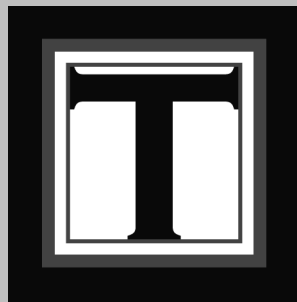


2022 MSBO Annual Conference

Legal Update

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April 2022



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Caution

- These slides reflect general legal standards for the related presentation and are not intended as legal advice for specific situations. Future legal developments may affect these topics.
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**First
Amendment**

**Free Speech
Updates**



Censuring Board Members

- *Houston Community College System v. Wilson*, 594 US ____ (2022)
 - Wilson criticized other trustees, claiming they violated Bylaws
 - Board censured Wilson, barred him from being officer
 - Wilson sued alleging violation of First Amendment
 - District court ruled for college
 - 5th Circuit Court of Appeals ruled for Wilson



Censuring Board Members

- “In this country, we expect elected representatives to shoulder a degree of criticism about their public service from their constituents and their peers—and to continue exercising their free speech rights when the criticism comes.”



Censuring Board Members

- “[T]he only adverse action ... is itself a form of speech from Mr. Wilson’s colleagues that concerns the conduct of public office. The First Amendment surely promises an elected representative like Mr. Wilson the right to speak freely on questions of government policy. But just as surely, it cannot be used as a weapon to silence other representatives seeking to do the same.”



Censuring Board Members

- “The censure at issue before us was a form of speech by elected representatives. It concerned the public conduct of another elected representative. Everyone involved was an equal member of the same deliberative body. As it comes to us, too, the censure did not prevent Mr. Wilson from doing his job, it did not deny him any privilege of office, and Mr. Wilson does not allege it was defamatory. At least in these circumstances, we do not see how the Board’s censure could have materially deterred an elected official like Mr. Wilson from exercising his own right to speak.”



Student Off-Campus Speech

- *Mahanoy Area Sch Dist v BL*, 594 US ____ (2021)
 - BL tried out for varsity cheerleader, made JV team
 - Snap chat sent over weekend while off-campus – “F-Bombs” away
 - Coach determined snap chat violated team rules, suspended BL from JV cheer
 - BL sued school district alleging violation of civil rights and First Amendment
 - District Court found in BL’s favor
 - 3rd Circuit Court of Appeals found in BL’s favor



Student Off-Campus Speech

3 Factors

1. School rarely stand *in loco parentis* when student speaks off campus.
2. Regulation of off-campus speech, coupled with regulation of on-campus speech, affects all the speech during full day. Courts must be more skeptical of school's efforts to regulate off-campus speech, otherwise the student cannot engage in that kind of speech at all.
3. The school has an interest in protecting a student's unpopular expression, especially when the expression takes place off campus, because "America's public schools are the nurseries of democracy."



Student Off-Campus Speech

- “We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school’s regulatory interests remain significant in some off-campus circumstances.”



Student Off-Campus Speech

Examples of off-campus student speech for which school officials may, depending on circumstances, be authorized to impose discipline include:

- Serious or severe bullying or harassment targeting particular student;
- Threats directed at teachers or other students;
- Failing to follow rules about lessons, the writing of papers, the use of computers, or participating in other online schooling activities; and
- Breaching school security devices.



Bonus: Eavesdropping

- Fisher v Perron, Docket No 21-1184 (CA6, 2022)
 - Reaffirms Michigan's one-party consent rule related to recording conversations
 - Federal court interpreting state law so it is not binding on State courts
 - Use CAUTION anytime activities at school or at meetings are recorded
 - Review board policies



Recent Legislation



Child Protection Law - Mandatory Reporters

- Child Protection Act amended to add the following as Mandated Reporters
 - Physical Therapists
 - Physical Therapist Assistants
 - Occupational Therapists
 - Athletic Trainers
- PA 47 of 2022, effective June 21, 2022



Mandatory Reporters

A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, physical therapist, physical therapist assistant, occupational therapist, athletic trainer, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider who has reasonable cause to suspect child abuse or child neglect shall make an immediate report to centralized intake by telephone, or, if available, through the online reporting system, of the suspected child abuse or child neglect.

MCL 722.623(1)(a)



Substitute Teachers

PA 149 of 2021

- May assign sub teacher without a teaching certificate or permit if all are satisfied:
 - HS diploma or an equivalency certificate;
 - Currently employed by the school or works at the school (e.g., independent contractor); and
 - Follow wage requirements:
 - If person's wage before becoming a substitute is higher than the wage paid to substitute teacher, then must be paid at the higher rate.
 - If the person's wage is lower than the wage paid to a substitute teacher, then must be paid at higher rate.
- * Does not address where there is range of wages for subs. Consider paying greater of current wage or wage of highest-paid sub.
- Prohibits discharging or retaliating solely for declining assignment as a substitute teacher.



OMA & FOIA



Open Meetings Act

- Sunset of “pandemic” virtual meetings on 12/31/21
 - A board member may only participate electronically to accommodate an absence due to military duty
 - All other board members must be physically present
 - Allow public to participate electronically if any board member is participating electronically



Open Meetings Act

- Recent cases
 - *Cook v Greenleaf Twp*, Case No. 20-1985 (CA6, 2021)
 - \$137,000 in legal fees
 - *Spalding v Swiacki*, COA No. 354598 (2021)
 - Special meeting notice not completely posted
 - Substantial compliance is not a defense for intentional violations
 - Attorney fees and personal liability



Open Meetings Act & AG Op 7318

- The AG opined that the ADA and Section 504 of the Rehabilitation Act may require state and local boards to provide virtual access to qualifying members of the public as a reasonable accommodation
- The AG recommends going through the ADA reasonable accommodation process
 - Identify qualifying disability
 - Is the request for accommodation reasonable?



