrested. Doe sued the school district for violation of Title IX claiming the school had actual knowledge of her being sexually abused and harassed claiming the peace officer had knowledge and the authority through his arrest power to take corrective action. (The peace officer did not arrest the teacher and did not tell any school administrator about the abuse.) The court found the peace officer was not an “appropriate person” under Title IX to address the sexual harassment. Under the actual knowledge theory, the person who knows of the abuse must be one that has the authority to address it through their authority to discipline the employee. This would include a supervisor of an employee. The peace officer was not a supervisor of the teacher just because he had arrest powers. The arrest power was criminal in nature; Title IX requires the school to address the sexual harassment within the school context and not the criminal courts, the court concluded. Based upon the above, the court found the school was not liable under Title IX as no appropriate school employee knew of the sexual abuse who could address it.

Doe also brought a Section 1983 claim alleging the hiring processes of the school district were not adequate. Doe alleged the hiring administrator of the peace officer did not do a thorough background check as he had prior arrests and incidences of sexual abuse in previous employment. The court found that while the administrator did not do a thorough background which would have found this information, the arrest was over 20 years ago and would not have given rise to a risk of sexual abuse of Doe; in addition, the policy of the board required the background checks, it was the administrator who acted and not the board. There was no evidence the board through its policy or hiring practices were liable under Section 1983.

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<th>6. School’s unwritten policy on the use of bathrooms violates trans-male student’s equal protection rights and violates Title IX.</th>
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<td><strong>Adams v. School Board of St. Johns County</strong>, 968 F.3d 1288 (11th Cir. 2020)</td>
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The school board had an unwritten policy that students should use the bathroom of the sex assigned at birth. The sex of the student was determined by the student enrollment
Transgender students could use gender-neutral bathrooms. Adams was a transmale student and used the boys’ bathroom for a few weeks until he was told to not use them as someone complained about his use of the boys’ bathroom. Adams sued claiming violation of Title IX and the Equal Protection Clause. The district court found for Adams on both claims. The school appealed.

On its appeal, the school argued the policy protected the privacy of the other students using the bathroom. The court found this was not a legitimate governmental interest in that there was no evidence presented that Adams's use of the bathroom engaged the privacy of other students using the bathroom. The bathroom had stalls or privacy walls and Adams did nothing but use the bathrooms in the proper manner. The court also found the policy was not administered evenly as some transgender students were using the bathroom of their gender identity because when enrolled they provided proof of their gender status. The school also acknowledged some transgender students may be using their gender identity bathroom and school officials do not know it as they do not know the students are transgender. Based upon the above, the court found the policy was being administered arbitrarily and thus did not pass the constitutional muster of the Equal Protection Clause.

With respect to the Title IX claim, the court reviewed the Bostick County case and found the bathroom policy was applied only to transgender students and as such was based upon sex, which violated Title IX.

7. School district’s refusal to change the sex on school records of transgender student violates Title IX and Equal Protection rights of the student. In addition, its policy requiring transgender students to use unisex bathrooms, or the bathroom of sex assigned at birth violates Title IX and the Equal Protection Clause.


The saga continues – the school district appealed the lower court’s decision in favor of Grimm on his case on the school district’s bathroom policy and the board’s refusal to change his school records to indicate his gender, i.e., male. He had gone through some of the sex-change operations, including breast reductions, and went through the state bureau of motor vehicles process to change his sex on his driver’s license and other state documents. The school board refused to do so citing its policy requiring school records to reflect the student’s birth sex. The school also argued this was a FERPA issue and he was required to follow the administrative requirements of FERPA, which Grimm had not done. The court found the basis of Grimm’s claim was not based upon technical violations of FERPA but rather the basis of the claim was discrimination. Thus, Grimm did not have to follow the exhaustion of administrative remedies requirement of FERPA. The court stated these requirements were non-existent in the text of FERPA itself. The appellate court upheld the lower court’s grant of a permanent injunction against the school district’s enforcement of its student records policy.

The appellate court then turned to the bathroom use policy. Using the rationale of the
Bostick County case, the court found the policy on the use of bathrooms to violate both the Equal Protection Clause and Title IX. In so doing, the court found the board’s rationale for the policy was subjective and based upon stereotypes and fear. It concluded the board policy treated transgender students worse than the cisgender in that the latter could use the bathroom related to their sex, but the transgender students were required to use unisex bathrooms. The court found there was no evidence of privacy concerns with the use of gender identity bathrooms by transgender students. The court found the rationale for the policy did not meet the heightened scrutiny required to meet the Equal Protection Clause.

With respect to the Title IX claim, the court applied the legal test from the recently decided United States Supreme Court case of Bostick County and found the policy violated Title IX as it was based upon sexual stereotyping of transgender students. The circuit court denied rehearing en banc, with one of the judges encouraging the school to appeal to the United States Supreme Court.

8. Tenured teachers did not state a claim for impairment of contract when the school board suspended them for budget reasons. Board’s actions were necessary and reasonable as budget shortfalls did not exist at the time of entering tenured contracts.

_Watters v. Bd. of School Directors of the City of Scranton_, 975 F.3d 406 (3rd Cir. 2020)

Three teachers were suspended from their employment due to budget shortfalls the school would be experiencing the next school year. At the time of the suspension, the teachers were tenured and had signed tenure contracts with the school board. The board suspended the teachers based upon state law that was passed after the teachers were tenured and signed the tenure contracts. The state law allowed tenured teachers to be suspended for economic reasons. This law amended the reasons for the suspension of teachers by adding this provision. (Similar to the former Reduction in Force law in Indiana.) The board followed all the statutory procedures required by the law. The teachers filed a lawsuit claiming the board’s action and not the law itself violated the Contracts Clause of the United States Constitution. The district court dismissed the claim and the appellate court affirmed.

The appellate court reviewed the case law on the issue and found the language in the Contract Clause is not absolute as states must be given the ability to carry out its purposes. The standard for review of state action in an impairment of contract case is whether the action is necessary and reasonable to carry out the functions of government. The court found the board’s actions were necessary to avoid additional budget cuts that would require educational program cuts and impede the ability of the school to educate children. In reaching this conclusion the court asked if the school board considered the impairment of the contracts on a par with other policy alternatives or did it impose the impairment when more moderate courses were evident and would serve the purpose equally well. The court found the school reviewed its budget with a fine-toothed comb and had already cut it in a manner that required other non-instructional employees to be let go. In addition, other programs and benefits were cut as well. The court found based
upon these actions the board did not consider the suspension of the contracts first but rather as a last resort. It had considered all other alternatives to reducing the budget before considering the suspension of teacher’s contracts.

