The Lawsuit You Didn't See Coming

NOTE: This presentation provides an outline of the law existing as of the presentation date. It is not intended as, nor should it be considered, legal advice. To receive legal advice on a specific issue, you should consult with legal counsel.

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Agenda

- Student Threats, Student Safety
  - Important considerations for response
- Student Discipline, Suspension, Expulsion
  - Policies & Procedures
- Student Accommodations
  - The interactive process
- Employee Discipline & Discharge
  - Important considerations
- Religious Liberty
  - Policies & Documentation
- Other
- *Note: Federal law and general legal principles*

Student Threats, Student Safety

Student Threats, Student Safety

- Scenario - Two 8th grade boys report that one of their classmates has made threats:
  - “People better watch out”
  - “My dad has guns at home”
  - “I have a hit list”
  - “You will be the first one I shoot”
- The student has had behavior issues in the past
- You know the home life isn’t stable

Considerations & Actions

- Student Safety
  - Immediate action
  - Accused student reputation
  - Get full information from reporting students
  - If safe, pull accused student, meet
- Law Enforcement
  - Inform and cooperate
  - Separate investigation
- Communications – Parent & School
  - Bring accused student home?
  - Inform others, but limited
  - Stop gossip

Considerations & Actions

- Internal Discipline & Investigation
  - Separate investigation
  - Temporary suspension?
  - Interview students, gather documents, keep notes, outcome report
  - Discipline based on policies
  - Opportunity to respond
  - Search & Seizure issues

Considerations & Actions

- Search & Seizure
  - No Constitutional protections
  - Concerns:
    - Invasion of privacy
    - Battery
    - Intentional Infliction of Emotional Distress
  - Best practice: reasonable suspicion
  - School property vs. student property – Policies!
  - Safety concern – easier to search student property
  - Student property - get permission. If none:
    - Parent presence
    - Inform them – assuming the worst.

Student Discipline, Suspension, Expulsion

Student Discipline, Suspension, Expulsion

- Scenario 1: Students bullying on playground. Pushing, hitting, calling names.
- Scenario 2: Students with cell phones in bathroom, sharing inappropriate photos.

Potential Liability

- Negligent supervision (failure to act)
- Breach of contract
- Discrimination
- Violation of Due Process (policy-based)
- Defamation

Considerations & Actions

- Prompt action is necessary!
- What do you actually know?
  - Is an investigation necessary?
  - Get the facts – employees, volunteers, students
  - Minimum – reporting and accused
- Review relevant policies & contracts
- 2 adults present
- Document statements made and actions taken
- If academic/social disruption, rearrange classrooms or schedules

Considerations & Actions

- Major discipline:
  - Meet in person, include parents
  - Plan the meeting
    - Talking points
    - Policies
  - Accused student chance to respond before finalizing
  - Be clear on reasons, rooted in policies

Student Discipline, Suspension, Expulsion

- FAQs:
  - Attorneys with family?
  - Parent partnership agreement?
  - Search & Seizure?
  - Suspension before final decision?
  - Recording devices?
  - Mandated reporting?
  - Criminal issues?
  - Return/waiver of tuition?

Student Accommodations

Student Accommodations

- Scenario 1: Student who may have significant disability applies to school
- Scenario 2: Student with learning disability, parents want significant accommodations
- Scenario 3: Student with a disability needs to be disciplined
- Scenario 4: Student’s disability is beyond your resources, decide it’s not in student’s best interest to stay at school

Federal Law

- Section 504 of the Rehabilitation Act of 1973
  - Applies to federal fund recipients (milk program, lunch, etc.)
  - Public district responsible for initial evaluation and providing services
  - Different requirements for private vs. public schools
  - Private, religious schools must make “minor adjustments”
- IDEA (Individuals with Disabilities Education Act)
  - Obligation on state and public school districts
  - Requires “FAPE” and Child Find
  - District Evaluation – not obligation for private school
    - Facilitate communication & participate in meetings
  - Equitable services provided

State Law

- State Human Rights Act, Disability Laws
  - Typically similar to federal requirements – minor adjustments, reasonable accommodations

Student Admissions / Enrollment

- Federal and state law prohibit admission discrimination
- Many states prohibit inquiries re: disability during admission process

