BACK TO SCHOOL:

Top Legal Issues

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PART ONE: PROPOSED CHANGES TO TITLE IX

Proposed Changes to Title IX

- June 23, 2022: Department of Education issued a Notice of Proposed Rule Making.
- Ongoing Public Comment Period.
- Current regulations still in effect until new effective date.

Proposed Changes to Title IX

- Key changes
  - The proposed regulations would prohibit all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity, in addition to sex based harassment.

Proposed Changes to Title IX

- Definition of Sex-Based Harassment
  - Including sexual harassment; harassment based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity; and other sex-based conduct that meets requirements described below.
    - Quid pro quo;
    - Hostile environment—unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person's ability to participate in or benefit from the recipient's education program or activity; or
    - sexual assault, dating violence; domestic violence or stalking.

Proposed Changes to Title IX

- Off Campus Conduct
  - Proposed changes would require recipients to address:
    - Conduct that occurs off-campus when the respondent is a representative of the recipient or otherwise engaged in conduct under the recipient's disciplinary authority.

Proposed Changes to Title IX

- Response Obligations
  - To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.

Proposed Changes to Title IX

- Grievance and Investigation Procedures
  - Nuanced changes
  - Include a process that enables the decisionmaker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant.

Proposed Changes to Title IX

- Dismissal
  - The Department proposes eliminating “mandatory dismissal,” leaving all dismissals to be “permissive” for the following reasons:
    - The complainant notifies the Title IX Coordinator that they would like to withdraw the complaint or any allegations therein;
    - The respondent is no longer enrolled or employed by the recipient;
    - Specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination; or
    - Would not constitute sexual discrimination under Title IX even if proven.

Proposed Changes to Title IX

- Pregnancy Discrimination
  - Protect students and employees from discrimination based on pregnancy or related conditions, including by providing reasonable modifications for students, reasonable break time for employees for lactation, and lactation space for both students and employees.
- LGBTQ Students
  - Prohibiting recipients from separating or treating any person differently based on sex (sexual orientation, gender identity, and sex characteristics) in a manner that subjects that person to more than minimal harm.
- Athletics
  - Not addressed in this Notice of Proposed Rule Making.

PART TWO: DISCIPLINE IDEA/504

FAPE

- If a student with a disability exhibits behaviors that impede their learning or learning of others, regardless of eligibility category, the IEP Team should convene discuss next steps to address the behavior, including whether additional data is needed to determine the child's educational needs and how to address the behavior. (Question A-5, pg 7)
- When a child with a disability demonstrates behavior that impedes the child's learning or that of others, appropriate behavioral supports may be necessary to ensure that the child receives FAPE. The IEP Team must consider and when determined necessary for ensuring FAPE, include or revise behavioral supports in the child's IEP. (Question A-4, pg 7)
- Failure to consider behavioral supports may lead to denial of FAPE. As OSERS noted in its 2016 DCL, the failure of the IEP Team to consider and provide for needed behavioral supports through the IEP process may result in a child not receiving a meaningful educational benefit or FAPE. In addition, an LEA's failure to make behavioral supports available throughout a continuum of alternative placements, including in a regular education setting, could result in an inappropriately restrictive placement and constitute a denial of placement in the least restrictive environment. (Question A-6, pg 8)

Manifestation Determinations

- **When Required:** A manifestation determination review must be conducted when school personnel propose to change the placement of a child with a disability because of a violation of the school's code of student conduct. The manifestation determination review also must take place when the LEA is deemed to have knowledge that the child is a child with a disability, even if the child has not yet been found eligible for special education and related services at the time the discipline is proposed (see Question H-7 for additional information). The manifestation determination review must occur within 10 school days of the decision to change the placement of the child because of a violation of the school's code of student conduct. 34 C.F.R. § 300.530(e)(1). (Question F-2, pg 24)
- **When Optional:** Additionally, while IDEA requires a manifestation determination to be conducted when there is a change of placement (see Question F-7), IDEA does not prohibit IEP Teams from conducting a manifestation determination review during other situations when a child's behavior is inconsistent with the school's code of student conduct. Information from such reviews can assist the IEP Team's decision-making, including whether to conduct an FBA; whether to create, implement, or change a behavioral intervention plan (BIP); or in considering the need for, and implementation of, positive behavioral interventions and supports and other strategies to support any child with a disability whose behavior impedes their learning or that of others. (Question F-2, pg 24)