For the reasonableness prone, the court looked to the actions of the board in light of the circumstances. The court found the board provided in great detail its reason for the suspensions, it followed all of the statutory requirements, and provided opportunities for the public and teachers to respond to its actions before taking the actions to suspend the contracts. The teachers argued the state law and the board’s action impeded the contract because the law was passed after they became tenured. The court stated this is not the correct inquiry but rather whether the “the problem sought to be resolved by [the] impairment of contract existed at the time the contractual obligation was incurred.” The court found at the time the tenured contracts were entered into there was no indication the school district was or would be in the immediate future subject to a budget crisis or shortfall that eventually precipitated the suspending of the tenure contracts.

B. District Court Decisions

1. Lawsuit must contain the claims addressed in the EEOC charge unless other claims are related to claims in the EEOC charge. Constructive Discharge claim is a separate legal theory from a discrimination claim.


Villa filed charges of discrimination with his employer and the EEOC based upon sex and national origin harassment. Subsequent to his filing of these charges, he claimed he experienced retaliation and harassment by other employees who were not named in the EEOC charge. He later resigned based upon the harassment and retaliation. He did not file any subsequent charges with the EEOC. He sued his employer for sexual harassment, national origin harassment, retaliation, and constructive discharge. His employer moved for summary judgment on all counts. The court granted the motion on all counts except for national origin discrimination and retaliation.

In dismissing the counts, the court found there was no evidence Villa was being harassed based upon his sex or that he did not conform to male gender stereotypes as his harasser never made such comments. With respect to the harassment claims against other co-workers, the court dismissed these claims as they were not part of the EEOC charge and thus the employer did not have notice of the claims as only one co-worker was named in the charge. With respect to the constructive discharge claim, it occurred a few months before Villa filed the lawsuit and it is a separate theory of Title VII liability. Villa did not file a separate EEOC claim or amend his first one to address the constructive discharge claim. Thus, the employer did not have notice of his claim and the EEOC was not given an opportunity to investigate it and the employer the opportunity to reconcile it as is the public policy behind the Title VII administrative requirements.
The court pointed out the claims made in a lawsuit under Title VII must go through the administrative process which is carried out by the EEOC. The EEOC charge gives notice to the employer of the employee’s complaints and gives the employer the opportunity to resolve the issues at the administrative level. Claims that are closely related to the EEOC charges can be presented at the trial level. This is why the constructive discharge and harassment by other co-workers were dismissed – the employer did not have notice of them through the EEOC administrative process.

The court denied the employer’s motion for summary judgment on the national origin harassment claim as Villa provided evidence of sufficient ongoing harassment by his co-worker based upon the co-worker’s racial slurs directed at Villa. The court also denied the employer’s motion for summary judgment with respect to the retaliation hostile work environment claim citing the evidence that the employer did not do a thorough investigation of the harassment complaints because it did not interview all of the witnesses given to the employer by Villa. The court ruled this was an issue of fact for the jury to decide.

2. For a discrimination claim under Title VII, Plaintiff does not need to show affirmative comparative evidence of discrimination prior to discovery. Thus, motion to dismiss is not appropriate for lack of such evidence in pleadings.


Niles brought an action against her employer under the Americans with Disabilities Act (ADA) and Title VII based upon race and sex. The employer moved to dismiss her lawsuit on all counts. On the race and sex discrimination claims the employer argued Niles did not show any evidence she was treated differently than her white male co-workers as their violations of rules were different than hers, which were the basis for her discharge. The court reviewed case law and held a plaintiff may aver in the complaint such comparatives but would not be able to prove affirmatively such evidence until after discovery when the parties have the opportunity to determine such evidence. A plaintiff is not in a position to do so at the pleadings stage. Thus, the employer’s motion to dismiss is denied on the race and sex discrimination claims.

Niles claimed she had a disability in which she had some short-term memory loss due to a seizure she had as a result of a work-related injury. The memory loss was related to events in the recent past. The employer argued Niles only had memory loss of one event that related to her termination. Niles alleged her medical doctors indicated the condition was such that memory loss would occur for events in the recent past. Based upon this statement and evidence provided by Niles in her termination meeting, the court found she met her burden to establish a prima facie case for her disability discrimination as the prima facie case required by *McDonnell Douglas* is an evidentiary standard and not a pleading requirement; a plaintiff does not have to plead every fact necessary for a prima facie case.
3. Plaintiff must show the employer’s act of deterrence to apply for a job in failure to hire claim under Title VII and must show a willingness to accept the job but for employer’s discriminatory actions.


Turner and two other co-workers who were fired by the school board for falsifying attendance records sued the board for race discrimination under Title VII claiming the board’s designation of Do Not Hire (DNH) in their personnel files was an adverse employment action and discriminatory as white co-workers were not fired for engaging in the same activity. The Board moved to dismiss the lawsuit claiming the plaintiffs did not state sufficient facts to show a prima facie case of failure to hire. The court reviewed the averments of each plaintiff. The court dismissed one plaintiff’s claim and denied the Board’s motion to dismiss for the other two plaintiffs.

The court reviewed the case law in the Seventh Circuit for failure to hire claims under Title VII. The court found two elements were required to be successful on such claims. The first was the employer’s action. This may include such obvious actions as posting a sign or putting in vacancy announcements that people of certain characteristics need not apply. In this case, the court found the Board’s action of putting in the plaintiff’s files the DNH letter and notifying them of the action and what the DNH designation means met the first element. This action could be found to serve as a deterrent for them to apply for other positions with the Board. (This action meant the plaintiffs were not to be hired by the Board in the future.)

The second element required was for the plaintiff to show a desire to apply for the job but were deterred by the employer’s action, application for a position and the plaintiff would have accepted the position but for the employer’s actions. The court found Turner did not aver this element in her complaint as she did not apply for any job with the board nor did she aver that she wanted to do so. The other two plaintiffs did so as both had applied for positions with the Board and were not hired. Based upon the above, the court denied the Board’s motion to dismiss for these plaintiffs. The court also ruled the plaintiffs’ claims should be dismissed as the claims were not the same as set out in the EEOC charge. The court found in reading the charge, which referenced the DNH notice, the claims in the lawsuit were reasonably related to the claims made in the EEOC charge.

