

# 2023-24 BACK TO SCHOOL: Top Legal Issues

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**DEPARTMENT OF EDUCATION  
GUIDANCE IMPACTING DPI  
OVERSIGHT OF WISCONSIN  
SCHOOL DISTRICTS**

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# Dear Colleague Letter, July 24, 2023

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- ❖ “OSEP has determined that many States have, over the past 15 years, not consistently met IDEA’s requirements.”

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# General Supervision

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- ❖ A State's general supervision responsibility over its local programs is a longstanding IDEA requirement and broader than its monitoring responsibilities under IDEA Sections 616 and 642.11.

# Examples of Additional General Supervision - Dispute Resolution Systems

- ❖ Question A-7: What role does the information from the State's dispute resolution system play in a State's reasonably designed general supervision system?

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# Areas of Concern

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- ❖ Question B-1: What is an “area of concern”?
- ❖ Question B-2: What actions must a State take when made aware of an area of concern with an LEA’s or EIS program’s or provider’s implementation of IDEA?

# Standard of Compliance

- ❖ Question B-8: May a State use a threshold of less than 100 percent compliance when determining an LEA or EIS program's or provider's compliance with IDEA requirements?
- ❖ Question B-11: What is "pre-finding correction?"
- ❖ Question B-15: How must a State verify that each individual case of child-specific noncompliance was corrected?

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# Recent DPI Guidance and IDEA Complaint Decisions

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- ❖ DPI Will Review More than Procedural Compliance
- ❖ IDEA Complaint Decision 23-031
  - ❖ "The IEP team's placement determination is reasonably supported by the student's circumstances."



# Preparing Staff to Implement IEPs

- ❖ IDEA Complaint Decision 23-020 - Not Sufficient
  - ❖ "The complainant shared that during the student's manifestation determination meeting in February 2023, one of the student's teachers indicated they were unaware that the student had a BIP."
  - ❖ Case manager:
    - ❖ met with every teacher responsible for implementing the student's IEP at the beginning of the school year,
    - ❖ emailed teachers about their responsibilities, and
    - ❖ regularly checked in with staff.

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# Tracking Disciplinary Removals

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## **IDEA Complaint Decision 23-030**

“Under circumstances where a student goes home based on a decision by the district or the district initiates or encourages the family to take the student out of school due to the student’s conduct, the removals are considered de facto suspensions and should be counted as disciplinary removals.”

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# Tracking Disciplinary Removals

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## **IDEA Complaint Decision 23-020**

“In this case, when the district contacted the parent to pick up the student, the district did not make it clear to the parent it was optional to take the student home, resulting in uncounted de facto suspensions of the student.”

# Tracking Disciplinary Removals

## IDEA Complaint Decision 23-011

“The student’s IEP included a behavior plan that indicated steps staff should take when the student refuses to work or is “sassy,” and if these actions continue, the student will be sent to a “quiet room.” Between October 31, 2022, and January 13, 2023, the documentation provided by the district demonstrates the student was sent to the office on 32 of 36 school days. District interviews indicate the student was sent to the office to “self regulate” but also acknowledge the student got into physical or verbal altercations with staff and students and thus needed to be removed from the classroom.”

# Placement Changes Following Manifestation Determination

## **IDEA Complaint Decision 23-030**

“Placement may be changed when the student’s behavior is a manifestation of their disability if the parent agrees to the change the student’s IEP outside of a meeting.”

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# Staffing Shortage

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## **IDEA Complaint Decision 23-029**

“The district acknowledged difficulty finding a teacher qualified to implement Student A’s reading program at the beginning of the 2022-23 school year . . . the IEP team shall meet within 30 days from the date of this decision to determine whether the missed reading instruction requires compensatory services.”

# Staffing Shortage

## IDEA Complaint Decision 23-024

“As a result of this noncompliance, the district is directed to submit a corrective action plan to the department outlining steps it is taking to fill vacant special education teacher positions at the student’s school. Within 30 days of filling the special education teacher vacancy positions, the district is directed to convene IEP team meetings for all students who are impacted by the special education teacher vacancies and determine whether compensatory services are required.”

