



# Legal Issues Impacting Student Travel

---



Presented by

Jeff Ment

# What Issues Are Impacting Student Travel Today?

- Waivers and Minors
- Terms and Conditions
- Transgender Students and Travel

# WAIVERS AND MINORS

---

# What is a Waiver

- A Waiver is an Exculpatory Contract
  - This is a contract that seeks to relieve one party of liability if damages are caused.
- Waivers are extensively used in the travel industry.



# Is a Waiver Signed by a Parent Enforceable

- Kirton v. Fields (Florida 2008)
- Facts: Bobby Jones and Bette Jones were the divorced parents of Christopher Jones. Bobby Jones, without the knowledge of Bette Jones took Christopher to a motor sports park to ride his ATV. Bobby signed a release and waiver of liability on behalf of Christopher. While attempting a jump, Christopher crashed and was killed. Christopher's estate brought a wrongful death claim against the motorsports park and its owners.

# Is a Waiver Signed by a Parent Enforceable

- Kirton v. Fields (Florida 2008)

Issue:

Is a pre-injury release executed by a parent on behalf of minor child that binds a minors' estate and releases an activity provider from liability enforceable?

Reasoning and Holding:

While parents have a fundamental right in child rearing decision, that right cannot extend to matters where the child's welfare is not being protected. In the pre-injury waiver, the parent is protecting not the child but the activity provider and therefore the waiver is unenforceable.

# Is a Waiver Signed by a Parent Enforceable

- In Re the Complaint of Royal Caribbean Cruises  
(Florida 2006)

- Facts: Keith Howard and his son were guests on a RCCL cruise. As part of the cruise activities, they decided to participate in a guided wave runner tour of near Coco Cay, Bahamas. Keith Howard signed a pre-injury release on behalf of his son. During the course of the wave runner tour, the wave runner crashed into an island and both father and son were injured.

# Is a Waiver Signed by a Parent Enforceable

- In Re the Complaint of Royal Caribbean Cruises (Florida 2006)
- Issue: Did the RCCL release executed by the father on behalf of his son exonerate RCCL from liability for the son's injury?
- Reasoning and Holding:
  - While a release executed by a parent on behalf of a minor is enforceable for non-profit, school, community and volunteer events, a release of liability run by a for-profit business is unenforceable.

# Is a Waiver Signed by a Parent Enforceable

- Kirton and Fields and In Re RCCL were not alone in finding parent signed waivers unenforceable:
- West Virginia: Parent could not indemnify on behalf of minor child who died in river rafting accident. (Johnson v. New River Scenic Whitewater Tours, Inc. 2004)
- Illinois: A parental preinjury waiver was unenforceable where a child was injured while horseback riding. (Meyer v. Naperville Manner Inc.)
- New Jersey: A parental preinjury waiver was unenforceable where a child was injured while skateboarding. (Hojnowski v. Vans Skate Park)

# Is a Waiver Signed by a Parent Enforceable

- Kirton and Fields and In Re RCCL were not alone in finding parent signed waivers unenforceable:
- Texas: Giving parents power to waive a child's cause of action is against public policy. (Munoz v. Il Jaz, Inc.)
- Utah: Parent- signed waiver was unenforceable for injuries of a child falling off a horse at a commercial business. (Hawkins v. Peart)
- Washington: Exculpatory agreement signed by a parent was unenforceable when a child was injured in a ski school. (Scott v. Pac W. Mountain)

# What is Happening in These Cases?

- The legal standard for children is Best Interest of the Child
- Parents, through the constitution, have a fundamental right in the rearing of their children
- However, this right is not unlimited
- Public Policy and Parens Patriae
  - The state is the legal protector of citizens that are unable to protect themselves.
- Courts that find waivers unenforceable do so as Parens Patriae because the court reasons that when a parent signs pre-injury waivers they are no longer acting in the best interest of their children.

# State Statues are Changing the Landscape



# What About State Statutes?

- Florida Statutes Annotated 744.301
- Enacted after Kirton v. Fields
- Enforces waivers for “Inherent Risks”
- “inherent risk” means those dangers or conditions, known or unknown, which are characteristic of, intrinsic to, or an integral part of the activity and which are not eliminated even if the activity provider acts with due care in a reasonably prudent manner.

