OHIO SCHOOL BOARDS ASSOCIATION
BOARD LEADERSHIP INSTITUTE

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HOW I MET YOUR MOTHER…….
and her attorney

Student Discipline Update

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I. REVISITING THE FUNDAMENTAL SOURCES AND LIMITATIONS OF STUDENT RIGHTS AND BOARD AUTHORITY

A. **Introduction:** The increasing number of student rights challenges and related litigation require a "sharpening" of the saw for school administrators relative to this evolving area of jurisprudence. Effective leadership responses are more important than ever, particularly in light of the unique challenges presented by social media, the interest of print and electronic media in these cases, and the conundrum of burgeoning "bring your own device" policies.

B. **Policy Imperatives:** The first step in keeping pace with these rapid changes is to accept the fact that policy and student handbook (including athletic codes) revisions are ongoing and important to outcomes.

C. **Issue Identification:** In order to effectively respond in this environment, administrators must develop a sophisticated understanding of student rights, constitutional parameters, and procedural land mines. The ability of public educators to properly identify legal issues in the vast number of student conduct scenarios is a precursor to successful regulation of behavior – and a corresponding reduction of unwanted litigation.

II. GENERAL STATUTORY AUTHORITY TO REGULATE STUDENT CONDUCT – THE BASICS:

A. R.C. 3313.20:

Grants to boards of education the power to "make any rules that are **necessary for the government of** its employees, **pupils of its schools**, and all other persons entering upon its school grounds or premises."

1. Rules and regulations adopted pursuant to R.C. 3313.20 must be "necessary to protect or preserve the educational environment." *Warren v. Board of Educ., Perry Local Sch. Dist.* (1974), 41 Ohio Misc. 87 (hair length case).

2. "The word 'necessary' obviously implies necessary to carry out the purposes of general public education. A board of education has that power and only that power to make rules and regulations over student conduct and status which are directly related to its function of educating the pupils in its charge. **The test applied by the courts is that there must be a rational basis for the rule; it must be reasonable; and there must be a reasonable relationship between the rule and the furtherance of a valid educational purpose."** *Jacobs v. Benedict* (1973), 35 Ohio Misc. 92 (hair length / style case).

3. "[T]he rule making power of [boards of education]...for the proper conduct, control, regulation and supervision of its employees, pupils and the entire school system is unlimited except to the extent that it is curtailed by express law, and that **in the absence of fraud, abuse of discretion or arbitrariness or unreasonableness a court will not interfere with the authority of a board of education to make rules and regulations, nor substitute its judgment for that of the board in the conduct of the affairs of the school**." *Holroyd v. Eibling* (1962), 116 Ohio App. 440, 188 N.E.2d 797.

B. R.C. 3313.47: Vests in boards, "the management and control of all of the public schools...in its respective district."

C. R.C. 3313.48: Boards shall provide a free education for school age children within their jurisdiction.

D. R.C. 3313.64: Free schooling for residents, etc.

E. R.C. Chapter 3321: Compulsory attendance laws.

III. SPECIFIC PROVISIONS RELATING TO STUDENT DISCIPLINE:

A. R.C. 3313.66: Sets out the procedural requirements for disciplinary removals (suspension, expulsion, permanent exclusion, emergency removal).

B. R.C. 3313.661: Boards must adopt policies which specify the types of misconduct for which a student may be removed, "post" it, and make it available to students upon request:

1. "No pupil shall be suspended, expelled, or removed except in accordance with the policy adopted by the board of education of the school district in which the pupil attends." *See Wilson v. South Central Local Sch. Dist.* (1995), 107 Ohio App.3d 610; and R.C. 3313.661(A)

2. A board of education may establish a program and adopt guidelines under which a superintendent may require a student to perform community service in conjunction with or in place of a suspension or expulsion imposed under R.C. 3313.66 except for a permanent exclusion. R.C. 3313.661(B).

3. "Any policy, program, or guideline adopted by a board of education under this section with regard to suspensions or expulsions pursuant to... 3313.66...shall apply to any student, whether or not the student is enrolled in the district, attending or otherwise participating in any curricular program provided in a school operated by the board or provided on any other property owned or controlled by the board." R.C. 3313.661(D).

C. R.C. 3313.662: Permanent exclusion permitted for students, 16 years of age or older, whose "criminal" acts committed "on property owned or controlled by, or at an activity held under the auspices of" a board of education.

D. R.C. 3313.663: Boards may adopt a policy requiring parents or guardians of any student who is suspended or expelled by the district to attend a parental education or training program provided by the district. Boards may also adopt a policy requiring parents or guardians of "truant and habitually absent" students to attend parental training. In addition, R.C. 3321.191 requires boards to adopt policies addressing students who are "habitual" truants.

E. R.C. 3313.664: Boards may adopt a policy authorizing personnel (i.e., the superintendent, other administrators or personnel employed to direct, supervise or coach a pupil activity) to "prohibit" students from participating in extracurricular activities. Requires affirmative enactment of Board policy.

F. R.C. 3313.665: "In order to promote a safe and healthy school setting and enhance the educational environment, a code of conduct or discipline policy adopted by a board of education may include a reasonable dress code, or may establish a school uniform to be worn by the students attending one or more district schools." If a dress code or uniform policy is developed, it must meet certain conditions. See, R.C. 3313.665(A)-(D).

G. R.C. 3313.534: Boards required to adopt a policy of "Zero Tolerance for violent, disruptive, or inappropriate behavior, including excessive truancy, and establish strategies to address such behavior that range from prevention to intervention."

H. R.C. 3327.014: Boards of education are authorized to adopt a policy for the suspension of bus riding privileges. Bus suspensions may be imposed for any period of time set forth in the policy, and only requires that the student have notice, not necessarily in writing, and an opportunity to appear before the superintendent or designee before the suspension is imposed. The policy must be posted in a central location and made available to students upon request

I. **Useful Clarifications from the General Assembly**

1. Who can Suspend?

Issue: Under prior law, only principals and superintendents were authorized to suspend under statute, leaving suspensions ordered by assistant principals and "unit" principals subject to legal challenge on procedural grounds.

Answer: **Assistant principals and "other administrators" may suspend under 3313.66(A).**

2. In-School Suspension**.**

Issue: Significant confusion and inconsistency was previously engendered by the phrase "in-school *suspension*" which had been interpreted by some parents and administrators (and even some policies!) to be equivalent to "regular" suspensions, thereby requiring the full panoply of due process rights (i.e. "notice and hearing").

Answer: **As long as it is served entirely in a school setting, an "in-school" suspension does not require the notice, hearing and appeal rights mandated under 3313.66(A) and (K)(2). [See also, *Kipp v. Lorain Board of Ed.*, 2000 WL 1729485 (Ohio App. 9 Dist. 2000) where court determined that it did not have jurisdiction to consider the appeal of a 4-day in-school suspension.]**

Caveat: Avoid early dismissal which could be deemed as a suspension "outside" the school setting and, as always, be careful with special education students–they require a different analysis relative to an appropriate educational/disciplinary setting.

3. Disciplining Students for "Off-Campus" Misconduct.

Issue: To what extent can the student code of conduct be used to "reach" off campus behavior?

Answer: **Revised Code Section 3313.661(A) specifically authorizes boards to adopt codes of conduct which include discipline for misconduct which occurs off school property to the extent that (1) the misconduct is connected to activities or incidents which have occurred on property owned or controlled by the board of education, or (2) the misconduct, regardless of where it occurs, is directed at a district official or employee, or the property of such official or employee.**

Caveat: Vagueness in the legislation may lead to legal challenges where districts try to extend the reach of the code of conduct too far. First Amendment issues involving free speech (including the private use of the internet, see below), remain substantially unaffected. Be careful.

4. Participation in Extracurricular Activities.

Issue: Since courts have established that participation in extracurricular activities is a "privilege" and not a "right," why do we have to utilize formal suspension procedures to remove students from participation for misconduct in these activities and provide post-removal notices and hearings for those posing a continuing danger or ongoing threat in non-curricular settings?

Answer: **We don't! Pursuant to 3313.664, students may simply be "PROHIBITED" (not "suspended") from participating in any or all extracurricular activities. This may be done by ANY administrative personnel or other personnel employed by the district to direct, supervise, or coach a pupil activity program.**

In addition, the emergency removal provisions of 3313.66(B)(6)(C) were amended to remove the word "extracurricular activity" thereby removing any requirement that post removal notice and hearing be provided students whose behavior in such non-curricular activities poses a continuing danger or ongoing threat. They are simply prohibited from participation pursuant to an adopted board policy.

Caveat: The Board of Education must adopt a policy sanctioning such exclusion and you must post it in a central location in each school building and make it available to students upon request. Further caveat: if you determine to limit the length of time you wish to extend the "prohibition" (i.e. to the end of the year or semester), be careful to parcel out your athletic code of conduct, which may have "carry over" provisions from one sport/year to another. Both the extracurricular policy and athletic code of conduct should be included in your student code of conduct to avoid any issues of notice. Also, boards must decide whether to allow non-certificated personnel with supplemental contracts to prohibit students from participation.

5. Districts Must Pursue "Fleeing" Wrongdoers.

Issue: In the past, students poised for expulsion often withdrew from school in order to avoid "sentencing" thereby precluding a receiving district from enforcing the expulsion. In addition, prior law did not prevent a student duly suspended from district "A" from attending district "B" during the period of a suspension.