# Behavior and Discipline

## IDEA Complaint Decision 23-011

“It is critical that districts actively monitor the effectiveness of each student’s positive behavioral interventions. If a student displays inappropriate behavior despite having an individualized education program (IEP) that includes behavioral supports, this may indicate that the behavioral supports in the IEP are not being appropriately implemented or the behavioral supports in the IEP are not appropriate for the student.”



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# Behavior and Discipline

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## **IDEA Complaint Decision 23-023**

“It is unfortunate that in this instance proper implementation of the BIP was not successful in addressing the student’s behavior. The department recommends the student’s IEP team meet to consider whether the behavior intervention plan needs to be revised to ensure that proper implementation of the BIP is effective in supporting the student.”

# Benefits of an Early Complaint Response

## IDEA Complaint Decision 23-015

“The district has taken a number of actions to address the concerns raised in the complaint. The district has increased the amount of training and support for all special education staff, including paraprofessionals. District administration increased supervision of the middle school classroom and has provided additional training and professional development to staff, including ensuring that all are current on training around the use of seclusion and physical restraint. The district ensured that techniques that were not permitted are no longer utilized in the classroom. The district has been cooperative and forthcoming with department staff and has sought and is accessing department resources to engage in continuous improvement around the needs of the students in this classroom and throughout the district.”

# Discipline – Transfer from Private School

## IDEA Complaint Decision 23-009

“During the transfer of the student's pupil records, the school district became aware of the behavioral incidents that were the basis of the student's expulsion from the private school . . . On January 13, 2023, the school board held an expulsion hearing to determine whether to expel the student from the public school district . . . After the district's decision to initiate expulsion proceedings regarding the student, the district properly followed special education disciplinary procedures given the circumstances. ***This decision is limited to the review of the special education disciplinary requirements under IDEA, and does not address any other issue related to the expulsion under Wis. Stat. s. 120.13, which would be beyond the scope of the department's special education complaint investigation authority.***”

# Response to Bullying Allegations

## **IDEA Complaint Decision 23-010 - Not Compliant**

“While the IEP team discussed the student's repeated absences, they did not revise the IEP to include providing access to a trusted adult within the school building, and did not, other than placement, adequately consider whether additional or revised services were required as a result of the bullying to ensure a continuation of FAPE. The district did not appropriately respond to allegations of bullying of a student with a disability.”

# TITLE IX UPDATE



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# Title IX Update

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- ❖ Common missteps when receiving a report of sexual harassment under Title IX
- ❖ Lessons learned from recent OCR investigations and interviews

# Title IX Update

## ❖ To-do list:

- ❖ Review designated Title IX Coordinator(s) and update as appropriate
- ❖ Review handbooks, annual notices, school websites, and School Board Policies for consistency
- ❖ Provide Title IX training to employees:
  - ❖ The current Title IX regulations require that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process receive training on certain topics, such as the definition of sexual harassment, how to conduct an unbiased investigation, issues of relevance, and the grievance process.

# Title IX Update

- ❖ In addition to the required training, we recommend that all school employees be trained on the definition of sexual harassment, the standard for actual knowledge of sexual harassment, and when to report allegations of sexual harassment to the Title IX Coordinator(s). The initial steps taken in response to allegations of sexual harassment are critical for Title IX compliance!
- ❖ Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - ❖ Unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal access to the recipient's education program or activity;
  - ❖ An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct (i.e., quid pro quo sexual harassment); or
  - ❖ Sexual assault, dating violence, domestic violence, or stalking. 34 CFR 106.30(a)



# Title IX Update

- ❖ A school district has actual knowledge of allegations of sexual harassment when any of the following individuals have notice of allegations of sexual harassment:
  - ❖ Any elementary or secondary school employee;
  - ❖ Any Title IX Coordinator; or
  - ❖ Any school official with the authority to institute corrective measures. 34 CFR 106.30

# Title IX Update

- ❖ Remember, notice often results from an informal report of harassment as opposed to a formal Title IX complaint. “Notice results whenever any elementary and secondary school employee, any Title IX Coordinator, or any official with authority: Witnesses sexual harassment; hears about sexual harassment or sexual harassment allegations from a complainant (i.e., a person alleged to be the victim) or a third party (e.g., the complainant’s parent, friend, or peer); receives a written or verbal complaint about sexual harassment or sexual allegations; or by any other means.” 85 Fed. Reg. 30040 (May 2020).