Manifestation Determinations

- **Consensus rules apply.** If the parent of a child with a disability, the LEA, and the relevant members of the child's IEP Team cannot reach consensus on whether or not the child's behavior was a manifestation of the disability, the LEA must make the determination and provide the parent with prior written notice pursuant to 34 C.F.R. § 300.503. The parent of the child with a disability has the right to exercise their procedural safeguards, including by requesting mediation and/or an expedited due process hearing to resolve any disagreement about the manifestation determination. 34 C.F.R. §§ 300.506 and 300.532(a). A parent also has the right to file a State complaint alleging a violation of IDEA related to the disputed manifestation determination. 34 C.F.R. § 300.153. (Question F-6, pg 26)

Virtual Placements

- Virtual home instruction or hybrid instruction could be additional options for an IEP Team to consider when determining the appropriate IAES for a child with a disability as long as the services allow the child to continue to participate in the general education curriculum and progress toward meeting the goals set out in the child's IEP. However, SEAs and LEAs should be cautious about excluding a child with a disability from their regular educational program to provide virtual instruction for the sole purpose of responding to a child's behavior. Removing a child from the regular education program without ensuring behavioral supports have been made available throughout a continuum of placements, including in a regular education setting, could result in an inappropriately restrictive placement and denial of FAPE. See Question J-5 for additional information regarding virtual instruction. (Question D-5, pg 19-20)
- IEP Teams and placement teams must ensure that the instructional methodology for delivery (e.g., in-person, virtual, hybrid), timing, frequency, service setting, and location of services appropriately support the child with a disability in achieving the functional and academic goals set out in the child's IEP, including those that address the child's social, emotional, and behavioral needs (Question J-5, pg 40).

Identifying and Evaluating Children with Behavioral Needs

- “A student who has not been identified as a student with a disability and who is repeatedly referred for discipline following inappropriate verbal outbursts beyond the expected range of behaviors for students of a similar age may need an evaluation to determine whether the student is a student with a disability entitled to FAPE.” (p. 6)

- The fact that a student is doing well academically does not justify the school denying or delaying an evaluation when the district has reason to believe the student has a disability, including if the student has disability-based behavior resulting in removal from class or other discipline (e.g., afterschool detentions). (p. 9)

Behavioral Assessments and Plans

- “If the school does not assess a student’s challenging behaviors during the evaluation process, including disability-based behaviors that pose a threat to the safety of the student or others, the Section 504 team would lack the information needed to design a program that will meet the student’s individual educational needs, and the student could be denied FAPE.” (p. 9-10)
- “Where a student’s evaluation shows that challenging behavior is caused by or directly and substantially related to the student’s disability or disabilities, the placement decision by the Section 504 team must identify individualized services, such as behavioral supports, to meet the student’s educational needs. Individualized behavioral supports may include, among other examples: regular group or individual counseling sessions, school social worker services, school based mental health services, physical activity, and opportunities for the student to leave class on a scheduled or unscheduled basis to visit a counselor or behavioral coach when they need time and space to ‘cool down’ or self-regulate.” (p. 10)
- “To be useful in addressing the behavior, a BIP should include information about: acceptable replacement behaviors, who will teach the student to use those behaviors and how, what staff should do to support the student if the behavior of concern recurs, and how the Section 504 team will monitor and measure the BIP’s implementation and effectiveness.” (p. 10-11)

PART THREE: EMPLOYMENT LAW REMINDERS

Fair Labor Standards Act Issues

- Non-Exempt Employees taking on additional responsibilities
  - “Pressure or coercion” – Are they truly volunteers?
  - “Same type of service” – Are the providing a different service than their primary role?
  - “Nominal fee” – Are they being paid more than a nominal amount for the additional responsibilities?

Fair Labor Standards Act

- Remember to be aware of how non-exempt employees are used generally.
  - Especially in the case of work-from-home arrangements
  - “Suffered or permitted to work”
  - When travel time is compensable

Americans with Disabilities Act

Protection for those diagnosed with gender dysphoria

- Williams v. Kincaid – Fourth Circuit (August 16, 2022)
  - *"Gender dysphoria" – "a "discomfort or distress that is caused by a discrepancy between a person's gender identity and that person's sex assigned at birth."*
  - Americans with Disabilities Act Excludes "gender identity disorders not resulting from physical impairments" (42 USC § 12211(b))
  - BUT gender dysphoria may be covered because it may be understood as resulting from a physical impairment

