

Emerging Legal Issues For All WASBO Members

WASBO Spring Conference

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Agenda

- Electioneering – Dos and Don'ts to Avoid Litigation.
- Board Vacancies – How seats are filled and potential implications of invalid seats.
- *Perez v. Sturgis Public Schs.*, 143 S.Ct. 859 (2023) – What a Business Manager Needs to Know!
- Transgender Considerations – What's the latest?
- Vendor Contracts – Are you minimizing legal risk?
- Exculpatory Agreements – How are you using liability waivers and what do they say?



▼ Electioneering 101

WHAT IS ELECTIONEERING?

- In its most basic form, electioneering is the action of actively or passively taking part in the activities of an election campaign.
- Important for school officials to understand Wisconsin Electioneering Law when a school district is going to referendum.
- The Wisconsin Elections Commission (“WEC”) will respond to complaints concerning violations of elections law and issues orders for correction of violations, if found, or referrals may be made to district attorneys for prosecution.
- With the influx in school districts going to referendum (especially with regarding to operating referenda), citizens are becoming savvier and looking for ways to challenge and/or hold districts accountable.

WHAT ADMINISTRATORS MAY DO

- School District Staff, School Administrators, and Teachers MAY–
 - Discuss the referendum in a *neutral* manner.
 - Distribute *neutral* information about a referendum while “on the clock.”
 - Produce materials to disseminate *neutral* information.
 - Place signs in yards of staff members’ personal residences.
 - Support referendums or join advocacy committees in a *personal* capacity outside of working hours.
 - **Exercise caution!!** It may be very difficult for the public to separate a staff member’s *personal* opinion from that staff member’s image as an employee of the public school district.

WHAT ADMINISTRATORS MAY NOT DO

- School District Staff, School Administrators, and Teachers **MAY NOT**—
 - Support a referendum while performing their job or while representing their school or district.
 - Create materials to influence voters regarding the referendum while on the job.
 - Allow school facilities to be used by advocacy groups on a preferential basis.
 - Use school or district resources to advocate for a referendum.
 - Advocate for or against a referendum at or near a polling place on election day.
 - Advocate for or against a referendum at or near the municipal clerk's office during the period when absentee ballots can be cast.

WHAT BOARD MEMBERS MAY DO

- School Board Members **MAY**:
 - Distribute *neutral* information about a referendum.
 - Make expenditures to disseminate *neutral* information.
 - Place signs in yards of staff members' personal residences.
 - Support referendums or join advocacy committees in a *personal* capacity.

WHAT BOARD MEMBERS MAY NOT DO

- School Board Members **MAY NOT**:
 - Support a referendum as a representative of the school board.
 - Use public funds or school facilities to advocate for a referendum.
 - Use other district resources to advocate for a referendum.
 - Advocate for or against a referendum at or near a polling place on election day.
 - Advocate for or against a referendum at or near the municipal clerk's office during the period when absentee ballots can be cast.

A CAUTIONARY TALE – SCHOOL DISTRICT OF MONROE

- District faced a lawsuit from citizens who alleged malice and misrepresentation in the materials the District utilized for “promoting” the referendum.
- Plaintiffs alleged the District downplayed the increase in property taxes
- Green County Circuit Court judge granted summary judgment in favor of the District.
 - Court denied Plaintiffs’ request to invalidate the Nov. 8, 2022 referendum.

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▼ Board Vacancies

Board Vacancies

- Procedures for Filling Vacancies – Wis. Stat. 17.26(1g)(a)
 - By appointment of the remaining Board Members
 - Appointee holds office until a successor is elected.
 - When a vacancy occurs in the last year of a term or when a vacancy occurs after the spring election but on or before the last Tuesday in November of a board member who is not in the last year of their term, the successor shall be elected at the next spring election.
 - When the vacancy occurs after the last Tuesday in November and on or before the date of the next spring election of a board member who is not in the last year of their term, the successor shall be elected at the second following spring election.
 - If an appointment is not made within 60 days of the vacancy, the remaining board may fill the vacancy in accordance with Board policy.

