

Legal Update: Recent Wisconsin Public Records & Open Meetings Decisions, Drug-Free Schools, and Title II of the ADA



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

PUBLIC RECORDS



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Voces de la Frontera, Inc. v. Clarke

Voces de la Frontera (Voces) submitted a public records request to Milwaukee County Sheriff David Clarke Jr. seeking all immigration detainer forms (I-247 forms) that the Sheriff received from the United States Immigrations and Customs Enforcement since November 2014. The I-247 forms contained immigration-related information about certain individuals held at the Milwaukee County Jail. Voces then filed a petition for a writ of mandamus seeking to compel the Sheriff to produce the I-247 forms. The circuit court granted the writ and ordered the Sheriff to produce unredacted versions of the I-247 forms. The court of appeals affirmed. The Supreme Court reversed, holding that the I-247 forms were

Voces de la Frontera, Inc. v. Clarke, 2017 WI 16, 373 Wis. 2d 348, 891 N.W.2d 803



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Madison Teachers, Inc. v. Scott

At issue was whether the public interest that elections remain free from voter intimidation and coercion in this certification election was sufficient to outweigh the public interest in favor of openness of public records.

The Supreme Court reversed the decision of the circuit court that granted summary judgment to Madison Teachers, Inc. (MTI) on its claim that the public records law was violated by the Wisconsin Employment Relations Commission (WERC). WERC denied MTI's requests, made at various times during the 2015 certification elections, for names of Madison Metropolitan School District employees who had voted as of those dates based on the WERC chairman's determination that the public interest that elections remain free from voter intimidation and coercion outweighed the public interest. In reversing the circuit court, the Supreme Court held that the chairman lawfully performed the balancing test in concluding that the public interest in elections free from voter intimidation and coercion outweighed the public interest in favor of openness of public records.

Madison Teachers, Inc. v. Scott, 2018 WI 11, 379 Wis. 2d 439, 906 N.W.2d 436



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES**

| Collaborators in Risk Management |

April 11, 2019 - Risk Mitigation

Teague v. Schimel

The policy and practice of the Wisconsin Department of Justice (DOJ) of creating and disseminating criminal history reports in a manner that sometimes indicate that some individuals who are innocent of any criminal activity have a criminal activity violates Petitioners' constitutional rights.

Petitioners challenged the DOJ's policy and practice of creating and disseminating criminal history reports that wrongly imply that certain individuals have a criminal activity. The circuit court granted judgment in favor of the DOJ. Petitioners argued that Wis. Stat. 19.70 requires the DOJ to correct or supplement its record production when it inaccurately ascribes a criminal history to an innocent person and that the failure to correct inaccuracies violates their right to procedural and substantive due process and their equal protection rights. The Supreme Court reversed and remanded, holding that the DOJ's criminal history search reports violate Petitioners' rights, and Petitioners are to be afforded prospective relief sufficient to protect those rights.

Teague v. Schimel, 2017 WI 56, 375 Wis. 2d 458, 896 N.W.2d 286



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

State ex rel. Flynn v. Kemper Ctr., Inc.

In *State of Wisconsin ex rel. Annette Flynn v. Kemper Center, Inc.* (2017AP1897), the Court of Appeals District II held that private corporation Kemper Center, Inc. is not a “quasi-governmental corporation” subject to the Wisconsin Public Records Law.

Kemper Center is a private corporation that leases property from Kenosha County and operates and maintains the property as a public park. Kenosha County provides some grants to Kemper Center, and other revenues come from rentals and user fees charged by Kemper Center.

Kenosha resident Annette Flynn filed a public records request for certain disclosures from Kemper Center. The issue before the court was whether Kemper Center is a “quasi-governmental corporation” under the definition of “authority” in Wis. Stat. §19.32(1), requiring it to disclose records to Flynn.