Best Practices

- Provide info on school resources throughout process (e.g. tours, pamphlets, etc.)
- If parents want to discuss, discuss – don't hide
- Parents decide if needs can be met, not school
- Review application w/out any disability information
- Discuss needs in depth after admission
- If in school, clearly document concerns and what school is doing to address/accommodate

Student Accommodations

- What is required:
  - Accommodations/minor adjustments:
    - Extra time for exams, special seating arrangements, breaks/absences, assignment time extensions, extra communications home, snacks, special lighting, etc.
    - *Not* accommodations that: require additional staffing, new programs, persistently disrupt other students, modify core academic requirements
    - *Not* 504 plan or IEP. Those are public school requirements
      - Use “Learning Plan” or other terminology
    - Public school district is required to create a service plan for student, following IEP process.

Student Accommodations

- Responding to accommodations requests
  - Meet with parents to discuss their requests
  - Do not have to do everything parents ask
  - Consider requests, offer what is reasonable, have a back-and-forth
  - If relevant, ask for medical documentation/evaluations from medical professional, that identifies the disability, explains how it limits the student, recommends accommodations
  - Document efforts

Discipline of Students with Disability

- Student with disability, discipline
  - You can discipline, especially if the behavior disrupts other students
  - But be careful, and first consider:
    - Is the behavior a manifestation of the disability?
    - If so, can you accommodate/modify the discipline?

Student Withdrawal

- Mandatory withdrawal can be OK
- Not automatic or absolute bar for special needs
- Not based on disability diagnosis
- Neutral determination, based on student progress or school's inability to meet child's needs
- Careful review

Student Withdrawal

- Conversations with parents – identify needs and goals
- Document accommodations discussed, offered
- Parents' right to evaluation
- Worked with district
- Each step documented

Student Withdrawal

- Ideal Process, after making significant efforts
  - District evaluation
  - District states that private school not meeting child's needs
  - Private school relies on district evaluation, encourages family to move to another school
  - If necessary and appropriate, private school mandates withdrawal

Student Withdrawal – Safety Issues

- Safety Concerns are separate category
  - Is it based on disability?
  - Can accommodations address?
    - If not, mandatory withdrawal is an option

Employee Discipline & Discharge

Employee Discipline & Discharge

- Scenarios:
  - 62 year old teacher, 28 year tenure, good performance, recently had knee surgery and has told you she is having a hard time going up and down the school stairs
  - 27 year old teacher, 2 year tenure, decent performance but some issues
  - 32 year old secretary, minor issues, 10 weeks out on pregnancy leave until last week

Employee Discipline & Discharge

- Can you fire, or not re-hire, an employee for any reason or no reason?

Employee Discipline & Discharge

- Answer: NO!*
- You cannot take an adverse employment action (including not re-hiring an employee) for an illegal reason
- You must:
  - Follow applicable law
  - Follow your policies
- *Ministerial exception

Employee Discipline & Discharge

- State Laws: Human Rights Act, Employment Statutes
- Federal laws to consider: ADA, ADEA, FMLA, etc., etc., etc.
  - Can’t terminate an employee based on discrimination, health, protected leave, or retaliation for exercising a protected right.
  - Employer defenses require a reason for discipline/termination.
- The big question:
  - Can you prove that your discipline or termination decision is *not* discrimination, retaliation, based on a health issue, or some other illegal reason?

