

UPDATE:
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Covid-19

Coronavirus / COVID-19
Response Team

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**Schools: One More Round of PD
Before Summer Break**

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Today's Topics

1. Updated COVID-19 Rules and application to schools
2. Regulating off-campus speech in light of the Supreme Court's recent Mahanoy ruling
3. Title IX update

1. Updated COVID-19 Rules And Application To Schools

Schools' Legal Obligations – COVID 19

- 3 Primary Sources of Legal Obligations:
 1. Michigan Occupational Safety and Health Administration (MIOSHA)
 2. Michigan Department of Health and Human Services (MDHHS)
 3. Local Health Departments
- Effective June 22, 2021, both the MIOSHA Rule and MDHHS Order Have Been Withdrawn

What Does Rescission of MDHHS Order Do?

- MDHHS Order (June 1, 2021)
 - MDHHS generally required:
 - Masks for unvaccinated individuals when “gathering” indoors, which would include students under age 12
 - Compliance with testing protocols stated in MDHHS’s Interim Guidance on Athletics
 - MDHHS rescinded “statewide” mask mandate, but warned that **“local health departments, establishments, sports organizers and school districts”** may have additional rules that must be followed”

Interim Recommendations for Operating Schools Safely

- On June 25, 2021, MDHHS issued *Interim Recommendations for Operating Schools Safely When There Is COVID-19 Transmission*
 - “Layers of Defense Against COVID-19 in Schools”
 - Promoting vaccination for eligible students and staff
 - Continue using face masks, consistent with CDC recommendations
 - Social Distancing, including physical distancing and cohorting
 - COVID 19 screening, testing and contact tracing
 - Maintaining healthy environments
 - Encourages adjustment of strategies based on risk assessment specific to community

What Does Rescission of MIOSHA Rule Do?

- MIOSHA Emergency Rule (October 2020)
 - As an employer, no longer **required by Rule** to do all of the specific things required by the Rule, including:
 - COVID-19 Preparedness Plan
 - Basic Infection Prevention Measures
 - Health Surveillance
 - Workplace controls, including masking and social distancing
 - Training
 - Recordkeeping

What Workplace Safety Rules Remain?

- But...workplace safety obligations remain:
 - MIOSHA Existing Standards
 - “General Duty” Clause – Obligation to provide “a place of employment that is free from recognized hazards that are causing, or are likely to cause, death or serious physical harm to the employee”
 - Enforcement Guidance – When determining if there is sufficient evidence for a general duty clause citation, the employer’s COVID-19 program in its entirety will be evaluated. If after considering all the measures the employer has implemented, there still exists a recognized hazard, a general duty clause citation may be warranted
 - Schools should determine what they need to do – in good faith – to keep COVID out and prevent its spread in the workplace

What Workplace Safety Rules Remain? (Cont.)

- OSHA's COVID-19 Emergency Temporary Standard
 - Applies to “all settings where any employee provides healthcare services or healthcare support services.”
- COVID 19 Employment Rights Act (PA 238 or 2020)
 - Incorporates CDC's quarantine/isolation standards, and provides protection to employees who cannot work because they:
 - Test positive for COVID-19
 - Display the principal symptoms of COVID
 - Have close contact with an individual who tests positive for COVID-19 (with exceptions, including for vaccinated employees)

Practical Advice

- Consider what the school (1) must do; (2) might have to do; and (3) might want to do
 - “**Must Do**” - Know the legal requirements that apply to your school and make sure you're adhering to them
 - Stay in touch with local health department and stay on top of legal developments
 - “**Might Have to Do**” - Consider what your school may need to do to avoid liability and be in compliance with MIOSHA's “general duty” clause
 - Civil Liability - Governmental Immunity
 - High standard - “Conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results”

Practical Advice: **“Might Have to Do”** (Cont.)

