2023 MTBFM ANNUAL WORKSHOP & WEBINAR

NEW LAWS AND REMINDERS FOR THE SPRING

MILLER, TRACY, BRAUN, FUNK & MILLER, LTD.

LABOR UPDATES 2023

Nonrenewals, Scanlon, and Bargaining

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RIF/NONRENEWAL

- 24-11 establishes dismissal rules for nontenured staff
  - No recall rights
- 24-12 establishes reduction of program and staff number rules for licensed staff
  - Recall rights
  - Both, confusingly, use the term "nonrenewal"

RIF/NONRENEWAL

- 24-11 establishes dismissal rules for nontenured staff
  - Does not require "cause" in resolution, but does require *cause* to distinguish from a RIF, and distinguish from illicit cause
- 24-12 establishes reduction of program and staff number rules for licensed staff
  - Is silent as to person – only used if it does not matter "who," just "that"

SCANLON V. IGNITE

- Former employee argued lack of compliance with Personnel Records Review Act (PRRA) when employer didn't send file to counsel on demand
- Employer demanded in-person review
- Court read PRRA narrowly – requiring only review

SCANLON V. IGNITE

- *BUT…*
  - A union has a right to information to support its representation functions pursuant to *Labor Act*
  - Union represents all staff – not one staff member
  - Relationships require balance – failing to provide information may pour gasoline on the fire of a difficult situation

SCANLON V. IGNITE

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BARO V. LAKE COUNTY IFT/AFT

- Baro argued her dues deduction authorization card was unconstitutional pursuant to the U.S. Supreme Court's ruling in *Janus v. AFSCME*
  - Interestingly, when she withdrew from union, union refunded her dues and "$500 for her trouble."
- Court ruled the authorization was a contract – her failure to understand terms was irrelevant.
- Court reaffirmed reasoning in *Bennett v. Council 31, AFL-CIO*, that no secondary analysis of consent is required beyond the face of the contract – no waiver of rights is required.
- The case is an important reminder to ensure the union is responsible for its own grievances (and doesn't drag the Board into court on its behalf).

BARGAINING

- Short-term money is running out or committed
- Inflation remains high
- 6% limitation remains an issue
- Watch out for auto-inflation (index) as a function of base
  - Increases automatically by CPI-U after 2022-2023 ($40,000)

TITLE IX

Ellen D. Lueking

ON YOUR DISTRICT WEBSITE

- Title IX regulations require the District to post:
  - Name and contact information for the Title IX Coordinator
  - Training materials for Title IX personnel
  - Policy
  - **Grievance Process**

INTAKE

- Upon notice of an incident that may rise to Title IX Sexual Harassment, the Title IX Coordinator is **required to promptly** meet with the Complainant to discuss:
  - Availability of supportive measures
  - A consideration of Complainant's wishes regarding supportive measures
  - How to file a formal complaint
  - That supportive measures are available with or without a formal complaint

"IT WAS JUST KIDS BEING KIDS"

- We don't need to use that whole Title IX process for "normal kid stuff" right?
- **WRONG**
  - Still need to begin the process because that is what is required and not doing so may be that pesky "clearly unreasonable in light of the circumstances"/deliberately indifferent/willful and wanton conduct breaching tort immunity.

START THE PROCESS, BUT EVALUATE IF YOU NEED TO BE IN THE TITLE IX PROCESS

- The Title IX process has an early phase for dismissal, both mandatory dismissals and permissive dismissals. Here's where the complaint that might just be "normal kid stuff" leaves the Title IX process.

MANDATORY DISMISSAL

- Title IX Coordinator **MUST** dismiss when, even if the allegations were proven true:

1. The conduct did not occur in the District's education program or activity;
2. Did not occur against a person in the United States; or
3. Would not constitute Title IX sexual harassment.

SEXUAL HARASSMENT AS DEFINED BY TITLE IX

1. Any instance of *quid pro quo* harassment by a school's employee where a school employee conditions education benefits on participation in unwelcome sexual conduct; or
2. **Any unwelcome conduct that a reasonable person would determine is so severe, pervasive, AND objectively offensive that it effectively denies a person equal access to the school's education program or activity;** or
3. Any instance of sexual assault, dating violence, domestic violence, or stalking (as defined by the Clery Act and VAWA—sometimes lovingly referred to as "the big four").