Answer: **3313.66(B)(6) REQUIRES the superintendent to initiate proceedings against a pupil who has committed an act that warrants expulsion under the Board's policy, even if the student withdraws from school. Following a hearing, if the superintendent determines that expulsion is warranted, disciplinary action must be handed down for the same time period as would be appropriate for the student who had not withdrawn. Further, under 3313.66(J), <u>schools may deny admission to any student who is currently under a period of suspension from another district in Ohio</u>. The "receiving" district must offer an opportunity for a hearing (same as for students expelled from another public school) before denying admittance. Unlike expulsions, this provision does not apply to suspensions from out-of-state or private schools. 3313.66(J)(1)(a).**

Caveat: Be extra vigilant to assure that proper notice is given with reasons for the intended expulsion/suspension and setting forth a timely opportunity to appear (having "withdrawn"). There is a strong likelihood that these students/parents will not appear but may nevertheless attempt to raise procedural issues later.

6. Coverage for Weapons – Extended Beyond the Campus.

Issue: Prior law either required or allowed for one-year expulsions for bringing firearms or knives onto property "owned or controlled" by the board; however, no coverage existed for such misconduct at school related activities not on board property.

Answer: **3313.66(B)(2)(b) & (B)(3) grant superintendents the authority to expel, for a period of one year, any pupil who brings a firearm or knife to an <u>interscholastic</u>**

competition, an extracurricular event, or any other school program or activity that is not located in a school or on property owned or controlled by the district.

Caveat: Remember that the law still requires expulsion for one year for those students who bring firearms to school or board owned property unless the board has adopted a policy to allow for reductions on a "case by case" basis. It is important to note that your policy must address how and when disciplinary action may be reduced in these circumstances. Be careful to appropriately and narrowly limit the mitigating factors to avoid raising expectations and/or inviting litigation for discriminatory application.

7. "Serious Physical Harm"– Recognized as an Additional Reason for a One Year Expulsion.

Issue: Why limit one-year expulsions to firearms and knives? These are not the only precursors to serious injury and/or harm.

Answer: **Revised 3313.66(B)(4) allows boards to adopt a resolution to extend its suspension/expulsion policy to authorize the superintendent to expel a pupil for a period not to exceed one year for committing an act that is a criminal offense when committed by an adult and that results in serious physical harm to persons or property on any property owned or controlled by the board or at an interscholastic competition, extracurricular event, or any other school program or activity.**

"Serious physical harm to persons" is defined in 2901.01 to mean:

(a) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

(b) Any physical harm that carries a substantial risk of death;

(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement; or

(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain.

"Serious physical harm to property" means harm that does either of the following:

(a) Results in substantial loss to the value of property or requires a substantial amount of time, effort, or money to repair or replace; or

(b) Temporarily prevents the use or enjoyment of the property or substantially interferes with its use or enjoyment for an extended period of time.

Caveat: Exercise caution when reacting to assaultive behavior or pranks which result in less than "serious physical harm" to persons or property.

8. Post-Secondary Credit can be Affected by Expulsion.

Issue: School imposed expulsions did not previously affect either high school or college credit obtained through post-secondary enrollment options during the period of such expulsions.

Answer: Boards may adopt a policy under which it may deny high school credit for post-secondary courses, any portion of which are taken during the period of a student's expulsion. Therefore, under 3313.613 as amended, a board is not obligated to grant credit for college courses enrolled in by a student under an expulsion (or, is in the process of taking, when the expulsion is imposed).

Likewise, under 3365.041(C), if a student who elected to receive both high school and college credit for post-secondary enrollment courses, upon expulsion, will be deemed to have had that election automatically revoked as to the high school credit. The school district will receive state reimbursement to the same extent as they would had the student voluntarily withdrawn. If the result is that the college receives no reimbursement, then it may require the student to return or pay for textbooks and materials it provided free of charge. The college must notify the student of the revocation no later than five (5) days after being notified of the expulsion. If the college does not withdraw its acceptance of the student (below), and the student chooses to remain in the college during the expulsion, the cost of all tuition, fees, textbooks, and materials becomes the student's responsibility.

Colleges are not obligated to allow an expelled high school student to remain in classes and if they withdraw acceptance, must simply reimburse students to the same extent as they would any other student voluntarily withdrawing. 3365.041(B).

Caveat: Board must make an affirmative decision to enact policy denying credit.

9. Driving Privileges Also Affected.

Issue: Why limit the penalty of loss of driving privileges merely to those who withdraw from school or have excessive absences?

Answer: **Pursuant to 3321.13(B)(4), whenever a pupil is "suspended, expelled, removed or permanently excluded" for misconduct involving a firearm, knife or other weapon as defined in adopted board policy, the superintendent SHALL notify the registrar and the county juvenile judge in writing within two weeks of the disciplinary action. The registrar must thereafter suspend the student's temporary instruction permit or driver's license or prohibit the student from obtaining one until the student turns 18 or the registrar is notified by the superintendent that the pupil has satisfied any terms or conditions established by the school.**

Caveat: Requires notification for mere "suspensions" and "removals" which may well be over before the 10 day notification has run.

IV. PROCEDURAL ISSUES

A. General Requirements

1. Constitutional Provisions.

a. The Fourteenth Amendment to the United States Constitution provides that no person may be denied life, liberty or property without due process of law.

b. *Goss v. Lopez* (1975), 419 U.S. 565, 573.

(1) Ohio law (free education and compulsory attendance statutes) creates a property interest entitling students to a public education:

"*On the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. Ohio Revised Code Sections 3313.48 and 3313.64. . . direct local authorities to provide a free education to all residents between 5 and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. Ohio Revised Code Section 3321.04. . . .*"

(2) Pupils suspended or expelled must be given "some kind of notice" and afforded "some kind of hearing" prior to such exclusions.

"Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. ***But things are not always as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.****"*

B. Suspension and Expulsion in Ohio – R.C. 3313.66: Beyond *Goss v. Lopez*

1. In General

a. Districts must post the Code of Conduct in a central location in the school, and copies must be made available to students upon request. Many districts now post these on the school's website as well.

b. No student may be removed, suspended, or expelled except in accordance with the policy adopted by the board of education. R.C. 3313.661.

2. Summary of Procedure for Suspension

a. Principal or superintendent can suspend students for not more than 10 days.

(1) The board of education, however, may adopt a policy granting assistant principals and other administrators the authority to suspend a pupil from school for a period of time as specified in the policy of the board, not to exceed ten days.

(2) There is no requirement for notice of intent to suspend and reasons or for a hearing in the case of an in-school suspension (Defined as entirely within the school setting).

(3) If there are less than ten days left in school year at time suspension is imposed, then a superintendent may apply all or part of suspension to following school year.

b. Before a suspension is implemented, pupil must be given written notice of the intention to suspend, including the reasons for the suspension. If the offense is one of the serious criminal offenses for which permanent exclusion is allowed, and the student is sixteen years of age or older, the notice must indicate that permanent exclusion may be sought. R.C. §3313.66(A)(1).

c. Pupil must be given opportunity to appear at informal hearing before principal, assistant principal, superintendent, or super-intendent's designee to challenge the reason for the suspension or otherwise explain his actions.

(1) At the pre-suspension hearing, pupil is not entitled to call his own witnesses. *Rossman v. Conran* (Franklin Co. 1988), 61 Ohio App.3d 246.

(2) Nor must a student be permitted to have counsel or his/her parents present for the informal hearing.

(3) In serious cases where student has categorically denied all charges – *Goss* may suggest increasing the process "due" the accused and allow for cross-examination and – perhaps – the presence of counsel if requested.

d. If pupil is suspended, his/her parent, guardian or custodian and the school treasurer must be notified in writing within 24 hours. This requirement is satisfied by regular mail on the date of the suspension.

e. Notice must include the reasons for the suspension, the right to appeal to the board or the board's designee, the right to be represented in the appeal, to be granted a hearing before the board, and to request that the board hear the appeal in executive session. The written notice must also specify the manner and date by which the student or his/her parents must notify the board of the intent to appeal the suspension.

3. Summary of Procedure for Expulsion

a. May be imposed for a period not to exceed the greater of 80 school days or the number of school days remaining in the semester or term in which the incident that gives rise to the expulsion takes place, unless it involves certain offenses that will permit expulsion of up to one year.

b. If there are fewer than eighty days remaining in the school year, the superintendent may apply all or part of the expulsion in the following year.

c. Only superintendent can expel.

d. Notice of intent to expel, including date, time and place for the hearing. Notice must include reasons and advise the **pupil** and parent that they may appear before the superintendent to challenge the expulsion or otherwise explain the pupil's actions. Also, if the offense is one of the serious criminal offenses for which permanent

exclusion is allowed, and the student is sixteen years of age or older, the notice must indicate that permanent exclusion may be sought. R.C. 3313.66(B)(6)(b).

e. For expulsions of more than 20 days or for expulsions carried over into the next school year, superintendents are required to notify of the name, phone number and address of public or private agencies that offer services that may improve the aspects of the pupil's behavior and attitudes that contributed to the incident that gave rise to the expulsion.

f. Expulsion hearing must occur not earlier than three nor later than five days after giving notice (unless the pupil's family requests a later date).

g. The superintendent must initiate expulsion proceedings even if the student has withdrawn from school after the incident giving rise to the hearing but prior to the hearing or the decision to impose the expulsion. R.C. 3313.66(B)(7).

h. Written notice of decision and of the right to appeal, the right to be represented in the appeal, to be granted a hearing before the board, and to request that the board hear the appeal in executive session. The written notice must also specify the manner and date by which the student or his/her parents must notify the board of the intent to appeal the expulsion.