4. Gender dysphoria is not a disability under the ADA unless it is caused by a physical impairment.


Plaintiff was a male transitioning to a female and was supported by his original supervisor who was subsequently replaced by a supervisor who was not as supportive. The new supervisor told Plaintiff he would not be deployed to a foreign assignment and sought to have Plaintiff transferred to another division within the company. Plaintiff was eventually placed on a furlough. Plaintiff sued the employer for sex discrimination and disability discrimination. The employer moved to dismiss both claims. The court did not dismiss the Title VII claim but did the disability discrimination claim.
The court dismissed the disability discrimination claim as the Plaintiff did not state his gender dysphoria was the result of a physical impairment as required by the law. The court stated the ADA clearly stated gender dysphoria was not a qualified disability under the ADA unless it was caused by a physical impairment. The Plaintiff did not allege his gender dysphoria was caused by a physical impairment and so did not state a claim under the ADA.

5. Employee’s absence to take of children did not qualify for FMLA leave as the children were not incapacitated for three full days as required by the law.

*Trail v. Utility Trailer Manufacturing Co.*, 2020 WL 104681 (W.D.Va.)

Trail was terminated for excessive absenteeism when he accumulated 15 points when he left his job to go to the emergency room for his sick children. The children were diagnosed with strep throat, given treatment, and were sent home. They did not stay in the hospital and were feeling better the next day. Trail thought his leaving to take care of his children would be covered by the FMLA. When he came back to work, he was told he was terminated for excessive absenteeism. His employer told him the absence was not covered by FMLA as the children were not sick for three or more consecutive days. He sued claiming his FMLA rights were violated.

The court granted the employer’s motion for summary judgment. The court found Trail did not show he was entitled to FMLA leave for his children’s strep throat as Trail did to provide evidence his children had a serious health condition for three full calendar days. The evidence showed the children were better within a day or two of the emergency room visit and were not incapacitated during that time. Thus, he did not meet the serious health condition element for qualification of an FMLA leave. The court found the employer did not meet the requirements for an employer under the law as it did not ask Trail questions about the situation or ask for the doctor’s documentation so that it could ascertain whether or not the illness qualified. But regardless of the employer’s lack of attention to its duties under the law, because Trail did not meet his burden the employer’s motion for summary judgment was granted.

6. Health insurance plan covering the same surgery for natal females but not for natal males is facially discriminatory and violates Title VII.


Fletcher was born a male but was in the process of transitioning to a female due to her gender dysphoria. Her transition included surgeries that would result in her having female physical characteristics and were medically necessary to address her gender dysphoria by her doctors. The health plan provided by her employer, the state of Alaska, covered such surgeries for employees who were born female and the surgeries were needed due to genetic defects. The surgeries were not covered for employees who were born male and the surgeries were needed for transitioning to being female. Fletcher spent thousands of dollars having the surgeries in a foreign country because they were
not covered by her employer’s health insurance. She sued claiming the plan violated Title VII based upon sex. The district court granted her motion for summary judgment.

The basis for the court’s decision was the policy was discriminatory on its face as it stated the surgeries would not be covered for gender dysphoria conditions. The court found the state’s argument the plan was not discriminatory because it treated transgender males and females the same to fail as the policy treated natal males differently than natal females. The court reasoned the policy covered the surgeries for the employees who were born female and needed the surgeries due to genetic defects but did not cover the surgeries for natal males. Thus, the policy discriminated against natal males as it treated this group differently based upon their natal sex. This violates the clear meaning of Title VII. The court pointed out that Title VII covers benefits including health plans provided to employees as such is a term, condition, or privilege of employment under the law.

7. Equal Pay Act and Title VII are two different laws, the four exceptions to the Equal Pay Act are incorporated into the Title VII employer’s legitimate, nondiscriminatory reasons burden-shifting legal theory.


EEOC brought a lawsuit against employer for violations of the Equal Pay Act and Title VII claiming it paid its female branch managers less in salary for equal work as the branch managers' duties were the same regardless of the size of the branch. The employer filed a motion for summary judgment which the court denied holding there were material issues of facts as to the articulated reasons for the pay differentials between the employer’s male and female branch managers. The court analyzed the claims separately even though the burden of proof is similar for both laws.

The court found the EEOC met its prima facie case under the Equal Pay Act in that it showed the employer was subject to the Act, the male and female branch managers were performing the same or similar work requiring the same skill, effort, and responsibility, and the male manager was being paid more than the female managers. Based upon this evidence the court found the EEOC also met the Title VII prima facie burden as well. The court then reviewed the employer's reasoning for the pay differential that must meet one of the four Equal Pay Act exceptions, i.e. seniority system, merit system, quantity or quality of production system, or a factor other than sex. The employer in this case articulated the last reason. It stated the salary difference was based upon experience and the requested amount by the applicant. The court found these reasons were unfounded as the male branch manager was less experienced than the two female managers and they did not give the female managers their requested salaries; in fact, one female manager was not even asked what her required salary was. The court found there were issues of facts for the jury to determine this issue and denied the employer’s motion for summary judgment.

With respect to the Title VII claim, the employer articulated as its legitimate discriminatory reason a different factor other than sex as it did for the Equal Pay Act
claim; it needed to hire a branch manager for the branch the female manager was transferred from or close it. The male applicant for the position gave the employer a “take it or leave it” offer of salary. The court pointed out the employer is required to only provide a reason and not prove it. It was up to the employee to show the articulated reason was pretext for the employer’s discriminatory reason. The EEOC presented evidence that other branches were without managers for two months or more, so there was no need to quickly fill this branch manager position. The court ruled a material issue of fact existed as to the reason for the pay differential that a jury would need to decide and thus denied the employer's motion for summary judgment on the Title VII claim.

8. Court assumes breastfeeding and the expressing of milk by an employee at work is covered by the Pregnancy Discrimination Act (PDA) even federal courts are split on the issue. Employee cannot prove pretext of termination when employer provides evidence of performance deficiencies.

**Swenson v. Falmouth Public Schools, ___ F.Supp.3d ___ (D.Maine 2020), 2020 WL 4352735**

Swenson was a probationary teacher in her second year when she took maternity leave under the FMLA and state law. Upon her return, she set up a schedule to breastfeed her child or to express her breast milk every two to three hours. Her principal agreed to this schedule. Swenson was an RTI teacher who worked with a team of other teachers and education technicians to provide services and instruction to RTI students in grades three through five. During the time she was on maternity leave some of her coworkers expressed concerns with her teaching methods and communication skills with her team to the principal. The principal used this information for Swenson’s annual evaluation. The principal noted these areas of concern to Swenson during her evaluation meeting upon her return from leave.