PERMISSIVE DISMISSAL

- The Title IX Coordinator may dismiss the formal complaint (but should carefully evaluate if doing so would be clearly unreasonable in light of the circumstances), if:

1. The Complainant notifies the Title IX Coordinator in writing that he or she wants to withdraw the formal complaint or allegations contained therein;
2. The Respondent is no longer enrolled or employed by the District; or
3. Specific circumstances prevent the District from gathering enough evidence to reach a determination as to the formal complaint or allegations therein.

IF DISMISSING...

- A notice is sent to both parties, allowing them the opportunity to appeal the dismissal. That dismissal notice has some required parts, including the reason for the dismissal and facts supporting dismissal.

CONSIDER INTERNAL MEMOS

- When we have a formal complaint and the conduct ALLEGED (not proven) fails to meet severe, pervasive, and objectively-offensive, the Title IX Coordinator dismisses, but there are some facts relevant to the dismissal or steps taken by the District in response to the alleged conduct that are worth documenting.

NO DISCIPLINE

1. Until there is a finding of responsibility through the Title IX process, or
2. It has been dismissed under Title IX and can be evaluated under another District policy/student conduct code.

PA 102-702

Faith's law trailer bill

PA 102-702: FAITH'S LAW TRAILER BILL

Faith's Law– *PA 102-702 (Effective July 1, 2023)*

- Requires verbal and written notification to parents if their child is the victim of alleged sexual misconduct by a school employee or contractor.
- Requires applicants for employment and contractors who work directly with children to affirm that they did not previously engage in sexual misconduct against a minor.
- Requires applicants for employment and contractors who work directly with students to provide contact information for all previous jobs where they worked with children and requires applicants for employment and contractors to consent to disclosure of certain information from these past employers

PA 102-702: FAITH'S LAW TRAILER BILL

- **NEW** 105 ILCS 5/22-94
- Applies to ALL permanent and temporary positions for employment with a school or a contractor of school involving direct contact with children or students.
- Direct Contact with Children or Students:
- *Possibility of care, supervision, guidance or control of children or students or routine interaction with children or students.*
- Prior to hiring an applicant to work directly with children or students, district or contractor must ensure that there is no knowledge or information pertaining to the applicant that would disqualify the applicant from employment.

PA 102-702: FAITH'S LAW TRAILER BILL

- **The applicant must swear or affirm that they are not disqualified from employment and complete a form based on an ISBE template that includes the following:**
- Relevant contact info of current employer and all former employers that were schools, school contractors or where applicant had direct contact with children or students;
- Written authorization that consents to and authorizes disclosure by applicant's current and applicable former employers and releases them from liability for disclosure or records; and
- Written statement of whether the applicant has been the subject of a sexual misconduct allegation, been discharged, been asked to resign, resign, or otherwise separated from, non-renewed, or disciplined due to an adjudication or finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, or has ever had a license or certificate suspended, surrendered, or revoked or had an application for licensure denied due to an adjudication finding of sexual misconduct or while an allegation of sexual misconduct was pending or under investigation, UNLESS the investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated.

PA 102-702: FAITH'S LAW TRAILER BILL

- The district in receipt of the application shall initiate a review of the employment history by contacting the employers listed and, using ISBE's template, request the following from the current or former employer:
- *Dates of employment; and*
- *Statement that confirms applicant's statement regarding prior allegations of sexual misconduct, unless the investigation resulted in a finding that the allegation was false, unfounded, or unsubstantiated, OR if the employer has no knowledge that would disqualify applicant.*
- Districts in receipt of the application shall verify the applicant's reported previous employers with previous employers in ISBE's licensure database to ensure accuracy.

PA 102-702: FAITH'S LAW TRAILER BILL

- No later than 20 days after receiving a request for information, the employer shall disclose the requested information using ISBE's template.
- If there is an affirmative response regarding allegations of sexual misconduct, the employer shall provide additional information about the matters disclosed and all related records.
- Template shall be maintained as part of the personnel file.
- Template shall be completed at time of separation from employment.
- If investigation is completed after separation from employment, school shall update information accordingly.
- Information received shall not be a public record.