- MDHHS Recommendations are not legal obligations; it’s guidance. However, MIOSHA may use it to help determine whether met general duty
 - Consider continuing or adopting the “easy” protocols
 - Make “hard” decisions in good faith, after considering MDHHS/CDC guidance and keeping in mind current COVID transmission in the community
 - Be flexible, as risk assessment may change safety protocols
 - Document (or at least be prepared to explain why) recommendations were not adopted

Practical Advice: **“Might Want to Do”**

- What safety (or other) protocols or procedures worked?
- What do employees think about continuing certain protocols or procedures?
- Setting aside fear of liability, are there concerns or areas of need within your community that would warrant voluntarily implementing or continuing certain protocols or procedures

2. Off-Campus Student Speech

Mahanoy Area School District v. B.L.

Mahanoy Area Sch. Dist. v. B.L.

- Supreme Court decision issued June 23, 2021
- Landmark decision of the Court addressing a school district's ability to address off-campus online speech of students
- Upheld the decision of the Third Circuit Court of Appeals, but for different reasons
 - This distinction was very significant as the lower court's decision would have restricted entirely a school district's ability to discipline for such speech

Mahanoy Area Sch. Dist. v. B.L.

- B.L. was a student in 9th grade at Mahanoy Area High School (MAHS)
- She was on the JV cheerleading squad her freshman year. She tried out for the varsity cheerleading squad at the end of the year for the following school year, but did not make the varsity team. She was offered a spot on the JV team for her sophomore year.
- She also tried out for a private softball team and did not make the roster around the same time
- The weekend after she was at a local convenience store with a friend and sent out two pictures to her friends on her Snapchat story.

Mahanoy Area Sch. Dist. v. B.L.

- The first picture was of B.L. and another student holding up their middle fingers and was captioned: “f--- school f--- softball f--- cheer f--- everything”
- The second picture was blank but read: “Love how me and [another student] get told we need another year of jv but tha[t] doesn’t matter to anyone else?”
- The snap could be seen by B.L.’s 250 friends on Snapchat, including many MAHS students and fellow cheerleaders
- The pictures were screenshotted by other students – including the daughter of the Cheer coach who showed it to her mom

Mahanoy Area Sch. Dist. v. B.L.

- The images spread among the MAHS student body, including to several other members of the cheerleading squad who went and talked to the coach about it and were “visibly upset.”
- The cheerleading team rules, which B.L. signed, stated that participants should have respect for the school, coaches, teachers, other teams, etc., and that good sportsmanship will be enforced, including foul language and inappropriate gestures. The rules also prohibited negative information about cheerleading, cheerleaders, or coaches from being placed on the internet.
- As a result, B.L. was suspended from cheer for the following year.

Mahanoy Area Sch. Dist. v. B.L.

- B.L. and her mother sued the school district asserting the suspension violated her First Amendment rights
- Both the District Court and the Third Circuit Court of Appeals found on behalf of the student
 - The Appeals Court set out a bright-line rule that speech occurring outside of school and off school grounds is not within the jurisdiction of the school
 - Case was appealed to the SCOTUS
- The Court reviewed the action under its precedent from *Tinker v. Des Moines*

Mahanoy Area Sch. Dist. v. B.L.

- *Tinker v. Des Moines*
 - Students do not lose their First Amendment rights at the schoolhouse gates
 - “conduct by [a] student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is . . . Not immunized by the constitutional guarantee of freedom of speech.”
- SCOTUS Holding:
 - All off-campus speech is not immunized from school action
 - “The school’s regulatory interests remain significant in some off-campus circumstances.”

SCOTUS Holding

- The times when the school’s interests remain significant “include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.”
- The Court goes on to explain:
 - It can sometimes be difficult to ascertain when speech is off-campus v on-campus
 - Further, there are a myriad of situations in which speech that is off-campus would trigger the ability to act on speech and the Court is not trying to define all such speech

SCOTUS Holding (Cont.)

- “[W]e do not now set forth a broad, highly general First Amendment rule stating just what counts as “off-campus” speech and whether or how ordinary First Amendment standards must give way off campus to a school’s special need to prevent, e.g., substantial disruption of learning related activities or the protection of those who make up a school community.”
- The notes, however, that “the school itself has an interest in protecting a student’s unpopular expression, especially when the expression takes place off campus. America’s public schools are the nurseries of democracy. Our representative democracy only works if we protect the ‘marketplace of ideas.’”