When Swenson returned to work some of her coworkers would make comments about her breastfeeding activity and how it was affecting her ability to provide services. Swenson felt harassed and she went to her principal, who promptly spoke with her coworkers and told them to stop the comments. In addition, these coworkers and others began to complain to the principal about Swenson’s performance issues which were similar to the ones made during her maternity leave. Swenson was put on a growth plan by the principal and while Swenson made some improvements under the plan the principal felt it was not enough to recommend Swenson to be put on a continuous contract essentially giving her tenure. Swenson was terminated from her employment with the school. Swenson sued for violations of the PDA and the FMLA. The school filed a motion for summary judgment on all counts and the court granted the motion.

The court assumed breastfeeding qualified as a medical condition protected by the PDA even though its review of federal circuit cases did lead it to a conclusion either way. The court found even if breastfeeding is covered, Swenson did not meet her burden of proof to show the employer’s motive for terminating her employment was discriminatory and based upon her pregnancy/breastfeeding status in violation of the PDA or was retaliatory in nature either. The school provided evidence her performance issues were present before, during, and after she went on maternity leave. In addition, the principal
supported Swenson in her breastfeeding schedule and addressed potential issues with her coworkers on the issue. Seven employees went on maternity leave and upon returned breastfed their children and only one was fired, Swenson. The court found a jury could not find based upon this latter fact, the employer discriminated against Swenson based upon her breastfeeding as they supported all other employees similarly situated. Swenson also brought a retaliation claim under the PDA, using the same evidence to show the employer’s retaliatory motives, the court dismissed it for the same reasons it dismissed the PDA discrimination claim. On Swenson’s FMLA claim, the court found the employer allowed her to have her leave she was entitled to under the FMLA and it did not interfere with that right before her leave or after her return. This case has been appealed to the circuit court.

<table>
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<tr>
<th>9. Test-taking anxiety specific to work-related examinations was not a disability under the Americans with Disabilities Act (ADA) as test-taking was not a major life activity or was the employee substantially impaired by the anxiety.</th>
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<td>Employee was fired by employer when he did not pass the written tests for being a locomotive engineer. The written tests were required for the promotion and while the employee was receiving training for the tests, he told his employer he thought he had a learning disability as he was having a hard time taking the quizzes for the training and the test itself. He went to a psychologist and was diagnosed with a test anxiety disorder which was only triggered by work-related testing but not at other times. The diagnosis came back after he failed the test for the second time. The employer determined he was not disabled and thus an accommodation was not required. The employee sued for violation of the ADA. The court granted the employer’s motion for summary judgment ruling the employee was not disabled. The court in so ruling determined the employee had to provide evidence he was disabled. The three elements of disability the employee had to prove was that he had a physical or mental impairment that substantially affected a major life activity.</td>
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<td>The court found the employee did have a mental impairment –anxiety. But the employee could not prove the impairment affected a major life activity in a substantial manner. The court found that test-taking depending upon the job can be considered a life activity, but in the case of the employee, it was not a regular part of his job and thus it was not a major life activity under the ADA. The court also pointed out the anxiety was limited to a very narrow activity of test-taking – that related to his work – which was not frequently done as part of his job. His anxiety did not apply to all tests a person takes in life. In addition, the court pointed out while other courts found test-taking to be a major life activity, those courts did so on the basis of the consequences of the testing and not the activity itself. A major life activity must be one in which a person engages on a frequent basis, the importance of it in terms of the “swarth” of the person’s life the activity touches, and the amount of time allotted to the activity. None of these elements applied to the test-taking activity in the employee’s life. On the element of significant impairment of the activity the court found the employee did not provide any evidence as to the extent his anxiety impaired his ability to take the job-related tests in comparison with the general population. Based upon the above, the court found the employee was</td>
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not disabled under the ADA and granted the employer’s motion for summary judgment. (The court noted the question of test-taking anxiety as a disability was one of first impression for the court.)

10. School did show important governmental interest for hair policy applicable only to male students and it provided no proof the hairstyle of male students improved academic performance, school discipline, and respect for authority.


African American male student wore his hair in locs as part of his cultural heritage. The high school policy for male students required hair not to be longer than the ear lobes, touch eyebrows, or the T-shirt collar. Plaintiff wore his hair in locs since junior high school. When his hair grew out and violated the policy, he put his hair up by using headbands. During his sophomore year, he was daily taken out of school for his hair to be checked. At the beginning of the second semester of his sophomore year, the hair policy was amended to add the word “when let down” to the policy. Thus, Plaintiff would be in violation of the hair policy. During the second semester, he served numerous in-school suspensions for violation of the hair policy. The In-school suspensions consisted of students not being able to ask teachers questions about their assignments, not being able to leave the room, and seated so that the students’ backs were to the supervising teacher. Plaintiff’s grade suffered because of the numerous ISS served; he transferred to another high school out of district for academic purposes but missed being at his Barbers Hill school. He sued Barbers Hill under Title IX, the Equal Protection Clause, Title VI, and the Free Speech Clause. Plaintiff asked for a preliminary injunction so that he could return to Barbers Hill and graduate. He has attended Barbers Hill schools since the first grade and missed its academics and band programs. The court granted the preliminary injunction finding the school did not have an important governmental interest for adopting the male-only hair policy.

The court found since the policy only applied to male students, it was subject to the intermediate scrutiny level under the Equal Protection analysis. The school stated it had a right to control the dress and hair of its students. The male-only hair policy was required to provide greater discipline, improve academic performance, and show authority to school officials by allowing male students to be clean cut. During the hearing, the school officials did not provide any evidence the policy was needed or contributed to any of those factors. The disciplinary records showed African American males were three times more likely to be disciplined and the student population was only 4% African American. Plaintiff testified he saw many white male students whose hair length violated the policy but were not subject to the same scrutiny he was. Plaintiff’s cousin gave an interview to the local news about the policy and the number of white males disciplined by the school for violation of the hair policy increased dramatically in the days and weeks after the story aired. Based upon the above, the court found the school could not articulate an important government interest for the policy and the policy was discriminatory on its face based upon sex and race due to the disparity in disciplinary actions taken against African-American students.
The court also found the policy violated the Free Speech rights of the student as evidence was presented at the hearing the locs were a symbol and tribute to the West Indies and African culture. Plaintiff had grandparents who were both African and West Indian and he wanted to honor that heritage by wearing locs. The court found hairstyles can be a symbol of various religions and therefore protected speech. Evidence was provided one native American student was allowed to wear his hair in a native American style that violated the hair policy thus showing the school knew of the religious significance of hairstyle.