Board Vacancies

- **Term Served by Appointee**
 - An appointee serves until a successor is elected to fill the vacant term
 - A successor is not elected for a new three (3) year term
 - Thus, an election may be held in the spring to fulfill the remaining year of a resignee's board term, and an election may also need to be held the following spring after the conclusion of the resignee/successor's three (3) year term.

Board Vacancies

- **Current Issues – Real World Examples**
 - A board vacancy notice incorrect provides that a successor will serve a new three (3) year term
 - If there is only a year or two years remaining on a board seat and a successor is appointed to a three (3) year term instead of fulfilling the current term, the successor is then invalidly holding office.
- **Consequences:**
 - The invalid successor cannot be counted for purposes of a quorum
 - The invalid successor cannot validly vote on matters

- Does *Perez* open school
- ▼ districts to increasing lawsuits for money damages?

WHAT IS THE *PEREZ* DECISION AND WHY SHOULD A SCHOOL BUSINESS OFFICIAL CARE?

- March 21, 2023, SCOTUS unanimously held in *Perez v. Sturgis Public Schs.*, 143 S.Ct. 859 (2023), that a student with a disability does not have to exhaust the administrative due process procedures under IDEA before filing a lawsuit seeking compensatory damages under the ADA or any other federal anti-discrimination laws.
 - The IDEA expressly requires exhaustion through due process hearings for lawsuits that seek relief that is available under the IDEA, but exhaustion is not required for lawsuits brought under other federal laws that seek relief not available under the IDEA (*i.e.*, compensatory damages)
 - Translation: exhaustion is not required when the IDEA cannot provide relief.

WHAT IS THE *PEREZ* DECISION AND WHY SHOULD A SCHOOL BUSINESS OFFICIAL CARE?

- Communication with and responsiveness to parent concerns is critical.
- When conflict arises, consider implications under IDEA, Section 504, and the ADA.
- The Big Debate: Does this open the floodgates for parent-side attorneys to seek money damages under the ADA?

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▼ Transgender Updates

THE LATEST

- Legal battles across the country rage on
 - At issue: restroom use, athletics/participation, use of pronouns, parent right to notice of status change, educator right to refuse to use preferred pronouns, policy provisions, records, etc., etc., etc.
- Title IX Regulations – Change is coming
 - May-ish has been announced as the timeframe for release of the Biden Administration's final rule regarding the Title IX regulations
- OCR Proposed Title IX Rule Related to Athletics
 - Prohibits a one-size-fits-all ban on transgender students participation on an athletic team based on their gender identity

WHITAKER STILL CONTROLS

- In Wisconsin, the Seventh Circuit's decision in *Whitaker v. Kenosha Unified School District* controls.
 - Recall this is Wisconsin's test case on transgender student use of restrooms.
 - Court denied the District's motion to dismiss and allowed the student to proceed on his claims of discrimination in violation of Title IX and deprivation of equal protection under the law.
 - The Court granted Whitaker's request for an injunction prohibiting the District from requiring the student to use the restroom associated with his biological sex and requiring the District to allow Whitaker to use the restroom of the gender in which he identified
 - Seventh Circuit never reached the merits of the case, as the parties settled out of court.

TITLE IX FINAL RULE

- For the last five months, the Department of Education has been reviewing more than 238,000 public comments on the proposed rule and working to draft the final rule
- Potential Changes:
 - Prohibit all forms of sex discrimination, including specific protections for transgender and nonbinary students and pregnant/parenting students.
 - Expansion of the definition of sexual harassment.
 - Replace “severe, pervasive, ***and*** objectively offensive” with “severe, pervasive, ***or*** objectively offensive”
 - Require investigation of off-campus conduct if respondent is a representative of the institution or engaged in conduct under the institution’s control
 - Decreasing the threshold for what schools are required to investigate.
 - Require schools to use a “preponderance of evidence” standard instead of a “clear and convincing evidence” standard in determining the outcome of most sexual assault cases.