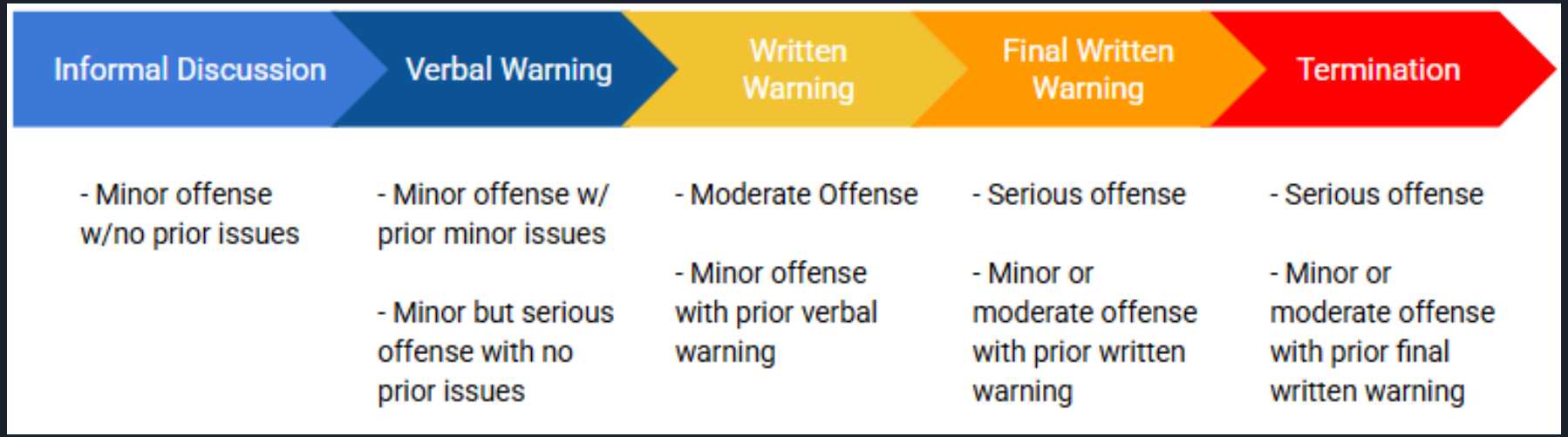
Documents in Place

- Clear policies
- Good job descriptions
- Intentional, accurate reviews
- Progressive Discipline Policy
  - “Generally, discipline problems will be handled through one or more appropriate procedures . . . .”
  - “In most cases, a written warning with steps for remediation will precede a suspension or separation . . . .”

Progressive Discipline

- Why progressive discipline?
  - Gives the employee fair warning that the behavior is not acceptable, and provides an opportunity to correct
    - Termination should never be a surprise (surprise = lawsuit)
    - Talking with an employee many times does not mean the employee understands there is a problem
  - Shows you gave the employee warning and the opportunity to correct

Progressive Discipline



Documenting Discipline

- Documentation is critical
  - Increases chances of employee improvement
  - Shapes employee expectations (serious matter, improvement required, potential for further discipline/termination)
  - Reduces likelihood of legal claims
  - Increases employer’s chances of winning if employee brings claims
  - Provides evidence that employment decision was based on legitimate business reason

Performance Improvement Plan

- Purpose:
  - Focus is on charting a positive path forward for employee
  - Identifies specific issues and provides action items for improvement and success
  - Contains dates for completion, typically has an end date
- Not a direct replacement for written warning/progressive discipline

Steps in Discipline Process

- Is a suspension necessary?
  - Complaint of serious misconduct
  - Safety concerns
  - Significant disruption of work environment
- Is contacting police necessary? Mandated reporter?
  - Potential criminal conduct
  - Safety concerns
  - Misconduct involving abuse/harassment

Investigate

- Investigate Complaints
  - Ensures you have the full story
  - Builds evidence for your decision
  - Sets employee expectations
  - Establishes legitimacy and fairness
- Investigation should include at minimum:
  - Complainant
  - Accused Employee

Review Documents

- Review key documents and know how they apply
  - Employee handbooks and personnel policies
    - Which policy was violated?
  - Job description
    - Which duties were not performed?
  - Offer letter
    - What promises have been made?
  - Performance Reviews
  - Personnel file
    - What unique facts exist?

Discipline / Termination

- Consider Timing
  - Other Events?
  - Not too soon:
    - Investigate to get all the facts and get employee's story
    - Have you given an opportunity to improve?
    - Not right after protected activity (leave, complaint, etc.)

