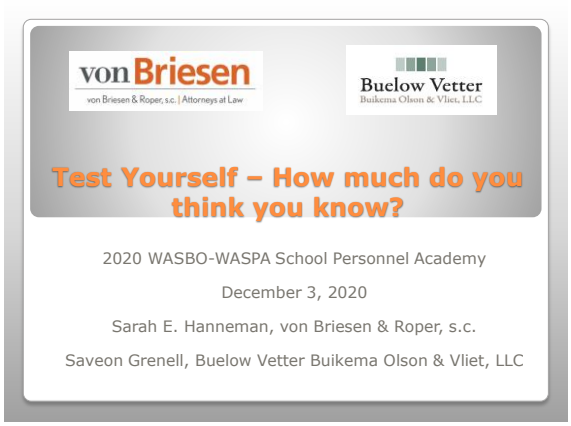

1

Agenda

"Test yourself" - How much do you know about these topics, and how would you handle these scenarios for your district?

1. Board request to increase open enrollment seats
2. COVID-19 workplace safety grievances
3. EEOC Considerations During COVID-19
4. Confidentiality
5. Protections for LGBTQ Employees

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Scenario 1: Open Enrollment

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Scenario 1: Open Enrollment

You are the business official for your district. Your school board president tells you that, thanks to the financial constraints caused by COVID-19, the district needs to look at other options to generate cash flow for the district. The board would like to know how the budget would be impacted if the district were to open up 50 or 75 more seats for open enrollment, and they have tasked you with doing this analysis.

What do you do? How do you proceed with this request?

What are some considerations you might want to share with the board as they consider whether adding open enrollment seats is a good option for your district?

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Considerations Before Expanding OE Seats

Historical Perspective of Open Enrollment

- Students in Wisconsin generally attend public school in the district where they physically reside
- Purpose of Open Enrollment is to:
  - Allow students to apply to attend in a district other than where they live
  - Provide additional educational opportunities
  - Allow for parental choice in education
- Historical purpose of OE was not intended to be a way to generate additional revenue

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Considerations Before Expanding OE Seats, cont.

- There are only limited factors a district is allowed to use in its open enrollment formula – but districts have broad discretion in how they choose to apply these factors within their formula
  - regular education factors – class size limits, pupil-teacher ratios, enrollment projections
  - special education factors – class size limits, pupil-teach ratios, staffing capacity limits (based on service needs, class/group sized based on intensity of pupil needs, type of staff required), projected pupil enrollment, changes to services in students' IEPs, etc.)
- Despite these limited factors, districts have discretion on how to apply such factors
  - Ex: The OE statute allows districts to consider pupil-teacher ratios – beyond that, DPI does not set a minimum/maximum staffing ratio, targeted class size range, or a projected student enrollment cushion. This means these criteria are up to a district to establish at the local level.

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Considerations Before Expanding OE Seats, cont.

- Be cautious about making adjustments to your OE formula for the sake of increased revenue
- If your district already has an OE formula that has been successful and deemed legally compliant by DPI – consider whether it is worth the risk to change that formula, as it would be difficult to go back to a more restrictive formula after making changes
- Remember that there are only limited reasons why a nonresident district can deny an OE application
  - Application can be denied for: space not available in the regular or special education program, expulsion, habitual truancy (in limited circumstances)
  - Application cannot be denied for: a student's lengthy behavior referral history or if the student struggles academically
- Similarly, once a student is accepted for OE, there are only very limited reasons a district can terminate a student's open enrollment

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Considerations Before Expanding OE Seats, cont.

Special education considerations:

- Districts are required to designate the number of regular education and special education seats available
  - Special education spaces are for students with disabilities under the IDEA who require an IEP.
  - Students with disabilities with a Section 504 plan who require reasonable accommodations in the school setting are eligible for a regular education seat
- Students with special education needs may not be denied open enrollment solely on the basis of their disability or category of their disability – denial can only occur if there is not space in the school, program, class, or grade
- The district would also be required to evaluate a student under the IDEA if the open enrollment student in a regular education seat is later identified as possibility being eligible for services or if an evaluation request is received

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To Make OE Seat Determinations – Start with Your Policy

- Start by reviewing your Open Enrollment ("OE") board policy
  - Ensure policy complies with state law
  - Ensure district follows its policy with making OE seat determinations
- If you want to adjust the number of open enrollment seats, you must do so according to your district's policy.
- Any changes to policy must be made prior to the start of the regular application period (first Monday in February)

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OE Policy – Statutory Requirements

- State statute requires all districts to have an OE policy that includes the following:
  - Reapplication requirements (if any)
  - Acceptance and rejection criteria
  - A statement of the preference required
  - District's eligible for Special Transfer Aid must include the limitation on transfers in or out of the district
  - Whether the resident district will provide transportation for open enrollment students

