

I. Pupils And Curriculum

A. Child Abuse Reporting .

1. What is Child Abuse? Under the children's code, conduct is considered child abuse or maltreatment if the victim is under the age of 18, and he/she is subjected to one or more of the following actions: (a) Physical abuse, (b) Physical neglect, (c) Emotional abuse, or (d) Sexual abuse.
2. Who is a mandatory reporter? In a school setting, the following persons are required to report child abuse or neglect: nurse, school teacher, school administrator, school counselor, alcohol or other drug abuse counselor, physical therapist, physical therapist assistant, occupational therapist, dietitian, speech-language pathologist, audiologist.
3. What is the reporting requirement? When the mandatory reporter has reasonable cause to suspect that a child, seen in the course of performing professional duties, has been abused/neglected; or 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, the mandatory reporter 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.
4. What are the rules regarding 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.
5. What are the rules regarding immunity? Any person or institution reporting abuse or negligence in good faith shall have immunity from liability.
6. What are the penalties? 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.*

B. Non Custodial Parent Rights.

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 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).

C. Student Discipline.

Parents and students sued a School District because a school bus driver repeatedly and arbitrarily suspended three minor children from riding the bus only because the children allegedly had a bad odor. The District Court found in favor of two of the children and the School District appealed. The Court determined that the evidence supported the District Court's finding that the bus driver acted preemptively and offensively rather than to control or discipline the school children, so as to support a negligence claim against the School District. The testimony at trial indicated that the bus driver trapped the student's hand in the school bus door while driving off, that another student was sprayed directly with deodorizer, and that the bus driver had arbitrarily suspended the children from bus privileges. Therefore, because the judgment was not against the overwhelming weight of the evidence, the Fifth Circuit affirmed the District Court. *Turner v. Norse Panola School District*, 299 Fed. Appx. 330 (5th Cir. 2008).

D. Elementary Student Free Speech Rights.

An elementary school student and his mother filed an action against the school alleging free speech, establishment clause and equal protection claim, arising from the school's restriction of the mother's effort to read aloud from the Bible to students in the child's kindergarten classroom as part of a circular "show and tell" type activity. The District Court granted summary judgment in favor of the school and the parent appealed. The Court affirmed the District Court and held that the School's restriction on the mother's efforts to read Bible passages did not violate free speech rights, that the restriction did not violate equal protection, and that the School's conduct did not violate the establishment clause. In classrooms, during school hours, when curricular activities are supervised by teachers, the appropriateness of student expression depends on several factors, including the type of speech, the age of the locutor and audience, the School's control over the activity in which the expression occurs, and whether the School solicits individual views from the students during the activity. For purposes of free speech analysis, the age of students bears an important inverse relationship to the degree and kind

of control a public school may exercise over expression in the classroom: as a general matter, the younger the students, the more control a school may exercise. When it invites speech, the public school may require that the solicited speech respond to the subject matter at hand without violating free speech rights. *Bush v. Marpel Newtown School District*, 567 F.3d 89 (3d Cir. 2009).

E. Student Interviews.

A police officer went to the elementary school to interview a 5 year old and a 10 year old (brother and sister) related to a robbery that occurred in their home. The police officer obtained permission from the School District's Director of Elementary Education and the Principal to conduct the interviews. The administrators followed the District's policy on Police Interviews of Students on School Premises. The policy required the administrators to attempt to notify the students' parents about the interviews. The administrators did not make reasonable attempts to notify the children's parents prior to allowing the interviews to take place. The court concluded that no reasonable jury could conclude that the administrators' actions violated the constitutional rights of the students or the parents. *Yates v. Village of Brown Deer, et al.*, 2007 U.S. Dist. LEXIS 72910 (E.D. Wis. 2007).