# Title IX Update

- ❖ In response to a report/notice of sexual harassment, “the Title IX Coordinator must promptly contact the complainant (alleged victim) to discuss the availability of supportive measures as defined in 106.30, consider the complainant’s wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.” 34 CFR 106.44(a).

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# Title IX Update

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- ❖ Look for revisions to Title IX regulations in October 2023:
- ❖ Biden Administration released Notice of Proposed Rulemaking (NPRM) in June 2022 and April 2023.
- ❖ You can find a fact sheet about the July 2022 NPRM [here](#), and you can find a fact sheet about the April 2023 Athletics NPRM [here](#).

# Title IX Update

- ❖ Proposed changes of interest in July 2022 NPRM:
  - ❖ Allows a single-investigator model. The Title IX Coordinator may also serve as the investigator and decisionmaker.
  - ❖ In response to notice of conduct that may constitute sex discrimination under Title IX, the Title IX Coordinator must take “appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient’s program or activity, in addition to remedies provided to an individual complainant.”

# Title IX Update

- ❖ Elimination of “mandatory dismissal.”
- ❖ Address discrimination based on sexual orientation, gender identity, and sex characteristics by prohibiting recipients from separating or treating any person differently based on sex in a manner that subjects that person to more than minimal harm (unless otherwise permitted by Title IX). This includes policies and practices that prevent a student from participating in a recipient’s education program or activity consistent with their gender identity.

# Title IX Update

- ❖ Proposed changes of interest in April 2023 NPRM
  - ❖ Proposes adding the following language to the regulations: “If a recipient adopts or applies sex-related criteria that would limit or deny a student’s eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.”

# Title IX Update

- ❖ U.S. Dept. of Ed. discussion: “[T]he proposed regulation would not prohibit a recipient’s use of sex-related criteria altogether . . . prevention of sports-related injury is an important educational objective in recipients’ athletic programs and that—as courts have long recognized in cases involving sex-separate athletic teams—fairness in competition may be particularly important for recipients in some sports, grade and education levels, and levels of 5 competition. The Department anticipates that some uses of sex-related eligibility criteria would satisfy the standard in the proposed regulation in some sports, grade and education levels, and levels of competition.”



# Title IX Update

- ❖ New [7th Cir. decision](#) addresses transgender student access to bathrooms and locker rooms
- ❖ Upholds Whitaker and sends SOS signal to the U.S. Supreme Court in light of circuit split: “The school districts invite us to reverse those preliminary injunctions and revisit our holding in Whitaker. We see no reason to do so, however. Litigation over transgender rights is occurring all over the country, and we assume that at some point the Supreme Court will step in with more guidance than it has furnished so far. Until then, we will stay the course and follow Whitaker.”

# Title IX Update

- ❖ “We also leave the door open to reasonable measures taken by the school districts to ensure that a student genuinely needs the requested accommodations. Just like the plaintiff in Whitaker, A.C., B.E., and S.E. have all provided ample evidence of their medical diagnoses and the care they receive from professionals to assist in their transitions. They have also demonstrated that their gender identities are enduring. All three have legal name changes and gender-marker changes. B.E. and S.E. have been receiving testosterone treatment for over a year. These are not cases where the plaintiffs’ good faith requests for gender-affirming facility access could be questioned. Nor do these cases present the scenario offered by Indiana and other states in their amicus brief, where only subjective ‘self-identification’ is offered as the basis for the plaintiffs’ requests.”

# Title IX Update

- ❖ “The proffered justification the school gave was the need ‘to protect the privacy rights of all 22,160 students.’ We found this unconvincing (more or less the opposite of ‘exceedingly persuasive’) because there was no evidence that A.W. was less discreet than other students while using the bathroom or that the stall doors in the bathrooms did not provide adequate privacy to all.”
- ❖ “Both B.E. and S.E. averred that the stalls in the locker room would allow them and other students to change privately, and that students do not disrobe entirely or use the locker room showers during the school day. As a result, the district court’s conclusion that locker room use would be indistinguishable from bathroom use in this instance is not clearly erroneous.”