Based upon the above, the court found there would be more harm to the student if the preliminary injunction was not granted and the school would suffer little to no harm. The court also had ruled since the policy related to hair, it applied to the students outside of school as hairstyles cannot be changed, it was too broad in scope. The court agreed schools can control what students wear to school but not outside of it. Hairstyle policies would not allow a student to wear their hair as they wanted at all times. The court also took issue with respect to the discrimination claims with the process for changing the policy during the school year. Traditionally and by process, the school did not change student-related policies during the school term. Here they did and for no apparent reason other than to address Plaintiff wearing his hair up in a headband. (This case is being appealed to the circuit court.)

11. Employee must give enough information to the employer for it to determine if FMLA leave is needed. Vague statements by the employee are not enough.


Blake was a paramedic for the city’s fire department. Due to a lack of staff and trained paramedics, Blake was often required to work double shifts, which meant being on duty 48 hours straight. This went on for months. One day as Blake was completing a very busy shift of 24 hours, his supervisor told him he would have to work the next 24-hour shift. Blake stated he could not do it anymore, he was burned out, and he would turn in his gear (this meant he would resign) if he had to work another 48-hour shift. His supervisor told him to think about it and they would talk later. Blake got someone to take the shift and he spoke with the supervisor later that day. In that conversation, Blake stated he wanted to talk to his wife about resigning. The next day, the station manager reviewed the report the supervisor wrote up and told Blake his resignation was accepted when Blake showed up for his shift the next day. Blake turned in his gear but stated he had not made a final decision yet. Blake sued claiming the fire department interfered with his FMLA rights and retaliated against him for using his FMLA rights.

The court granted the city’s motion of summary judgment. The court focused on whether Blake had given notice to his employer for an FMLA leave. The court reviewed the law and cases related to this issue. The employee must give the employer notice of the need for a leave, but the employee is not required to specifically state it is an FMLA leave. Once the employer gets the employee’s notice for a leave, the employer is required to procure additional information to determine if the leave qualifies for an FMLA leave. Thus, the content of the employee’s notice is key. In this case, Blake only stated he was
burned out and could not take anymore. He did not state he needed or wanted a leave of absence or provide any additional medical information to give the city notice he needed or wanted a leave. Blake argued the city should have known he needed a leave given the workload of the paramedics for the past several months. The court found the employer is not required to read the employee's mind and general conditions of the workplace or workload are not notice of a need for leave for an individual employee. The court found since Blake did not give notice of an FMLA leave, the city could not have interfered with his FMLA rights or retaliate against him for using his FMLA rights because Blake did not invoke his FMLA rights.

Blake also argued he was constructively discharged due to the workload required which forced him to resign. The court found in order to prevail on a constructive discharge claim, the employee must show the employer created a work environment or situation to force the employee to quit. In this case, the workload and conditions were applicable to all the paramedics and not just Blake and were not necessarily created by the fire department to force Blake to quit. He also claimed the city violated his due process rights and he was not given a hearing before being terminated. The court found Blake had resigned and due process is not required when an employee resigns voluntarily, which was the case here. (This case is being appealed to the circuit court.)

12. Exclusion for sex-change medical procedures by government employer under health care plan may violate Title VII and the Equal Protection clause.

**Lange v. Houston County, Georgia, ___ F.Supp.3d ___ (M.D.Georgia 2020), 2020 WL 6372702**

Lange is a transgender female who was diagnosed with gender dysphoria. Due to her condition, she needed to have sex-change operations for female characteristics and to remove male characteristics. Her health care plan provided by her employer did not cover such procedures. The employer specifically asked for the exclusion for the last three years of Lange’s employment. Lange worked for the Sheriff’s Office, which was a separate agency from the county under state law. While the Sheriff’s Office was responsible for providing benefits to its employees, the sheriff delegated that duty to the county. The county continued to ask for the exclusion even though the insurance company advised against it. Lange sued the county and Sheriff’s Office for discrimination based upon sex under the Equal Protection Clause, Title VII, and the ADA. The county and sheriff’s office filed a motion to dismiss all claims. The court granted the motion in part.

The sheriff argued he had sovereign immunity as he was an arm of the state and acting as such when providing benefits to his employees. The court found as a general rule, the sheriff’s office was an arm of the state as it was created by the state and used state funds. But the analysis does not end there as case law provides the immunity applies depending upon the function the agency is engaged in and the state oversight of such function. The court found the state does not have oversight of the Sheriff’s Office with respect to the benefits provided to the employees. That is at the discretion of the Sheriff’s Office. Thus, the Sheriff’s Office was not entitled to sovereign immunity.
With respect to the employment discrimination claims, the county moved to be dismissed as it was not the employer of Lange. The court agreed it was not the employer of Lange, the Sheriff’s Office was her employer. But for purposes of providing fringe benefits, the Sheriff had delegated this responsibility to the county. As such, it could be argued the county was acting as an agent of the employer. Under Title VII the employer’s agent could be the employer for liability purposes. The court found at the pleading stage, this was a viable claim and was not subject to dismissal. For the ADA claims, Lange averred her dysphoria was causing a physical impairment covered by the ADA. The court found Lange alleged facts to indicate such and discovery or trial was the more appropriate manner in which to determine this issue. Based upon the above, the court denied the motion to dismiss the employment discrimination claims.

13. Parents did not have standing to sue school for violation of free speech and religion rights for passing policies addressing transgender students wherein parents nor their children were disciplined or threatened to be disciplined for violations of the policy. Parents did not provide specific actions they would be engaged in that constituted violation of the policies.


Parents brought an action against the school board and other administrators after it adopted several policies allowing all students including transgender students to receive counseling service and education and to participate in all extracurricular activities and student groups as their gender identity. The parents claimed their Christian faith required them to speak out against persons who were sinning, and transgender students were included in this group. The parents brought the action under Title IX, the Free Speech Clause, and the Freedom of Religion clause. The parents argued the policies did not allow them or their children to freely speak out about their religious beliefs; that the policies required them to accept the transgender and homosexual lifestyles. The school moved to dismiss the claims as the parents did not have standing to sue the school. The court agreed.

The court stated a person who brings an action must show the person was injured or is in danger of being imminently injured by the defendant’s actions. The court found the parents did not show they were injured or would be in danger of imminent injury due to the school’s new policies. The policies did not provide for a mechanism for discipline against a student who did not follow the policy. Nor did the policies prohibit any students from expressing their opinion or religious belief about homosexuality or transgender students. The parents also did not state what specific action they were planning to engage in that would violate the policies and potentially subject to discipline or injury. The parents also argued some of the policies were vague with respect to bullying and harassing protected students. The court found the policies set out specific definitions of what constituted bullying and harassment within the policy. Based upon the above, the court found the parents did not have standing to bring the action as the was no injury to them as a result of the adopted policies.
14. Court enjoins the U.S. Department of Education from implementing its interim final rule on the allocation of funds under the Coronavirus Aid, Relief, and Economic Security Act.