F. Department Of Public Instruction Directive Regarding Photocopying Birth Certificates For School Admission.

1. The Wisconsin Department of Public Instruction (DPI) was alerted that many school districts in Wisconsin allegedly have a practice of photocopying birth certificates as part of their admission process for new students. Wisconsin law strictly prohibits copying vital records pursuant to Wis. Stat. §69.24. This prohibition applies to everyone, including school staff, the subject of the birth record, and his/her parents.
2. There are at least two legal and practical alternative methods that some schools are using to collect the pertinent information and stored in their school records:
 - a. Use an existing school district form to annotate that a school staff person viewed a true certified copy of a birth certificate and check the information against the information collected or copied on the form.
 - b. Design a separate form to annotate the viewing of the true certified copy of the birth certificate. Relevant information will be copied onto the form.

II. Employment And Discrimination.

A. Retaliation and First Amendment.

During a current-events session in her classroom, a probationary teacher stated that she supported demonstrations against the United States' military intervention in Iraq. The school district nonrenewed the teacher's contract and the teacher sued, claiming the district had violated her First Amendment rights. The teacher argued that, because the military intervention in Iraq is a matter of public importance, she had a right to express her own views so long as that expression did not unduly disrupt the school's curriculum. The Seventh Circuit Court of Appeals held that *Garcetti* applied and that the teacher was required to present the curriculum from the viewpoint prescribed by the school district. The court further held that the First Amendment did not entitle teachers to present their own views to a captive audience of students against the directives of elected school district officials. *Mayer v. Monroe County Community School Corp.*, 474 F.3d 477 (7th Cir. 2007) cert denied, 128 S. Ct. 160 (2007).

B. Objectionable and Abusive Language.

At times, employees use language that school boards and administrators find objectionable or abusive. Before disciplining the employee, the board and administrators must consider the employee's Constitutional rights and the rights to engage in lawful, protected, concerted activity under the Wisconsin Statutes known as the Municipal Employment Relations Act (MERA). The employer needs to consider whether the circumstances under which the language was used warrants discipline. Employees lose their protection of the law if the speech is made with a reckless disregard for the truth, if it is profane or obscene, or if it includes threats of violence. Arbitrators and the Wisconsin Employment Relations Commission (WERC) determine if the speech is a protected concerted activity on a case-by-case basis. Arbitrators and the WERC have said that an employee's speech concerning wages, hours or conditions of employment is protected and that municipal employers must tolerate extremely offensive language from employees when used while commenting on these matters. For example, in a recent case, the WERC considered whether the termination of an employee, who had complained about the County providing incorrect wage schedules to the employees prior to their contract ratification meeting, constituted a prohibited practice in violation of MERA. When presenting her complaints to her supervisors, she was forceful, assertive, "perhaps even 'condescending' and 'disrespectful.'" The WERC concluded that her statements were protected, concerted activity, saying "The rights established by Section 2 of MERA are often exercised in tense, chilly, or hostile atmospheres, because by its very nature involves challenging the employer's authority." *Finkelson v. Clark County*, Dec. No. 30361-B (WERC, 2003).

C. Employee Rights and Safety.

A school employee filed a Section 1983 action against the School District alleging a violation of substantive due process rights by subjecting the employee to dangerous working condition as a teacher's aide for a special education student who had assaulted her. The District Court granted the School District's motion for summary judgment and the employee appealed. The Court of Appeals held that the School District did not act arbitrarily, in violation of substantive due process rights of the teacher's aide, under the "state-created danger doctrine". Under the "state-created danger doctrine," a governmental actor can be held responsible for an injury committed by a private person if: (1) an affirmative act by the government actor created or increased the risk that the plaintiff would be exposed to the injurious conduct of the private person, (2) a governmental actor's act created a special danger to the plaintiff or a small class of which plaintiff was a member, and (3) the governmental actor had the requisite degree of culpability. Under the "state-created danger doctrine," when the government's executive action is worse than negligent but was not done for the purpose of injuring someone or in furtherance of invidious discrimination, several considerations bear on whether the action will be considered arbitrary, in violation of the plaintiff's substantive due process rights, including: (1) the degree to which the relationship between the government and the plaintiff is voluntary, especially whether the plaintiff was involuntarily in government custody or was voluntarily a government employee, (2) whether the governmental actor was required to act in haste or had time for deliberation, and (3) whether the governmental actor was pursuing a legitimate governmental purpose. The Court found that even if the School District was chargeable with actual knowledge of the risk of harm and failed to address the harm to the teacher's aide based on the special education student's history of 31 incident reports, the School District's actions were not arbitrary or in violation of the aide's substantive due process rights under the "state-created danger doctrine." The teacher's aide voluntarily undertook such hazardous employment, and the School District has had a duty, under the IDEA, to educate a child with dangerous propensities. Therefore, the Sixth Circuit affirmed the District Court's holding. *Hunt v. Sycamore Community School Board of Education*, 542 F.3d 529 (6th Cir. 2008).

