UW-STEVENS POINT CONTEMPORARY ISSUES FOR NEW TEACHERS

TOP FIVE LEGAL ISSUES FOR NEW TEACHERS

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Presented By:

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I. REPORT SUSPECTED CHILD ABUSE AND NEGLECT.

A. Child Abuse.

A. Child Abuse. Under the children's code, conduct is considered child abuse if the victim is under the age of 18, and he/she is subjected to one or more of the following actions:

1. Physical abuse: Physical injury inflicted on a child by other than accidental means, including, but not limited to, lacerations, fractured bones, burns, internal injuries, severe or frequent bruising or great bodily harm. (Bodily harm is defined under Wis. Stat. § 939.22(14) as physical pain or injury, illness or any impairment of physical condition.)

2. Physical neglect: Failure, refusal or inability on the part of a parent, guardian, legal custodian or other person exercising temporary or permanent control over a child, for reasons other than poverty, to provide necessary care, food, clothing, medical or dental care or shelter so as to seriously endanger the physical health of the child.

3. Emotional abuse: Harm to a child's psychological or intellectual functioning caused by the child's parent, guardian, legal custodian or other person exercising temporary or permanent control over the child.

4. Sexual abuse*:* Several types of behavior are considered sexual abuse and prohibited under the statutes.

   a. Both sexual intercourse and sexual contact are prohibited under Wis. Stat. §§ 940.225 and 948.02. The statues provide a broad definition of sexual contact. Consent is not a defense when minors under 16 are involved. Persons suffering mental illness or deficit are presumed incapable of consent.

   b. Permitting, allowing or encouraging a child to violate Wis. Stat. § 944.30 (prostitution) is prohibited.

   c. Sexual exploitation of children, in violation of Wis. Stat. § 948.05 is prohibited.

   d. The forced viewing of "sexually explicit conduct," as defined in Wis. Stat. § 948.01(7) is also prohibited.

B. Mandatory Reporter.

1. The following persons shall report child abuse or neglect as required under Wis. Stat. § 48.981(2): physician, coroner, medical examiner, nurse, dentist, chiropractor, optometrist, acupuncturist, medical or mental health professional, social worker, marriage and family therapist, professional

counselor, public assistance worker including a financial and employment planner, school teacher, school administrator, school counselor, mediator, child-care worker in a day care center, group home, or residential care center for children and youth, day care provider, alcohol or other drug abuse counselor, member of the treatment staff employed by or working under contract with a county department or a residential care center for children and youth, physical therapist, physical therapist assistant, occupational therapist, dietitian, speech-language pathologist, audiologist, emergency medical technician, first responder, and police or law enforcement officer. Wis. Stat. § 48.981(2)(a)1.-29.

2. A court-appointed advocate shall report child abuse or neglect as required under Wis. Stat. § 48.981(2)(b).

3. A member of the clergy shall report child abuse as required under Wis. Stat. § 48.981(2)(bm).

4. Recent legislation:

    a. 2011 Wisconsin Act 81 made all public school employees mandatory child abuse and neglect reporters effective December 9, 2011.

    b. School district employees include anyone who receives an annual statement of wages for tax purposes (W-2 form) from the school district. Some school districts contract with a Cooperative Educational Service Agency (CESA) or other organizations for different kinds of services. In such cases, school districts may wish to consider requiring these contracted personnel to participate in the required training, if they work with students (e.g., school psychologist, physical therapist, special education teacher, bus driver).

C. Reporting requirement.

1. Wis. Stat. § 48.981(2) provides that specified individuals i.e., mandatory reporters, must report child abuse and/or neglect when:

    a. He/She has reasonable cause to suspect that a child, seen in the course of performing professional duties, has been abused/neglected; or

    b. He/She has reasonable cause to suspect that a child, seen in the course of performing professional duties, has been threatened with abuse/neglect and that abuse/neglect of the child will occur.

2. When is there "reasonable cause" to suspect that abuse/neglect is, or may be, occurring under Wis. Stat. § 48.981(2)?

   a. Generally, a "reasonable cause to suspect" involves a belief that an ordinary person would reach as to the existence of abuse/neglect based on the totality of facts and circumstances actually known to the person possessing the suspicion. *State v. Hurd*, 135 Wis.2d 266, 400 N.W.2d 42 (Ct. App. 1986).

   b. If a prudent person would have a reasonable cause to suspect child abuse/neglect if presented with the same totality of circumstances as that held and viewed by the individual observer, then a report of that suspicion is mandatory under the statute. *Id.*

3. What are the responsibilities of educators for mandatory reporting?

   a. Any individual, who is statutorily required to make a report, must immediately inform, by telephone or in person, the county department of protective services, the local sheriff or the local police department, of the facts and circumstances contributing to his/her suspicion that child abuse/neglect has or will occur. Wis. Stat. § 48.981(3).

   b. There is not a specific reporting "deadline," and performing a reasonable investigation into a child's allegations before reporting suspicions is consistent with the intent of the statute. *Phillips v. Behnke*, 192 Wis.2d 552, 531 N.W.2d 619 (Ct. App. 1995).