Americans with Disabilities Act

- Remember:
  - Rely on their medical documentation
  - Conduct an individualized analysis
  - Engage in an interactive process

PART FOUR: FIRST AMENDMENT CASE UPDATES

Public Employee's Personal Religious Expression During Work Hours. Kennedy v. Bremerton, 597 U.S. ___ (2022)

The Facts of the Case

- Joseph Kennedy (Kennedy) was a football coach for the Bremerton School District (the District). Kennedy initially would engage in a private prayer at midfield, but eventually his players and fellow coaches would join the prayer, and Kennedy would make religious motivational speeches. Kennedy also continued a standing school tradition of engaging in pregame or postgame prayers in the locker room.
- The District counseled Kennedy against his practice of prayers in the locker room and prayers with the team at midfield because the District believed it violated the First Amendment's prohibition against government's establishment of religion.

The Facts of the Case

- Kennedy stopped the locker room prayers. Kennedy continued to engage in private prayer at midfield after games, but he did so when his team was otherwise engaged in other activities to prevent them from joining him.
- At times, though, opposing players and other adults would join Kennedy in his prayer at midfield. The District continued to counsel Kennedy against his midfield prayer.
- After one game, Kennedy privately prayed at midfield after a game while his team was otherwise preoccupied; Kennedy was not joined by others in the prayer. The District placed Kennedy on administrative leave because the District believed he was engaging in actions that would subject the District to liability for violating the Establishment Clause of the First Amendment.

What the Court Said

- The Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal, and the First Amendment neither mandates nor permits the government to suppress such religious expression.

- This Court long ago abandoned Lemon and its endorsement test offshoot. The Establishment Clause must be interpreted by reference to historical practices and understanding.

What it Means

- Government employers cannot discipline employees for engaging in personal religious observances, even when the observance occurs during work time or at the work location.

- It is unreasonable to conclude that that the government employer is endorsing a religion by allowing an employee to exercise their First Amendment right to engage in a personal religious observance.

Practical Considerations

- Government employers should not automatically consider personal religious expression while the employee is “on the clock” as prohibited by the First Amendment.
- Government employers also should not assume that all religious expression by an employee is permissible. There are still prohibitions under the Establishment Clause regarding religious activity by the government and its employees.
  - The Court in Bremerton focused only on the private prayer by Kennedy. The Court specifically noted: “The contested exercise before us does not involve leading prayers with the team or before any other captive audience.”
  - The Court in Bremerton also looked at the secular activities Kennedy was permitted to do and the lack of connection to actual work functions. For example, the Court noted: “Mr. Kennedy prayed during a period when school employees were free to speak with a friend, call for a reservation at a restaurant, check email, or attend to other personal matters. He offered his prayers quietly while his students were otherwise occupied.”
- Government employers need to be more cautious about how they assess the religious activities of employees and the line between whether the activity is protected free speech by the employee or a violation of the Establishment Clause by the government employer.

Student's Freedom of Speech. N.J. v. Sonnabend, No. 21-1959 (7th Cir. 2022)

The Facts of the Case

- The case concerned two students who attended schools in Neenah and Kettle Moraine School Districts.
- The schools have a dress code policy that prohibits clothing depicting firearms.
- The students, through separate lawsuits, challenged the “no gun” provisions as violating the First Amendment and Tinker’s substantial disruption test.

The Facts of the Case

- The district court in each case applied different standards – one court applied the Tinker test and another applied the speech-forum analysis of Muller v. Jefferson Lighthouse Schools.
- The 7th Circuit overruled the Muller decision and applied the Tinker Test to determine whether the student speech could be restricted.
- The 7th Circuit found that the school could not reasonably forecast that the student speech (the gun t-shirt) would substantially disrupt the school environment.

What the Court Said

- Schools must apply the “substantial disruption” test from Tinker v. Des Moines prior to restricting student speech, such as restricting students from wearing clothing depicting firearms.
- The Tinker Test applies to student religious expression.
- The Tinker Test applies even to viewpoint-neutral restrictions on student speech in a public forum.