D. Disability Discrimination and the Duty to Accommodate.

An elementary school teacher told her principal that she suffered from seasonal affective disorder, which made it difficult for her to function in a room with artificial light, rather than natural light. Based on this medical condition, she requested a transfer to a room with natural light. The principal refused to reassign her. Her medical condition worsened and she took a medical leave of absence. Ultimately, the teacher resigned when the superintendent clearly stated that she would not be transferred to a room with natural light upon her return from leave. She filed suit alleging that the school district failed to accommodate her disability

in violation of the Americans with Disabilities Act. “An employee’s request for reasonable accommodation requires a great deal of communication between the employee and employer. The communication process becomes even more difficult in a case involving an employee with a mental disability, because any necessary accommodation is often nonobvious to the employer. Thus, our cases have consistently held that disabled employees must make their employers aware of any nonobvious, medically necessary accommodations with corroborating evidence such as a doctor’s note or at least orally relaying a statement from a doctor, before an employer may be required to provide a specific modest accommodation the employee requests.” The court concluded that, under the circumstances, a reasonable jury could find in favor of the teacher’s failure to accommodate claim. *Ekstrand v. Sch. Dist. of Somerset*, 2009 U.S. App. LEXIS 21912 (7th Cir. 2009).

III. Governance

A. Open Meetings Law.

1. The Definition of a Governmental Body for Purposes of the Open Meetings Law.

- a. Wisconsin law defines a “governmental body” as a “state or local agency, board, commission, committee, council, department or public body corporate and politic created by constitution, statute, ordinance, rule or order; a governmental or quasi-governmental corporation except for the Bradley center sports and entertainment corporation created under Ch. 232; any public purpose corporation as defined in § 181.79(1); a non profit corporation operating an ice rink which is owned by the state; or a formally constituted subunit of the forgoing, but excludes any such body which is formed for or meeting for the purpose of collective bargaining under subchapter IV or V of Chapter 111.” *Wis. Stat. § 19.82(1)*.
- b. The provision defining a governmental body as a state or local agency, board or commission focuses on the manner in which the body was created as opposed to the type of authority the body possesses. Thus, bodies created by constitutions, statute, ordinance, rule or order are subject to the law even if they are purely advisory in function. *State v. Swanson*, 92 Wis.2d 310 (1979).
- c. State or local bodies created by “rule or order” are included in the definition. The phrase “rule or order” has been construed to include any directive, formal or informal, creating a body and

assigning it duties. This includes directives from governmental bodies, presiding officers of governmental bodies, or certain governmental officials such as county executives, school superintendents, mayors, or heads of a local agency, department or division.

- d. In a school setting, some examples of entities that qualify as “governmental bodies” for the purpose of the Open Meetings Law include:
 - (1) A committee created by a school board policy rule to review administrative decisions.
 - (2) A committee appointed by a school superintendent for the purpose of considering school library materials.
 - (3) A consortium of school districts created by a contract between the districts.
 - (4) A strategic planning team whose creation was authorized, and whose duties were assigned to it by the school board.
- e. A formally constituted subunit of a governmental body qualifies as a governmental body for the purpose of the Open Meetings Law. A subunit is a separate, smaller body created by a parent body and composed exclusively of the members of a parent body. The subunit need not constitute a quorum of the parent body in order to qualify as a governmental body.