4. Appeals

a. Suspensions or expulsions may be appealed to the board of education or its designee at the request of the pupil or his/her parent or guardian. R.C. 3313.66(E).

b. If held before the board of education, a presumption is created that the hearing will be held in public session unless the student, his/her parent, or attorney requests the hearing be held in executive session. *Armstead v. Lima City Bd. of Educ.*, 75 O.App.3d 841 (1991). Any deliberation after the hearing may be held in executive session. R.C. §121.22(G)(1). However, formal action on the suspension or expulsion must be taken in public session. R.C. 3313.66(E).

c. The student has a right to a hearing, to be represented by counsel, and to have a verbatim record of the proceedings provided by the board. R.C. §3313.66(E).

(1) At the board hearing, pupil does not have the right to cross-examine an informant "whistle blower" (whose identity the school wants to keep anonymous), the principal or superintendent. *Newsome v. Batavia Local School Dist.* (6th Cir. 1988), 842 F.2d 920. *Paredes v. Curtis* (6th Cir. 1988), 864 F.2d 426.

(2) It should be noted, however, that if a student is not permitted to cross-examine adverse witnesses at the administrative hearing, the student may be able to present additional evidence pursuant to R.C. § 2506.03 on appeal in court. *See, Neague v. Worthington City School District (1997), 122 Ohio App. 3d 433; see also, Dawson v. Richmond Hts. Local School Board (1997), 121 Ohio App. 3d 482.*

(3) Testimony at a suspension appeal hearing must be "under oath," in order to avoid a subsequent *de novo* hearing upon further appeal to court. For example, the testimony of a principal under oath summarizing the "unsworn" statements made by student witnesses was deemed insufficient to prevent a new court hearing upon appeal under R.C. § 2506.03 in *Knott v. Toledo Board of Education,* 115 Ohio Misc.2d 20 (Lucas County CP, 2001). The court determined that since the only evidence linking the student to the claimed threats of violence (i.e., to "shoot up" the school) was an unsworn statement read by the administrator, "an R.C. 2506.03 hearing must be held."

d. After the hearing, the board, by majority vote of its full membership, may affirm, reverse, vacate, or modify the order of suspension or expulsion. This decision may be appealed to the common pleas court. R.C. 3313.66(E). The notice of appeal must be filed with the board within thirty days.

Note: The failure of the board or designee to make "conclusions of fact supporting the final order," per R.C. 2506.03 (A)(5) will likely result in an evidentiary hearing before the court. *Eckmeyer v. Kent City School District Board of Education,* 2000 Ohio App. LEXIS 5123 (CA, Lake County, 2000).

e. The common pleas court will review the record and make a decision, and may reverse, vacate, or modify the decision if it finds the decision to be unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by the preponderance of substantial, reliable, and probative evidence on the whole record. R.C. §2506.04.

f. The court must give deference to the board's resolution of evidentiary conflicts and may not substitute its own judgment for the board's. However, if the court finds that the board did not comply with certain enumerated procedural safeguards, it will conduct its own hearing where additional evidence may be introduced. *R.C. §2506.03.*

5. Firearm/Knife: Board Options When Dangerous Weapons are Involved

a. The superintendent of schools shall expel a pupil from school for a period of one year for bringing a firearm to a school operated by the board of education or on to any other property owned or controlled by the board, except the superintendent may reduce this requirement on a case-by-case basis in accordance with policy adopted by the board.

b. The superintendent of schools may also expel a pupil from school for a period of one year for bringing a firearm to an interscholastic competition, an extracurricular event, or any other school program or activity that is not located in a school or on property that is owned or controlled by the district. The superintendent may reduce this disciplinary action on a case-by-case basis in accordance with policy adopted by the board under section 3313.661 of the Revised Code.

c. The board of education may adopt a resolution authorizing the superintendent of schools to expel a pupil from school for a period not to exceed one year for bringing a knife to a school operated by the board or on to any other property owned or controlled by the board, or to an interscholastic competition, an extracurricular event, or any other program or activity sponsored by the school district or in which the district is a participant, or for possessing a firearm or knife at a school, on any other property owned or controlled by the board, or at an interscholastic competition, an extracurricular event, or any other school program or activity, which firearm or knife was initially brought on to school property by another person.

d. **Remember:** there is statutory authority for a board of education to adopt a policy that authorizes the superintendent to expel a pupil from school for a period not to exceed one year for committing an act that is a criminal offense when committed by an adult and that results in serious physical harm to persons or to property as defined in the criminal statutes – even in the absence of a dangerous weapon.

6. Summary of Procedures for Emergency Removal

a. Where pupil poses a continuing danger to persons or property, or an ongoing threat of disrupting the academic process, pupil may be removed from a curricular activity or school premises by a teacher, assistant principal, principal or superintendent.

(1) If a removal is made by a teacher, that teacher must submit a report to the principal stating the reasons for such removal.

b Pupil must be afforded a hearing within 72 hours after the removal, together with written notice of the reasons for removal as soon as possible prior to the hearing. Follow the hearing requirements applicable to a suspension.

c. If expulsion is contemplated, follow the hearing requirements applicable to expulsion, except within 72 hours of removal.

7. Permanent Exclusion

a. A student age sixteen or older may be permanently excluded from school for committing an act that would be a criminal offense if committed by an adult.

b. The permanent exclusion process may be initiated by a superintendent whenever he/she learns that a student has been convicted of, or has been ruled a delinquent child on account of one of the above-listed offenses.

c. The student must have been sixteen years or older at the time of the offense.

d. After receiving written proof of the conviction or delinquency adjudication, the superintendent must make his/her own determination that the student's presence in the school may endanger the health and safety of other pupils or school employees.

e. Written notice that the superintendent intends to recommend permanent exclusion must be given to the student and his/her parent or guardian.

f. The superintendent then forwards this recommendation to the board of education. The recommendation must include a copy of the conviction or delinquency adjudication and the written determination by the superintendent.

g. The board of education then has 14 days to make a determination, and must consider certain enumerated factors. If the board decides to go forward with the permanent exclusion, written notice must be sent to the superintendent, the student, and the student's parents or guardian.

h. If the board decides to proceed with the permanent exclusion, it must adopt a resolution and forward it to the Superintendent of Public Instruction, and it must also designate a representative to present the board's case before the Superintendent of Public Instruction.

i. The Superintendent of Public Instruction will then make a decision regarding the permanent exclusion of the student. If an order for permanent exclusion is issued, no public school district in Ohio may admit the student. *R.C. §§ 3313.64(K), 3313.662(E).*

j. A student who is permanently excluded may request to be readmitted on a probationary basis for a period not to exceed 90 days.

k. Records of a student's permanent exclusion must be included in the student's official records and forwarded to any school district requesting such information. If the exclusion is revoked, or when the student turns 22 years old, the board of education is required to destroy all references to the exclusion in the student's file.

C. The "Zero Tolerance" Conundrum

1. The Statutory "Dilemma"

a. **Ohio Revised Code § 3313.534**

> ** * * the board of education of each city, exempted village, and local school district shall adopt a policy of **zero tolerance** for violent, disruptive, or inappropriate behavior, including excessive truancy, and establish strategies to address such*

behavior that range from prevention to intervention. No later than July 1, 1999, each of the big eight school districts, as defined in section 3314.02 of the Revised Code, shall establish under section 3313.533 of the Revised Code at least one alternative school to meet the educational needs of students with severe discipline problems, including, but not limited to, excessive truancy, excessive disruption in the classroom, and multiple suspensions or expulsions. Any other school district that attains after that date a significantly substandard graduation rate, as defined by the department of education shall also establish such an alternative school under that section.

b. **Ohio Revised Code § 3313.66**

(*2)(a) Unless a pupil is permanently excluded...the superintendent of schools of a city, exempted village or local school district shall expel a pupil from school for a period of one year for bringing a firearm to a school operated by the board of education of the district or onto any other property owned or controlled by the board,* ***except that the superintendent may reduce this requirement on a case-by-case basis in accordance with the policy adopted by the board under section 3313.661 of the Revised Code.***

c. **Ohio Revised Code § 3313.661**

(A) The board of education of each city, exempted village, and local school district shall adopt a policy regarding suspension, expulsion, removal, and permanent exclusion that specifies the types of misconduct for which a pupil may be suspended, expelled or removed. The types of misconduct may include misconduct by a pupil that occurs off of property owned or controlled by the district that is connected to activities or incidents that have occurred on property owned or controlled by that district and misconduct by a pupil that, regardless of where it occurs, is directed at a district official or employee, or the property of such district official or employee. ***The policy shall specify the reasons for which the superintendent of the district may reduce the expulsion requirement in (B)(2) of section 3313.66 of the Revised Code.***

2. Standards for Zero Tolerance Policies

   a. The imposition of a predetermined, uniform set of consequences regardless of the individual circumstances of the offense.

   b. Punishment is automatic, singular and preordained.

   c. Intended to send a message that certain behaviors will not be tolerated by punishing all prohibited behaviors, regardless of the severity or the existence of any mitigating circumstances.