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OE Policy – DPI Regulation Requirements

Wis. Wis. Admin. Code PI § 36.04(2) requires an OE policy to include:

- Whether the district will guarantee the approval of OE applications for currently-attending students, or their siblings
- The method of random selection to be used when there are more applications than available seats
- A procedure to establish a waiting list (if a waiting list is used)
- A habitual truant policy
- A procedure to receive and date applications received during the regular application period
- The criteria that will be used to determine the number of available spaces in each grade
  - Per the regulations, criteria may include the availability of space in the schools, programs, classes, or grades (and state law provides more criteria options)
  - But the number of spaces must be aggregated by grade for the purpose of determining spaces at the January board meeting

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Possible Criteria to Include in OE Policy

State law lists the statutorily acceptable criteria that districts may choose to include in their individual policy:

1. Available space in the schools, programs, classes or grades

- When considering changing the number of available OE seats, start with your district's policy to see what the board can consider
- Decisions regarding changing OE seats must be made soon – boards must set the number of regular and special education seats at the January board meeting
- To determine the number of available seats, the board can consider: class size limits, pupil-teacher ratios, and enrollment projections
- To determine how many spaces are already occupied (i.e. not available for OE), the board can consider:
  - Pupils attending the district who pay tuition
  - Pupils and their siblings who already attending the district via open enrollment
  - Pupils who have submitted open enrollment applications and who are currently attending an underlying elementary school district

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Possible Criteria to Include in OE Policy, cont.

2. If the student has been expelled during the current or prior 2 school years, or whether a disciplinary proceeding is pending, for conduct specified under Wis. Stat. § 118.51(5)(a)(2)
3. Whether the nonresident district determined the student was habitually truant from the nonresident district
4. Whether the special education or related services in the student's IEP are available in the nonresident district, or whether there is space available to provide those services (e.g., class size limits, pupil-teacher ratios, enrollment projections)
5. Whether the student has been referred to or identified by the resident district as a child in need of special education or related services but has not yet been evaluated by the resident district's IEP team

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Timeline of Open Enrollment Process

- January – Board reviews its space available for OE based on projected enrollment for the upcoming school year and sets OE seats (regular education and special education) at January board meeting
- First Monday in February through the last weekday in April – Parents can apply for open enrollment
  - Exception: Students who meet certain statutory criteria can apply any time under the alternative application procedure
- May 1 – Nonresident districts can begin accepting/rejecting applications
  - If more applications are received than space is available in a grade/program, district must determine which to accept, based on:
    - First, if included in your policy, preference may be given to students and their siblings who are already attending, and to students attending an underlying elementary district
    - Second, the remaining applications are accepted on a random basis (any students on a waiting list are also accepted on a random basis)

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Timeline of Open Enrollment Process, cont.

- First Friday following the first Monday in May – deadline for resident district to send to the nonresident district (1) a copy of the student's IEP (if applicable) and (2) records related to any expulsions or pending disciplinary proceedings involving the student
- First Friday following the first Monday in June – Deadline for nonresident district to notify applicant in writing whether the OE application was accepted
- Second Friday following the first Monday in June – Deadline for resident district to notify student and nonresident district of the resident district's denial of the student's enrollment in a nonresident district
- Last Friday in June – if a nonresident district accepts a student's OE application, this is the deadline for the student's parent to notify the nonresident district of the student's intent to attend the nonresident district
  - Students accepted from a waiting list have 10 days to accept and notify the nonresident district
- July 7 – Nonresident district must report the name of any student accepted for open enrollment to the student's resident district

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Open Enrollment Appeals

- Parents can appeal rejection of an open enrollment application to DPI
- 30 day window to appeal from receipt of rejection notice
- State law requires that the district's denial of OE shall be affirmed unless it is found to be arbitrary and unreasonable
  - The burden is on the appealing parent to prove the district's action was arbitrary and unreasonable
- Previous cases and DPI open enrollment decisions show that the standard applied on appeal is that a decision is "arbitrary" if it does not have a rational basis or is the result of an "unconsidered, willful, and irrational choice of conduct."

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Scenario 2: COVID-19 Workplace Safety Grievances

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Scenario 2: COVID-19 Workplace Safety Grievances

Your district just had a workplace safety grievance filed related to COVID-19 concerns. The grievance was filed by your local union president, who states that the grievance is a "class action" filed by all teachers in your district. The grievants believe your district's current in-person instruction model presents a workplace safety concern for all staff. They also state the district's supply of PPE and CDC-approved cleaning supplies is not adequate. The requested remedy is that the district move to a virtual instruction model immediately until Wisconsin's COVID-19 rates are lower, that the district work with the union to determine when it is safe to return to in-person instruction, and that the indicated PPE and other supplies be replenished.