2. The Definition of “Meeting” for Purposes of the Open Meetings Law.

- a. A “meeting” is defined as “the convening of members of a governmental body for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body.” *Wis. Stat. § 19.82(2)*.
- b. There is no meeting within the meaning of the Open Meetings Law when the members of a governmental body conduct official business while acting separately, without communicating with each other or engaging in other collective action.
- c. If one-half or more of the members of a governmental body are present, the meeting is presumed to be for the purpose of exercising the responsibilities, authority, power or duties delegated to or vested in the body. The governmental body may rebut this presumption.

- d. The term “meeting” does not include any social or chance gathering or conference which is not intended to avoid the Open Meetings Law.
- e. The Wisconsin Supreme Court has held that the definition of “meeting” applies whenever a convening of members of a governmental body satisfies two requirements: (1) there is a purpose to engage in governmental business, and (2) the number of members present is sufficient to determine the governmental body’s course of action.

3. Public Comment Period.

1997 Wisconsin Act 123 amended the Open Meetings Law to permit public notice of a meeting of a governmental body to provide for a period of public comment, during which the body may receive information from the public. During a period of public comment, a governmental body may discuss any matter raised by the public. The amendments do not require governmental bodies to designate a public comment period. The amendments authorize only discussion and no other action by the governmental body. A governmental body should refrain from deliberating or taking action on items raised during public comment sessions and, if necessary, should place such matters on future agendas. Governmental body members may not bring up items not specifically designated on the agenda under a period of public comment. This may be interpreted as an attempt to circumvent the notice requirements of the Open Meetings Law.

B. Public Records Law.

1. *Zellner v. Herrick*, 2009 WI 80.

a. Factual Background.

In *Zellner v. Cedarburg School District*, 2007 WI 53, 300 Wis. 2d 290, 731 N.W. 2d 240, the Wisconsin Supreme Court affirmed the Circuit Court’s denial of Zellner’s request for an injunction prohibiting the School District from releasing a memorandum and a compact disc containing adult images and internet searches that the teacher allegedly viewed and conducted on his school computer. In *Cedarburg Education Ass’n v. Cedarburg Board of Education*, No. 2007 AP 852, unpub. slip op. (Wis. Ct. App. July 23, 2008), the Wisconsin Court of Appeals affirmed the Circuit Court’s conclusion that an arbitrator exceeded his authority when he ordered Zellner to be reinstated in contradiction of public policy

that immoral behavior in our public schools is grounds for immediate termination. The arbitrator determined that the School Board had violated the collective bargaining agreement which provided that no permanently employed teacher may be discharged except for just cause, and ordered the School District to reinstate the teacher, reduce his discipline to a letter of reprimand, and compensate him for lost wages and benefits.

After the District decided not to reinstate the teacher as ordered by the arbitration award, a private citizen filed a formal request under Wis. Stat. §19.35, for the transcript of the closed arbitration proceeding. The District determined that the transcript was a public record and, under the requirements of Wis. Stat. § 19.356 (2) (a), it notified the teacher of its intent to release the transcript. The teacher sought judicial review contending that the transcript was not a “public record” and, in the alternative, if it was a public record, certain personal and medical information must be redacted prior to releasing the transcript.

The Circuit Court determined that the transcript was a “public record” and that no statutory or common law exceptions exempted the transcript from release. The Court then considered “whether the presumption of openness under the Open Records law is overcome by any other policy” and concluded that allowing the disclosure of the transcript would defeat the purpose of closed arbitration proceedings. The case was then appealed to the Wisconsin Court of Appeals.

b. The Wisconsin Court of Appeals Decision.

The Court of Appeals acknowledged that the answers to the two questions presented in this certification will have a significant impact on governmental labor relations throughout the state. Whether transcripts of arbitration proceedings should be disclosed as “public records” will have an impact on governmental bodies and public employees filing, pursuing and defending grievances. Both sides to a labor dispute may seek other, non-voluntary, means to resolve grievances contrary to the express purpose of the Municipal Employment Relations law. The potential release of medical and other personal information, submitted to a prosecutor to defend a grievance, could deter public employees from fully exercising their right under the collective bargaining agreement in the Municipal Employment Relations law. Because the resolution of these issues will reverberate across the state, the Court of Appeals certified these issues to the Wisconsin Supreme Court,

which is solely invested with the power to oversee and implement the statewide development of the law.