3. Substantive Due Process Issues Related to the Adoption and Enforcement of Zero Tolerance Policies

   a. *"Zero Tolerance" policies cannot be applied arbitrarily or irrationally.*

   b. ***Seal v. Morgan,*** 229 F.3d 567 (6th Cir. 2000)

   Facts: Plaintiff and a friend were embroiled in an out-of-school dispute with another student over a girl. The Plaintiff's friend began to carry a knife with him which he showed to Plaintiff one day. The following day the Plaintiff, the friend and another girl were riding in Plaintiff's mother's car when the friend placed the knife with a 3½ inch blade on the floor behind the driver (Plaintiff). Later, when Plaintiff went into a friend's house while the passengers waited in the car, the friend moved the knife to the car's glove compartment. Later that evening, Plaintiff's car was searched by school officials based on an unconfirmed report that the three had been drinking. The search uncovered the knife, and Plaintiff was expelled for possession of a weapon based on the School District's Zero Tolerance policy for drugs and weapons offenses. Plaintiff maintained throughout proceedings that he had no idea that the weapon was in the glove compartment and his friends confirmed this lack of knowledge. He appealed his one-year expulsion claiming that the Board's decision was irrational in light of the facts as uncovered during the course of the hearing.

   Held: The Sixth Circuit found that expelling a student for weapons possession, even when the student did not knowingly posses the weapon, would not be rationally related to any legitimate state interest. The Court rejected the Board's argument that the student's knowledge of weapon possession was completely irrelevant and that the Zero Tolerance policy required expulsion regardless of whether the student knew the weapon was in his car.

According to the court "consistency is not a substitute for rationality." The Court held that a "Board may not absolve itself of its obligation, legal and moral, to determine whether students intentionally committed the acts for which their expulsion are sought by hiding behind a Zero Tolerance policy that purports to make the students' knowledge a non-issue."

4. Pros and Cons of Zero Tolerance Policies

   a. Mandatory punishments issued under zero tolerance policies often exclude innocent children from school for non-violent behavior that poses little or no threat to school safety.

   b. Unfortunately, the credibility of zero-tolerance policies can be undermined by pursuing unnecessary cases and failing to understand that zero tolerance includes a range of punishments, including a note home or after-school detention.

   c. There is little, if any data showing that zero tolerance policies increase school safety or reduce school violence.

   d. Zero tolerance policies are ineffective and a one-size fits all solution and are partly to blame for the growing disparity between white and black discipline rates.

   e. Policies that expel students for every offense is needed to send an unambiguous message that drugs and weapons have no place in school.

   f. Schools depend on inflexible zero-tolerance policies because officials fear being sued if they differentiate among students.

V. HARASSMENT, INTIMIDATION OR BULLYING: THE BASICS

A. OHIO REVISED CODE SECTION 3313.666 (with Jessica Logan Act, effective as of 11/4/2012)

1. Definition of "harassment, intimidation, or bullying"

   "Harassment, intimidation, or bullying" is defined as "any intentional written, verbal, **electronic** or physical act that a student has exhibited toward another particular student more than once and the behavior both:

   (1) causes mental and physical harm to the other student; and

(2) is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for the other student."

* *Given the language of this section, it appears that harassment, intimidation, or bullying directed toward a group of students would not qualify under the above definition. The behavior must be directed at a "particular student." Additionally, the section does not state how determinations of harm or severity of behavior and its effects will be determined. Presumably, whether or not a student feels threatened or intimidated is a subjective determination.*

2. Individual Policy Requirements

Boards of education of all city, local, exempted village, and joint vocational school districts must establish individual policies prohibiting harassment, intimidation, and bullying on school property, **on a school bus**, or at school-sponsored events **and expressly providing for the possibility of suspension of a student found responsive for harassment, intimidation, or bullying by an electronic act**. The policy must be developed in consultation with (1) parents; (2) school employees; (3) school volunteers; (4) students; and (5) community members. The policy must include the following:

a. A statement prohibiting harassment, intimidation, or bullying of any student on school property or at school-sponsored events;

b. A definition of harassment, intimidation, or bullying in accordance with the language in the statute (as laid out above);

c. A procedure for reporting prohibited incidents;

d. A requirement that school personnel report prohibited incidents of which they are aware to the school principal or other administrator designated by the principal;

e. A requirement that custodial parents or guardians of any student involved in a prohibited incident be notified and, to the extent permitted by R.C. § 3319.321[1] and the Family Educational Rights

[1]R.C. § 3319.321 is the Ohio law that prohibits the public release of personally identifiable student information other than directory information, subject to certain limited exceptions. Directory information includes information such as a student's name, address, telephone listing, date and place of birth, participation in officially recognized activities

and Privacy Act ("FERPA"), 20 U.S.C. § 1232g[2], have access to any written reports pertaining to the prohibited incident;

f. A procedure for documenting any prohibited incident that is reported;

g. A procedure for responding to and investigating any reported incident;

h. A strategy for protecting a victim or other person from new or additional harassment, intimidation, or bullying, and from retaliation following a report, **including a means by which a person may report an incident anonymously**;

i. A disciplinary procedure for any student guilty of harassment, intimidation, or bullying, which does not infringe on any student's rights under the First Amendment to the Constitution of the United States;

j. **A statement prohibiting students from deliberately making false reports of harassment, intimidation, or bullying and a disciplinary procedure for any student responsible for deliberately making a false report of that nature; and**

k. A requirement that the administration semiannually provide the board president a written summary of all reported incidents and post the summary on its website, if the district has a website, to the extent permitted by R.C. § 3319.321 and FERPA.

3. Individual Policy Included in Comprehensive Policies

The policy must be included in student handbooks and any other publications that set forth the comprehensive rules, procedures, and standards of conduct for schools and students in the district. **The policy and explanation of the seriousness of bullying by electronic means shall be made available to students in the district and to their custodial parents or guardians.** Information regarding the policy should also be included in employee training manuals.

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and sports, weight and height of members of athletic teams, dates of attendance, date of graduation and awards received.

[2] FERPA is the federal law that protects the privacy of student educational records. Under FERPA, all but directory information regarding a student is prohibited from public release, subject to certain limited exceptions.

4. **To the extent that state or federal funds are appropriated for this purpose, each board shall require that all students enrolled in the district annually be provided with age-appropriate instruction, as determined by the board, on the board's policy, including a written or verbal discussion on the consequences for violations of the policy.**

   Each board shall require that once each school year a written statement describing the policy and the consequences for violations of the policy be send to each student's custodial parent or guardian. The statement may be sent with regular student report cards or may be delivered electronically.

5. Civil Immunity

   A school district employee, student, or volunteer will be individually immune from liability in a civil action for damages arising from reporting an incident in accordance with a policy adopted pursuant to this law if that person reports an incident of harassment, intimidation, or bullying promptly in good faith and in compliance with the procedures as laid out in the policy. Additionally, nothing in this law prohibits a victim from seeking redress under other laws *but this law does not create a new cause of action or legal right for any person.*

B. R.C. § 3313.667 – TASK FORCE AND TRAINING (with Jessica Logan Act, effective 11/4/2012)

Any school district may form bullying prevention task forces, programs, and other initiatives involving volunteers, parents, law enforcement, and community members. To the extent that state or federal funds are appropriated for these purposes, the school district must provide training, workshops, or courses on the district's harassment, intimidation, or bullying policy to school employees and volunteers who have direct contact with students. (Time spent by school employees in the training, workshops, or courses will apply toward any state- or district-mandated continuing education requirements).

Additionally, it is clear that R.C. § 3313.667, like R.C. § 3313.666, does not create a new cause of action or substantive legal right for any person.

C. R.C. § 3313.073 (with Jessica Logan Act, effective 11/4/2012)

The board of education must adopt or adapt the curriculum to include a program of in-service training in the prevention of child abuse, violence, and substance abuse and the promotion of positive youth development. Each person employed by any school district or service center to work in a school as a nurse, teacher,

counselor, school psychologist, or administrator shall complete at least four hours of the in-service training within two years of commencing employment with the district or center, and every five years afterwards.

The board must incorporate training in school safety and violence prevention into the in-service training.

The board must incorporate training on the board's harassment, intimidation, or bullying policy adopted under section 3313.666 of the Revised Code into the in-service training. Each board also must also incorporate training in the prevention of dating violence into the in-service training required by that division for middle and high school employees. **The board shall develop its own curricula for these purposes.**

D. R.C. § 3301.22 – ODE MODEL POLICY

In order to assist individual school districts in developing their own policies under R.C. § 3313.666, the Ohio Department of Education ("ODE") was charged in R.C. § 3301.22 with developing a model policy prohibiting harassment, intimidation or bullying. The policy is now available on the Department's website at:

http://education.ohio.gov/GD/Templates/Pages/ODE/ODEDetail.aspx?page=3&TopicRelationID=431&ContentID=29246&Content=135933 (last visited November 27, 2012).

The Jessica Logan Act charges the ODE with developing a new policy by 11/4/2012 that includes the provision in the Act. On October 9, 2012, ODE adopted its new policy.

E. R.C. § 117.53 – POLICY INCLUDED IN STATE AUDIT

When the Auditor of State conducts an audit of a city, local, exempted village, or joint vocational school district or a community school under R.C. Chapter 3314, the Auditor is required to determine whether the school district or community school has adopted an anti-harassment policy in accordance with R.C. § 3313.666. This determination will be recorded in the audit report although the Auditor of State will not prescribe the content or operation of any anti-harassment policy adopted by a school district or community school.