D. **Immunity.** Any person or institution reporting abuse or negligence in good faith shall have immunity from liability. Wis. Stat. § 48.981(4). In addition, no person making a report under this subsection in good faith may be discharged from employment, disciplined or otherwise discriminated against in regard to employment, or threatened with any such treatment for so doing.

E. **Confidentiality.** All reports and records made under this section and maintained by the department, county agencies, and other persons, officials and institutions shall be confidential. Wis. Stat. § 48.981(7).

F. **Penalty**. Whoever intentionally violates this section by failure to report as required may be fined not more than $1,000.00 or imprisoned not more than 6 months, or both. Wis. Stat. § 48.981(6).

G. Training.

1. School boards are required to ensure that all employees receive training within 6 months of initial hiring and at least every 5 years thereafter.

2. Initial training of all public school employees was to have occurred no later than June 9, 2012.

3. Training may be accomplished through the viewing of DPI webcasts and/or in-person training by school district staff and/or others, e.g., legal counsel.

4. Training must focus on identifying children who have been abused or neglected and understanding the laws and procedures under Wis. Stat. § 48.981 governing the reporting of suspected or threatened child abuse and neglect.

II. RESPECT STUDENT BOUNDARIES.

A. Teacher Student Boundaries. In a recent study, various categories teacher-student boundaries were identified to assist teachers in maintaining a proper professional relationship with students. Aultman, Lori Price, *Boundary dilemmas in teacher-student relationships: Struggling with "the line."* Teacher and Teacher Education. Vol. 25 No. 5 (July 2009).

1. Curricular Boundaries: Includes discussing themes of morality or emotionally-charged issues with vulnerable populations.

2. Emotional Boundaries: Includes maintaining a professional emotional demeanor with students by masking and/or controlling emotions and recognizing when personal emotions are affecting students, such as anger.

3. Relationship Boundaries: Engaging in intimate relationships, such as engaging in romantic and/or sexual relationships, with current or former students.

4. Power Boundaries: Using authority to harm a student or allowing a student to violate a school rule or law. This also includes rewarding or punishing a student based on his/her relationship with the teacher, popularity, or favors done by the student or teacher.

5. Institutional Boundaries: Driving a student home, leaving the classroom unsupervised to deal with a particular student, and allowing a student to violate a school rule.

6. Financial Boundaries: Providing excessive personal funds for the classroom or classroom activities, and altruistic gestures such as performing favors, or loaning money to an individual student.

7. Communication Boundaries: Talking about highly personal subject matter with students, or engaging in conversations with a student when the student is sharing information that does not benefit the student, including breaches of confidentiality and offering advice on personal matters.

8. Temporal Boundaries: Spending too much time with one student which detracts from time spent with other students, or suggests that there is a "special" relationship.

9. Expertise Boundaries: Not having the training to deal with certain student personal issues, such as acting as school psychologists or social workers. Teachers should offer encouragement and listen to the student, but seek out other professional such as counselors who have the proper training to deal with serious issues.

B. Examples of Boundary Breaches.

1. Curriculum Boundary Breach.

Mayer v. Monroe County Cmty. Sch. Corp., 474 F.3d 477 (7th Cir. 2007), cert. denied, 552 U.S. 823 (2007).

Facts: In August of 2002, Mayer signed a one-year contract with the Monroe School Board to teach a current events class for fourth through sixth graders. She relied on approved material such as the current events magazine, "Time for Kids," to teach the class. On January 10, 2003, the magazine contained information on the war in Iraq and related protests. After discussing the article, one student asked Ms. Mayer if she would ever march in a protest. She responded that peace protests are going on all over the country including Bloomington, and "when I drive past the courthouse square and the demonstrators are picketing I honk my horn for peace because their sign says 'Honk for Peace.'" She further explained that it is important for everyone to seek out peaceful solutions even on the playground. The class then moved on to discuss other material.

Soon afterward, one parent complained and the school principal held a meeting with the parent and Ms. Mayer. All three agreed that Ms. Mayer should "not mention peace in her class again." The next day, the principal circulated a memo to the school teachers informing everyone that the school had no official stance on the war in Iraq. He also cancelled "Peace Month," an annual tradition supporting peaceful resolution of problems. After the school district refused to renew her contract, Mayer sued.

Holding: The Seventh Circuit Court of Appeals concluded that the First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences, to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system. "The school system does not 'regulate' teachers' speech as much as it hires that speech." Teachers must follow the rules set by school authorities, which includes sticking to the prescribed curriculum, such that a literature teacher cannot choose what books to teach and a math teacher cannot decide to teach calculus in place of trigonometry. Part of the rationale for this rule is that teachers can be powerful influences in students' lives; the power to decide what students hear must rest in the hands of elected officials.