As part of the litigation arising from the Cedarburg School District's discharge of a teacher for viewing pornography on a District-provided computer, the issues before the Wisconsin Supreme Court on certification were as follows:

- (1) Is a transcript of a closed arbitration proceeding a public record under Wisconsin Public Records law?
- (2) If the transcript is a public record, must all personal and medical information be redacted before release?

c. The Wisconsin Supreme Court Decision.

The Wisconsin Supreme Court held that the Court of Appeals erred when it determined that the appeal was timely under Wis. Stat. § 19.356(8). The statute requires that an appeal of a decision related to an open records request be filed in the time period specified in Wis. Stat. § 808.04(1m). The time period specified in that statute is 20 days. Because the appeal was filed outside the 20-day period, the Supreme Court determined that the Court of Appeals did not have jurisdiction to review the decision or to certify the decision to the Wisconsin Supreme Court; therefore, the Court did not consider the certified questions.

2. *Schill v. Wisconsin Rapids School District*, 2009 WL 1154920 (Certified by WI Court of Appeals to WI Supreme Court).

a. Factual Background.

A citizen sent the School District a public records request for emails from five school district employees "from the computers they used during their school work day," over a six week period. The District subsequently informed the employees that it intended to comply with the request. The employees did not object to release of their work-related emails, but commenced an action to enjoin release of their personal emails. The Circuit Court denied the injunction and order the release of all the requested emails, including personal emails, subject to deletion of home addresses, home telephone numbers, home email addresses, Social Security numbers, medical information, bank account number and pupil record information.

b. The Wisconsin Court of Appeals Decision.

The Court of Appeals found that the issue of whether, and to what extent, personal emails of public employees are subject to the Open Records law is a question of first impression in Wisconsin. Therefore, the Court of Appeals found that the Wisconsin Supreme Court is the appropriate form to decide this question.

3. Names of Final Candidates.

Attorney General Letter Clarifying the Terms “Candidate” and “Applicant” for Purposes of an Open Records Request (January 17, 2008). The Attorney General was asked to reconsider the conclusions reached in a 1993 Attorney General Opinion and Department of Justice correspondence from 2004. A 1993 Attorney General Opinion concluded that the term “candidate” in the statute is synonymous with “applicant” for purposes of a public records request for information on final candidates for a particular position. The Opinion reached this conclusion because it resulted in the greatest number of applicants as final candidates, consistent with the public policy providing the greatest information to the public. Correspondence from the Department of Justice in 2004 applied Wis. Stat. §19.36(7), defining “final candidate” and the 1993 Attorney General Opinion to a situation in which a consultant referred eight applicants to an interview team and the school board picked two finalists. The conclusion was that all eight applicants, not just the top two finalists, were “final candidates” whose names and addresses should have been disclosed in response to a public records request. The 2008 Opinion concluded that the 1993 Opinion and the Department of Justice correspondence from 2004 contained the correct interpretation of Wis. Stat. §19.36(7), because that interpretation results in the greatest number of candidates being identified as final candidates. This result is consistent with the legislative mandate in Wis. Stat. §19.31 that the public records statute be “construed in every instance with a presumption of complete public access, consistent with the conduct of governmental business.”

C. Sale of Goods and Services at Schools.

No school district employee may receive for his or her personal benefit anything of value from any person other than his or her employing school district to sell, promote the sale of or act as an agent or solicitor for the sale of any goods or services to any public school pupil while on the property of his or her employing school district or at any activity of his or her employing school district. Any person violating this provision is subject to a forfeiture of not more than \$200 for each offense. *Wis. Stat. 118.12(2)*.

D. Access to Property.

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).