What it Means

- Schools must assess a student's exercise of free speech on a case-by-case basis to determine if it can be restricted. Bright-line rules in policy will fail if it does not meet the Tinker requirements.
  - Tinker allows student speech to be restricted when:
    - School officials reasonably forecast that the speech would materially and substantially disrupt the work and discipline of the school or invade the rights of others; or
    - The speech falls into one of the categories of speech that schools may regulate regardless of the circumstances, which are:
      - Indecent, vulgar, and lewd student speech;
      - Student speech that can be reasonably regarded as encouraging illegal drug use; or
      - Student expression that others might reasonably perceive to bear the imprimatur (approval) of the school.

Practical Considerations

- Schools should review their dress code and speech policies and assess whether any speech restrictions comply with the Tinker Test.
- Restrictions on student speech should be assessed on a case-by-case basis to determine if the speech can be restricted under the Tinker Test.
- Schools should not overlook that the Tinker Test applies to attempts to restrict student religious expression.
  - Schools should not view this case as only addressing the display of guns on shirts.
  - Other speech, including political or religious speech, will need the same analysis by school officials before it can be restricted.

PART FIVE: PUBLIC RECORDS UPDATE

Wisconsin Supreme Court Decision

- *Friends of Frame Park, U.A. v. City of Waukesha,* 2022 WI 57.
  - The decision substantially changes the award of attorney fees in Public Records cases.
  - The case involved a Writ of Mandamus action to compel release of public records.
  - The Court held, in order to "prevail in whole or substantial part" for the award of attorney's fees, "a party must obtain a judicially sanctioned change in the parties' legal relationship." *Id.* at ¶ 3.

Facts

- On October 9, 2017, the City received a public records request from Friends requesting Letters of Intent, Memorandum of Understanding, and/or Lease Agreements between Big Top Baseball and/or Northwoods League Baseball and the City of Waukesha from May 1, 2016 to the present date of the letter. *Friends,* 2022 WI 57 at ¶ 3.

- Approximately two weeks later, the City tendered all responsive documents except for one: a draft contract with Big Top Baseball. *Id.*

- In a letter provided with the responsive documents, the City explained its decision to withhold the draft contract was temporary, and due to ongoing negotiations of the contract itself. *Id.* The City further clarified its rationale pursuant to the requisite balancing test, and explained the document would be released once the Common Council took action, which was then scheduled for December 19, 2017. *Id.* at ¶ 6.

- Friends filed a Writ of Mandamus to compel the City's release of the draft contract on December 18, 2017, and the City—pursuant to its original representation—released the contract after the December 19 meeting by the Common Council to Friends on December 20, 2017.

Court's Rationale

- The Wisconsin Supreme Court focused its inquiry on an interpretation of Wis. Stat. sec. 19.37(2)(a), and what it means to "prevail in whole or substantial part" in order for a court to award attorney's fees under a Mandamus action for release of public records, as well as whether the City improperly withheld the draft contract.
  - The Court found the City had not improperly withheld the draft contract, and also discussed the standard to award attorney's fees at length.
  - In its discussion, the Court noted, "to prevail" means "the party seeking records must obtain a judicially sanctioned change in the parties' legal relationship." *Id.* at ¶ 13.
  - In doing so, the Court looked at parallel federal law under the Freedom of Information Act (FOIA) and how federal courts award attorney's fees in similar actions. *Id.* at ¶ 15.

Court's Rationale (cont.)

- Comparing prior state court practice and current federal law, the Court explained, "previously, the State's appellate courts had found a party 'prevails' under the statute in a public records lawsuit if there exists a 'causal nexus' between the requestor bringing the action and the defendant providing the requested records." *Id.* at ¶ 18.

- This analysis, however, created an uneven playing field for cases involving a delay in the release of records, especially due to unintentional or inadvertent error.

- A requestor could still receive attorney fees by virtue of a custodian correcting their error, and complying with the law if a lawsuit had been initiated. In changing course, the Court noted federal courts rely on an analysis of whether a party "substantially prevailed" in an action to determine whether to award attorney's fees. *Id.* at ¶ 21.

- The Wisconsin Supreme Court decided in this case to change course and implement the "substantially prevailed" standard going forward. In doing so, the Court stated "absent a judicially sanctioned change in the parties' legal relationship, attorney's fees are not recoverable under sec. 19.37(2)(a)." *Id.* at ¶ 24.

Substantial Victory for Records Custodians

- While previously, a records requestor could apply for court action to compel release of records and expect to receive compensation for attorney's fees almost automatically, the landscape has changed significantly with this decision.

- Now, an award of attorney's fees is no longer an automatic entitlement under this interpretation, much to the benefit of records custodians and well-meaning public servants.

Thank you!

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