# What About State Statutes?

- Florida Statutes Annotated 744.301
- The term includes, but is not limited to:
  - 1. The failure by the activity provider to warn the natural guardian or minor child of an inherent risk; and
  - 2. The risk that the minor child or another participant in the activity may act in a negligent or intentional manner and contribute to the injury or death of the minor child. A participant does not include the activity provider or its owners, affiliates, employees, or agents.

# What About State Statutes?

- Florida Statutes Annotated 744.301
  - NOTICE TO THE MINOR CHILD'S NATURAL GUARDIAN
- READ THIS FORM COMPLETELY AND CAREFULLY. YOU ARE AGREEING TO LET YOUR MINOR CHILD ENGAGE IN A POTENTIALLY DANGEROUS ACTIVITY. YOU ARE AGREEING THAT, EVEN IF (name of released party or parties) USES REASONABLE CARE IN PROVIDING THIS ACTIVITY, THERE IS A CHANCE YOUR CHILD MAY BE SERIOUSLY INJURED OR KILLED BY PARTICIPATING IN THIS ACTIVITY BECAUSE THERE ARE CERTAIN DANGERS INHERENT IN THE ACTIVITY WHICH CANNOT BE AVOIDED OR ELIMINATED. BY SIGNING THIS FORM YOU ARE GIVING UP YOUR CHILD'S RIGHT AND YOUR RIGHT TO RECOVER FROM (name of released party or parties) IN A LAWSUIT FOR ANY PERSONAL INJURY, INCLUDING DEATH, TO YOUR CHILD OR ANY PROPERTY DAMAGE THAT RESULTS FROM THE RISKS THAT ARE A NATURAL PART OF THE ACTIVITY. YOU HAVE THE RIGHT TO REFUSE TO SIGN THIS FORM, AND (name of released party or parties) HAS THE RIGHT TO REFUSE TO LET YOUR CHILD PARTICIPATE IF YOU DO NOT SIGN THIS FORM.

# What About State Statutes?

- Florida Statutes Annotated 744.301
- Complying with the Statute provides a rebuttable presumption that the waiver is valid.
- To rebut the presumption the claimant must:
  - Demonstrate the waiver does not comply with the statute.
  - Demonstrate that the injury or damage was not an inherent risk.

# What About State Statutes?

- Colorado Revised Statutes Annotated 13-22-107
- Enacted after Kirton v. Fields
- Came out of Cooper v. Aspen Skiing Company (2002)
  - Facts: Mother signed a pre-injury waiver on behalf of her son, a competitive ski racer. He was then injured suffering blindness. Citing Kirton v. Fields the court found the pre-injury waiver unenforceable as against public policy.

# What About State Statutes?

- Colorado Revised Statutes Annotated 13-22-107
- In response to Cooper v. Aspen
- Public, Private and Non-Profit Entities are protected.
- Parents have a fundamental right to make decisions for their children, including participating in activities that may involve risk
- As long as the decision is voluntary and informed it is enforceable.
- Does not permit waivers that include willful and wanton act or omission, a reckless act or omission, or a grossly negligent act or omission.

# States That Allow Parent Signed Waivers

- Minnesota
- Alabama
- Alaska
- Arizona (Only Equine)
- California
- Colorado
- Connecticut
- Delaware
- Florida (W/I Statute)
- Georgia
- Idaho
- Indiana
- Iowa
- Kansas
- Kentucky
- Maryland
- Massachusetts
- Missouri
- Nebraska
- Nevada
- New Hampshire
- New Mexico
- North Carolina
- North Dakota
- Ohio
- Oklahoma
- South Carolina
- South Dakota
- Vermont
- Wisconsin
- Wyoming

# States That DO NOT Allow Parent Signed Waivers

- Arkansas
- Hawaii
- Illinois
- Louisiana
- Maine
- Michigan
- Mississippi
- Montana
- New Jersey
- New York
- Oregon
- Pennsylvania
- Rhode Island
- Tennessee
- Texas
- Utah
- Virginia
- Washington
- West Virginia

- The Take-Away
  - Have Parents Sign a Waiver.
  - Make sure the waiver meets the requirements of state statute.
    - i.e. in Florida a waiver that covers more than inherent risks will be unenforceable.
  - The waiver cannot waive recklessness, gross negligence or willful misconduct.
  - Include a waiver of injury due to inherent risks.



# TERMS AND CONDITIONS

---

What's new and Different?