2. <u>Communication Boundary Breach.</u>

Piggee v. Carl Sandburg College, 464 F. 3d 667 (7th Cir. 2006)

Facts: Carl Sandburg College is a public community college located in downtown Galesburg, Illinois. Ruel was a student in the program and Piggee was his instructor for several classes. At some point, Ruel became aware that Piggee was a Christian and she realized that he was gay. On September 5, 2002, Piggee placed two pamphlets on the sinfulness of homosexuality in Ruel's smock during clinical instruction time, as he was preparing to leave for the day. She told him to read the materials later and invited him to discuss them with her.

Ruel was offended and complained to College officials. After the College looked into the matter, it admonished her in a letter to cease such behavior, and the following semester it chose not to retain her. Piggee sued the College under 42 U.S.C. § 1983. She asserted, among other things, the measures the College took violated the Free Speech clauses of the Constitution, because it infringed upon her ability to discuss matters of religious concern in the workplace.

Holding: The College did not violate Piggee's First Amendment rights because her speech, both verbal and through the pamphlets she put in Ruel's pocket, was not related to her job of instructing students in cosmetology. If it did anything, it inhibited her ability to perform that job by undermining her relationship with Ruel and other students who disagreed with, or were offended by, her expressions of her beliefs.

3. Relationship Boundary Breach.

a. *Doe v. St. Francis School Dist.,* No. 12–1039, 2012 WL 3990717 (7th Cir., Sept. 10, 2012).

Facts: NR was a student at Deer Creek Middle School. Kelly Sweet was employed as a teacher at Deer Creek. In October, 2007, NR broke his leg and could not participate in Physical Education classes. Instead, he reported to Ms. Sweet's classroom during Physical Education classes.

Ms. Sweet invited NR to paint her classroom along with several other students. Ms. Sweet took NR to dinner and a Milwaukee Bucks basketball game with the permission of his parents. She coordinated these events, in part, through text messaging with NR.

Shortly after attending the basketball game together in February, 2008, NR and Ms. Sweet began including inappropriate content in their text messages. After an exchange of text messages in which she told NR that she wanted him to be her boyfriend, she invited him to her apartment. He accepted the invitation and when he arrived they spent 15 to 20 minutes kissing and petting. (She concedes the kissing but denies the petting). Sexually suggestive text messages followed, though no further physical contact.

Ms. Sweet was disliked by the other eighth-grade teachers. They thought she failed to maintain discipline. One of them complained to the school's principal that Ms. Sweet was text messaging during the school day. The principal told Ms. Sweet not to send text messages on the job.

On February 21, 2008, a group of teachers, including Ms. Sweet, met for dinner. An argument ensued wherein two teachers accused Ms. Sweet of carrying on an inappropriate relationship with NR and demanded to see her phone. She refused.

Shortly thereafter, the teachers reported this argument to their principal and superintendent. The teachers complained that Ms. Sweet had "breached the line" and "blurred the line" by treating students as friends. One of the teachers said that Ms. Sweet and NR had something "like an eighth grade girlfriend/boyfriend relationship," "like a crush." The principal and superintendent advised the teachers that they could do nothing because they had no evidence to support a conclusion that Ms. Sweet had engaged in any wrongdoing.

Although Ms. Sweet and NR had agreed to keep their relationship secret, one or more of the text messages were discovered by NR's mother. She then transferred him to a private school and contacted the police.

When NR's mother contacted police, Ms. Sweet told her principal that NR's family had discovered a "flirtatious" text message that she had sent to NR. She was immediately placed on administrative leave. When the principal learned from the police that the allegations included more than a single flirtatious text message, the District commenced an investigation into Ms. Sweet's conduct.

Ultimately Ms. Sweet was fired, prosecuted, and pleaded guilty to fourth-degree sexual assault in violation of Wis. Stat. § 940.225(3m).

NR's family filed suit against the District alleging that they had knowledge of an inappropriate relationship between NR and Ms. Sweet and did nothing to prevent it from occurring and escalating.

Holding: In a case in which a school district is sued in a private suit under Title IX, it cannot be held liable unless the plaintiff proves that an official of the school district, who at a minimum has authority to institute corrective measures, has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

Because the teachers informed the administrators only that they believed Ms. Sweet to be a poor educator, that she communicated with students by text message, and that they had suspicions that her relationship with NR was inappropriate, the administrators had no actual knowledge of a sexual relationship between NR and Ms. Sweet. As such, the District did not violate Title IX when they did not intervene.

b. *Douglas v. Brookville Area Sch. Dist.,* 2011 WL 6116449 (W.D. Pa. Dec. 8, 2011).

Facts: KE, a 15-year-old high school student at Brookville High School (BHS), had a sexual relationship with Karen Hetrick, a math teacher and sophomore at BHS, which included sending text messages and photographs with sexual content. Ms. Hetrick's daughter, Brynna, who also attended BHS, accessed her mother's phone and reviewed the messages and photographs. She became angry and told her friend Shannon what she had learned. Together, Brynna and Shannon first contacted KE to tell her that they were

aware of her relationship with Ms. Hetrick. Next, they reported the situation to Mr. Stevenson, a BHS music teacher.