OCR – TITLE IX RULE – ATHLETICS

- Department of Education Proposed Title IX Rule Related to Athletics
 - Prohibits a one-size-fits-all ban on transgender students participation on an athletic team based on their gender identity
 - Allows for consideration of nuanced factors – grade level, level of competition, eligibility requirements of governing bodies (WIAA)
 - Balance factors with potential harm to student who are limited or denied participation
 - Allows schools to develop sex-related criteria to determine eligibility
 - Substantially related to the achievement of an important educational objective; and
 - Minimize harm to students who are limited or denied in their participation because of gender identity
- Rule came down the same day SCOTUS declined to hear a Fourth Circuit Court of Appeals case that blocked West Virginia from enforcing a law banning MTF girls from participating on female sports teams

ATHLETICS

- WIAA Policy for Participation
 - Addresses “bona fide transgender students”
 - School is responsible for determining student eligibility to participate
 - School’s policy should provide that the student and parents/guardian notify the school in writing that the student is transgender and list the WIAA sports the students would like to participate
 - Provides procedures for decision making regarding participation and eligibility of transgender athletes
 - Criteria to determine which gender school team the student will participate :
 - Current school registration information
 - Written statement from student and parent/guardian affirming the consistent gender identity and expression to which the student self-relates
 - Documentation affirming the actions, attitudes, and dress which demonstrate the student's consistent gender identification and expression
 - Written verification from an appropriate healthcare professional (physician, psychologist) of the student's consistent gender identity and expression; and
 - Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.)

ATHLETICS

- Medical documentation (hormonal therapy, sexual re-assignment surgery, counseling, etc.)
 - A FTM student who has started hormone therapy is only eligible for male teams
 - A FTM student who has not started hormone therapy may participate on female teams if desired
 - A MTF student must have one calendar year of medically documented testosterone suppression therapy to be eligible to participate on a female team
 - A MTF student who has not started testosterone suppression therapy may participate on male teams if desired