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# Title IX Update

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- ❖ “Further, nothing in the district courts’ injunctions restricts a school district’s ability to monitor student conduct in bathrooms and locker rooms . . . gender-affirming access policies neither thwart rule enforcement nor increase the risk of misbehavior in bathrooms and locker rooms.”



# **TOP 10 DOS AND DON'TS WHEN PREPARING FOR EXPULSION HEARINGS**

# #1

## Specificity of Expulsion Hearing Notices: Particulars of the Pupil's Alleged Conduct

- ❖ Do: Think about the four W's and H questions. Answer each of these questions in the notice of expulsion hearing.
  - ❖ Who was involved?
  - ❖ What happened?
  - ❖ When did it happen?
  - ❖ Where did it happen?
  - ❖ How did it happen?
- ❖ Don't: Do not provide simple generalizations about the alleged conduct, and do not rely solely on police reports.

# #1

## Specificity of Expulsion Hearing Notices: Particulars of the Pupil's Alleged Conduct

Example: Expulsion Decision No. 817 – The parent did not raise procedural issues with the notice, but the expulsion decision was reversed due to procedural errors. The notice stated:

“The letter specifically alleged that on May 19, 2022, the pupil “engag[ed] in a physical attack on staff on school grounds...”

The reasoning for the decision was as follows:

“In the present case, the notice does not state the time that the alleged misconduct occurred, does not specify the location in the school where the alleged misconduct occurred and does not adequately describe the conduct to be considered. For example, the notice does not describe how many staff were attacked or the name of the staff who were attacked. Because the notice failed to include the particulars of the alleged misconduct, the school district did not give adequate notice to the pupil about the charges that would be considered at his expulsion hearing and the expulsion must be reversed.”

## #2 Other Contents of the Expulsion Notice

❖ Do: Treat the statute like a checklist for preparing your notice of expulsion hearing. Do you have every item contained in Wis. Stats. §120.13(1)(c)(4) in the notice?

4. Not less than 5 days' written notice of the hearing under subd. 3. shall be sent to the pupil and, if the pupil is a minor, to the pupil's parent or guardian. The notice shall state all of the following:
  - a. The specific grounds, under subd. 1., 2. or 2m., and the particulars of the pupil's alleged conduct upon which the expulsion proceeding is based.
  - b. The time and place of the hearing.
  - c. That the hearing may result in the pupil's expulsion.
  - d. That, upon request of the pupil and, if the pupil is a minor, the pupil's parent or guardian, the hearing shall be closed.
  - e. That the pupil and, if the pupil is a minor, the pupil's parent or guardian may be represented at the hearing by counsel.
  - f. That the school board shall keep written minutes of the hearing.
  - g. That if the school board orders the expulsion of the pupil the school district clerk shall mail a copy of the order to the pupil and, if the pupil is a minor, to the pupil's parent or guardian.
  - h. That if the pupil is expelled by the school board the expelled pupil or, if the pupil is a minor, the pupil's parent or guardian may appeal the school board's decision to the department.
  - i. That if the school board's decision is appealed to the department, within 60 days after the date on which the department receives the appeal, the department shall review the decision and shall, upon review, approve, reverse or modify the decision.
  - j. That the decision of the school board shall be enforced while the department reviews the school board's decision.
  - k. That an appeal from the decision of the department may be taken within 30 days to the circuit court for the county in which the school is located.
  - L. That the state statutes related to pupil expulsion are ss. 119.25 and 120.13 (1).



## #2 Other Contents of the Expulsion Notice

- ❖ Don't: Do not overlook any item in Wis. Stats. §120.13(1)(c)(4). For instance, L requires that you include a statement that the state statutes related to pupil expulsion are ss. 119.25 and 120.13(1). Although DPI stated in a previous decision that this is not a substantive error where the correct statute is listed for the school location, this is a procedural item that could be an issue on appeal. Failure to cite these statutes correctly can render the notices defective. Expulsion Decision No. 489.

## #3 The notice contains “minor” factual errors, can I correct information at the hearing?

- ❖ Do: If you discover an error in the notice before the expulsion hearing, including the date of the alleged incident or the location where the alleged incident occurred, you should revise and resend the notice.
- ❖ Don't: Do not rely on correcting factual information in the notice at the hearing. Incorrect information in the notice does not satisfy the requirement that the student receive adequate notice of the charges against him or her prior to the hearing.