Almost immediately, Mr. Stevenson reported the situation to the BHS principal, who investigated the allegations, which included questioning KE about her relationship with Ms. Hetrick. KE acknowledged that she had been involved in a sexual relationship with Ms. Hetrick. Shortly thereafter, Ms. Hetrick resigned and the police department began an investigation into her conduct.

KE's family filed a lawsuit against the District alleging that they had violated Title IX by failing to protect her from an inappropriate sexual relationship with a teacher.

Holding: The court rejected KE's family's claims that the District violated Title IX or §1983 with regard to Ms. Hetrick's actions toward KE, despite the fact that there were several instances of other teachers preying on students within the Brookville School District in the last few years. In addition, the fact that BHS staff observed KE and Ms. Hetrick together both on and off school grounds is not sufficient to conclude that they knew or should have known that an inappropriate relationship had developed.

III. MAINTAIN THE CONFIDENTIALITY OF STUDENT RECORDS.

A. Pupil Records. With limited exceptions, all records directly related to a student and maintained by the school district are classified as "pupil records."

1. Pupil records include:

   a. Directory data: Pupil records which include the pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received, and the name of the school most recently previously attended by the pupil. Wis. Stat. § 118.125(1)(b).

   b. Progress records: Pupil records which include the pupil's grades, a statement of the courses the pupil has taken, the pupil's attendance record, the pupil's immunization records, any lead screening records, and the records of the pupil's extracurricular activities. Wis. Stat. § 118.125(1)(c).

c. Behavioral records: Pupil records which include psychological tests; personality evaluations; records of conversations; any written statement relating specifically to an individual pupil's behavior; tests relating specifically to achievement or measurement of ability; the pupil's physical health records other than immunization records or lead screening records required under § 254.162, law enforcement officers' records obtained under § 48.396(1) or §§ 938.396(1)(b)2,(c)3, and any other pupil records that are not progress records. Wis. Stat. § 118.125(1)(a).

d. Law enforcement unit records: Records maintained by a law enforcement unit that were created by that law enforcement unit for the purpose of law enforcement. Wis. Stat. § 118.125(1)(bs).

2. State law specifically excludes personal records, psychological treatment records, and law enforcement unit records from the definition of pupil records.

a. Personal records are notes or records maintained for personal use by a teacher or other person who is required by the state superintendent under Wis. Stat. § 115.28 (7) to hold a certificate, license, or permit if such records and notes are not available to others.

b. Records necessary for the psychological treatment of a pupil are not pupil records, if they are only available to the persons involved in the psychological treatment of the pupil. Wis. Stat. § 118.125(1)(d)2. School districts, through their policies, may determine: 1) what individuals or professions within the school are qualified to provide psychological treatment, and 2) what services constitute psychological treatment (e.g., support and counseling for dealing with issues related to alcohol and other drug problems).

3. Pupil records include records maintained in any way including, but not limited to, computer storage media, video and audio tape, film, microfilm, and microfiche.

4. School districts must have a written policy concerning pupil records.

B. Availability of Pupil Records.

1. Pupil records must be made available to persons employed by the school district where the pupil attends school, who are required to be DPI-licensed, law enforcement officers who are individually designated by the school board and assigned to the school district, and other school district officials who have been determined by the school board to have legitimate

educational interests, including safety interests, in the pupil records. *See,* Wis. Stat. § 118.125(2)(d).

2. A school official may include a person employed by the school district such as an administrator, supervisor, instructor, or support staff member; a person serving on the School Board; a person or company with whom the school district has contracted to perform a special task (such as an attorney, auditor, health consultant, or therapist); or a person serving on an official committee, such as a disciplinary or grievance committee, or assisting another school official in performing his or her tasks. A school official has a legitimate educational interest if the official needs to review an educational record in order to fulfill his or her professional responsibility.

C. Disclosure.

1. Under the Family Educational Rights and Privacy Act (FERPA), disclosure means to permit access to or the release, transfer, or other communications of personally identifiable information contained in education records to any party, by any means, including oral, written, or electronic means, 34 CFR 99.3.

2. A school district may disclose personally identifiable information from a pupil record under three circumstances: 1) written consent from a parent, guardian or adult pupil, 2) receipt of a court order, or 3) by authority of statute.

3. Both state and federal law related to pupil records allow confidential information to be disclosed in an emergency to protect the safety of students or other people.

   a. Under state law, the school board may adopt policies to promote the disclosure of pupil records and information permitted by law for purposes of school safety. A school board may disclose pupil records to appropriate parties in connection with an emergency if knowledge of the information is necessary to protect the health or safety of any individual.

   b. Similarly, under federal law disclosure is dependent upon the ability of school officials to identify an articulable and significant threat to the health and safety of a student or other individuals.

   c. These provisions should not be interpreted to authorize broad disclosures of confidential information. Rather, only the information necessary to immediately address the emergency

should be disclosed and only to individual(s) who have the authority and capacity to intervene.

IV. KNOW THE RIGHTS OF PARENTS AND THE LIMITATIONS.

A. Basic Rights of Parents.

1. It is well-established and supported by the U.S. Supreme Court that a parent has constitutionally protected rights to some control over his/her child's education, but the control is not absolute. *See, Meyer v. Nebraska,* 262 U.S. 390 (1923); *Pierce v. Society of Sisters,* 268 U.S. 510 (1925).