PA 102-702: FAITH'S LAW TRAILER BILL

- Districts have immunity for submitting information, unless knowingly false.
- Districts cannot hire an applicant until they've provided the relevant information.
- No right to suppress relevant information regarding sexual misconduct in contracts.
- Employment history review is required for substitute employees.
- Contractors are required to conduct same employment history review and inform school of any instances involving their employees, and schools can object to placement after receiving information.
- Districts can conduct more expansive background checks at their discretion.

PA 102-702: FAITH'S LAW TRAILER BILL

- **NEW** 105 ILCS 5/22-85.10
- Districts are required to develop procedures to notify the parents or guardians of students with whom a district employee, agent, or contractor:
- *Is alleged to have engaged in sexual misconduct; and*
- *When any formal action is taken against the employee, including acceptance of the employee's resignation.*

PA 102-702: FAITH'S LAW TRAILER BILL

- First, the student must be notified in a developmentally appropriate matter indicating what information will be given to parent.
- Next, parents shall be notified in writing of the alleged misconduct or board action as soon as feasible, subject to Children's Advocacy Center reporting requirements.
- All notices to parents and students must include available resources within school and community and available counseling services.
- Beginning July 1, 2025, this shall include the name and contact information of the district's domestic and sexual violence and parenting resource coordinator. See 105 ILCS 5/26A-35, added by P.A. 102-466, eff. 7-1-25.

PA 102-702: FAITH'S LAW TRAILER BILL

- Notices do not need to be provided if the student is 18 or older or emancipated.
- Notices should not conflict with the student's IEP or 504 plan.
- The time frame for providing notice should be considered in light of any DCFS or law enforcement investigation.
- If the student is no longer enrolled at the time of formal action taken, written notice to the last known address in the student's file fulfills the notification requirement.
- Prior notification to student shall not be required if district deems it necessary to address an imminent risk of serious physical injury or death of student or another person, including the victim. If not given, student should be notified as soon as practicable after parent notification.
- Notice requirements do not apply if parent or guardian is the alleged perpetrator.

STUDENT SOCIAL MEDIA

Chen v. Albany unified school district, 2022 WL 17957458 (9th Cir. Dec. 27, 2022).

CHEN V. ALBANY UNIFIED SCHOOL DISTRICT, 2022 WL 17957458 (9TH CIR. DEC. 27, 2022).

- In 2016, Epple created a private Instagram account as "a private forum where [he] could share funny memes, images, and comments with [his] close friends that [they] thought were funny, but which other people might not find funny or appropriate Epple allowed about 13 classmates, including Chen, to follow the private account. Chen engaged with some of the content.
- Epple posted cruel things about classmates, ranging from "immature posts making fun of a student's braces, glasses, or weight to much more disturbing posts that targeted vicious invective with racist and violent themes against specific Black classmates." The posts referenced things like slavery, lynchings, and gorillas, and used the n-word.
- As usual with "private" accounts like this, eventually the contents leaked out to other students. Many students, parents, and teachers were justifiably upset, and unsurprisingly the public reaction was severely negative.

CHEN V. ALBANY UNIFIED SCHOOL DISTRICT, 2022 WL 17957458 (9TH CIR. DEC. 27, 2022).

- The court says that the school could easily have punished the students for their speech if it had been made on campus:
- *"The posts in the yungcavage account include vicious invective that was targeted at specific individuals and that employed deeply offensive and insulting words and images that, as used here, contribute nothing to the "marketplace of ideas." Moreover, some of the posts used violent imagery that, even if subjectively intended only as immature attempts at malign comedy, would reasonably be viewed as alarming, both to the students targeted in such violently-themed posts and to the school community more generally."*

CHEN V. ALBANY UNIFIED SCHOOL DISTRICT, 2022 WL 17957458 (9TH CIR. DEC. 27, 2022).

- Though the Instagram activity took place off-campus, the court says there was a sufficient nexus between Epple's conduct and the on-campus impacts to justify discipline:
- *"Given the ease with which electronic communications may be copied or shown to other persons, it was plainly foreseeable that Epple's posts would ultimately hit their targets, with resulting significant impacts to those individual students and to the school as a whole…*
- *Epple again emphasizes that he did not ever intend for the targets of his posts to ever see them. But having constructed, so to speak, a ticking bomb of vicious targeted abuse that could be readily detonated by anyone following the account, Epple can hardly be surprised that his school did not look the other way when that shrapnel began to hit its targets at the school."*

CHEN V. ALBANY UNIFIED SCHOOL DISTRICT, 2022 WL 17957458 (9TH CIR. DEC. 27, 2022).