# Why has Arbitration Been the Choice?

- To reduce court caseloads and expense;
- To reduce parties' financial and time expenditures;
- To provide speedy settlement of disputes disruptive to the community and the parties' families;



# Why has Arbitration Been the Choice of Business?

- The Consumer cannot go to court;
- The business has the choice of who the arbitrator will be – most contracts tell consumers that the choice of arbitrator is at the discretion of the business;
- It avoids class action lawsuits;
- The business can choose a business friendly venue.

# So Why Not Use Arbitration?

- No Longer Simple: Now Discovery can make the process as arduous and long as regular litigation.
- Not that Cheap:
  - Filing Fees
  - Costs
  - Professional Fees of the Arbitrator
- Rarely Appealable:
  - Most Arbitrations are Binding
  - Only Appealable on a showing of fraud, bias or corrupt arbitrator
  - Cannot appeal on incorrect interpretation of the law.

# So Why Not Use Arbitration?

- Most Importantly Forced Arbitration fails to address the customers dissatisfaction and leads to bad reviews and bad word of mouth. – In the short term you may save money but in the long term you may lose.
  - Consumers obtain relief in only about 9% of cases.
  - Consumers are generally unaware what they are agreeing to.
  - Consumers are not allowed to choose.
  - Consumers feel they are entering with a deck stacked against them.

# Alternatives: Litigation or Voluntary Arbitration?

- The Benefit of a Judge
  - Judges know the law. They are less apt to make mistakes of law that effect the outcome of the case.
- The Appeal:
  - Unlike Arbitration decisions are appealable for mistakes of law.
- Joinder of Parties:
  - Parties can be compelled to participate.
- Many consumers will still choose arbitration if offered as voluntary and if they have a say in the arbitrator. So you still cut costs while having a consumer that feels they had a fair bite at the apple.

# Choice of Law

- Choice of law provisions are exactly what they sound like: they allow the parties (businesses or individuals) to a contract to select in advance which jurisdiction's law will apply to any dispute that may arise between them out of the contract.
- If a contract does not specify which law to apply a court will decide.
- Because many laws are left to the states under our constitutions contractual provisions may be interpreted very differently.



# Choice of Law: Why It Matters?

- Let's Look back at one of our previous waiver cases Johnson v. New River Scenic Whitewater Tours, Inc
- Facts: A 14 year old minor was on a whitewater trip provided by the defendant. Her father signed a waiver and indemnification agreement. During the trip the raft flipped over, and the minor was pinned to a rock and drowned.
- Law Applied: The court applied West Virginia law and found the waiver and indemnification agreement unenforceable.

# Choice of Law: Why It Matters?

- Let's Look back at one of our previous waiver cases  
Johnson v. New River Scenic Whitewater Tours, Inc
- Let's Assume:
  - Whitewater Tours is located in West Virginia
  - The plaintiff is also located in West Virginia
  - Whitewater Tours was Incorporated in the state of Delaware
  - In the contract Whitewater Tours adds a choice of law provision that the law to be applied is Delaware law.

# Choice of Law: Why It Matters?

- Let's Look back at one of our previous waiver cases: Johnson v. New River Scenic Whitewater Tours, Inc
- How Does Choosing Delaware Law change this case?
  - In Delaware, parent signed waivers are acceptable.
  - Therefore the waiver would be upheld and the tour operator would have been protected.
- To Be Enforceable: governing law provisions are presumptively enforceable as long as there is some relationship between the transaction and the jurisdiction whose law would govern or another reasonable basis for choosing the law for a particular jurisdiction.

# Choice of Venue

- Choice of Venue is a similar but distinct concept that often appears along with choice of law. With Choice of Venue, you agree in advance to submit yourself or your business to the jurisdiction of a particular venue (state, county within a state, or country) in the event that a dispute arises from the underlying contract.



# Choice of Venue: Why It Matters?

- Consider the Following:
  - First, the geographical convenience of litigating in a particular jurisdiction is often an important issue.
  - There are also some benefits to litigating in a forum that is well known to the party involved in litigation and its counsel. This is the so-called “home court advantage” where attorneys are more familiar with the local law and courts in the particular forum. One aspect of this advantage is knowing which courts tend to decide in favor of which issues. This tendency can be the result of the particular judge overseeing the proceeding or of the type of jury likely to be selected in that forum. For examples, is the forum pro- environment, pro- plaintiff, pro-business, etc.?
  - Additional consideration should be used as to whether federal or state courts are better able to handle a dispute in the most favorable manner and whether jurisdiction should be permissive or mandatory as discussed below.