How should you proceed with this workplace safety grievance?

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Where are these workplace safety grievances coming from?

- The global pandemic and rising COVID-19 cases in Wisconsin mean school districts are having to make difficult decisions on a daily basis regarding health and safety measures, which includes difficult decisions related to instructional delivery models
- Districts are having to pivot between virtual, hybrid, and in-person instructional models based on local data and advice from local health officials
- In response, school districts are seeing an increase in COVID-19-related workplace safety grievances being filed across the state
- Due to the similar nature of the various workplace safety grievances and the requested remedies, there is reason to believe that there is a coordinated effort going on to help and encourage local staff to file these types of grievances statewide

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The "Standard" COVID-19 Workplace Safety Grievance

- What is the goal of these grievances?
  - The requested remedy often demands districts move exclusively to a virtual instructional model.
- Can employees demand, via a workplace safety grievance, that school districts only utilize an in-person instructional model?
  - Short answer is no.
  - While this is untested territory, there is a strong argument that these issues are not grievable.

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Why is in-person learning not a grievable workplace safety concern?

- There is a conflict between the grievance procedure statute (Wis. Stat. § 66.0509(1m)) and the statutes governing school districts and their boards
  - Wis. Stat. § 66.0509(1m) only allows for a grievance over a specific workplace safety concern.
  - In contrast, Chapters 118 and 120 of the Wisconsin Statutes give school boards broad powers and authority to manage the affairs of a school district and do all things reasonable to promote the cause of education.
- The remedy requested in these grievances (changing the instructional model decided upon by the board) would usurp the power and authority vested in the school board by state statute
- The conflict arises by allowing a decision of an independent hearing officer ("IHO"), through the second step of the grievance procedure, to override a decision of the school board that the board, by statute, has the power and authority to make.

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Additional Conflicts

- Many grievances request as part of the remedy that the union have a "seat at the table" for decisions regarding virtual vs in-person instruction
- This presents a conflict with the limits that have been placed on collective bargaining under Wis. Stat. § 111.70
- Formalizing employee input on learning models by virtue of a grievance decision may run afoul of Wis. Stat. 111.70's prohibition on collective bargaining on matters other than total base wages
- Instead, find ways to informally solicit employee input and keep employees informed of district updates

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How to Handle a COVID-19 Workplace Safety Grievance?

- School districts should take a firm stance on the grievability of these types of workplace safety concerns
- Consider refusing to process the grievance because the requested remedy (virtual instruction) is incapable of being implemented
- Instead, try to resolve any legitimate concerns outside of the grievance process.
  - Ex: Concerns regarding PPE shortages can likely be resolved.
- Recognize that this appears to be a coordinated tactic around the state
  - How you handle these grievance in your district can impact other districts.
  - Important to reach out to your colleagues at other districts
  - Encourage your legal counsel to contact von Briesen to ensure a coordinated response

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Proactively Review Your Grievance Procedure

- Grievance procedure must comply with Wis. Stat. § 66.0509(1m)
  - Must address employee terminations, discipline, and workplace safety
  - Must include an IHO hearing
  - Appeal to the school board must be the final step
- Review your definitions section
  - Make sure you clearly indicate who can file a grievance
  - Limit to a single employee – not union leadership, no "class action"
- Define what constitutes grievable discipline, termination, and workplace safety issues
  - Explicitly list what employment actions are considered "discipline" or a "termination" and which are not
  - Counseling sessions and performance improvement plans should be clearly excluded from the definition of discipline
  - Terminations should exclude layoffs
  - Define the safety standards for evaluating workplace safety violations

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Proactively Review Your Grievance Procedure

- Review how IHO authority is defined in your grievance procedure
- Consider how you want an IHO to preside over a hearing
  - The IHO's ability to dismiss untimely or procedurally defective grievances
  - What standard of review the IHO shall apply to the various types of grievances
  - Whether the rules of evidence will be strictly followed
  - Whether a hearing must occur, or whether the IHO can accept written submissions in lieu of a hearing
  - Whether the hearing must be closed or open to the public
  - Whether the direct testimony of students will be permitted
- Identify who will select the IHO

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Proactively Review Your Grievance Procedure

- Considerations for Board appeal step:
  - Per statute, must be last level of grievance procedure
  - Limit the board's review to the record established before the IHO – do not allow for a new hearing before the board
  - Require the board appeal be held in closed session
- Consider including a cost-sharing requirement for the IHO step
  - Require employee and employer to split the cost of the IHO by each paying 50%
  - Helps minimize the number of grievants who appeal all the way through the grievance procedure, as many may not feel strongly enough to appeal if they have to share the cost.