VI. "CYBERBULLYING"

A. Definition

1. "Cyberbullying involves the use of information and communication technologies such as e-mail, cell phone and pager text messages, instant messaging (IM), defamatory personal Web sites, and defamatory online personal polling Web sites, to support deliberate, repeated, and hostile behavior by an individual or group that is intended to harm others." Bill Belsey (http://www.cyberbullying.ca).

2. Bullying is commonly defined as intentional, repeated hurtful acts, words, or other behavior, such as name calling, threatening, and/or shunning committed by one or more child against another. These negative acts are not intentionally provoked by the victims.

3. Cyberbullying differs from other forms of bullying in a number of ways.

   a. It is a cowardly form of bullying because cyberbullies can more easily hide behind the anonymity that the Internet can provide.

   b. Cyberbullies can spread their hurtful messages to a very wide audience with remarkable speed. Unlike traditional rumors that eventually die out, rumors in cyberspace can be cut, pasted, printed and forwarded ad infinitum.

   c. Cyberbullies do not have to own their own actions, as it is usually very difficult to identify cyberbullies because of screen names, so they do not fear being punished for their actions.

      (1) This can affect a young person's ethical behavior because it does not provide tangible feedback about the consequences of actions on others.

      (2) This lack of feedback minimizes feelings of empathy or remorse.

      (3) Young people say things online that they would never say face-to-face because they feel removed from the action and the person at the receiving end.

   d. Cyberbullying is often outside the legal reach of schools and school boards because the behavior often happens outside of school on home computers or cellular phones.

e. Victims of cyberbullying are often also afraid to report it to adults, because they fear that adults will overreact and take away their cell phone, computer, and/or Internet access.

f. The reflection time that once existed between the planning of a prank – or a serious stunt – and its commission has all but been erased.

g. The power and speed of technology has made it nearly impossible to contain a regrettable deed – because once committed, there is almost no way to retrieve and destroy all evidence of it in cyberspace.

h. Home may no longer be a haven from negative peer pressure such as bullying.

i. Cyberbullying can occur 24/7 and be very public.

j. According to the National Crime Prevention Council, each day 160,000 students miss school because they are afraid of bullying. (www.ncpc.org).

4. Forms

a. Cyberbullies post slurs, rumors or other disparaging remarks about a student on a website or on a blog.

b. The most common instances of cyberbullying involve instant messaging and text messaging because cyberbullies can send mean or threatening instant messages ("IMs") with no immediate identification beyond a screen name or text messages so numerous as to drive-up the victim's cell phone bill.

c. Using a camera or videophone to take and send embarrassing photographs and videos of students.

d. Posting misleading or fake photographs of students on websites.

e. "Flaming" which constitutes online fights using electronic messages with angry and vulgar language.

f. "Impersonation" such as pretending to be someone else and sending or posting material to get that person in trouble or danger or to damage that person's reputation or friendships.

g. "Exclusion" which is intentionally and cruelly excluding someone from an online group.

h. "Trickery" which is tricking someone into revealing secrets or embarrassing information and then sharing it online.

i. Websites are often used to circulate rumors, ask students to vote on the ugliest or fattest kid in school, and focus on one individual.

j. Blogs are cyber reality shows, widely read diaries that publicly detail the social drama and fluctuating emotions of young lives.

k. Cyberbullying frequently involves a population that is largely middle-class, usually known as the "good kids" who are "on the right track" or "the ones you'd least expect" to bully or degrade others.

5. The Cyberbullying Research Center reported in the September 2009 edition of *School Climate Matters* that 15% to 35% of students have been victims of cyberbullying. According to another recent study conducted by the Cyberbullying Research Center, nine percent (9%) of a representative sample of middle schoolers said they had been a victim of cyberbullying in the past month, while eight percent (8%) said they had been a cyberbully. (Seattle Times, 1/15/2010, Linda Shaw).

6. Another study found that 14% of teens admitted to some form of involvement in cyberbullying. Kids are more likely to admit involvement in a "cyber-prank" (6%) than sending anonymous e-mails (3%), spreading rumors online (3%), forwarding private information without someone's permission (2%) or posting mean or hurtful information about someone online (2%). (McAfee, *Youth Online Behavior Report*, June 2010.)

7. Even though a relatively small percentage of youth acknowledge their own participation in cyberbullying, 52% of youth "know someone" who experienced some form of cyberbullying behaviors. 1 in 4 youth indicated that they "know someone" who has had mean information about them posted online, rumors spread about them online or their passwords hacked, while 1 in 6 "know someone" who has been approached online by someone they did not know, had embarrassing information posted on the web, or had been cyber-pranked. (McAfee, *Youth Online Behavior Report*, June 2010.)

8. In terms of first-hand experience, 29% of teens reported personally experiencing some form of cyberbullying "behavior," while only 7% admit to have actually been bullied or harassed online. Almost 1 in 10 youth say they have been approached online by someone they did not know, received a message of a bullying nature, or had their passwords hacked. (McAfee, *Youth Online Behavior Report*, June 2010.)

9. One in four teens say they would not know what to do if they were bullied or harassed online. Of the youth who admitted to having been bullied or harassed online, 72% say they have made some adjustment to their online behavior. For example, 52% modified their privacy options, 40% adjusted privacy settings on their social networking accounts, 24% changed their passwords, and 21% deleted certain pictures, posts, or personal information that was on their profile. (McAfee, *Youth Online Behavior* Report, June 2010.)

10. Cyberbullying may not only happen to students. Some situations may involve the cyberbullying of school administrators such as a situation where a student created a Facebook page to disparage one of her teachers. Such actions would have likely violated the school's prohibition on cyberbullying.

B. District Policies and the Law

1. Although it is difficult to legally deal with off-campus conduct, courts have upheld the discipline for off-campus behavior if schools can show the conduct substantially disrupts learning or interferes with school discipline.

2. In order to discipline a student, the District must be able to prove that the student's conduct violates a law or school rule. Outdated school rules and new policies alike are consistently being challenged in school Internet speech cases across the country as "vague" and "overbroad."

    a. A rule is "overbroad" when it is designed to punish activities that are not constitutionally protected, but that also prohibits (or could be interpreted to prohibit) protected activities as well.

    b. A rule may be declared "vague" if it fails to give a person adequate warning that his conduct is prohibited or if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement.

3. Policy Suggestion

a. Evidence of illegal or inappropriate student conduct posted on the Internet should be included as grounds for disciplinary action.

b. Acceptable Use Policy.

(1) Acceptable Use Policies ("AUPs") can help educate students, parents, and staff about Internet use and issues of online privacy and safety, and to seek parental consent for their children's Internet use.

(2) Make cyberbullying a punishable offense.

(3) Require students to sign a statement agreeing to comply with district rules on network or Internet use and have parents sign a consent form and a release authorizing their child's use of the school network.

(4) In the release, the authorized student user and his/her parent (if the student is under age 18) should agree to indemnify and hold the school system harmless from all claims that result from the student's activities while using the school's network and that cause direct or indirect damage to the user, the school system, or third parties.

(5) Also in the release, e-mails that include malicious gossip and slander, "hit lists" via e-mail or other methods of electronic communication naming specific students and/or teachers, and changing other students' e-mail or personal settings should be prohibited.

c. Laws on Privacy of Records and Internet Use.

(1) School districts must comply with various federal and state laws governing the privacy of student records and children's use of the Internet. Schools must be especially vigilant in complying with such laws so that private student information and school networks are not used by cyberbullies to harass or intimidate other students or school employees.

(a) Family Educational Rights and Privacy Act ("FERPA") – If a school fails to safeguard student education records and a cyberbully publicizes confidential information to classmates or on the Internet, the school may be in violation of FERPA.

(b) Children's Online Privacy Protection Act ("COPPA").

i. COPPA is a federal law that requires commercial online content providers who either have actual knowledge that they are dealing with a child 12 or under or who aim their content at children to obtain verifiable parental consent before they can collect, archive, use, or resell any personal information pertaining to that child.

ii. Schools should educate staff and students' parents about the requirements of COPPA so that personal information concerning a child under 12 does not fall into the hands of online content providers or others.

d. Above all, enforce a fair and consistent disciplinary procedure, which should be in place for students who misuse computers, the Internet, or other electronic communication devices in violation of school rules.

e. Revised Code § 3313.666 (see page 1 of the outline)

f. The Jessica Logan Act: House Bill 116

(1) The Act amends Ohio Revised Code Section 3313.666, among other statutes, and require boards to develop an anti-bulling policy that expressly prohibits harassment, intimidation, or bullying on a school bus. The law also requires an express provision for the possibility of suspension of a student found responsible for bullying on school grounds via the use of a cellular telephone, computer, pager, personal communication device, or other electronic communication device (i.e., "cyberbullying").

(2) Among other changes, the statute also requires boards to provide in their policies a way by which an individual may make an anonymous report, and a disciplinary procedure for deliberately making false reports. Boards must also make their policies available to students and their custodial parents and guardians.

(3) To the extent state or federal funds are given for training, boards must provide age-appropriate written and verbal instruction to students on the consequences of violating board policy with respect to bullying. Staff are also be required to have training on the policy during required in-service hours. The bill also requires boards, once per school year, to provide a written statement to parents describing the policy and consequences for violating it.