Citing factors from a previous Supreme Court decision that determined Beaver Dam Area Economic Development Corporation was a quasi-governmental corporation, the appeals court held that Kemper Center is not a quasi-governmental corporation because:

- Despite receiving grants from the County, Kemper Center is mostly funded by sources other than taxpayer dollars.
- While Kemper Center’s operation of the park does provide a public benefit, it does not provide an exclusively governmental function.
- Kemper Center does not have a public appearance of being governmental in nature. The court determined it is clear that the County owns the park, but Kemper Center, Inc.’s operation of the park does not appear governmental.
- The County does not have a significant degree of control over the Kemper Center operations

State ex rel. Flynn v. Kemper Ctr., Inc., 2019 WI App 6



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES**

| Collaborators in Risk Management |

April 11, 2019 - Risk Mitigation

Media Placement Servs., Inc. v. Wis. Dep't of Transp.

Media Placement is a Louisiana-based company interested in obtaining motor vehicle accident reports from the Wisconsin Department of Transportation (DOT). Media Placement made a request under Wisconsin's public records law to access high volumes of individual accident reports using DOT's online database without paying for the reports. In *Media Placement Services, Inc. v. Wisconsin Department of Transportation*, the Wisconsin Court of Appeals concluded that Media Placement is not entitled to free access to the DOT's database because Wisconsin law allows the DOT to charge access fees for certain records and the right to access records does not extend to the right to access databases.

Media Placement Servs., Inc. v. Wis. Dep't of Transp., 2018 WI App 34, 382 Wis. 2d 191, 913 N.W.2d 224



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Hagen v. Bd. of Regents of the Univ. of Wis. Sys.

This case involved the applicability of Wis. Stat. § 19.356 to records pertaining to employee misconduct. The requester, in his capacity as a reporter for a newspaper at the University of Wisconsin-Oshkosh, sought various personnel records pertaining to Hagen, a business professor at the university. The university determined that Hagen was entitled to statutorily-required notice under Wis. Stat. § 19.356(2), because some of the records contained information related to investigations of employee misconduct and related employee discipline. After Hagen received notice of the university's intent to release the records, Hagen filed his notice of intent to seek judicial review of the university's decision to release the records. Hagen then initiated this lawsuit under Wis. Stat. § 19.356(3), seeking to restrain the release of the records. The circuit court denied Hagen's motion under the public records balancing test, finding that the strong public interest in knowing about public employee misconduct outweighed Hagen's reputational concerns, and ordered the disclosure of the records. Hagen has now appealed the circuit court's order, and the case is currently being briefed in the court of appeals.

Hagen v. Bd. of Regents of the Univ. of Wis. Sys., 2018 WI App 43, 383 Wis. 2d 567, 916 N.W.2d 198



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

OPEN MEETINGS



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

State ex rel. Zecchino v. Dane County

- In [State ex rel. Zecchino v. Dane County \(February 27, 2018\)](#), the Court of Appeals (District IV) considered an Open Meetings Act claim based on a series of email messages between Dane County Board Supervisor Paul Rusk and no more than eight of his fellow supervisors prior to a controversial vote on the renewal of a billboard lease. The plaintiffs argued that the emails suggested the effort to assemble a walking quorum in violation of the Open Meetings Act, such that he should be allowed discovery to ascertain the full extent of informal communications.
- The Court of Appeals dismissed the complaint for failure to state a claim. The Court first determined that the emails Zecchino already had did not indicate a “tacit agreement” between the defendants to vote against the lease. One of the emails dealt with a scheduling matter, while others asked supervisors for their opinion or expressed Rusk’s personal position. The Court also found that because the quorum of the Board on the day of the vote was eighteen, Rusk’s communications with eight supervisors could not establish a walking quorum. The court confronted the walking quorum prohibition in the context of email messages. Applying the walking quorum concept in light of newer technologies will raise new issues for Wisconsin governmental bodies. Today, members of governmental bodies can communicate using a wide variety of real-time communications platforms. Along with email, public officials can chat through tweets, Gchat, Yik Yak, Snapchat, Facebook, Instagram, Viber, Skype, HipChat, FireChat, Cryptocat, What’s App, and, of course, text messaging.