The State of Washington filed a motion for a preliminary injunction, seeking to enjoin the U.S. Department of Education from implementing its interim final rule on the allocation of funds provided under the CARES Act. The State claimed that the rule misconstrued congressional intent and diverted emergency relief funding from economically disadvantaged public schools to less disadvantaged private schools. The U.S. Department of Education asserted that the motion should not be granted as the State was not likely to succeed on the merits of its claims or that the State will suffer irreparable harm. In granting the motion for a preliminary injunction, the court found that Congress did not grant the Department the authority to promulgate the interim final rule and therefore the Department’s rule promulgation was in excess of its statutory authority and not in accordance with law. Additionally, the court found that public school students would be irreparably harmed by the diversion of funds to private schools.


The Department eventually withdrew its rule.

15. School had the authority to discipline students for off-campus speech under *Tinker* standards.


Student was expelled for an anti-Semitic post on social media made on a Friday night. The student argued that his speech was protected by the First Amendment and that, as such, the school could not discipline him for his speech. The court acknowledged the split in the circuit courts as to a school’s authority to regulate off-campus speech and noted that the Tenth Circuit had yet to rule on the issue. The judge concluded that *Tinker* applies to off-campus speech and that the school could discipline the student because of the disruption it had caused in the school community. (The court noted the Indiana case of **T.V. v. Smith-Green Community School Corporation** and the Indiana district court’s conclusion that the posting of raunchy photos merely caused divisiveness within the volleyball team. The court in the *Siegfried* case distinguished the Indiana case by concluding the disruption in this case was wide-spread throughout the school community.)

NOTE: The student has filed an appeal of this decision to the Tenth Circuit Court of Appeals.
## VIII. State Court Decisions

### 1. School district may be liable for student’s death occurring off-campus during non-school hours when school officials had knowledge of student issues under a negligence theory.

**Dinsmoor v. City of Phoenix**, 468 P.3d 745 (App. 2020)

The state appellate court upheld the denial of the school district’s motion for summary judgment in a negligence case brought by the mother of a female student who was shot and killed by a male student who was her boyfriend at their friend’s house. The shooting took place after school hours. Earlier that day at school it was reported the boyfriend was at school with a gun. But that report was not confirmed. The girlfriend told the assistant principal and the SRO she may see the boyfriend after school. They discouraged her from doing given he had threatened his ex-girlfriend.

The school district argued it did not have a duty to care for the students as the incident took place off school campus and not during school hours. The court ruled the time and place of the injury were issues of fact that went to the breach and causation elements of negligence and not whether the school had a duty of care. The duty of care is a matter of law and comes out of a relationship between the parties. The court found the school had a duty to the student who was killed due to the school-student relationship between the two parties. Based upon the facts, the court found there were issues of fact wherein a jury could find the school officials were negligent in their duty to care for the student while she was at school that morning. As an example, the school officials were aware of the male student’s past violent behavior and his threat towards his ex-girlfriend, which they told the parents of the ex-girlfriend about but not the mother of the deceased female student. While they knew she may see the boyfriend, they did not call her mother to tell her of the danger. The court found the jury may determine these were negligent acts that caused her death.

## IX. IEERB Decisions

| None to Report. |
## X. Public Access Counselor Opinions

<table>
<thead>
<tr>
<th>1. School corporation did not violate the Open Door Law’s provisions on executive sessions with the exception that the minutes of the executive sessions did not contain the required certification that no other subjects were discussed.</th>
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<tbody>
<tr>
<td><strong>Formal Complaint 20-FC-26</strong>, Office of the Public Access Counselor.</td>
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<td>A reporter alleged that the Tri-Township Consolidated School Corporation violated the Open Door Law (ODL) by posting insufficient notices of executive sessions, improperly citing an executive session provision, and taking final action during an executive session. The Public Access Counselor (PAC) concluded that the notices of the school board’s executive sessions were sufficient in that they included both the statutory citation and the statutory language. While the notices were not an exact recitation of the language, there was still specific references to the provisions that allowed the school board to meet in executive session. With respect to the second alleged violation, the reporter claimed that the board improperly cited the provision on meeting for strategy discussions when it met to discuss a possible purchase of land from the Lions Club. Specifically, the reporter claimed that these executive sessions included the “adversary” since a school board member was also a member of the Lions Club. The PAC rejected this allegation, but did suggest that the board member should have recused himself from the executive sessions. In response to the assertion that the board took final action in an executive session, the PAC concluded there was no evidence that the board voted in any executive session. He did express concern that discussion of the school’s strategic plan appeared to be broader than the advertised topic of school safety measures. Finally, the PAC noted the minutes of the board’s executive sessions did not include the required certification that no other subject matters were discussed in the meeting.</td>
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<th>2. School corporation advised to comply with request for the existence of emails on a specific date.</th>
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<td>An attorney representing parents of a student requested access to specified emails. The request met the reasonable particularity requirements of the Access to Public Records Act (APRA), but the school corporation asserted the request amounted to pre-litigation discovery. Despite this assertion, the school released a substantial amount of non-deliberative materials. The attorney subsequently requested “metadata,” specifically asking whether emails existed on a specific date between named individuals regarding the student. The school refused that request, arguing the request was akin to an interrogatory.</td>
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<td>The Public Access Counselor (PAC) acknowledged that the office has strongly discouraged using APRA for records that are discoverable through litigation and found that the school</td>
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had likely exercised appropriate discretion with its release of non-deliberative material. With respect to the request for the existence of emails on a specific date, the PAC noted that a request for metadata is a valid request and encouraged the school to respond to the request.

**XI. Attorney General Opinions**

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<th>1. Public employers must give employees notice of their First Amendment rights when collecting union dues.</th>
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In response to an inquiry made by a legislator, the Attorney General concluded that any political subdivision that collects union dues from its employees must provide adequate notice to the employees of their First Amendment rights against compelled speech. The Attorney General cited the U.S. Supreme Court’s decision in *Janus v. American Federation of State, County, and Municipal Employees Council 31* as the basis for his opinion. The Attorney General further stated that the notice must show by clear and compelling evidence that the employee voluntarily and knowingly waived his/her First Amendment rights and consented to the deduction from his/her wages.
Ethics for the School Attorney

Alex P. Pinegar
Church Church Hittle + Antrim, Noblesville
Two major parts to today’s session

• First, some current events

• Second, revisiting the theme from past several years’ presentations: When things get “adversarial” for the general counsel attorney.