2. In *Wisconsin v. Yoder*, 406 U.S. 206 (1972), the U.S. Supreme Court wrote:

> This case involves the fundamental interest of parents, as contrasted with that of the state, to guide the religious future and education of their children. The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring tradition.

3. When parents have joint legal custody and the court has not identified that one party's legal custody rights are superior to the other, parental consent may be obtained form only one parent. However, when the parents with joint legal custody disagree with one another, if a compromise cannot be reached, the parents may need assistance from the courts.

B. Access to Records.

1. A school district must respond to reasonable requests from parents for explanations and interpretations of all pupil records. State law requires that a school district, upon request, show a parent the child's behavioral records in the presence of a person qualified to explain and interpret the records. However, a district may not use this provision of the law to unreasonably restrict the parent's right to access behavioral records.

2. Upon request, a parent must be shown and provided a copy of his or her child's education and progress records. Wis. Stat. § 118.125(2)(a), 34 CFR § 99.10(a). Under Wis. Stat. § 118.125(2)(b), upon request, the pupil's behavioral records must be shown to a parent in the presence of a person qualified to explain and interpret the records.

a. If circumstances effectively prevent the parent from exercising the right to inspect and review the education records, the school must provide the parent with a copy of the records requested or make other arrangements for the parent to inspect and review the records. 34 CFR § 99.10(d).

b. If a pupil record contains information on more than one student, the parent may inspect and review the specific information related only to their child. 34 CFR § 99.12(a).

3. Parents are entitled to copies of any pupil records, Wis. Stat. § 118.125(2)(a),(b).

4. The school district must give full rights with regard to pupil records to either parent, unless there is a court order or other legally binding document relating to divorce, separation, or custody that specifically revokes these rights. The terms of the court order or other legally binding document determine the rights of the parents. A parent who has been denied periods of physical placement with a child by a court in an action relating to divorce or separation does not have the rights of a parent with regard to pupil records, Wis. Stat. § 118.125(2)(m).

5. The rights held by a parent regarding his or her minor child transfer to the child when the child reaches the age of 18 years. 34 CFR § 99.5; Wis. Stat. § 118.125. However, the parents of an adult student who continues to be financially dependent upon the parents may continue to obtain this information unless the adult child has informed the school, in writing, that the information may not be disclosed to the parents. Wis. Stat. § 118.125(2)(k). This transfer of rights at the age of majority should be included in the school district's policy on pupil records to help ensure both parents and students understand the process.

6. Parents are not allowed access to certain pupil records.

a. Parents are not allowed access to information relating to their adolescent child's reproductive health without authorization from the adolescent. Wis. Stat. § 253.07(3)(c).

b. Parents are also not entitled to information received by a school psychologist, counselor, social worker or nurse, or any teacher or administrator designated by the school board who engages in alcohol or drug abuse program activities from a pupil that the pupil or another pupil is using or is experiencing problems resulting from the use of alcohol or other drugs unless:

(i) The pupil gives written consent for disclosure,

(ii) There is serious and imminent danger to the health, safety or life of any person and that disclosure of the information will alleviate the serious and imminent danger, or

(iii) A report of suspected child abuse or neglect is required under Wis. Stat. § 48.981. Wis. Stat. § 118.126.

7. Also, parents may not access information related to the HIV test results of a student age 14 years and older without the student's consent. Wis. Stat. §§ 118.125(2m), 252.15(3m)(c).

C. Access to Property.

1. Following an incident in which a sex offender gained access to a school in the school district and exposed himself to a child, the school district implemented a rule to require visitors to provide a state issued photo ID as a condition of entering areas where students are present. Mrs. Meadows, the mother of several children in the school district, refused to show her photo ID, when she attempted to visit the school to attend a musical, a volleyball game and the annual Thanksgiving lunch. Mrs. Meadows and her husband filed suit in federal court alleging that the school district violated their constitutional rights. According to the Court of Appeals for the Fifth Circuit, parents of students do not have a fundamental right to access secure areas of the school. Parents do have a constitutional right to direct their children's education, but that right does not grant them unfettered access to the school buildings. *Meadows v. Lake Travis Independent School District,* 397 Fed.Appx. 1 (5th Cir. 2010).

2. A school district prohibited the parent of several students from attending school events because of a previous child sex offense. The school based the decision on an Illinois statute prohibiting child sex offenders from being present on school property in the absence of a specific exception. The parent sought an injunction to permit him to attend school activities, claiming among other things, that the school district has violated his right to equal protection. The court recognized that although the parent was prohibited from attending school activities, attendance at sporting events and concerts is common but not mandatory. The court, however, noted that events such as graduation ceremonies are a right of passage to students appropriately honored by parents' presence, and had the parent only sought an injunction to permit his attendance at graduation, instead of the broader right to attend all school events, the result might have been different. *Doe v. Paris Union School District*, 2006 U.S. Dist. LEXIS 1606 (C.D. Ill. 2006).

