

WASB Legal and Legislative Video Update, April 21, 2021, 12 pm

WASB Staff Counsel will address the following topics:

- I. Post-Election Wrap Up
- II. Directory data and Military Recruiter Access to Student Email Addresses
- III. Face Covering Requirements for Students, Staff and Visitors
- IV. Face Covering Requirements on School Buses
- V. DOJ memo to federal agencies finds Bostock analysis applies to Title IX
- VI. Teacher Contract Renewal and Nonrenewal Timelines
- VII. COBRA premium subsidies under the American Rescue Plan Act

Government relations staff are monitoring the Joint Finance Committee hearing in Rhinelander and will not participate in today's update. The Government Relations staff will appear at the Capital Chat webinar at Noon on Friday April 23, 2021.

Here are a few notes and links relevant to those topics:

WASB LEGAL UPDATE

I. Post-Election Wrap Up

After April 6, 2021 – [Campaign Committees May File Campaign Finance Termination Report](#)

On or Before April 26, 2021 – [Deadline for Newly Elected School Board Members to File Notice of Refusal of Salary that Takes Effect at the Start of the Term of Office](#)

On or Before April 26, 2021 – [School Board Members Take and File the Official Oath](#)

April 26, 2021 – [School Board Members Take Office](#)

April 26 to May 26, 2021 – [Election of School Board Officials](#)

On or About June 30, 2021 – [Notify Non-Exempt Committees of Duty to File a Continuing Report for the Period Ending June 30](#)

July 15, 2021 – [Deadline for Non-Exempt Committees to File July Continuing Campaign Finance Report](#)

The WASB 2021 Election Schedule and other school board election resources can be found here: [Elections Resources | Wisconsin Association of School Boards \(wasb.org\)](#)

II. Directory data and Military Recruiter Access to Student Email Addresses

Military recruiters have greater access to student email addresses under the new the [National Defense Authorization Act for Fiscal Year 2021](#) (PL 116-283, enacted 1/1/21).

(c)Access to Secondary Schools.—

(1)

(A)Each [local educational agency](#) receiving assistance under the [Elementary and Secondary Education Act of 1965](#)—

(i) shall provide to military recruiters the same access to secondary school students as is provided generally to postsecondary educational institutions or to prospective employers of those students; and

(ii) shall, upon a request made by military recruiters for military recruiting purposes, provide access to secondary school student names, addresses, electronic mail addresses (which shall be the electronic mail addresses provided by the school, if available), and telephone listings, notwithstanding subsection (a)(5) of section 444 of the General Education Provisions Act (20 U.S.C. 1232g). ~~and telephone listings, notwithstanding section 444(a)(5)(B) of the General Education Provisions Act (20 U.S.C. 1232g(a)(5)(B)).~~

(B) A local educational agency may not release a student's name, address, ~~and telephone listing~~ electronic mail address, and telephone listing under subparagraph (A)(ii) without the prior written consent of a parent of the student if the student, or a parent of the student, has submitted a request to the local educational agency that the student's information not be released for a purpose covered by that subparagraph without prior written parental consent. Each local educational agency shall notify parents of the rights provided under the preceding sentence.

While parents may request that email addresses and other information not be released as directory data, school boards may not deny military recruiters access to email addresses by excluding addresses or email addresses from its definition of directory data.

Note that the definition of directory data in the Wisconsin Pupil Records Law includes "address" but not "email":

Wisconsin Legislature: 118.125(1)(b): "Directory data" means those pupil records which include the pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received and the name of the school most recently previously attended by the pupil.

Student Records and Confidentiality (wi.gov)

"Directory data means those pupil records which include the pupil's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, photographs, degrees and awards received, and the name of the school most recently previously attended by the pupil," Wis. Stat. sec. 118.125(1)(b). "Dates of attendance" is the time frame over which the student was enrolled in the school, not the specific dates when the student was or was not in school (i.e., records related to truancy).

School districts must have a written policy concerning pupil records. **When defining directory data in the policy, the district is limited to the types of information listed above.** The district may choose some, none or all of the data as directory data, Wis. Stat. sec. 118.125(3).

Compare definition of directory information in FERPA:

20 U.S. Code § 1232g - Family educational and privacy rights | U.S. Code | US Law | LII / Legal Information Institute (cornell.edu): For the purposes of this section the term "directory information" relating to a student includes the following: the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight

and height of members of athletic teams, dates of attendance, degrees and awards received, and the most recent previous [educational agency or institution](#) attended by the [student](#).