# #3 The notice contains “minor” factual errors, can I correct information at the hearing?

Example: Expulsion Decision No. 819– The board did not comply with all procedural requirements of Wis. Stat. §120.13(1)(c). The notice of expulsion hearing was inadequate.

“In addition to specifying an incorrect date, the notice of expulsion hearing failed to specify the time and specific location of the pupil’s alleged conduct. Proper notice must inform the pupil of the time frame during which the alleged conduct occurred and where the alleged conduct occurred.”

“The notice of expulsion hearing did not provide the pupil with adequate notice of the allegations against him because it specified an incorrect date of the alleged conduct. The notice of expulsion hearing must state the particulars of the pupil’s alleged conduct upon which the expulsion proceeding is based.” Wis. Stat. §120.13(1)(c)4.a. When the notice of an expulsion hearing fails to provide the correct date of the alleged conduct, it has not satisfied this requirement.”

## #4 So you have a police report, is that all you need?

- ❖ Do: Use the police report as part of your record during the expulsion hearing to verify the information you obtained during your own investigation.
- ❖ For example: if you caught a student with illegal drugs while at school, your investigation may have found that there was an odor to the drugs (i.e, a vape with marijuana) or that the student admitted that the substance in their possession was an illegal drug such as marijuana. You may then use the police report and any drug testing to confirm that the substance in the student's possession was an illegal substance.

## #4 So you have a police report, is that all you need?

- ❖ Don't: Do not rely solely on the police report to support your decision to expel the student. Conduct your own investigation, separate from any investigation conducted by the police department.
- ❖ Police reports are considered hearsay and may constitute sufficient evidence to support an expulsion when there are other factors establishing the reliability and probative value of the report.
- ❖ The school should always conduct their own investigation. If a student admits the alleged conduct to school officials, that would be considered a factor that establishes the reliability and probative value of a police report regarding the same conduct.

# #5

## Testimony from School Officials

- ❖ Do: Best practice is to have a school official present at the expulsion hearing who conducted the investigation and/or witnessed the alleged conduct. When possible, obtain signed statements from witnesses and/or any victim of alleged conduct.
- ❖ School officials have an obligation to investigate and can properly present testimony as to statements made to them in the course of their investigation. This can include statements from students and/or staff who witnessed the alleged conduct.
- ❖ Don't: School boards may not base a decision solely on hearsay.

## #6 Identifying a Teacher in an Expulsion Notice

- ❖ Do: When the victim of alleged conduct is a staff member, best practice is to identify the teacher in the expulsion hearing notice. This is a due process and notice requirement as to “Who” was involved in the incident. The student has a right under due process to defend against their accuser. Failure to identify such person in the hearing notice violates a student’s right to due process.
- ❖ Don’t: Do not characterize a teacher simply as “a teacher.” That does not provide adequate information to inform the student of the particulars of misconduct and “who” was involved.

## #6 Identifying a Teacher in an Expulsion Notice

Example: Expulsion Decision No. 826 – the notice did not name the “Crossroads teacher” and therefore failed to adequately describe the teacher. The notice also mischaracterized a “gun” by failing to specify that it was a toy or cap gun.

The notice of expulsion hearing in this case alleged that:

On November 27, 2022, [the pupil] was part of a group of students who developed, supported, and carried out a plan to shoot a gun at the Crossroads teacher while the teacher was in the front yard of his residence for the purpose of scaring the teacher, as admitted by [the pupil].

In the present case, the notice does not state the time that the alleged misconduct occurred and does not adequately describe the conduct to be considered. For example, the notice does not name “the Crossroads teacher” and, therefore, failed to adequately describe the teacher. The

The same requirement is not true for identifying other students.



# #7

## Sending the Expulsion Hearing Notice

- ❖ Do: Send the parent(s) or guardians and the student separate notice of the expulsion hearing.
- ❖ Don't: Do not mail the notice only to the parent(s) or guardian(s), or only to the student. Likewise, if you need to amend a notice before the hearing date, you must ensure that the amended notice is sent separately to both the parent(s) or guardian(s) and the student.

# #7

## Sending the Expulsion Hearing Notice

Example: In a recent case, a day before the hearing, the district wanted to correct information in the expulsion hearing notice. The district resent the notice via email to the parent, but they did not send the notice to the student.