3. A divorce settlement explicitly allowed the father, Mr. Crowley, as the non-custodial parent, equal rights to control his children's education and to be kept in the loop by the custodial parent on their children's progress and grades. Crowley attended public school meetings, critically and publicly addressed the principal and superintendent about leadership and direction of the school, about his son being bullied and demanded that the school district send him the correspondence he was entitled to have. After his son was beaten up on the playground, Crowley demanded more security and offered to be a volunteer playground supervisor but was turned down. The father sued for emotional distress claiming that the school's conduct deprived him of his constitutional due process right to participate in his children's education. The court recognized the difficulties schools face when trying to accommodate both divorced parents, and dismissed the father's due process claim. Crowley states that, because of his outspoken criticism of the principal and superintendent, he was refused access to the premises and to information about his children. Crowley's equal protection and free speech claims, however, went to trial. *Crowley v. McKinney*, 400 F.3d 965 (7th Cir. 2005).

D. Relevant Family Law Terms.

1. Legal Custody. In the State of Wisconsin, any person granted legal custody of a child has the right and responsibility to make "major decisions" concerning the child. "Major decisions" includes, but is not limited to: decisions such as authorization for nonemergency health care, choice of school and consent with regard to special education matters. When parents have "joint custody", each parent has decision making power. While it is preferable that parents with joint custody agree on a course of action and then direct the school accordingly, that is not always possible. In rare cases, even where the parents have joint custody, a family court will order that one parent has the authority to make all education-related decisions or may provide tie-breaking authority to one parent. Without such an order, neither parent's decision-making power is superior to the other. As a general rule, parental consent may be obtained from either parent.

2. Physical Placement. Physical placement of a child refers to the conditions under which one parent will have the child physically placed with him or her. During the period of placement, the parent will have the right and responsibility to make routine/daily decisions about the child's care. Periods of physical placement may be awarded to both parents, even when one parent has been awarded sole legal custody. In fact, the law provides that a child is entitled to meaningful periods of physical placement with both parents unless the court finds that physical placement with one parent would endanger the child's physical, mental or emotional health. Denials of physical placement are not common. If a parent is denied physical

placement of a child, that parent does not have access to the child's education or health care records. *See,* Wis. Stat. § 118.125(2)(m), Wis. Stat. § 767.24(4), and Wis. Stat. § 146.835.

3. Guardian Ad Litem (GAL). A GAL is an attorney, licensed to practice law in Wisconsin. The GAL's role is to represent the best interests of the children as determined by the GAL through an investigation. The GAL will investigate the facts, participate in negotiations, and take a position in court on legal custody and placement. The GAL also may become involved in the financial issues of a case when those issues affect the children. The GAL does not have any of the rights or duties of a parent or general guardian. Although the GAL may be incorrectly referred to as the children's attorney, the GAL's role is to advocate for the best interests of the children. This may not be the same as advocating for what the child wants.

V. UNDERSTAND RESTRICTIONS ON STUDENT DISCIPLINE.

A. Corporal Punishment.

1. Statutory Definition.

   a. Wis. Stat. §118.31 defines "corporal punishment" as the intentional infliction of physical pain which is used as a means of discipline. The statute offers the following examples of what is and is not corporal punishment:

   b. Corporal punishment includes, but is not limited to, paddling, slapping, or prolonged maintenance of physically painful positions, when used as a means of discipline.

   c. Corporal punishment does not include actions consistent with an individualized education program (IEP) or reasonable physical activities associated with athletic training.

2. Prohibitions. No official, employee or agent of a school board may subject a pupil enrolled in the school district to corporal punishment. However, the statute is not intended to prohibit, permit or otherwise affect any action a school official, employee or agent takes with regard to a person who is not a student enrolled in the district.

3. Recognized Exceptions. The statute recognizes the following exceptions when a school employee may use physical force or restraint on a student:

   a. Use of reasonable and necessary force to quell a disturbance or prevent an act that threatens physical injury to any person.

b. Use of reasonable and necessary force to obtain possession of a weapon or other dangerous object within a student's control.

c. Use of reasonable and necessary force for the purpose of self-defense or defense of others under Wis. Stat. § 939.48.

d. Use of reasonable and necessary force for the protection of property under Wis. Stat. § 939.49.

e. Use of reasonable and necessary force to remove a disruptive student from school premises, a motor vehicle, or a school-sponsored activity.

f. Use of reasonable and necessary force to prevent a student from inflicting harm on himself or herself.

g. Use of reasonable and necessary force to protect the safety of others.

h. Use of incidental, minor or reasonable physical contact designed to maintain order and control.

4. Limits on Liability. The statute recognizes that deference must be given to the reasonable, good faith judgments made by a school official, employee or agent who uses reasonable and necessary force under one of the exceptions set forth above.