SCOTUS Holding (Cont.)

- B.L.’s speech, while crude, merely amounted to criticisms of the world of which she is a part
- The speech did not:
 - Contain fighting words;
 - While crude, was not obscene as has been defined by the Court;
 - Did not identify the school or target any member of the school community;
- The speech was of a variety that “were she an adult, the First Amendment would provide strong protection.”
- The school expressed an interest in teaching good manners and punishing vulgar language aimed at the school community:
 - she was on her own time;
 - The school was not standing in loco parentis; and
 - The school also presented no evidence of generally attempting to prevent vulgarity outside of school.

SCOTUS Holding (Cont.)

- The School further expressed it was attempting to prevent disruption:
 - No evidence of substantial disruption occurring (interrupted 5-10 minutes of class);
 - No evidence that substantial disruption likely to occur
- Finally, the School expressed a concern for team morale:
 - “There is little . . . That suggests any serious decline in team morale – to the point where it could create a substantial interference in, or disruption of, the school’s efforts to maintain team cohesion.”

Important Takeaways From *Mahanoy*

- Off-campus speech deserves more protection than on-campus speech;
- Such speech is not, however, always outside of a school’s interest to regulate;
- Off-campus speech would not include periods of time when the school is acting in loco parentis;
- Off-campus speech may be regulated when it involves bullying, harassment, threats aimed at teachers or students, or involves the failure to follow curricular rules or use of school equipment;

Important Takeaways From *Mahanoy* (Cont.)

- Off-campus speech may be regulated when it causes or is likely to cause a substantial disruption to the school environment:
 - The school “must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.”
- Just because an activity is extracurricular does not put it outside of First Amendment protection;
 - Though it may impact the balance that must be shown – i.e., how strong the student’s interest remains in the right v. the school’s right to regulate
- Consistency in the enforcement of rules is important to the defense of a school’s action

3. Title IX Update

Short Title IX Recap

- Title IX Regulations
 - Announced May 2020
 - Effective August 2020
- Litigation/Legal Challenges
 - Didn't go anywhere
 - Why litigation?
- Implementation
 - Practical challenges
 - The "new" battlefield



Time Line of Notable Events

- June 2020 - *Bostock v. Clayton County* [SCOTUS]
- August 2020 - USDE Interpretation on Title IX
- November 2020 - Election
- January 2021 - Executive Order
- February 2021 - T-Female Sports Equity Focus/Legislation
- March 2021 - Executive Order
- June 2021 - USDE Statements/Press Releases
- June 2021 - SCOTUS cert denial

Executive Orders from Biden Administration

- *Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity and Sexual Orientation [01.20.21]*
 - “Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”
- *Executive Order Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity [03.08.21]*
 - “Within 100 days of the date of this order, the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and other similar agency actions that are or may be inconsistent with [administration policy].”
- “Administration Policy”
 - VERY clear
 - Early Predictions

The Battle for Headlines

- ***New Michigan bill: Divide high school teams based on biological sex***
 - Detroit News, 03.10.21
- ***U.S. Department of Education confirms Title IX protects students from discrimination based on sexual orientation and gender identity***
 - USDE Press Release, 06.16.21 / Notice of Interpretation
- ***Proposed Title IX Rule Changes Expected May 2022***
 - Inside Higher Ed, 06.24.21 / “consistent with the priorities of the Biden-Harris Administration”
- ***Ohio Gov. Mike DeWine: Transgender athlete issue shouldn't be resolved by government***
 - Cincinnati Enquirer, 06.25.21
- ***Supreme Court will not hear transgender bathroom rights dispute, a win for Va. Student who sued his school for discrimination***
 - Washington Post, 06.28.21

Moving Forward

- Expectations
 - Follow the law
- Process
 - Policies, Regulations, Training, Awareness
- So ... nothing really changes!?!
- Reading the signs



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