[Electronic Code of Federal Regulations \(eCFR\) 34 CFR 99.3](#)

Directory information means information contained in an education record of a student that would not generally be considered harmful or an invasion of privacy if disclosed.

(a) Directory information includes, but is not limited to, the student's name; address; telephone listing; electronic mail address; photograph; date and place of birth; major field of study; grade level; enrollment status (*e.g.*, undergraduate or graduate, full-time or part-time); dates of attendance; participation in officially recognized activities and sports; weight and height of members of athletic teams; degrees, honors, and awards received; and the most recent educational agency or institution attended.

(b) Directory information does not include a student's—

(1) Social security number; or

(2) Student identification (ID) number, except as provided in paragraph (c) of this definition.

(c) In accordance with paragraphs (a) and (b) of this definition, directory information includes—

(1) A student ID number, user ID, or other unique personal identifier used by a student for purposes of accessing or communicating in electronic systems, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a personal identification number (PIN), password or other factor known or possessed only by the authorized user; and

(2) A student ID number or other unique personal identifier that is displayed on a student ID badge, but only if the identifier cannot be used to gain access to education records except when used in conjunction with one or more factors that authenticate the user's identity, such as a PIN, password, or other factor known or possessed only by the authorized user.

(Authority: 20 U.S.C. 1232g(a)(5)(A))

III. Face Covering Requirements for Students, Staff and Visitors

The Wisconsin Supreme Court ruled in [Fabick v. Evers](#), March 31, 2021, that [Executive Order #105](#) (2/4/21) exceeded the Governor's powers and is therefore unlawful. [Fabick v. Evers \(wicourts.gov\)](#) Executive Order #105 was the basis of the statewide face covering requirement and the Court's decision invalidated that requirement. While some counties and municipalities continue to impose face covering requirements, many parts of the state are not subject to a face covering requirement.

May schools require students, staff, and visitors to wear face coverings?

Students: The legal authority for students (outside of school buses) regarding face coverings is not as clear and explicit as it is for employees. We continue to believe that where things stand right now is that a school district can have a local school rule about mandatory "face coverings" for students, but in enacting such a rule the district would need to allow for possible exceptions (and think about accommodations) based on individual health conditions/disabilities. A rule would also have to appropriately identify certain

times where wearing a face covering would not be appropriate (e.g., while students are swimming or running in a PE class; if the use itself would create a workplace hazard), as well as situations where a higher level of protection than a cloth face covering may be appropriate (e.g., when the student is visiting the nurses/health aide, riding the school bus). There may also be certain circumstances where a rule might be relaxed, e.g., when substantial physical distancing is feasible.

For the school rule purposes, we have advised districts that the district treat the issue like any other health requested accommodation if the student desires not to wear the face covering. For example, the district could follow its process that it uses for documenting a student's inability to participate in an activity due to a health condition, a student's request for an adaptation to a requirement for participation and/or treat it as a 504 accommodation to see how the district could accommodate the student's health issue while still protecting the health and safety of others. In both situations a pupil record will be created and possibly a pupil health record will be created and potentially a 504 plan as well. A 504 plan may entail, for example, offering the student a face shield instead of a face covering, enhanced social distancing, other devices like a neck gaiter/buff, etc.

To avoid situations where a district is disciplining or sending either employees or students home for not having a face covering of their own, a district with a mandatory face covering rule should likely be prepared to supply a disposable facial covering when needed. The district could also place the student in a setting where physical distancing is possible, e.g. an open aired area where a face covering is not necessary.

Schools with a rule (or even a recommendation) should provide employees and students with instructions/training/reminders on how to wear, maintain and clean their face coverings.

Please find below additional resources from DPI on this topic:

Teach and reinforce use of cloth face coverings.