It was necessary to reschedule the hearing for two reasons: (1) the amended notice was not provided 5 days in advance of the hearing, and (2) the amended notice was not sent separately to the student and the parent as required by Wis. Stats. 120.13(1)(c)4.

# #8 Disciplining Students with Disabilities

- ❖ Do: If the student is a student with disabilities, prior to any expulsion hearing the IEP team must conduct a manifestation determination review to determine whether the student's conduct was a manifestation of the student's disability. Include a statement in your expulsion hearing packet that informs the board whether the student is a student with disabilities and if there was a determination that the conduct was not related to the student's disability. The district can expel if conduct was not a manifestation but must continue to provide special education services during the term of expulsion if the student is an eligible student under the IDEA.
- ❖ Don't: Do not skip over the manifestation determination review (MDR) to move quickly to an expulsion. The MDR **MUST** be conducted before you can change a student's placement. Expulsion is considered a change in placement.

# #9

## There is video of the incident, should it be used during the hearing?

- ❖ Do: Video may be used to clearly establish conduct and may be made a part of the administration's evidence and the record. If multiple students can be seen on the video, best practice is to use blurring software if available in your district.
- ❖ Don't: Do not rely solely on testimony that video was reviewed to establish the student's alleged conduct. Students and parents may refute testimony that a video is an accurate representation of the alleged conduct if they were never given the opportunity to review the video.

# #10 Preparing the Administration's Evidence

- ❖ Do: Prepare a thorough evidence exhibit or “packet” and briefly review each item in the packet for the hearing record. Evidence to submit on the record should contain the following information:
  - ❖ Notices of suspension and expulsion hearing.
  - ❖ Certified mailing receipts (if applicable) of notices.
  - ❖ Summary of the misconduct subject to expulsion.
  - ❖ Investigation report and supporting evidence which may include witness statements, photos, videos, and police reports.
  - ❖ Disciplinary information.
  - ❖ Grade and attendance information.
  - ❖ A statement of whether the student is a student with disabilities who has an IEP or a Section 504 plan.
  - ❖ Copy of the policies and handbook sections that were violated or apply to the situation.

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# #10 Preparing the Administration's Evidence

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- ❖ Don't: Do not skip over information in the packet while presenting your case. Each item should be reviewed so that the board/hearing officer and the parent/student are aware of the information that forms the basis for the expulsion recommendation, statutory basis for the hearing, and for the opportunity to respond and cross-examine the information.



# HR ISSUES

# Wage and Hour Reminders

## ❖ Hourly Employees

- ❖ Tend to have more claims in schools - Be mindful of how they are reporting their time.
- ❖ Ensure time they are in the building, attending to school business, is accounted for even if outside of their regular hours.

## ❖ Coaching/Athletics

- ❖ Especially if you use hourly employees for extracurricular activities (including ticket-takers), ensure they are properly qualified as volunteers or are being paid appropriately.
- ❖ Document volunteers with an agreement.



# Staff First Amendment Issues

- ❖ Kennedy v. Bremerton School District
  - ❖ Holding: District violated coach's First Amendment rights.
  - ❖ Why?
    - ❖ His action was private. He was not acting as a government employee
    - ❖ There was no coercion as to persuading or forcing students to participate
    - ❖ Case specific but raises new questions about how to administer policies related to staff prayer at school events.

# Staff First Amendment Issues

- ❖ Various potential First Amendment issues (e.g. posters in class, discussions, social media)
- ❖ Three-part analysis:
  - ❖ Is the speech made pursuant to an employee's official duties?
  - ❖ Does the speech address a matter of public concern?
  - ❖ Does the employer's interest in promoting efficiency in education outweigh the interests of the employee in speaking freely?