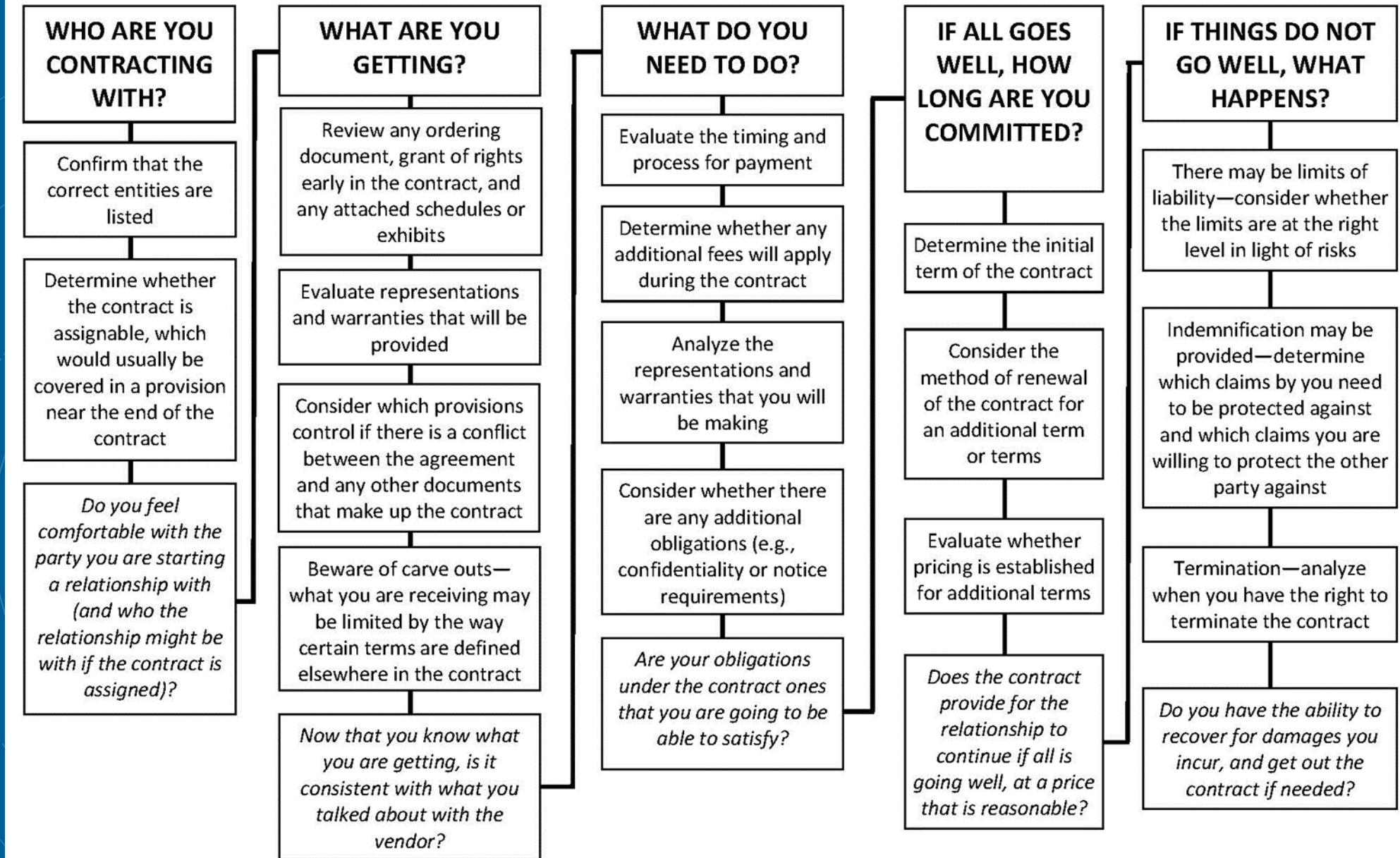
Considerations and Practical Guidance

- Policies?
 - Create? Revise? Do nothing?
 - Internal processes?
- Considerations
 - Records
 - Confidentiality
 - Communications with parents/community
 - Student/parent relationships
 - Etiquette and proper manner to address students
 - Physical Education
 - Restrooms/Locker rooms
 - Sports and athletic activities
 - Other school sponsored activities and events
 - Student Dress
 - Bullying and harassment
 - Special Education considerations

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▼ Contracts 101

Five Step Roadmap to Contractual Success



Step 1: Who Are You Contracting With?

- Confirm that the correct entities are listed
- Determine whether the contract is assignable—usually covered in a provision near the end of the contract
- *Do you feel comfortable with the party you are starting a relationship with (and who the relationship might be with if the contract is signed)?*

Step 2: What Are You Getting?

- Review any ordering document, grant of rights early in the contract, and any attached schedules or exhibits
- Evaluate representations and warranties they will be providing
- Consider which provisions control if there is a conflict between the contract and any other documents that make up the contract
- Beware of carve outs—what you are receiving may be limited by the way certain terms are defined elsewhere in the contract
- *Now that you know what you are getting, is it consistent with what you talked about with the vendor?*

Step 3: What Do You Need To Do?

- Evaluate the timing and process for payment
- Determine whether any additional fees will apply during the contract
- Analyze the representations and warranties that you will be making
- Consider whether there are any additional obligations (e.g., confidentiality or notice requirements)
- *Are your obligations under the contract ones that you are going to be able to satisfy?*

Step 4:
If All Goes Well,
How Long Are You
Committed?

- Determine the initial term of the contract
- Consider the method of renewal of the contract for an additional term or terms
- Evaluate whether pricing is established for additional terms
- *Does the contract provide for the relationship to continue if all is going well, at a price that is reasonable?*

Step 5:
If Things Do Not
Go Well,
What Happens?

- There may be limits of liability—consider whether the limits are at the right level in light of risk
- Indemnification may be provided—determine which claims by you need to be protected against and which claims you are willing to protect the other party against
- Termination—analyze when you have the right to terminate the contract
- *Do you have the ability to recover for damages you incur, and get out of the contract if needed?*



▼ Exculpatory Agreements

EXCULPATORY AGREEMENTS (LIABILITY WAIVERS)

- Difficulties in enforcement
- Is it worth the paper written on?
- If not, why is there such a push to use them?

ELEMENTS OF STRONG EXCULPATORY AGREEMENTS (LIABILITY WAIVERS)

- Standalone form
- Must be specific as to the release
- Should not be overly broad and all inclusive
- What exactly does the release mean—what claims are being released?
- Opportunity to bargain
- Consider differences in different jurisdictions



Questions? Comments?



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