- *Face coverings may be challenging for students (especially younger students) to wear in all-day settings such as school.*
- *Face coverings should be worn by staff and students (particularly older students) as feasible, and are most essential in times when physical distancing is difficult. Follow any current local or state level public health order(s).*
- *Individuals should be frequently reminded not to touch the face covering and to wash their hands frequently.*
- *Information should be provided to staff, students, and students' families on proper use, removal, and washing of cloth face coverings.*
- *DPI Resource:*
 - *School Health Services Interim COVID-19 Infection [Control and Mitigation: Toolkit](#)*
 - *[Considerations in Using Facial Coverings When Supporting Students during In-Person Instruction](#)*

o [CLOTH FACE COVERINGS IN SCHOOLS What Families Need to Know](#)

<https://dpi.wi.gov/education-forward/health-safety/infection-control-mitigation>

Employees: The EEOC has stated that employers may require employees to wear personal protective equipment during a pandemic. Note that many face coverings do not meet the OSHA standard for masks and employers should use the term “face coverings” instead of “masks” unless they intend to require masks meeting OSHA PPE standards. Employers should provide reasonable accommodations for employees with disabilities, absent undue hardship. You may solicit information from the employee in order to determine what, if any, accommodations are necessary. See [Pandemic Preparedness in the Workplace and the ADA](#) for more information.

Visitors: [Section 120.13\(35\)\(a\)](#) gives school boards the power to adopt rules applicable to persons who enter or remain in buildings operated by the school board.

A school district can have a local visitor policy provision requiring mandatory “face coverings” for visitors, but in enacting such a provision the district would need to allow for possible exceptions (and think about accommodations) based on individual health conditions/disabilities. There may also be certain circumstances where a rule might be relaxed, e.g., when substantial physical distancing is feasible like holding a meeting on the football field.

If the district has adopted a local face covering requirement then how you respond to the situation would depend upon a number of factors. The first is the breadth of the district’s face covering requirement and the district’s assertion of the legal authority to have a local face covering requirement for visitors. The legal authority for requiring visitors to school facilities (including events and board meetings) to wear face coverings is not as clear and explicit as it is for employees and to a lesser extent students. We believe that where things stand right now a school district can have a local visitor policy provision requiring mandatory “face coverings” for visitors/spectators. The second factor to consider is the district’s ability to make reasonable accommodations for the visitor provided the accommodations don’t create an undue burden on the district and/or create a significant health and/or safety risk to students, staff, and other visitors.

In enforcing a locally adopted face covering requirement, the district needs to allow for possible exceptions (and think about accommodations) based on individual health conditions/disabilities. The district should first start an interactive conversation with the visitor if the visitor stated that he/she had an ADA covered health reason for not wearing the face covering. You would then see what kind of accommodation(s) could be made for the visitor. Such accommodations should not create an undue hardship on the district and/or threaten the health and/or safety of students, staff or visitors.

Districts should also consult with their medical adviser, local health officials, and review Department of Health Services and CDC guidance before making a decision regarding the use of face coverings as a mitigation strategy. In addition, districts should consult with their legal counsel and their liability, property and casualty, and worker’s compensation insurance carriers before lifting any face covering requirement.

IV. Face Covering Requirements on School Buses

[Requirement for Face Masks on Public Transportation Conveyances and at Transportation Hubs | CDC](#)

CDC has issued an [Order](#) that requires face masks to be worn by all travelers while on public transportation (which includes all passengers and all personnel operating conveyances). People must wear masks that completely cover both the mouth and nose while awaiting, boarding, disembarking, or traveling on airplanes, ships, ferries, trains, subways, buses, taxis, and ride-shares as they are traveling into, within, or out of the United States and U.S. territories. People must also wear masks while at transportation hubs (e.g., airports, bus or ferry terminals, train and subway stations, seaports, U.S. ports of entry, and other locations where people board public transportation in the United States and U.S. territories). [see above link for list of exceptions and exemptions]

Frequently Asked Questions

Which public transportation conveyances does the order apply to?

The order applies to all public transportation conveyances traveling into the United States (i.e., arriving from a foreign country) or within the United States (including within states or territories or traveling between states or territories). This includes school buses. The Order also applies to all conveyances leaving the United States until they arrive at a foreign destination.

Are masks required on school buses?

Yes, passengers and drivers on school buses must wear a mask, including on buses operated by public and private school systems, subject to the exclusions and exemptions in CDC's Order. Operators of school buses should refer to the Department of Education's [COVID-19 Handbook](#) for additional guidance.

Drivers do not need to wear a mask if they are the only person on the bus.