# TRANSGENDER STUDENTS AND TRAVEL

A word cloud featuring various terms related to trans identity and experience. The word 'trans' is the largest and most central. Other prominent words include 'transgender', 'transfeminine', 'transmasculine', 'transsexual', 'trans history', 'transgender', 'transsexual', 'transgender', 'transsexual', 'transgender', 'transsexual'. Smaller words include 'bigender', 'genderqueer', 'pre-transition', 'female', 'mtf', 'boi', 'gender-neutral', 'grrl', 'ftm', 'agender', 'questioning', 'post-transition', 'androgynous', 'non-transitioning', 'woman', 'boy', 'girl', 'man', 'intersex', 'male', 'gi' (in a speech bubble). The colors are primarily shades of purple and pink.

# Identity Documents

- Consistent ID should be a priority in preparing for travel.
- Talk to parents of transgender youth to ensure they prepare in advance for travel.
- This process can be arduous as states have individual requirements for changing identity cards such as a drivers license.
- Currently Only 21% of trans people have updated identification.
- The federal government has made this process easier for obtaining a currently gendered passport.



# Passports

- The TSA guidelines only require that identifying paperwork matches the gender chosen on the flight manifesto.
- Minors may apply for a passport with current gender.
  - Must have had clinical treatment determined by a doctor to appropriate to facilitate gender transition.
  - A physicians certificate is required if prior documents do not reflect current gender.
  - Like all minors parental consent is required.

# Passports: Physician's Certification

- Letter must be from a licensed physician with whom the minor has a doctor-patient relationship and who is familiar with the minors transition-related treatment.

I, (physician's full name), (physician's medical license or certificate number), (issuing U.S. State/Foreign Country of medical license/certificate), (DEA Registration number or comparable foreign designation), am the physician of (name of patient), with whom I have a doctor/patient relationship and whom I have treated (or with whom I have a doctor/patient relationship and whose medical history I have reviewed and evaluated). (Name of patient) has had appropriate clinical treatment for gender transition to the new gender (specify new gender male or female). I declare under penalty of perjury under the laws of the United States that the forgoing is true and correct.