A few current events

• The Supreme Court amended Rule 7.5 of the Rules of Professional Conduct
  [https://www.in.gov/judiciary/files/order-rules-2020-1124-prof-conduct.pdf]

• The Supreme Court amended Rule 8.3 of the Rules for Alternative Dispute Resolution

• The Supreme Court amended both the Interpreter Code of Conduct and Procedure and the Disciplinary Process for Certified Court Interpreters & Candidates for Interpreter Certification

• The ISBA Legal Ethics Committee issued two opinions in the last year

• An only somewhat current event: In Dec. 2019, the Indiana Supreme Court made sweeping changes to Administrative Rule 9, replacing it with a new set of rules – the Indiana Rules on Access to Court Records
Amended Rule 7.5(a) of the Rules of Professional Conduct

• What remains?
  • Essentially:
    • A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 7.1.
    • A trade name may also be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization—and otherwise doesn’t violate Rule 7.1.

So what does Rule 7.1 say?

• Rule 7.1 (in its entirety):
  • “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.
  • A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.”

Amended Rule 7.5(a) of the Rules of Professional Conduct

• What was taken out?
• Language covered by Rule 27 from the Rules for Admission to the Bar and the Discipline of Attorneys
  • For example: Language permitting a law firm to use in its name the name(s) of deceased or retired member(s) of the firm
  • Language requiring suffixes if applicable (e.g. “P.C.”)
• Bottom Line: If your current firm name conforms to the rules, it still will. However, some changes (deletions, really) may permit more creativity and flexibility in your firm’s name—if you are so inclined.
Amended Rule 8.3 of the Rules for Alternative Dispute Resolution

- Rule 8.3 concerns the agreement to mediate parties must enter into if pursuing a “pre-suit mediation.”
- The amendment adds a statement that persons participating in a pre-suit mediation have the same rights under Trial Rule 26 to obtain discovery of the existence and contents of any insurance agreement that might provide coverage for the loss in question.
- The interesting wrinkle is the rule of (unwaivable) confidentiality still applies under Rule 2.11.

Supreme Court’s amendments to rules concerning court interpreters

- Interpreter Code of Conduct & Procedure
- Disciplinary Process for Certified Court Interpreters & Candidates for Interpreter Certification
- Both found here: https://www.in.gov/judiciary/rules/interpreter/interpreter.pdf
- Most interesting change (to me): Amendments explicitly state an interpreter may not paraphrase the speaker and may not summarize the speaker’s statements

A very brief “FYI”

- In late 2019, effective January 1, 2020, the Supreme Court completely overhauled the rules concerning access to court records and procedures for filing cases and/or papers excluded from public access
- Administrative Rule 9 no longer exists in anything resembling its prior form
- These items now governed by the Rules on Access to Court Records
- https://www.in.gov/judiciary/rules/records/index.html
Recent opinions from the ISBA Legal Ethics Committee

- Issued November 25, 2020:
- The Obligation to Self-Report Certain Conduct to the Disciplinary Commission
  - Rule 8.3(a): “A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”

ISBA opines that Rule 8.3(a) does not require self-reporting.
ISBA based its opinion on:
- The plain language of Rule 8.3(a): “…another lawyer…”
- Out-of-state decisions addressing the same language and holding that it does not require self-reporting.
- Contrasting other states’ rules that use the phrase “any lawyer” instead of “another lawyer.”

ISBA’s opinion identifies two exceptions to its conclusion that Rule 8.3(a) does not require self-reporting. Both arise under Rule 23 of the Rules for Admission to the Bar and the Discipline of Attorneys.
- Rule 23 requires lawyers to self-report any finding of criminal guilt concerning any felony or misdemeanor; the report must occur within ten days after the finding of guilt.
- Rule 23 also requires lawyers to self-report most discipline received in foreign jurisdictions.
A continuation on a theme...

Professional Responsibility Considerations for Lawyers serving as General Counsel for a School Corporation

Introduction

• As general counsel, it is common for (a) our assistance to be sought in situations that are not yet adversarial, (b) but which later become adversarial, and (c) for our client to then ask us to represent it in the adversarial proceeding.

• Such scenarios present complex questions regarding, for example:
  • Can the attorney serve as advocate at trial?
  • Can an attorney be compelled to testify as a witness;
  • What is the scope of attorney-client privilege and our obligation to safeguard information related to a client; and
  • Whether conflicts of interest arise from our representation of a client in an adversarial matter that relates to a matter on which we provided the client advice.

You are general counsel for City Community Schools. You attend a meeting with the assistant superintendent where the assistant superintendent questions an employee who has been accused of theft. The employee is offended by the allegations and refuses to answer any questions.

• As a result, the employee is subsequently fired.
• The employee later files a § 1983 action alleging the school corporation violated his constitutional rights by failing to provide Garrity warnings to the employee before asking the potentially self-incriminating questions.
• Are you permitted to advise the school corporation in the § 1983 action?
• Can you act as advocate at trial in the § 1983 action?
• Can your law partner, who was not involved in the meeting, act as advocate at the trial?
Rule of Professional Conduct 3.7

(a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
• (1) the testimony relates to an uncontested issue;
• (2) the testimony relates to the nature and value of legal services rendered in the case; or
• (3) disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as advocate in a trial in which another lawyer in the lawyer’s firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9.

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Rule of Professional Conduct 3.7

• “...likely to be a necessary witness...”

• Necessary means what it says:
• “Before disqualifying a lawyer under this rule, a specific showing of necessity is normally required . . . A ‘necessary’ witness under Rule 3.7 is one whose testimony is unobtainable elsewhere.”

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The employee interview hypothetical (continued)

• A similar but different hypothetical. You did not attend the meeting.
• You represent City Community Schools in the lawsuit.
• The assistant superintendent tells you in witness prep he gave the Garrity warning. You call the assistant superintendent as a witness and he testifies that he provided the Garrity warnings.
• However, the assistant superintendent later tells you during a recess that he really did not provide the Garrity warnings.
• What should you do?
• Should you reveal what the assistant superintendent told you in confidence?
Rule of Professional Conduct 3.3

(a) A lawyer shall not knowingly:
(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

The employee interview hypothetical (continued)

• A similar but different hypothetical.
• You did not attend the meeting. But you spoke with the assistant superintendent after the meeting who told you what was asked, what the responses were, and whether Garrity warnings were provided.
• You attend the trial as observer (not advocate). As you watch the trial, you hear the assistant superintendent describe a version of the meeting very different from what he told you.
• What should you do?
• Should you reveal what the assistant superintendent told you? If so, to whom?