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# Personnel Issues

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- ❖ Teacher or administrator contract is in place, but what about discipline?
  - ❖ Progressive discipline
  - ❖ Investigative process
  - ❖ Opportunity to respond
  - ❖ Corrective vs. punitive discipline

# Personnel Issues

- ❖ Negotiated resolution of employee disciplinary matters
  - ❖ Always check the contract first!
  - ❖ Pros and cons of settling a dispute
  - ❖ Key issues
    - ❖ Wages and benefits
    - ❖ Waiver and release – ADEA Requirements
    - ❖ Unemployment
    - ❖ Non-Disparagement and Confidentiality
    - ❖ References

# Managing Employee Leaves

- ❖ Do NOT assume that federal and Wisconsin medical leave benefits are identical
- ❖ Intermittent leave can be tricky and frustrating, but it is still protected leave.
- ❖ Use second opinion option sparingly.
- ❖ Integrating medical leave and ADA/WFEA can be challenging
- ❖ Worker's compensation & “unreasonable refusal to rehire”
- ❖ Running worker's comp. and medical leave concurrently
- ❖ Role of Long-Term Disability



**UNITED STATES COURT OF  
APPEALS FOR THE SEVENTH  
CIRCUIT, NO. 22-2527  
(JULY 20, 2023)  
APPEAL FROM THE U. S. DIST. CT.,  
EASTERN DIST. OF WIS.**

United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
Appeal from the U. S. Dist. Ct., Eastern Dist. of Wis.

- ❖ Parent brought this suit on behalf of herself and her child alleging that several School District staff members violated the Student's 4th Amend. rights when disciplining her.
- ❖ Rather than sue the individual staff members involved in the discipline, Parent pursued only a "Monell" claim against the District and asserted that it had a de facto practice of using excessive force or threats of force against students with behavioral disabilities like the Student. The district court dismissed the suit because the Parent failed to plausibly allege a widespread custom or practice of violating disabled students' Fourth Amendment rights.
- ❖ The 7th Circuit agreed and affirmed the District Court's dismissal of the claim.

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United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
Appeal from the U. S. Dist. Ct., Eastern Dist. of Wis.

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- ❖ The Student has multiple developmental and cognitive disabilities that affect her capabilities at school. She had an Individualized Education Plan.
- ❖ Facts alleged: on a particular occasion a staff member and law enforcement engaged in a restraint based on the Student's unsafe and violent behavior. Parent alleged other instances of restraint and seclusion but did not provide sufficient information in her pleadings.



United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
Appeal from the U. S. Dist. Ct., Eastern Dist. of Wis.

- ❖ Section 1983 provides a civil remedy against any “person” who violates a plaintiff’s federal civil rights while acting under color of state law. 42 U.S.C. § 1983.
- ❖ In *Monell*, the Supreme Court held that municipalities—such as school districts—are “person[s]” who may be sued under § 1983.
- ❖ Municipalities (includes school districts) may be sued only for their own violations of federal law, however, and cannot be held vicariously liable for the constitutional torts of their employees.

United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
Appeal from the U. S. Dist. Ct., Eastern Dist. of Wis.

- ❖ For a Monell claim to survive a motion to dismiss, a plaintiff must plead facts that plausibly suggest that:
  - ❖ she was deprived of a constitutional right;
  - ❖ the deprivation can be traced “to some municipal action (i.e., ‘a policy or custom’), such that the challenged conduct is properly attributable to the municipality itself”;
  - ❖ “the policy or custom demonstrates municipal fault, i.e., deliberate indifference”;
  - and
  - ❖ “the municipal action was the moving force behind the federal-rights violation.”
- ❖ Both the District court and the Court of Appeals found that the Parent failed to adequately plead a policy or custom.

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United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
Appeal from the U. S. Dist. Ct., Eastern Dist. of Wis.

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- ❖ Three types of municipal action support Monell liability:
  - ❖ an express policy that causes a constitutional deprivation when enforced;
  - ❖ a widespread practice that is so permanent and well-settled that it constitutes a custom or practice; or
  - ❖ an allegation that the constitutional injury was caused by a person with final policymaking authority.”

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United States Court of Appeals For the Seventh Circuit, No. 22-2527 (July 20, 2023)  
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- ❖ The Court concluded that the Parent's allegations of two isolated incidents fail to plausibly allege that the District has a widespread practice of using excessive force to punish students with behavioral disabilities and failed to state a claim under Monell.
- ❖ Cautions:
  - ❖ Continue to train on the use of seclusion and restrain.
  - ❖ Engage in active functional behavior assessment, development of behavior intervention plans and review placements.
  - ❖ Review use of law enforcement in schools.

# Thank you!

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