B. Removal from Class.

1. Under Wis. Stat. § 118.164, a school district may adopt a policy that provides teachers with the authority to remove a student from class. The student code of conduct may provide for the short-term, temporary removal of a student from the classroom, but also long term removal under certain conditions. Removal from class under the student code of conduct does not prohibit a school district from pursuing or implementing other disciplinary measures, including but not limited to detentions, suspension or expulsion, for the conduct for which the student was removed.

2. Grounds for Disciplinary Removal from Class. A student may be removed from class for the following types of behavior:

   a. Behavior which violates the district’s policies regarding suspension or expulsion;

   b. Behavior which violates the behavioral rules and expectations set forth in the student handbook;

   c. Behavior which is disruptive, dangerous or unruly;

d. Behavior which interferes with the ability of the teacher to teach effectively; or

e. Behavior which is incompatible with effective teaching and learning in the class.

Removal is a serious measure, and should not be imposed in an arbitrary, casual or inconsistent manner. Behavioral expectations are always more constructive, and more likely to be followed, where their terms are communicated as clearly as possible to students and staff. However, it is neither possible nor necessary to specify every type of improper or inappropriate behavior, or every inappropriate circumstance, that would justify removal under a student code of conduct.

3. Positions With Authority to Remove a Student From Class.

a. Any student may be temporarily removed from class by a teacher of that class.

b. For long term removals, a student may be removed from a class based upon the request of a teacher as upheld and implemented at the discretion of the building administrator.

4. Length of a Short Term Removal.

Removal is a serious matter, and should not be taken lightly either by the teacher or the student. In most cases, a student should remain in the short term removal area for at least the duration of the class or activity from which she or he was removed, or for at least forty-five (45) minutes, whichever is longer. Prior to allowing the student to resume his/her normal schedule, the building principal or designee shall speak to the student to determine whether the student is, or appears to be, ready and able to return to class without a recurrence of the behavior for which the student was removed. In the event it is not deemed appropriate to return the student to regular classes, the building administrator or designee shall either retain the student in short term removal, or, where necessary, appropriate and practicable, shall take steps to have the student sent home.

5. Procedures For Long-Term Removal.

a. Unlike short term removal, the ultimate decision regarding long-term removal rests with the building administrator.

b. Where a teacher believes that the best interests of the student and/or the class require long term removal, the teacher should so notify the building administrator in writing. Such statement should

set forth as clearly and completely as possible (a) the basis for the removal request; (b) the alternatives, approaches and other steps considered or taken to avoid the need for the removal; (c) the impact, positive and negative, on the removed student; and (d) the impact, positive and negative, on the rest of the class.

c. Upon receipt of such statement, the building administrator may, in his/her discretion, consult with the teacher and/or other District staff. In most cases, it is appropriate to inform and consult with the parents of the student, and the student, involved in the request for long-term removal.

d. Following consideration of the teacher's statement and any other information, the building administrator shall, in his/her discretion, take one of the following steps:

(i) Place the student in an alternative education program as defined by law;

(ii) Place the student in another class in the school, or in another appropriate place in the school;

(iii) Place the student in another instructional setting; or

(iv) Return the student to, or retain the student in, the class from which he or she was removed or proposed to be removed.

C. Seclusion and Restraint: 2011 Wisconsin Act 125.

1. Background.

a. Seclusion and restraint are highly dangerous pupil interventions that have led to death, injury, and trauma. There are no federal laws governing the use of seclusion and restraint in the public schools. After more than two decades of state-wide discussion, on March 19, 2012, Senate Bill 353 was signed by the Governor creating 2011 Wisconsin Act 125 (Act 125). The law becomes effective September 1, 2012, and will be implemented for the 2012-13 school year.

b. Act 125 creates two new statutory sections: Wis. Stat. § 115.787(2)(i), relating to the use of seclusion and physical restraint with pupils receiving special education services; and Wis. Stat. § 118.305, relating to the use of seclusion and physical restraint with pupils in the regular education programs.

2. Individuals Covered By Act 125.

a. Individuals covered by the law include all employees of a public or charter school.

b. The law specifically includes individuals contracted with the school to provide services, such as CESA employees, and student teachers.

c. The law does not apply to a law enforcement officer who is authorized or designated by the school board to perform the following:

(i) Enforce any law or ordinance, or refer to the appropriate authorities a matter for enforcement of any law or ordinance, against any person other than the school district.

(ii) Maintain the physical security and safety of a public school.

3. Seclusion.

a. Seclusion is the involuntary confinement of a pupil, apart from other pupils, in a room or area from which the pupil is physically prevented from leaving.

b. Covered individuals may use seclusion with a pupil only if all of the following apply:

(i) The pupil's behavior presents a clear, present, and imminent risk to the physical safety of the pupil or others and it is the least restrictive intervention feasible.

(ii) A covered individual maintains constant supervision of the pupil, either by remaining in the room or area with the pupil or by observing the pupil through a window that allows the individual to see the pupil at all times.

(iii) The room or area in which the pupil is secluded is free of objects or fixtures that may injure the pupil.

(iv) The pupil has adequate access to bathroom facilities, drinking water, necessary medication, and regularly scheduled meals.