Discipline / Termination

- Consider Timing
  - Not too late:
    - Undercuts cause and effect
    - Allows intervening events, such as:
      - Employee finds out and manipulates situation
      - Medical leave
      - Report of harassment or other whistleblower issue

Disciplinary Meetings

- Verbal warning:
  - Email follow-up, noting issue and thanking them for conversation
- Written warning:
  - History, current problem, why it's a problem, consequences of further problems, acknowledgment
  - Consider audience: employee, lawyer, judge

Termination Meeting

- Plan your termination meeting
  - Have a script
    - Short, true, and to the point
    - Have a few examples ready
    - Avoid legal conclusions (e.g. theft, fraud)
    - Not a debate
  - Have a witness
  - Plan where and when meeting will occur
    - Avoid important school events
  - Consider practical steps
    - Security; property; technology access
  - Final pay

When to Get Legal Advice

- Before a termination
- When a major behavior/performance issue occurs
- Before skipping any step in progressive discipline
- Whenever your Spidey-sense tingles
- Simple check-in

Other Considerations

- What is written, what is in your head?
- Workplace isn’t charity.
  - But is this just?
  - Is it fair?

Religious Liberty

Primary Concerns Today for Religious Schools – Gender Identity / Sexual Orientation

- Employees:
  - Teacher informs you of planned marriage with same-sex partner
  - Front desk secretary says transitioning over the summer
- Student:
  - Boy wearing makeup and earrings
  - Girl with short haircut and wearing boys' uniform
  - Two girls appear to be dating
  - Two boys attend prom together
- Student's Parents
  - New student applying, discover student has two moms, married.

Applicable laws

- Employment:
  - Title VII of Civil Rights Act of 1964
  - *Clayton v. Bostock*
- Student
  - Title IX of Education Act of 1972
  - 2017, 2020, 2024 DOE guidance
  - State Human Rights laws
- Student's parents
  - State Human Rights laws

Religious Exemptions

- U.S. Constitution
  - Ministerial Exception
  - Church Autonomy / Ecclesiastical Abstention
- Title VII exception for co-religionists
- Federal RFRA
- Title IX religious exemption where compliance would conflict with religious beliefs
- State Constitutions
- State statutory religious exemptions

Proactive Measures – Overall

- Statement of Faith on Marriage, Gender, and Sexuality
  - Clear and concise
  - Rooted in biblical teaching
  - Provides notice to employees & families
  - Provides legal defense
  - Can be standalone or part of the handbook (if standalone, reference it in the handbook)
- WELS teachings, “What We Believe”
  - References on website, school materials
- Member of WELS Church

Proactive Measures – Student Policies

- Code of Christian Conduct
  - Variety of conduct issues, including:
  - Dressing in conformance with biological sex
  - Using restrooms, locker rooms, etc. in conformance with biological sex
  - Abstaining from all intimate sexual conduct outside the marital union of one man and one woman
  - Rooted in bible and WELS doctrine

Proactive Measures – Enrollment

- Don’t hide faith aspect of school
  - Information Packet
  - Website
  - Enrollment forms
  - School tour
  - Family interview?
- Parent Partnership Agreement

Proactive Measures – Employees

- Clear statements of faith in employment documents
  - Offer Letter, Job Description, Employee Handbook
  - Follow WELS doctrine.
  - Policy: Employment for the church is substantially different from secular employment. Church employees must conduct themselves in a manner that is supportive of the mission and values of the church. All employees are integral in creation of a school environment that respects and supports WELS doctrine and provides students with faithful Christian witnesses.

Response

- Meeting – plan!
- Consult attorney?
- Pastor present?
- Explain faith issues
- Have documents with faith statements
- Do they understand?
  - Ask questions, provide opportunity for explanation
- Require faith-aligned action
- Allow withdrawal/resignation

Other Issues

Unwed Pregnant Employee

- Difficult Balance
  - Respect for life, support new mother
  - Example provided to students
  - Considerations:
    - Age of students
    - Employee’s approach to issue
    - Other opportunities available
    - If unable to continue, how to support

Student Behavior Off School Grounds

- Student bullying, harassment, sexual misconduct, drugs/alcohol, etc.
- Policies?
- Direct impact on safety of that student or other students?
- Clear nexus with improper conduct on school grounds?
- Impact academic or social environment of school?

Divorced Parents

- Decree of dissolution
- Legal Custody vs. Physical Custody / Parenting Time
- Parental Rights to Records & Information
- Others awarded or granted rights
- Order for Protection
- General Rule:
  - Don’t take sides
  - Request a subpoena

Thank you!

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