(4) **Excluded from the final bill were provisions that would have required schools to discipline students for participating in cyberbullying while off of school grounds.**

VII. INVESTIGATING CLAIMS OF HARASSMENT, INTIMIDATION, OR BULLYING BY STUDENTS

A. Reporting Harassment

1. Students must know how to report harassment.

a. Contact information can be found in student handbooks, policy and administrative guidelines, or in any other publications that lay out the comprehensive rules, procedures and standards of conduct for schools and students in the district. The policy must also be incorporated into employee training manuals.

b. Students should be put on notice that any form of harassing or bullying behavior is prohibited:

(1) In the classroom;

(2) On or immediately adjacent to school property;

(3) To and from school;

(4) On school-provided transportation or at any official school bus stop;

(5) at school-sponsored events/activities;

*A school-sponsored activity is defined as "any activity conducted on or off school property (including school buses and other school-related vehicles) that is sponsored, recognized, or authorized by the Ohio Board of Education."

c. Accountability of Students – Students who engage in harassment, intimidation, or bullying are subject to disciplinary action, including suspension or expulsion. Discipline involves a multifaceted approach including education and the promotion of a school atmosphere in which harassment, intimidation, or bullying is not tolerated by students, faculty or school personnel.

2. Administrators, teachers and staff must know how to follow the guidelines if they learn of harassment.

a. Distribute policy and train employees.

b. Staff should provide knowledgeable responses to reports of harassment and be prepared to advise students appropriately and accurately about their options, including identifying the employees designated to accept and act on reports of harassment (i.e., building principal, complaint coordinator, and/or superintendent).

c. Address responsibility to **report** harassment and to intervene to stop harassment that occurs in the presence of teachers and staff members.

d. Address responsibility to **report** harassment even when there is not ability to stop harassment.

(1) A school staff member or administrator who receives an informal complaint should promptly document the complaint in writing (including, persons involved, the number of times and locations of the alleged conduct, the target of the harassment, intimidation, or bullying, and the names of any potential student or staff witnesses).

(2) The written report should be promptly forwarded to the building principal or his/her designee for review and action in accordance with the policy.

e. Accountability of Staff – Discipline employees who fail to report harassment.

B. Conducting an Investigation

1. Although prevention of student harassment is everyone's concern, protocols must be followed in conducting an investigation.

   a. Investigate all reports of harassment.

   b. Make sure the superintendent knows about the complaint and the investigation.

2. Investigate promptly and thoroughly.

   a. In cases involving peer-on-peer harassment, while school boards are not responsible for the actual harassing statements made by students, liability can attach for failing to prevent or curtail the harassment, thereby permitting it to continue.

3. Investigation should include statements from all witnesses and parties.

   a. Interview with the complaining student.

   b. Interview with alleged harasser.

   c. Interviews with any other witnesses who may be reasonably expected to have any information relevant to the allegations.

4. Learn as much as you can about determining the credibility of all parties and witnesses – particularly young children.

   a. Note that students with disabilities may be more vulnerable to certain types of harassment, including harassment from their peers and sexual abuse and less able to articulate that they have been harassed.

5. Make sure to the get the "appropriate" people involved to judge the credibility of parties and witnesses.

6. When the alleged harasser is a district employee, the investigation must be conducted from two perspectives – anti-harassment procedures and personnel procedures.

    a. Consider placing employee on leave with pay until the investigation is over.

    b. Even if you believe the employee account of the incident(s) warn him or her and explain exactly what conduct you expect in the future.

    c. Sexual Harassment – Remember, you are a mandated reporter of child abuse to either the police or children's services. But any investigation by those entities does not fulfill the district's Title IX obligations. The reporting requirement goes to individuals; however, tell your administrator you have made a report.

7. Involve law enforcement when appropriate.

C. Evaluating Information Gathered During Investigation

1. In evaluating whether conduct constitutes harassment, special attention should be paid to:

    a. The nature of the student's behavior – i.e., the words chosen or the actions taken;

    b. Whether such conduct occurred in front of others or was communicated to others;

    c. The context in which the alleged incidents occurred;

    d. How often the conduct occurred. Also, have there been other incidents in the school involving the same or other individuals?

    e. How the perpetrator interacted with the victim – i.e., the relationship between the parties involved;

    f. The motivation (either admitted or appropriately inferred).

2. Consider any documentation or other information, which is reasonably believed to be relevant to the allegations.

3. The issue of whether a particular action or incident constitutes harassment on the basis of race or other prohibited factor requires a determination based on all the facts and surrounding circumstances.

D. Results of the Investigation

1. The district must inform parents of the results of the investigation – in writing.

2. Parental concerns must be addressed even if the investigation does not find harassment occurred. How best to address these concerns is an administrative decision.

3. Take timely and appropriate corrective measures and make sure they are working.

VIII. BULLYING LAWSUITS ON THE RISE

A. Types of Claims

1. Suit by the Alleged Bully for First Amendment Violations

a. On-Campus Speech: Summary of the Traditional School Speech Analysis

Tinker v. Des Moines Indep. Community Sch. Dist. (1969), 393 U.S. 503
Bethel Sch. Dist. No. 403 v. Fraser (1986), 478 U.S. 675
Hazelwood Sch. Dist. v. Kuhlmeier (1988), 484 U.S. 260
Morse v. Frederick (2007), 551 U.S. 393, 127 S.Ct. 2618

(1) Pursuant to *Bethel*, a school may categorically prohibit lewd, vulgar or profane language <u>on school property</u>.

(2) Under *Hazelwood*, a school may regulate <u>school-sponsored speech</u> (i.e., speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern.

(a) Caution: The ability to regulate speech in student publications (electronic or otherwise) may be limited by the nature of the forum that has been created or emerged.

(b) If the student publication can reasonably be deemed a limited public forum, the ability to restrict speech based upon content becomes increasingly more circumspect.

(3) Any speech that does not fall into one of the two categories addressed in *Bethel* and *Hazelwood* is analyzed under *Tinker* and *Morse*. Accordingly, student speech may be regulated only if it:

(a) substantially disrupts school operations or interferes with the rights of others (or if there is a reasonable and particularized fear of a disruption or interference); or

(b) promotes illegal drug use.

(4) Discipline for on-campus bullying should clearly meet a "conventional" exception to the First Amendment: *Tinker* substantial disruption; a "true threat;" or "obscene and vulgar, defamatory, drug promoting, fighting words, or school-sponsored"

b. Off Campus Speech by the Alleged Bully

(1) Districts have been successfully sued under the First Amendment for disciplining students for speech that occurred partially or totally off-campus.

(2) There is no United States Supreme Court free speech case that applies *specifically* to off-campus student speech.

(3) Off campus speech cases typically involve cyber-bullying.

(4) How courts are applying *Tinker* to off-campus speech demonstrates their reluctance to allow public schools to discipline students for speech occurring outside of school.

(5) In determining how to handle off-campus "cyber" speech, districts should consider the following four things:

(a) **L**ocation of the speech – is there a viable nexus or connection to the district network or system?;

(b) The disruptive **E**ffect, if any, on the educational environment;

(c) The **N**ature or type of speech (personal, violent, lewd, vulgar, pro-drug, threatening?); and

(d) The manner in which the speech was **D**istributed (i.e., how did the speech make its way onto the campus?).

c. "Checklist" for analyzing student discipline for Internet misconduct (web page, website, Facebook, YouTube, blogs, etc.)

(1) Carefully and thoroughly investigate the incident in question and fully identify the potential legal issues presented. Begin with these basic questions:

(a) What kind of speech is involved (i.e., political, lewd, threatening, pro-drug, satirical)?

(b) Why do we want/need to discipline (because it threatens the mission of the school vs. because we simply don't like the speech)?

(2) Review the student handbook to assure that there is clear language supporting an offense.

(a) Language that is vague or overbroad and/or which fails to reasonably put a student on notice that conduct is a violation may not survive judicial scrutiny, particularly where the First Amendment is implicated.

(b) This is true, despite the supportive language appearing in Ohio Revised Code § 3313.661, which requires districts to have policies in place for suspension and expulsion and permits among the types of misconduct for such removals:

[M]isconduct by a pupil that occurs off of property owned or controlled by the district but that is connected to activities or incidents that have occurred on property owned or controlled by that district and misconduct by a pupil that, regardless

of where it occurs, is directed at a district official or employee, or the property of such official or employee.

d. Location: Assess whether the student's speech occurred off campus, on campus, or both. There are significant ramifications that flow from this critical determination.

(1) In-school conduct. If the Internet was accessed and/or utilized at school to develop the "speech," there is a dramatically increased chance of applying the code of conduct to such behavior.

(a) The stronger the "nexus" between the school and the conduct, the greater the efficacy of the disciplinary response.

(b) However, minimal use/access by a student (cutting and pasting a photo, accessing a non-approved website, etc.) will not remove First Amendment protections.

(c) If it is determined that significant use of the school computer (i.e., "in school conduct") was involved, then apply the code of conduct to the offender in a measured fashion.

i. For example, if a website developed on the school computer is critical of the building principal (but not obscene, threatening, or defamatory); consider how you would punish a student who engaged in similar conduct on school grounds.

ii. However, be careful not to overreact simply because the District's AUP was violated. For example, if the speech in question is purely "political" – say the cyber-equivalent of Tinker's armband – and there is no substantial disruption of the educational environment, any attempt to extend punishment beyond the violation of the AUP may likely be met with a First Amendment challenge.

iii. By the same token, if it can be established that significant conduct occurred on school grounds and/or on the school's computer system, where there is significant disrespectful, lewd, obscene, threatening, "pro-drug," and/or defamatory speech, the use of a computer should NOT prevent an appropriate and significant disciplinary response.