- The court says the school had "the role of protecting other students from being maltreated by their classmates….a failure by the school to respond to Epple's harassment might have exposed it to potential liability on the theory that it had 'failed to respond adequately' to a 'racially hostile environment' of which it had become aware." The court summarizes (emphasis added):
- *"Students such as Epple remain free to express offensive and other unpopular viewpoints, but* ***that does not include a license to disseminate severely harassing invective targeted at particular classmates in a manner that is readily and foreseeably transmissible to those students****."*

CHEN V. ALBANY UNIFIED SCHOOL DISTRICT, 2022 WL 17957458 (9TH CIR. DEC. 27, 2022).

- Chen didn't contribute as much content to the private account as Epple did, but the court still condemns his behavior:
- *"he affirmatively liked two such posts and denounced, in vulgar terms, another follower who criticized one such post. At the very least, Chen is akin to a student who eggs on a bully who torments classmates. A school may properly take account of such affirmative participation in what ended up, after the account became known, as abusive harassment targeted at particular students. Moreover, several of the targeted students stated that the severity of the hostile environment they experienced was exacerbated by the knowledge that other students participated in the account and "liked" the abusive posts."*

STUDENT DISCIPLINE AND STUDENTS WITH DISABILITIES

Changes and updates to OCR and OSEP Guidance

MANAGING THREATS TO SAFETY

"[W]hen faced with an identifiable threat of school violence, schools may take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*."

Wynar v. Douglas County School District, 728 F.3d 1062 (9th Cir. 2013).

MANAGING THREATS TO SAFETY

- *A.N. v. Upper Perkiomen School District*, 228 F. Supp. 3d 391 (E.D. Pa. 2017) (where the court found no First Amendment violation where a student created an Instagram post utilizing imagery related to the Sandy Hook school shooting and with the caption ""See you next year, if you're still alive.", which resulted in a canceled day of school while authorities investigated the nature of the post).

MANAGING THREATS TO SAFETY

- BUT…
  - When school officials do not understand a student's disability, they are unlikely to be able to understand and appropriately respond to a threat by that student.

MANAGING THREATS TO SAFETY

- When school officials do not understand a student's disability, they are unlikely to be able to understand and appropriately respond to a threat by that student.
- *See, e.g., In re Prince William County Public Schools*, 116 LRP 21763 (OCR 2015) (where OCR found the school district's threat assessment for a student on the autism spectrum was flawed because it failed to account for, among other things, the student's social skills deficits resulting from the autism spectrum disorder).

MANAGING THREATS TO SAFETY

- OSEP/OCR have released relatively new guidance (5 total documents) on discipline of students with disabilities.

STUDENT DISCIPLINE

- Failure by schools to take proactive steps within the IEP process to address the behavioral needs of children with disabilities can result in LRE violations and behaviors that can violate the code of conduct
- Proactive steps include determining if whatever is currently in place is working and IF NOT, what should be done.
- Disciplinary removals for purposes of IDEA's discipline rules include "informal actions" such as shortened school days.
- *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Disciplinary Provisions* (OSEP/OSERS).

STUDENT DISCIPLINE

- Consider the following factors in the use of short-term disciplinary removals:
  - Circumstances leading to the removal
  - Whether or not IEP services are being provided during the removal
  - Whether the behavior can be addressed through minor changes to the class or program (e.g., adjusting the time a student transitions to lunch in the cafeteria)
  - Whether the IEP team should be convened to discuss the student's behavior
- *Questions and Answers: Addressing the Needs of Children with Disabilities and IDEA's Disciplinary Provisions* (OSEP/OSERS).