Open Meetings Act & AG Op 7318

- The impact of AG Op 7318 is unclear
- Recommendations
 - Develop a policy/procedure for individuals to request accommodation
 - The school official overseeing the requests should determine whether (1) there is a qualifying disability and (2) a reasonable accommodation
 - This does not mean board members can participate electronically



Freedom of Information Act

- *Blackwell v City of Livonia*
 - Individual requested communications to/from mayoral campaign's social media account
 - Court considered definition of “public record”
 - Social media account was not used for official city business and was not a “public record”
- Keep school business on school email....
- Always look for purpose of communication



Finance & Transactions



Construction of Sch. Build. Act

- PA 48 of 2022 effective March 23, 2022
- Changes rules related to the installation of lockdown devices (e.g., the boot) in schools
- Changes rules re plan approval for installation
- No longer prohibits installation in rooms with capacity of more than 50 people



Indemnification Clauses

- *Washtenaw Cnty Parks v Vortex Aquatic Structures*, COA Docket No. 355889 (March 10, 2022)
- Construction issues with a park arose several years after construction
- County asserted contractual indemnification clause
- Court held that indemnification clauses do not extend beyond the life of a contract
- Be mindful of what you are signing....



School Bond Qualification, Approval, and Loan Act

- Public Act 51 of 2022
- Allows the Department of Treasury to set the interest rate for loans qualified through the program at an interest rate of less than 3%
- Removes the 3% floor



Labor Update



MERC – CBA Covers COVID-19 Health and Safety Measures

- *Wayne Co Cmty College Dist*, MERC Case No. 20-I-1436-CE (2021).
 - Union demanded to bargain “health and safe working conditions”
 - CC responded that they were covered in CBA, but it would meet to discuss concerns. CBA required the employer to “make reasonable provisions for the health, safety, and first aid of its employees during hours of employment.”
 - Union filed ULP, argued CBA did not cover COVID-19 health and safety matters because it did not specifically mention COVID-19.
 - CBA need not expressly mention a subject for that subject to be “covered by” the CBA. MERC determined that the relevant analysis is whether “the agreement contains provisions that can be reasonably relied on for the actions in dispute.”
 - No duty to bargain COVID-19 health and safety matters because those issues were covered by CBA.



Pending Legislation



Bills to Watch

Critical Race Theory

- SB 460 - Sen. Lana Theis (R)
 - Would prohibit public schools from instructing children on “critical race theory,” “the 1619 project,” or other specified “anti-American and racist theories” including that any race is inherently superior or inferior, that the United States is a fundamentally racist country, that the Declaration of Independence or the United States Constitution are fundamentally racist documents, that an individual's moral character or worth is determined by his or her race, or that an individual of a particular race is consciously or unconsciously “inherently racist or oppressive.”
 - 5% State Aid penalty



Bills to Watch

Curriculum Transparency

- HB 5722 - Rep. Gary Eisen, St. Clair Township (R)
 - Would require school districts to publicly post curriculum, textbooks, literature, research projects, writing assignments, and field trips planned for the year by the first day of school
 - 5% State Aid penalty



Bills to Watch

Retired Return to Work

HB 4375 - Rep. Steven Johnson (R); Rep. Luke Meerman (R)

- Would amend the PS Employees Retirement Act to allow retirees in MPSEERS to return to work without forfeiting pension or health benefits as long as they have first been retired for at least 12 months.

HB 5536 – Rep. Lori Stone (D)

- Would amend same act to require ORS to prepare reports on the number of such retirees who are employed at reporting units during specified periods.



Bills to Watch

Retired Return to Work as Sub

SB 726 - Sen. Dale Zorn (R)

- Reduce, from 12 to 4 months, amount of time a retiree must be retired from teaching before could be reemployed as sub teacher without having benefits reduced
 - would apply until July 1, 2024.
- Eliminate language pertaining to retiree employed at a reporting unit that provides instruction under extended COVID-19 learning plan.
- Eliminate a provision requiring reporting unit at which a retiree provides sub teaching to pay 100% of the contribution rates for the unfunded actuarially accrued liability for retiree health care and pension to the retirement system.
- Require the retirement system, by May 1, 2024, to prepare and submit a report regarding the number of retirees who were reemployed between specified dates to various individuals and entities within the Legislature.
- Require Retirement Board and MDE to include in the 2024 experience investigation study variances from assumptions in the rate of normal retirement or early retirement, if any, after the bill's effective date.



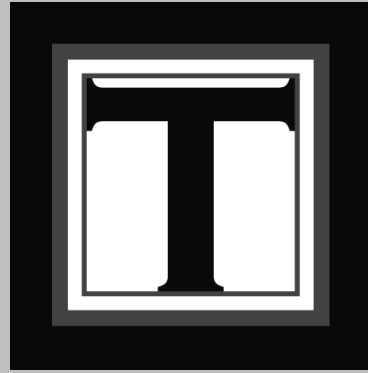
Bills to Watch

Teacher Shortage

HB 5685 - Rep. Pamela Hornberger (R)

- Would add 1233d to the Revised School Code to allow board of school district, intermediate school district, public school academy to employ directly, employ through a contract, or contract for a full-time or part-time noncertificated, nonendorsed student teacher without permit to teach in a school operated by the board for up to one year.





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