(d) Where student Internet misconduct ("speech") occurs entirely or predominantly off campus, a school's ability to discipline the student is **significantly limited,** unless one or more of the following is present:

i. The website contains "true threat" speech, which can be defined as speech that would cause a reasonable person to interpret the alleged threat as a serious expression of intent to cause present or future harm. In a post-Columbine era, courts are much more likely to allow a school to reach out in relation to a cyber-threat of this nature. Contrast this, however, with the more popular "MySpace" parodies and satire, which are constitutionally protected where they cannot reasonably be interpreted to be stating believable facts.

ii. You have reliable proof of either an actual substantial and material disruption to the educational environment or there exists a provable concrete and particularized reason to anticipate that such a disruption would result from the student's speech.

• Remember *Tinker* – "undifferentiated fear or apprehension of disturbance" is not enough to overcome the right to freedom of expression.

- While it is not totally clear what a substantial disruption actually looks like, it would be critical for a school district moving solely upon this basis (off-campus behavior) to have documented incidents of classroom unrest, palpable reactions by students and staff, and/or other data showing that normal operations (work and discipline, for example) were actually affected.

- Specific and significant fear of disruption. As a practical matter, if discipline (in effect, censorship) under these circumstances is attempted before the speech actually makes it to the educational environment, there must be a well-founded fear of a genuine disruption that you are certain will substantially interfere with school operations or the rights of others.

    - Tread carefully here.

    - Only if you have sustained previous disruptions through similar speech or experienced a prior incident within the district that is certain to be ignited or reignited by the publication of this speech should you act.

    - For those with higher degrees of risk tolerance, there is a minority view that in order for a district to meet the *Tinker* standard (above) on predicting a disruption, one need only show that it was "reasonably foreseeable" that the student speech would materially and substantially disrupt the work and the discipline of the school. *Wisniewski v. Bd. of Edn. of Weedsport Central Sch. Dist.* (2nd Cir. 2007), 494 F.3d 34; *O.Z. v. Bd. of Trustees of the Long Beach Unified Sch. Dist.* (C.D. Cal.), 2008 WL 4396895.

(e) **In the absence of a substantial disruption, concrete prediction of a substantial disruption, or unprotected (true threat) speech, disciplinary action for off-campus expression (Internet or otherwise) is extremely risky business for schools.**

e. Alternatives to Discipline

(1) Ask the student to stop bullying or remove the Internet posting and issue an apology.

(2) Inform the bully's parents and ask them to be involved in stopping the bullying or removing the posting and getting an apology.

(3) For Internet bullying: contact the web site and request the removal of the posting.

(4) Contact the police if a crime may have been committed/Tell the parents to do the same.

(5) Work with the victim: Offer counseling. Check in periodically. Ask if mediation might work (involve parents).

2. Sued by the Victim under many statutes and/or constitutional provisions: The basic claim is that the student has a right to be safe and free from bullying at school; school officials have a duty to provide an atmosphere free from repeated bullying; and school officials breached their duty to keep the student safe.

a. Title IX: Bullying "on the basis of sex"

(1) *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) held students who are sexually harassed by peers may receive monetary damages if they show the school district: (1) was "deliberately indifferent" to the sexual harassment; (2) had "actual knowledge;" and (3) harassment was "so severe, pervasive, and objectively offensive that it deprived the victim of access to the school's educational opportunities or benefits."

(2) Includes harassment of a sexual nature, "gender harassment" where a student fails to conform to sex stereotypes (sexual orientation and gender identity included), and where students of one gender were singled out for harassment

(3) Plaintiffs sue under Title IX because: (1) money damages are available; (2) the cause of action is well established; and (3) it is often easy to characterize bullying as sexual harassment.

(4) If there is not harassment *based on sex*, then a Title IX claim fails. Therefore, not all bullying cases are Title IX cases—only bullying based on sex can support a Title IX claim.

b. Fourteenth Amendment Substantive Due Process

(1) Individual claims for violations of substantive due process claims arising under the Fourteenth Amendment are enforceable through 42 U.S.C. § 1983 ("Section 1983"). *In order to recover under this statute, a plaintiff must show that a person acting under the color of state law, deprived the plaintiff of a federal right.*

(2) Plaintiffs often claim this federal right is a right to the life and liberty interest in "familial relationships."

(3) Under the Due Process Clause of the Fourteenth Amendment, no state can deprive "any person of life liberty, or property, without due process of law. *However, nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasions by private actors.*

(4) Thus, courts seem to be on the same page with substantive due process claims.

(5) There is generally no affirmative duty for the state actor to protect an individual from harm caused by another private individual, except: (1) a state-created danger, where the state affirmatively places a student in harm's way; or (2) special relationship/custody, in which the state has custody and control over the victim.

(6) *Scruggs v. Meridien Bd. of Educ.*, 2007 WL 2318851 (D. Conn. 2007): Repeated bullying of student, of which defendant school officials were aware, did not give rise to substantive due process claim because they did not put the student affirmatively in harm's way.

(7) *O'Dell v. Casa Grande Elem. Sch. Dist. No. 4*, 2008 WL 5215329 (D. Ariz. 2008). No deprivation of substantive due process when student attacked after threat from another student. The special relationship/custody expectation has been uniformly rejected by courts in the school context. There was no state-created danger because no evidence of prior assaults or other evidence that officials were remiss for re-admitting the aggressor to the school after a suspension, or for failure to discipline the other student based on threats.

c. Title VI, race discrimination:

(1) Title VI prohibits intentional discrimination based on race in any program that receives federal funding.

(2) Under Title VI, a plaintiff may sue a school district for money damages based on alleged student-on-student harassment only if the school district "acts with deliberate indifference to known acts of harassment."

(3) Thus, courts generally apply the *Davis* Title IX standard to Title VI cases, because the language in the two statutes parallels one another. Schools likely liable if they are made aware of egregious discrimination and make the nearly intentional choice to sit by and do nothing.

(4) *DT for JL v. Somers Central Sch. Dist.*, 348 Fed.Appx. 697 (2nd Cir. 2009). Plaintiff, a student, was suspended twice for theft. He and his mother sued the school district claiming student-to-student racial harassment. The Second Circuit applied *Davis* and upheld the decision of the district court finding no Title VI violation. The incidents that he reported to school staff (one) and that staff observed (one) were investigated and action taken. The suspension for theft did not support a finding of deliberate indifference.

c. Ohio Revised Code Section 2307.44 – Hazing Civil Liability

(1) Ohio Revised Code Section 2903.31 – Hazing: A fourth degree misdemeanor for recklessly participating in hazing, or for a school official to recklessly permit it.

"Hazing" means "doing any act or coercing another, including the victim, to do any act of initiation into any student or other organization that causes or creates a substantial risk of causing mental or physical harm to any person."

(2) Ohio Revised Code Section 2307.44 – Hazing Civil Liability

"Any person who is subjected to hazing . . . may commence a civil action for injury or damages, including mental and physical pain and suffering, that result from the hazing . . . . If the hazing involves students in a . . . primary . . . school . . . or any other educational institution, an action may also be brought against any administrator, employee, or faculty member of the school, . . . who knew or reasonably should have known of the hazing and who did not make reasonable attempts to prevent it and against the school .. . . If an administrator, employee, or faculty member is found liable in a civil action for hazing, . . . the school . . . that employed the administrator, employee, or faculty member may also be held liable."

(3) *The term "student organization" does not simply mean being a member of the student body at a particular school. The initiation must be into an organization where membership is voluntary.*

d. Noncompliance with state bullying statute: Ohio Revised Code §§ 3313.667 and 3313.666, **do not create a new cause of action or substantive legal right for any person. (exception: proposed Senate Bill regarding cyber-bullying)**.

(1) Thus, plaintiffs cannot bring a private cause of action under these Revised Code sections, if a school district fails to comply with them.

(2) That does not foreclose suit under other statutes and constitutional provisions.

B. United State Department of Education, Office for Civil Rights: A Higher Standard

1. OCR's "Dear Colleague" letter, issued October 26, 2010, reminded schools that some student misconduct that falls under the schools' anti-bullying policy also may trigger responsibilities under one or more of the federal anti-discrimination laws.

2. "By limiting its response to a specific application of its anti-bullying disciplinary policy, a school may fail to properly consider whether the student misconduct also results in discriminatory harassment."

3. OCR's New Standard:

   a. A school can be liable if it knew *or should have known* of the harassment (courts require "actual knowledge of the harassment).

   b. A school can be held liable if the harassment is severe, pervasive, *or* objectively offensive (courts require "severe, pervasive, and objectively offensive).

   c. A school can be held liable if the conduct interferes or limits participation in school (courts require an affective bar to educational opportunities).

   d. A school can be held liable if it fails to eliminate the harassment (courts require responding in a manner that is not clearly unreasonable).

   e. A school must also use multiple remedial measures (punishment, training, etc.) to deal with harassment, and may be required to respond to the parents' demands (courts do not require this, unless multiple remedial measures are needed to act reasonably).

   f. Schools must publically label an incident as harassment (This could violate FERPA.).

C. Preventable Problems If Your District Is Sued

1. The Media Blitz: Remember, school districts cannot release personally identifiable student information to the media. This substantially limits and District's ability to respond to allegations made in the media.

    a. Remember, you can publicize information regarding your district's anti-bullying policy.

    b. You can publicize information regarding recent training sessions, and also parent involvement and general information about student groups regarding anti-bullying measures.

    c. Be sure to keep accurate records of what your District is doing to combat bullying!