V. DOJ memo to federal agencies finds Bostock analysis applies to Title IX

The U.S. Department of Justice circulated a memo to federal agencies stating its interpretation of the application of the U.S. Supreme Court's decision in [17-1618 Bostock v. Clayton County \(06/15/2020\) \(supremecourt.gov\)](#) to Title IX:

After considering the text of Title IX, Supreme Court caselaw, and developing jurisprudence in this area, the Division has determined that the best reading of Title IX's prohibition on discrimination "on the basis of sex" is that it includes discrimination on the basis of gender identity and sexual orientation. Before reaching this conclusion, the Division considered whether Title IX "contain[s] sufficient indications" that would merit a contrary conclusion. The Division carefully considered, among other things, the dissenting opinions in 3 Gloucester and Adams, and the concerns raised in the dissents in Bostock. Like the majority opinions in those cases, however, the Division ultimately found nothing persuasive in the statutory text, legislative history, or caselaw to justify a departure from Bostock's textual analysis and the Supreme Court's longstanding directive to interpret Title IX's text broadly. Whether allegations of sex discrimination, including allegations of sexual orientation or gender identity discrimination, constitute a violation of Title IX in any given case will necessarily turn on the specific facts, and therefore this statement does not prescribe any particular outcome with regard to enforcement.

[Application of Bostock v. Clayton County to Title IX of the Education Amendments of 1972 \(justice.gov\)](#)

VI. Teacher Contract Renewal and Nonrenewal Timelines

[Wisconsin Legislature: Section 118.22](#)

(1) In this section:

(a) "Board" means a school board, technical college district board, board of control of a cooperative educational service agency or county children with disabilities education board, but does not include any board of school directors in a city of the 1st class.

(b) "Teacher" means any person who holds a teacher's certificate or license issued by the state superintendent or a classification status under the technical college system board and whose legal employment requires such certificate, license, or classification status, but does not include part-time teachers or teachers employed by any board of school directors in a city of the 1st class.

(2) On or before May 15 of the school year during which a teacher holds a contract, the board by which the teacher is employed or an employee at the direction of the board shall give the teacher written notice of renewal or refusal to renew the teacher's contract for the ensuing school year. If no such notice is given on or before May 15, the contract then in force shall continue for the ensuing school year. A teacher who receives a notice of renewal of contract for the ensuing school year, or a teacher who does not receive a notice of renewal or refusal to renew the teacher's contract for the ensuing school year on or before May 15, shall accept or reject in writing such contract not later than the following June 15. No teacher may be employed or dismissed except by a majority vote of the full membership of the board. Nothing in this section prevents the modification or termination of a contract by mutual agreement of the teacher and the board. No such board may enter into a contract of employment with a teacher for any period of time as to which the teacher is then under a contract of employment with another board.

(3) At least 15 days prior to giving written notice of refusal to renew a teacher's contract for the ensuing school year, the employing board shall inform the teacher by preliminary notice in writing that the board is considering nonrenewal of the teacher's contract and that, if the teacher files a request therefor with the board within 5 days after receiving the preliminary notice, the teacher has the right to a private conference with the board prior to being given written notice of refusal to renew the teacher's contract.

[The WASB Nonrenewal Bulletin | Wisconsin Association of School Boards](#)

The WASB Nonrenewal Bulletin

[The WASB Nonrenewal Bulletin](#)

Boardman Clark LLP prepared this publication for the WASB for annual dissemination to member school districts.

The complexity of the nonrenewal process is such that this publication should not be used as a substitute for legal counsel. The Nonrenewal Bulletin will, however, serve as a useful resource for district personnel and school attorneys seeking a synopsis of many legal considerations that generally guide the nonrenewal of a teacher's individual contract.

VII. COBRA premium subsidies under the American Rescue Plan Act

The APRA includes COBRA premium subsidies for employees losing health benefits due to involuntary termination of employment. Subsidies are available for terminated employees enrolled in COBRA from April 1 to September 30, 2021. Employers are required to provide a notice to employees of the subsidies and another notice prior to the termination of the subsidies. The Departments of Labor and Health and

Human Services have created model notices. More information on the premium subsidies can be found here:

[COBRA Premium Subsidy | U.S. Department of Labor \(dol.gov\)](#)

Model Notices

- Model General Notice and COBRA Continuation Coverage Election Notice: [MS Word](#) | [PDF](#)
- Model Notice in Connection with Extended Election Period: [MS Word](#) | [PDF](#)
- Model Alternative Notice: [MS Word](#) | [PDF](#)
- Model Notice of Expiration of Premium Assistance: [MS Word](#) | [PDF](#)
- Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021: [MS Word](#) | [PDF](#)
- [Federal Register Notice](#)