Signature

Typed Name

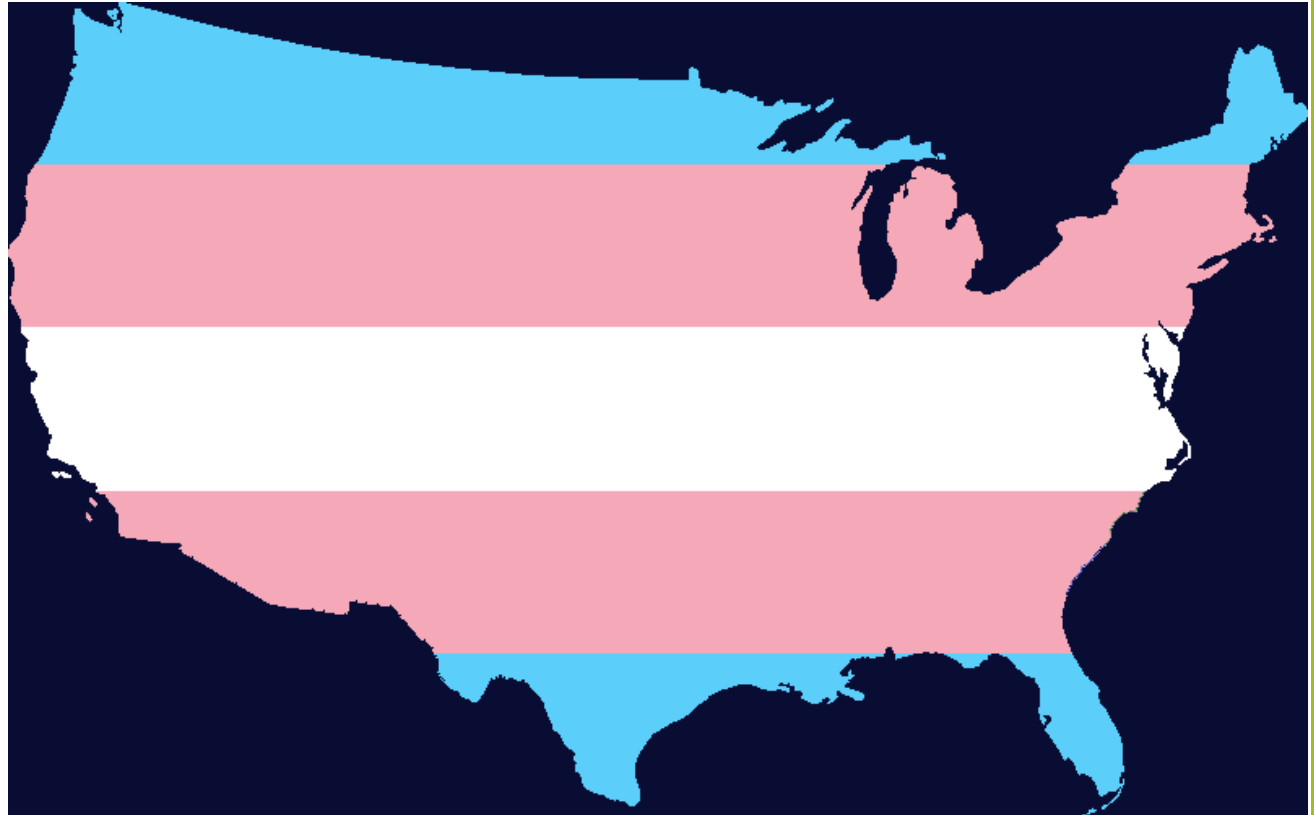
Date

# Passports: Appropriate Clinical Treatment

- This is highly individualized.
- The minor is entitled to a passport reflecting his/her current gender if they have had clinical treatment determined by their doctor to be appropriate in their individual case, to facilitate gender transition.
- No details of treatment should be provided.
- If the doctor will not provide a letter that treatment is being provided, a two-year passport can still be issued if the doctor states that the individual “is in the process of gender transition.”

# State Issued Identity Documents

- Every state has different requirements for updating gender on identity documents.
- State by State Requirements



# Bathroom and Rooming for Trans Youth

- The Obama Administration “Dear Colleague” Letter
  - Protected Transgender Students under Title IX “on the basis of sex” clause.
- Trump Administration rescinded the “Dear Colleague” Letter.
- US Supreme court has denied certiorari to cases relying on the letter.
- Transgender issues are currently handled state by state.



# Bathroom and Rooming Done Wrong

- Student v. Arcadia Unified School District (2011). (Transgender Male Student had transitioned but was still required to use a separate bathroom and forced to room alone on an overnight field trip. The OCR (Office for Civil Rights) and DOJ issued a decision requiring the school to treat the student as male.)
- Whitaker by Whitaker v. Kenosha Unified School District (2017). (Title IX lawsuit Transgender Male student still required to use either girls bathroom or single occupant restroom. When he refused he was issued a green wristband to identify him so teachers could report if he used the wrong bathroom. On band trip he was forced to room with a girl. Appeals court upheld injunction against the school as they found Whitaker was likely to succeed upon the merits of his Title IX action. Case remains pending.)

# So What are School Districts Saying?

- National School Board Association(2017):
  - If a school trip involves an overnight stay with sex-segregated sleeping rooms, may a school assign a transgender student to share a room occupied by student(s) of the sex with which he or she identifies?  
There is no definitive federal legal authority on the question of room assignments for transgender students. As noted, OCR has taken the position that Title IX's prohibition on sex discrimination extends to transgender students and requires that schools provide them with access to restrooms and locker rooms that correspond with their gender identity. With respect to overnight school trips, the U.S. Departments of Education and Justice took a similar position in its recent guidance.

# So What are School Districts Saying?

- National School Board Association(2017):
  - Question: Should a school notify the other students assigned to the same sleeping room, or their parents, that a transgender student will be assigned to their room? No. As noted above, a student's gender identity is likely to be considered personal information in a student's education record that may not be disclosed to others absent parental consent under FERPA and that may be protected by the constitutional right to privacy.
  - Question: If a student's transgender status is known or suspected by other students, how should a school handle a request from a non-transgender student to be assigned a sleeping room with a student of the same birth gender? Again there is no federal legal authority on this issue. To the extent that district policy allows schools to honor student requests to switch rooms after an assignment has been made or to specify a preference for a particular roommate in advance without regard to the reason, a request to be assigned to a room with a student of the same birth gender should be treated similarly
  - Ensure that all students (and their families) who participate in extracurricular activities that may involve overnight trips are aware of the school's policy and the options available to them. Where the district has chosen to adopt an inclusive policy that would allow the assignment of transgender students to occupy rooms with students with the same gender identity, provide notice of the policy well in advance.