(v) The duration of the seclusion is only as long as necessary to resolve the clear, present, and imminent risk to the physical safety of the pupil or others.

(vi) No door connecting the room or area in which the pupil is secluded to other rooms or areas is capable of being locked.

c. Provided that none of the following results in a pupil being confined to an area from which s/he is physically prevented from leaving, the following actions are specifically excluded from the definition of seclusion:

(i) Directing a disruptive pupil to temporarily separate himself or herself from the general activity in the classroom to allow the pupil to regain control, or for the teacher to maintain or regain classroom order.

(ii) Directing a pupil to temporarily remain in the classroom to complete tasks.

4. Physical Restraint.

a. Physical restraint is defined as a restriction that immobilizes or reduces the ability of a pupil to freely move his or her torso, arms, legs, or head.

b. A covered individual may use physical restraint on a pupil at school only if all of the following apply:

(i) The pupil's behavior presents a clear, present, and immediate risk to the physical safety of the pupil or others and it is the least restrictive intervention available.

(ii) There are no medical contraindications to the use of physical restraint.

(iii) The degree of force used and the duration of the physical restraint do not exceed the degree and duration that are reasonable and necessary to resolve the risk.

(iv) None of the following maneuvers or techniques are used:

(1) Those that do not give adequate attention and care to protecting the pupil's head.

(2) Those that cause chest compression by placing pressure or weight on the pupil's chest, lungs, sternum, diaphragm, back or abdomen.

(3) Those that place pressure or weight on the pupil's neck or throat, on any artery, or on the back of the pupil's head or neck, or that otherwise obstruct the pupil's circulation or breathing.

(4) Those that constitute corporal punishment under Wis. Stat. § 118.31(1).

(v) The covered individual does not use a mechanical or chemical restraint on the pupil. The law provides that the use of supportive equipment to properly align a pupil's body or assist a pupil to maintain balance, under the direction and oversight of appropriate medical or therapeutic staff, does not constitute the use of a mechanical restraint.

(vi) Physical restraint does not include briefly touching or holding a pupil's hand, arm, shoulder, or back to calm, comfort or redirect the pupil.

5. Parental Notice And Written Report Requirements.

a. Whenever seclusion or physical restraint is used on a pupil at school, the school principal or his/her designee must notify the pupil's parent as soon as practicable, but no later than one business day after the incident. The notice must advise the parent of the incident and of the availability of a written report.

b. The school principal or his/her designee must prepare a written report, in consultation with the individuals involved, within two business days after the incident. The written report must include:

(i) The pupil's name.

(ii) The date, time, and duration of the use of seclusion or physical restraint.

(iii) A description of the incident, including the actions of the pupil before, during, and after the incident.

(iv) The names and titles of the covered individuals present during the incident.

c. The report must be retained by the school and, within three business days of the incident, the report must be made available to the parent for review.

d. Principals or their designees will be required to prepare and submit an annual report to the school board of the number of incidents involving seclusion or physical restraint, the total number of pupils involved, and the number of children with disabilities involved in such incidents.

6. IEP Requirements.

a. The first time that seclusion or physical restraint is used on a child with a disability, the child's IEP Team must convene as soon as possible after the incident.

b. The IEP Team must review the child's IEP to ensure that it contains appropriate positive behavioral interventions and supports and other strategies to address the behavior of concern, and to revise the IEP if necessary.

c. In addition, if the IEP Team determines that the use of seclusion or physical restraint may reasonably be anticipated for the child, the child's IEP shall include appropriate positive interventions and supports and other strategies that address the behavior of concern and that comply with all of the following:

(i) The interventions, supports, and other strategies are based upon a functional behavior assessment of the behavior of concern.

(ii) The interventions, supports, and other strategies incorporate the use of the term "seclusion" or "physical restraint."

(iii) The interventions, supports, and other strategies include positive behavioral supports.

7. Physical Restraint Training Requirements.

a. Act 125 also contains detailed training requirements for the use of physical restraint. The training must include:

(i) Methods of preventing the need for physical restraint.

(ii) An identification and description of dangerous behavior that may indicate the need for physical restraint and methods of evaluating risk of harm in order to determine that physical restraint is warranted.

(iii) Experience in administering and receiving various types of physical restraint.

(iv) Instruction on the effect of physical restraint on the person restrained, monitoring signs of physical distress, and in obtaining medical assistance.

(v) Instruction in documenting and reporting incidents of physical restraint.

(vi) A requirement that the trainee demonstrate proficiency in administering physical restraint.

(vii) The school board must ensure that, in each school in which physical restraint is used, at least one covered individual (for purposes of this outline, "the trainee") has received the training identified above.

(viii) The school board must also ensure that, in each school in which physical restraint is used, the school maintains a record of the training received by the trainee, including the period during which the training is considered valid by the entity that trained the trainee.

8. <u>Use Of Physical Restraint By An Untrained Covered Individual.</u>

A covered individual who has not received the training set forth above may use physical restraint on a pupil at school only in an emergency, and only if the trainee is not immediately available due to the unforeseen nature of the emergency.

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