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News For School Clients

Enforcing the New Sex Education Law

On March 11, 2010, Wisconsin Act 134, which substantially changed Wis. Stat. § 118.019, became law. The Act's purpose is "to encourage all school boards to ensure that pupils in their districts are provided age-appropriate instruction in human growth and development. The instruction should support and enhance the communication between pupils and their parents and provide pupils with the knowledge, skills, and support necessary to make healthy decisions now and throughout their lifetimes and to make responsible decisions about sexual behavior."

Wis. Stat. § 118.019 still allows each school board the opportunity to decide whether to provide an instructional program in human growth and development to pupils. However, if the school board chooses to offer such a program, the list of subject areas that must be included in the curriculum has been expanded. Now, the instructional program must address: (1) the importance of communication about sexuality and decision making about sexual behavior between the pupil and the pupil's parents, guardians, or other family members; (2) reproductive and sexual anatomy and physiology; (3) puberty, pregnancy, parenting, body image, and gender stereotypes; (4) the skills needed to make responsible decisions about sexuality and sexual behavior throughout the pupil's life; (5) the benefits of and reasons for abstaining from sexual activity; (6) the health benefits, side effects and proper use of contraceptives and barrier methods approved

by the federal food and drug administration to prevent pregnancy and sexually transmitted infections; (7) methods for developing healthy life skills; (8) how alcohol and drug use affect responsible decision making; and (9) the impact of media and one's peers on thoughts, feelings and behaviors. The program must also promote self-esteem and positive interpersonal skills with an emphasis on healthy relationships; identify counseling, medical and legal resources for survivors of sexual abuse and assault; and when age-appropriate, instruct pupils about Wisconsin's criminal penalties for engaging in sexual activities involving a child, as well as the sex offender registration requirements under the law.

One new required subject area is causing a stir. Act 134 requires that each human growth and development program must address "the health benefits, side effects and proper use of contraceptives and barrier methods approved by the federal food and drug administration to prevent pregnancy and the barrier methods approved by the federal food and drug administration to prevent sexually transmitted infections." Because of this provision, the Juneau County District Attorney sent a letter to the five school districts in his jurisdiction outlining various concerns about the new law. He suggested that Wis. Stat. § 118.019, as amended, exposes teachers to criminal liability. He explained that Wis. Stat. § 948.40, which prohibits certain behavior that contributes to the delinquency of a child, would

be violated by a teacher who instructs a student age 16 or younger how to use contraceptives if the teacher knows that the child is engaging in sexual activity with another child or if the natural and probable consequences of the teacher's instruction causes the child to engage in sexual intercourse with another child. The District Attorney threatened that teachers could face criminal charges for providing instruction in a school board-approved human growth and development program. The District Attorney suggested that, depending upon the specific facts involved, a teacher could be charged with a misdemeanor or felony with maximum penalties ranging from 9 months in jail to up to 6 years in prison.

The Wisconsin Legislative Council issued a memo in response to the Juneau County District Attorney's concerns. The Council advised that a teacher, who provides instruction in human growth and development in the context of a school board approved program, which adhered to the requirements outlined in Wis. Stat. § 118.019, likely could not be successfully prosecuted for the crime of contributing to the delinquency of a minor.

The Council referenced the privilege available to public employees under Wis. Stat. § 939.45(3), which provides for a defense against criminal prosecution when an individual's conduct is privileged because the conduct is in good faith and is an apparently authorized and reasonable fulfillment of any duties of a public office. In light of this statute, if a District Attorney brought criminal charges against a public school teacher for instructing

students about the use of contraceptives as part of the curriculum in a school board-approved human growth and development program, the teacher would have a legitimate defense against such criminal prosecution in that the conduct was in good faith, authorized by the school board, and part of the reasonable fulfillment of his or her duties as a public school teacher. According to the Council, "if a teacher in good faith relies upon and acts in accordance with a program created by a legally constituted school board that in turn acted in good faith in accordance with a valid, constitutional legislative enactment, it is very likely that the teacher would have a successful defense to a prosecution for contributing to the delinquency of a child."

School boards must decide whether to offer a human growth and development program to students. For boards that decide to offer such a program, as a result of Act 134, there are many changes that must be made to the curriculum. In preparation for the 2010-2011 school year, school boards should be reviewing policies and convening the advisory committee of parents, teachers, administrators, pupils, health care professionals, clergy, and other school district residents, to review and develop the curriculum and to advise the school board. Because of the substantial changes required by Act 134, many school boards will have a difficult time deciding whether to offer such a program. However, the criminal prosecution of staff should not be a substantial factor considered by a school board deciding whether to offer such a program. The potential criminal repercussions of the new law appear to be exaggerated.

If you have any questions regarding this topic, please call any of the following members of the Lathrop & Clark LLP School, Municipal, Labor and Employment Law Team.

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