State ex rel. Zecchino v. Dane County, 2018 WI App 19, 380 Wis. 2d 453, 909 N.W.2d 203



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES**

| Collaborators in Risk Management |

April 11, 2019 - Risk Mitigation

Drug-Free Schools & Communities Act Compliance:

Lessons from Research & Recent Events



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Agenda

- DFSCA History/ Current Events
- Study Design & Results
- Recommendations for Improving Compliance



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

History

- War on Drugs: 1970s-1990s
- Anti-Drug Abuse Act of 1986
 - Drug-Free Schools and Communities Act
- 1989 National Drug Control Strategy
- 1989 DFSCA Amendments
 - Signed by President Bush, Dec. 12, 1989
 - Amended 1965 Higher Education Act
 - 34 CFR Part 86 - “EDGAR 86”



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Legal Mandates: The Big Three

- §86.100
 1. Implement AOD Prevention Program
 2. Deliver Annual Notification
 - Content
 - Students/Employees
 - Annual distribution
 3. Perform Biennial Review
 - Enforce sanctions consistently
 - Evaluate program effectiveness



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Drug-Free Schools & Communities Act

- Implemented by 34 CFR Part 86 (Part 86)
 - Requires institutions to certify that they have developed and implemented a drug and alcohol abuse education and prevention program (DAAPP) – completed through the PPA
 - The program must be designed to prevent the unlawful possession, use, and distribution of drugs and alcohol on campus and at recognized events and activities
 - As part of the program, institutions must distribute certain information to students and employees annually
 - Institutions must do a biennial review of the program



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Drug-Free Schools & Communities Act

- Annual disclosure
 - Must share information with current students and employees
 - 34 CFR § 86.100 outlines the information that must be included:
 - Standards of conduct prohibiting the possession, use, and distribution of drugs and alcohol
 - Possible sanctions for violations of Federal, state, and local drug and alcohol laws as well as sanctions for violation of institutional policies
 - Health risks associated with the use of drugs and alcohol
 - Information on counseling, rehabilitation, and treatment programs
 - A clear statement that the school will impose sanctions on students and employees who violate drug and alcohol laws, ordinances, and/or institutional policies



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

Drug-Free Schools & Communities Act

- Biennial Review
 - Objectives are:
 - To determine the effectiveness of your drug and alcohol abuse prevention program
 - To ensure consistent enforcement of applicable laws, ordinances, and institutional policies against violators
 - The biennial review report and supporting documents must be maintained by the school and made available to the Department upon request

Special Note* The DFSCA requirements are stackable/cumulative i.e., if an institution fails to develop and implement a substantive DAAPP, the institution CANNOT comply with the other requirements



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

Penn State Investigation

- Nearly \$2.4M in Clery Act fines
- \$27,500 DFSCA violations
 - Failed to distribute AN for 14 years
 - All new students, including summer only students
 - Combined with Clery ASR, erroneously
 - AN lacked legal sanctions & health risks
- *“Penn State did not conduct a single biennial review that meets the requirements of the regulations nor did it publish an accurate and complete report of findings for each review.”*



Seek Training

- Handbook: Complying with the Drug-Free Schools and Campuses Regulations
- Focus on the Big Three
 - Write complete annual notification
 - Distribute notification correctly
 - Conduct biennial review
 - Document findings
 - Implement AOD programs



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES

| *Collaborators in Risk Management* |

Collect (More) Data

- 18 colleges provided some disciplinary data
 - 7 colleges reported 0 AOD incidents*
- Health surveys
 - Core Institute Alcohol & Other Drug Survey
 - National College Health Assessment (NCHA)

*From Michigan survey



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Be Transparent

- Not required
- Publish Biennial Review online
- Provide updated copies to:
 - FOIA Coordinator
 - Financial Aid Director



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES

| *Collaborators in Risk Management* |

Move Beyond Compliance

- Be creative
- Why invest in DFSCA?
 - Federal Law
 - Penalties: fines & loss of funding
 - Health Promotion
 - High alcohol and drug use rates
 - Crime Prevention
 - Title IX + DFSCA



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES

| *Collaborators in Risk Management* |

From Penn State Letter

“Failure to comply with the DFSCA’s DAAPP requirements deprives students and employees of important information regarding the educational, disciplinary, health, and legal consequences of illegal drug use and alcohol abuse. Failure to comply with the biennial review requirements also deprives the institution of important information about the effectiveness of its own drug and alcohol programs. Such failures may contribute to increased drug and alcohol abuse as well as an increase in drug and alcohol-related violent crime.”