A new hypothetical: the “investigation”

• Allegations surface that a teacher had inappropriate relationships with students for years and that administrators failed to take appropriate action.
• The board hires you to conduct an “investigation.”
• You conduct interviews, take notes, and present findings and analysis to the board.
• What questions concerning ethical obligations and/or attorney-client privilege does this fact pattern present?

• Upjohn learns a subsidiary may have bribed foreign government officials
• Upjohn attorneys conduct an investigation
  • Questionnaire sent to mid-level employees; responses returned to general counsel
  • Dozens of interviews conducted with resulting notes and memoranda

Upjohn v. United States of America

• The "two-way street" of attorney-client privilege becomes complicated with corporate clients.
• With corporations, "it will frequently be middle-level and lower-level employees who possess the information needed by the corporation's lawyers."
• Such employees can "embroil the corporation in serious legal difficulties" and it's only natural they will have the information the attorney needs to advise the client.

Upjohn v. United States of America

• The Court held, therefore, that the communications made in the questionnaires and as captured in the attorneys' notes and memoranda were privileged.
Upjohn v. United States of America

- But! – the privilege cannot apply to the information itself.
- “The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.”

C.J. Burger’s consent included this general guidance:

- Privilege would apply when attorney authorized by management to inquire into the subject and is seeking information to:
  - Evaluate whether employee’s conduct would bind corporation;
  - Assess legal consequences of that conduct; or
  - Formulate appropriate legal responses.

Upjohn warnings

- Usually characterized this way:
- Attorneys for an organization must disclose their role when interviewing agents or employees of the organization whose interests might be adverse to the organization.
- Emphasize that you represent the organization and not the employee and that the organization controls whether the conversations remained privileged as to the organization.
Rule of Professional Conduct 1.13(f)

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

Rule of Professional Conduct 1.13

- Comment 10: There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.

600 F.3d 612 (7th Cir. 2009)

- “Factual investigations performed by attorneys as attorneys fall comfortably within the protection of the attorney-client privilege.” (emphasis in original) (relying on Upjohn)
- “When an attorney conducts a factual investigation in connection with the provision of legal services, notes or memoranda ... or other client communications in the course of the investigation are fully protected by the attorney-client privilege.” (my emphasis)
The Engagement Letter is critical

- Seventh Circuit call it “the most important piece of evidence.”
- It explicitly stated attorneys were hired to provide legal services.
- In addition to calling for investigating the allegations, it called for the attorneys to analyze the effectiveness of the school’s existing compliance procedures.

Main Takeaways:

- Do Upjohn warnings; follow Rule 1.13(f).
  - Error on side of caution when deciding whether to give them.
- Advise board members and administration to not use term “independent investigation” in discussions with employees or public.
- Use an engagement letter specific to the “investigation” task:
  - Frame your work as “legal work that includes investigative aspects”
  - Document the possibility of litigation, why that possibility exists, and explain why your work is being done in anticipation of it.

Litigating Matters arising out of Prior Representation

- To flesh out that heading above: What if we represent a school in litigation that arises from a scenario in which we advised the school?
- This can happen in many different ways –
  - Contract dispute (where we offered advise regarding the contract’s language or meaning).
  - Special education dispute (where we offered advise regarding what the IDEA required).
  - Employment dispute (where we offered advise about how to handle the employment issue and/or whether termination, suspension, discipline, etc., was permitted).
Litigating Matters arising out of Prior Representation

- For attorneys who serve as a corporation's general counsel, Rule 1.7(a)(2) contains a latent but significant potential conflict of interest.
- That rule states that a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

Consider comments to Rule 1.7:

- Comment 8: "Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests."
- Do these other responsibilities or interests "in effect foreclose[] alternatives that would otherwise be available to the client"?
- Will a "difference in interests" arise that interferes with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client?"
Litigating Matters arising out of Prior Representation

• Transitioning the matter to your colleague “down the hall” does not solve this problem.
• Rule 1.10 Imputation of Conflict of Interest:
  • “While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.9, or 2.2 unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

So, again, how can this arise?

• What if the best argument to pursue in a breach of contract case is that the contractual language is ambiguous?
• What if the best course of action for the client is to pursue settlement because of potential liability?
• What if you advise the school it can do X, and then the school is sued because it did X?

Litigating Matters arising out of Prior Representation

• This is not and does not have to be the end of the world.
• Many sophisticated clients will “get it.”
• Many clients will still want you to represent them in the litigation.
• Rule 1.7(b) permits this conflict to be waived if the lawyer reasonably believes the lawyer can provide competent and diligent representation and if the client gives informed consent, confirmed in writing.
Thank you.
Alexander P. Pinegar

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Alexander P. Pinegar is a partner of Church Church Hittle + Antrim in its litigation, school law, and appellate practice groups. Alex’s practice includes a variety of litigated matters, and he advises both plaintiff and defendant clients in personal injury and car accident cases, business and commercial litigation, insurance defense, and appeals. Alex has first-chair jury trial experience representing both plaintiffs and defendants in both Indiana’s state and federal courts. He has represented clients on appeal in the Indiana Court of Appeals, Indiana Supreme Court, Seventh Circuit Court of Appeals, and the United States Supreme Court, and represented the State of Indiana in a multi-year, nationwide arbitration arising under the Tobacco Master Settlement Agreement. Alex serves as general counsel for Sheridan Community Schools and assists with the firm’s general counsel representation of numerous public school corporations throughout Indiana.

Alex resides in Noblesville. When away from the office, Alex serves as elder and clerk of the Session of Grace Presbyterian Church in Indianapolis. Alex is a board member of Janus Developmental Services, Inc., a local non-profit organization that provides adults with disabilities the opportunity to participate and contribute within the local community. Alex previously served as president and board member of Noblesville Main Street.

Alex’s greatest joy is spending time with his wife Laura and their four children, and his hobbies include reading, exercising, playing sports and games with family, and practicing the piano.

Bar Admissions

- Indiana
- Indiana Supreme Court
- U.S. District Court Northern District of Indiana
- U.S. District Court Southern District of Indiana
- U.S. Seventh Circuit Court of Appeals
- U.S. Supreme Court

Education

- Indiana University School of Law, Indianapolis, Indiana, J.D., magnum cum laude, 2006
- Taylor University, Upland, Indiana, B.A, summa cum laude, 2003

Honors and Awards

- “AV Preeminent” Peer Review Rating- Martindale-Hubble

Professional memberships

- Indiana State, Indianapolis, and Hamilton County Bar Associations