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Scenario 3: EEOC Considerations during COVID

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Scenario 3: EEOC Considerations during COVID

- The EEOC enforces workplace anti-discrimination laws, including the Americans with Disabilities Act (ADA) and the Rehabilitation Act (which include the requirement for reasonable accommodation and non-discrimination based on disability, and rules about employer medical examinations and inquiries), Title VII of the Civil Rights Act (which prohibits discrimination based on race, color, national origin, religion, and sex, including pregnancy), the Age Discrimination in Employment Act (which prohibits discrimination based on age, 40 or older), and the Genetic Information Nondiscrimination Act.
- The EEO laws, including the ADA and Rehabilitation Act, continue to apply during the time of the COVID-19 pandemic, but they do not interfere with or prevent employers from following the guidelines and suggestions made by the CDC or state/local public health authorities about steps employers should take regarding COVID-19.

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EEOC Considerations during COVID

- Disability Related Inquires and Medical Exams
  - What may an employer do, given the serious nature of COVID-19?
    - Take an employees' body temperature
    - Conduct COVID-19 Testing
    - Establish Protocols specific to COVID-19
    - Request Medical Information
  - During a pandemic, ADA-covered employers may ask employees if they're experiencing COVID-19 like symptoms who call in sick in order to protect the workforce during the COVID-19 pandemic
    - Employers must maintain all information about employee illness as a confidential medical record in compliance with the ADA.

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EEOC Considerations during COVID (cont.)

- What if an employee has symptoms of COVID-19?
- Can I ask my employees if they have been tested for COVID-19?
- Can I ask my employees if a family member has COVID-19 or symptoms?
- What happens if I have a non-compliant employee, such as an employee who refuses to have their temperature taken or answer pertinent questions about symptoms, etc.?

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Scenario 4: Confidentiality

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Scenario 4: Confidentiality

- With limited exceptions, the ADA requires employers to keep confidential any medical information they learn about any applicant or employee. Medical information includes not only a diagnosis or treatments, but also the fact that an individual has requested or is receiving a reasonable accommodation.
- If an employer comes to learn that an employee has COVID-19, the employer may disclose that information to a local/public health agency
- Employers should determine whom in the organization needs to know the identity of the employee who has tested positive for COVID-19
  - All employer officials who are designated as needing to know the identity of an employee should be specifically instructed that they must maintain the confidentiality of this information.

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Scenario 5: Protections for LGBTQ Employees

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Scenario 5: Protections for LGBTQ Employees

- On June 15, 2020, the Supreme Court of the United States ruled on a much anticipated landmark decision related to discrimination based on sexual orientation and transgender status.
- Historically, the Civil Rights Act of 1964, Title VII, has made it "unlawful … for an employer to fail or refuse to hire or to discharge any individual, or otherwise, to discrimination against any individual … because of such individual's race, color, religion, sex, or national origin."
- The debate presented in this matter primarily centered on the intent of Congress and the inclusion of sexual orientation or transgender status as it relates to the interpretation of the term "sex" under the Act.

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Protections for LGBTQ Employees (Cont.)

- Discrimination today, according to the Court, means what it roughly meant in 1964 when the Act was enacted: 1) to make a difference in treatment or favor (of one as compared with others); 2) to treat an individual worse than others who are similarly situated and; 3) as it relates to "disparate treatment", the difference in treatment based on sex must be intentional. Therefore, an employer who intentionally treats a person worse because of sex – such as by firing the person for actions or attributes it would tolerate in an individual of another sex — discriminates against that person in violation of Title VII.
- It is not a defense for an employer to say it discriminates equally against both men and women. Title VII protects individuals of both sexes from discrimination. In other words, it does not matter if the employer treated women as a group the same when compared to men as a group.
- Even if the employer is willing to subject all male and female homosexual or transgender employees to the same rule, it violates the law based on the individual's sex.
- An employer who discriminates against homosexual or transgender employees necessarily and intentionally applies sex-based rules, regardless of the intent of the employer.

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Protections for LGBTQ Employees (Cont.)

- Title VII The law protects employees from discrimination in hiring, firing, promotions, training, and benefits. It also protects employees from harassment and retaliation based on one of the listed characteristics or participating in a proceeding that addresses discrimination.
  - Are LGBTQ employees eligible for the same benefits to which other employees are eligible?
  - Does the law require school districts to recognize the marriages of gay employees?
  - Are school districts required to allow transgender employees to use bathrooms of the gender with which they identify?
  - Should school districts change policies so that they comply with the Supreme Court ruling?

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Protections for LGBTQ Employees (Cont.)

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  - Are school districts required to allow transgender employees to use bathrooms of the gender with which they identify?
  - Should school districts change policies so that they comply with the Supreme Court ruling?
  - What are some recommendations going forward for the school district to ensure a nondiscriminatory workplace for LGBTQ employees?

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Questions?

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