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES

| Collaborators in Risk Management |

Title II of the ADA



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Title II

- Title II protects persons with disabilities by prohibiting discrimination by public entities.
- No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.
- Different but similar to Section 504 of the Rehabilitation Act.



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Who is a qualified individual with a disability?

- An individual with a physical or mental impairment that substantially limits a major life activity; has a record of such an impairment; or is regarded as having such an impairment.
- Determination is made on a case by case basis.
- Title II and Section 504 protect all persons with disabilities from discrimination, including parents, guardians, students and employees (Title I as also applies).



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Student Accommodations

- Title II requires a public college to provide students with disabilities with appropriate academic adjustments and auxiliary aids and services that are necessary to afford the individual an equal opportunity to participate in the program.
 - Extra time to take a test.
 - Notetaker
 - Interpreter
 - Reader
 - Specialized equipment



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Harassment Prevention

- Colleges are required to respond to disability-based harassment that is sufficiently serious to deny or limit a student's ability to participate in or benefit from the recipient's education program and activities.
- If the College knew or should have known about possible disability harassment, it must investigate what occurred.
- If the investigation determines harassment created a hostile environment, the College must take prompt and effective steps to end the harassment and prevent recurrence.



DISTRICTS MUTUAL INSURANCE & RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Free Speech Concerns

- Offensive speech is protected speech.
- Speech which constitutes a direct threat is not protected speech.
- Curbing harassment could implicate an infringement on free speech. This does not excuse the College from addressing the matter.



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Direct Threats

- Title II does not require a public entity to permit an individual to participate in or benefit from services, programs, or activities when the individual poses a direct threat to the safety of others.
 - Facts and circumstances, based upon reasonable judgment and current medical knowledge.
 - Legal counsel should be involved in such discussions.



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Service Dogs v. Comfort Animals

- Service animals – only dogs and miniature horses, where reasonable, are currently recognized under Title II of the ADA.
 - Must be trained to do work or perform tasks for people with disabilities.
 - Service animals are not pets.
- Generally, a College must permit a service animal to accompany people with disabilities in all areas where members of the public are allowed to go.
 - Sterile environment exception.



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Service Animals v. Comfort Animals

- Service animals must be harnessed, leashed, or tethered, unless it interferes with the animal's work or the individual's disability.
- The service animal must be under control.
- Generally, service animal cannot be requested to leave the premises.
 - How to address allergies or others' fear of dogs?
 - Housebroken?
 - Out of control?



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Service Animal v. Comfort Animal

- Questions a College can ask:
 - Is the animal a service animal required because of a disability?
 - What work or task has the animal been trained to perform?
- Questions a College cannot ask:
 - What is your disability? Can I have documentation?
 - Differentiate a Title I accommodation and the interactive process.
 - Please provide me with documentation regarding the dog's training.
 - Please show me how the dog will perform its work or task.



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation

Public Accommodation for Comfort Animal

- Any type of animal can be a comfort animal.
- Title II does not provide for emotional support, therapy, or comfort animals.
- What if the person has falsely labeled the animal?
 - Mail order vests.
- Employee accommodation concerns.
 - Is it a reasonable accommodation?
 - What essential job functions will be performed and how does the animal assist?
 - Is it the only effective accommodation?



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Website Accessibility

- Government websites must be accessible for individuals with disabilities.
- Common problems
 - Images without text equivalents
 - Accessible format for documents
 - Specifying colors and font sizes
 - Videos and multimedia not accessible
- Reminder of the Wave tool:
<http://wave.webaim.org>



DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

Questions?



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES**

| *Collaborators in Risk Management* |

Michael Best & Friedrich LLP
100 E Wisconsin Ave, Ste 3300
Milwaukee, WI 53202



Kevin Terry
kterry@michaelbest.com
414-270-2734



**DISTRICTS MUTUAL INSURANCE
& RISK MANAGEMENT SERVICES** | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation



Thank you!



DISTRICTS MUTUAL INSURANCE & RISK MANAGEMENT SERVICES | *Collaborators in Risk Management* |

April 11, 2019 - Risk Mitigation