# So What are School Districts Saying?

- Iowa Department of Education (October 2017):
- Iowa Code section 216.9 clearly delineates that protection from unfair practices and discriminatory acts in education includes Gender Identity. Thus, in Iowa the law still provides protections for transgender students in educational settings. Such discrimination practices shall include but not be limited to the following practices:
  - Exclusion of a person or persons from participation in, denial of the benefits of, or subjection to discrimination in any academic, extracurricular, research, occupational training, or other programs or activity except athletic programs;
  - Denial of comparable opportunity in intramural and interscholastic athletic programs;

# So What are School Districts Saying?

- Iowa Department of Education (October 2017):
- **Restroom and Locker facilities** – All students should have access to locker room, bathroom, and shower facilities that are safe, comfortable, and convenient. Absent a concern for safety schools should permit a student to use the restrooms or locker rooms for which they identify with. If private or separate facilities are requested by any transgendered or non-transgendered student, the student should be provided with those facilities. Remember a student cannot be forced to use a restroom for which they do not identify.
- **Overnight Accommodations** – Transgendered students should be assigned to rooms based on their gender identity, accommodating additional privacy needs as requested.

# So What are School Districts Saying?

- Iowa Department of Education (October 2017):
- **Confidentiality** – A student has a right to keep their status as a transgendered student private at school. The district should keep this information confidential and staff should not disclose this unless legally required to. Even if the student has disclosed their status to other staff or students it is not the schools information to share. Medical information of the student should also be kept confidential.

# So What are School Districts Saying?

- Texas Association of School Boards (2018):
- For field trips involving overnight stays, an administrator or counselor may ask the student to identify other students with whom the student feels comfortable sharing a room. In this case, the administrator should seek written consent from the parent of a minor transgender student (or the student, if 18 years old) allowing the district to share information with the other students and their parents.

# So What are School Districts Saying?

- Idaho School Board(2015):
- In the case of overnight trips sponsored by the District, students will be assigned sleeping rooms that correspond to the gender identity they consistently assert at school or to a private sleeping room. No student shall be required to sleep in a private room or in an assigned room conflicting with his or her consistently asserted school gender identity.
- In no case will a transgender student be denied the right to participate in an overnight trip because of that student's transgender status.
- In no case will a student be denied the right to participate in an overnight trip because of that student's sexual orientation. Likewise, a student will not be required to use a private sleeping room or denied participation on the basis of that student's sexual orientation.

# So What are School Districts Saying?

- Idaho School Board(2015):
- School employees should not disclose a student's transgender status or sexual orientation to other individuals, regardless of setting, including the other school personnel or (in the case of middle school, junior high school, and high school students) the student's parents/guardians, unless they have a legitimate need to know or unless the student has authorized such disclosure. Action in violation of such student confidentiality may subject an employee to discipline, up to and including possible termination and for certificated personnel, a report to the Professional Standards Commission.

# What about Gay/Lesbian/Bisexual Students

- Use the same Title IX approach with the assumption that the federal government or Supreme Court will include gender and sexual orientation under the umbrella prohibiting discrimination, “on the basis of sex.”
- Students should be allowed to room with their own gender. Most schools allow students to submit names of roommates they are comfortable sharing with or that they do not want to share with.
- Students privacy rights must be protected.

# What Should You Do?

- Until the law is settled it is best to err on the side of caution:
  - Meet with the transgender student and parent ahead of the trip to gain their input on how to meet the students needs.
  - Call ahead to destinations and make sure that bathroom and shower accommodations will meet the needs of the student.
  - Allow LGBTQI students to sleep in a room with same gender identifying students.
    - In this case, it is also valuable to get the trans student's input as to who they would feel comfortable rooming with.
  - Make parents aware of the policy but DO NOT share personally identifying information of the student.





# Questions?

Jeff Ment

[jment@mentlaw.com](mailto:jment@mentlaw.com)

# Recording

[Click here for the audio recording.](#)