STUDENT DISCIPLINE

- *Positive, Proactive Approaches to Supporting the Needs of Children with Disabilities: A Guide for Stakeholders* (OSEP/OSERS)

STUDENT DISCIPLINE

- Section 504 requires school districts reevaluate students with disabilities prior to a significant change in placement. This "evaluation" is a manifestation determination to decide:
  - Whether the behavior for which discipline is proposed is a manifestation of the student's disability and, if so,
  - Whether changes in the student's placement are required to ensure that the student receives FAPE.

STUDENT DISCIPLINE

- If school requires student to undergo a threat or risk assessment to identify if the individual poses a threat of physical violence to self or others at school or school sponsored events, under Section 504, schools MUST:
  - Avoid disability discrimination
  - Safeguard a student's FAPE rights throughout any threat or risk assessment process.

MANAGING THREATS TO SAFETY

- Highlights from the Department of Ed guidance:
  - Reduce discriminatory practices in the discipline of students with disabilities.
  - Improve procedures and interventions for addressing the behavioral needs of students under IDEA and Section 504 without exclusionary discipline.

STUDENT MENTAL HEALTH

New laws, section 504 implications, and new litigation

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PUBLIC ACT 102-0416

- Effective January 1, 2023, each school district that serves pupils in any of grades 6-12 and that issues an identification card to pupils in any grades 6-12 shall provide contact information for the National Suicide Prevention Lifeline (988), the Crisis Text Line, and either the Safe2Help Illinois helpline or a local suicide prevention hotline or both on the identification card. The contact information shall identify each helpline that may be contacted through text messaging.

PUBLIC ACT 102-0416

- The contact information [for the National Suicide Prevention Lifeline, the Crisis Text Line, and either the Safe2Help Illinois helpline or a local suicide prevention hotline or both] shall be included in the school's student handbook and also the student planner if a student planner is custom printed by the school for distribution to pupils in any of grades 6 through 12.

PUBLIC ACT 100-810

- Valid Cause for illness includes "the mental or behavioral health of the student." 105 ILCS 5/26-2a
- Absence for cause by illness required to include the mental or behavioral health of the child for up to 5 days for which the child need not provide a medical note, in which case the child shall be given the opportunity to make up any school work missed during the absence and, after the second mental health day used, may be referred to the appropriate school support personnel.

CHILD FIND- SECTION 504

- Under the Section 504 regulations at 34 CFR 104.3 (j)(1), a student is eligible for Section 504 coverage if her/his impairment is one that "substantially limits one or more major life activities."
- Under Title II of the ADA, certain impairments "virtually always" will substantially limit a major life activity. Those impairments include major depressive disorder, bipolar disorder, PTSD, traumatic brain injury, obsessive compulsive disorder, and schizophrenia, which "each substantially limit brain function." 28 CFR 35.108 (d)(2)(iii)(K).

COMMONWEALTH CHARTER ACADEMY CHARTER SCHOOL, 118 LRP 30092 (PENN. SEA 2018)

- Parent and school communicated about student's incomplete work/difficulty with assignments, absences, and student's anxiety disorder.
- School waited 2 months before providing "504 paperwork," which the parent returned. No evaluation or 504 plan was ever developed.
- Hearing officer found that the school discriminated against student under Section 504 by not promptly evaluating and providing a 504 plan. Hearing officer ordered an Independent Educational Evaluation and Compensatory Education.

SEATTLE PUBLIC SCHOOLS LITIGATION

- Seattle Public Schools has filed a lawsuit against TikTok, Instagram, Facebook, YouTube, and Snapchat.
- The Complaint alleges that the social media companies have created a public nuisance by targeting their products to children.
- Seattle Public Schools alleges that these companies have worsened mental health and behavioral disorders (including anxiety, depression, disordered eating, and cyberbullying), have made it more difficult to educate students, and forced schools to take steps such as: hiring additional mental health professionals, developing lesson plans about the effects of social media, and providing additional training to teachers.

SEATTLE PUBLIC SCHOOLS LITIGATION

- Seattle Public Schools alleges that from 2009 to 2019, there was, on average, a 30% increase in the number of Seattle Public Schools students who reported feeling "so sad or hopeless almost every day for two weeks or more in a row" that they stopped doing some typical activities.
- Seattle Public Schools requests that the Court order the companies to stop creating the public nuisance, to award damages, and to pay for prevention education and treatment for excessive and problematic use of social media.

THANK YOU!

- Questions?
  - Type them in the chat!

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