2. Records Retention

    a. A litigation hold will be immediately instituted if your District is sued or there is a threat of suit based on bullying, where you must find and retain all records regarding the lawsuit.

    b. As part of your anti-bullying training, be sure staff members are aware of the District's records retention policy with respect to documents related to bullying.

    c. Once there is any indication that litigation could occur (for example, you know a parent has retained a lawyer), immediately ensure that records are kept.

    d. Failing to do so could result in sanctions against the District and/or individual defendants, including school administrators, that could severely prejudice your case. This could occur, even if the records were accidentally destroyed.

D. Avoiding Getting Sued by the Victim

1. What standards will school districts be held to? It depends on whether you're in Court, or being investigation by the Office for Civil Rights with its higher standard.

2. Simple advice: This is really about avoiding deliberate indifference:

    a. Respond promptly

b. Investigate thoroughly, including in-person interviews

(1) Often difficult when the harassment is going both ways, and/or there are no witnesses or reliable witnesses. Nonetheless, be sure to interview corroborating witnesses even if they don't have first-hand information. Take repeated complaints about a particular individual seriously.

(2) If you can't determine what happened, consider instituting "informal corrective measures," like reminding the accused of the district's anti-bullying policy and keeping an eye on the accused perpetrator.

c. Take action that is clearly reasonable

(1) Ideally, this is an action that is likely to solve the problem. Generally, school districts will not be found to be deliberately indifferent just because the discipline implemented did not work. **An exception to that may be where a school district continues to take the same action to try and stop a student from being bullied, and the district knows that action does not work.**

(2) Respond to every incident promptly, and make sure the seriousness of the response matches the seriousness of the incident. The response should escalate as the incidents escalate.

d. Keep written records; and

(1) Include in the written records the allegations, interview notes, the conclusion reached, any corrective action taken, and any follow up done.

e. Follow up with staff, student, and parents.

f. Districts lose bullying and sexual harassment cases even where they did investigations and took corrective action where that corrective action proved to be ineffective or the bullying/harassment continued. Courts might not expect victims to continue to report every instance of bullying/harassment where, in particular, it is ongoing and happening in front of numerous people. It is, therefore, advisable to follow up and see whether any retaliation-type bullying occurs after the perpetrator is disciplined.

IX. SURVEY OF RECENT CASES – STUDENT RIGHTS AND REGULATION

A. First Amendment Cases – Religion:

School District May Not Prohibit Student From Wearing to School a T-shirt Stating "Jesus is Not a Homophobe"

Maverick Couch v. Wayne Local School District
U.S. District Court for the Southern District of Ohio
Case No. 1:12-cv-00265
May 21, 2012

High school student wore to school a T-shirt displaying the Christian fish symbol with a rainbow-colored interior and the phrase "Jesus in Not a Homophobe." The principal ordered the student to turn the shirt inside-out, which the student did. The student wore the shirt again a week later, which prompted the Principal to threaten the student with discipline if he wore the shirt a third time. The principal or board legal counsel wrote student and his parents a letter stating that the student could not wear the T-shirt to school because the phrase was "sexual in nature and therefore indecent and inappropriate in a school setting." Student sued the Board and Principal, alleging that he had a First Amendment free speech right to wear the T-shirt.

It appears from the district's letter to parents and student explaining why student could not wear the T-shirt that the district conceded early on that the message on the T-shirt did not cause a substantial and material disruption of the school environment or an imminent threat of such a disruption. Instead, the district sought to censor the student's speech because it was lewd, vulgar, or obscene. A school district may prohibit student speech that is lewd, vulgar, or obscene, but otherwise the general rule is that student speech may not suppressed unless it causes a substantial and material disruption of the school environment, or school officials have a reasonable belief that such a disruption is imminent unless the speech is censored or that discipline is necessary to prevent a substantial and material disruption.

The characterization of the phrase on the T-shirt to be lewd, vulgar, or obscene ("sexual in nature") was tenuous, and the parties quickly settled the lawsuit. The district agreed that the Student's right to wear the T-shirt was protected by the First Amendment, and the Board agreed to pay the Student's attorney $20,000.00 in attorney's fees.

Principals Entitled to Qualified Immunity From Establishment Clause Claims Because First Amendment Freedom of Religion Rights and the Obligation Not to Endorse Any Particular Religion is (Still) Unclear

Morgan v. Swanson
659 F.3d 359 (5th Cir. 2011)

Parents of Texas elementary school students sued the board of education and two principals in their personal capacities for alleged violation of the First Amendment's Establishment Clause, which includes a prohibition against government interference with religion. The school district: (1) prohibited a student from distributing literature at the winter break party describing how candy canes were symbols of Jesus (the district allowed the literature to be placed at the library information table); (2) confiscated tickets to a church play that a student distributed during school; (3) prohibited a student from distributing pencils with a religious message at a school birthday party; and (4) confiscated the pencils the student gave to other students who requested them after school, outside but on school grounds, while waiting for the bus.

The principals asked the trial court to dismiss the claims against them, asserting they had qualified immunity because the law was unclear whether their conduct was illegal. The trial refused to do so, and the principals appealed. A three judge panel of the appellate affirmed, but a rehearing of the matter by all of the appellate court judges resulted in the complaint against the principals being dismissed based on qualified immunity.

The appellate court granted qualified immunity to the principals because educators should not be held accountable for misapplying complicated First Amendment law, including the "murky waters of the Establishment Clause," which requires a "delicate constitutional balance between student's free-speech rights and the…imperative to avoid endorsing religion." The court referred to these types of cases as "the thorniest of constitutional thickets." Noting that numerous court cases had failed to provide adequate guidance to administrators, the court stated: "no federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first."

The court noted that some courts *allow* school districts to prohibit speech in elementary schools precisely because it was religious, while other courts *require* schools to prohibit the distribution of religious literature in elementary schools because young children won't understand the difference between neutrality and endorsement. In the former category, the court cited *Curry ex rel. Curry v. Hensiner*, 513 F.3d 570, a 2008 case from the Sixth Circuit (which includes Ohio), where the court upheld the school's prohibition against an elementary school student's distribution of a similar "candy cane message" at an organized school activity. There, the Sixth Circuit stated that "[t]he school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose."

After granting qualified immunity to the principals, the court addressed the substance of only one of the incidents at issue, the confiscation of pencils distributed while waiting for the bus. The court stated that confiscating the pencils because they displayed a religious message was unconstitutional because even elementary school students would realize that the speech on the pencils was not sponsored by the school: the student gave a pencil only to students who requested one, and the distribution occurred after school with no indicia of school sponsorship, *albeit* on school grounds.

One Student Telling Another That the Other Student's Views or Conduct Will Cause the Other Student to End Up in Hell are Fighting Words That the School District May Regulate

R.Z. v. Carmel Clay Schools
2012 U.S. Dist. LEXIS 50945 (S.D. Ind. 2012)

A male student complained to the bus driver that a female student on the bus, R.Z., had repeatedly told him that his brother was going to Hell because his brother was gay. Rather than single R.Z. out, one morning the bus driver lectured all of her riders that they should embrace diversity and stop criticizing other students for their differences and different viewpoints, including differences in religious beliefs. The bus driver was especially critical of students telling others that they would go to Hell for holding certain views. The bus driver noticed that R.Z. was listening to her iPod during most of her speech, so after completing her afternoon run, she drove her bus back to R.Z.'s house and asked R.Z. and her older sister to get back on the bus to talk. The bus video system recorded the conversation that followed.

The bus driver accused R.Z. of telling the male student that the student's brother was going to Hell. R.Z. denied this, but acknowledged she told the student that she did not support President Obama because the President supported gay marriage and abortion, which were contrary to R.Z.'s religious beliefs. R.Z. also said she told the student that Obama's presidency would cause "gays to rule the world" and that God "made Adam and Eve, not Adam and Adam." The situation deteriorated after R.Z.'s mother joined the discussion, and R.Z.'s mother told the bus driver that R.Z. would no longer ride the bus. The bus driver told R.Z. that if she could not be tolerant of others, she belonged in a parochial school.

R.Z. and her parents sued the school board and the bus driver for violating R.Z.'s right to free speech and free exercise of religion, claiming that the bus driver's speech, both to all of the students on the bus and later with R.Z. and her sister, was retaliation against R.Z. for expressing her political and religious beliefs, and was evidence of a board policy against free expression of beliefs.

The court granted the board and bus driver summary judgment on the free speech claim. The court applied *Tinker*, which allows schools to regulate student speech that materially and substantially interferes with the provision of educational services, or that "collides with the rights of other students." The court noted that the Seventh Circuit Court of Appeals, which includes

Indiana, previously held that a school could discipline one student for telling another student that the latter was "going to Hell" because these were "fighting words" which could be regulated.

The court also based its decision on R.Z.'s failure to allege any adverse action based on her speech, and that no reasonable jury could construe the bus driver's speech to express board policy. The court did not consider R.Z.'s statements about "gays ruling the world" and the nature of God's creation because there was no evidence that the bus driver ever heard those comments.

The court also granted the board and bus driver summary judgment on the free exercise of religion claim. The First Amendment prohibits the government from infringing on a person's religious beliefs or practices. The court held that to the extent the bus driver's comments could be construed to be critical of R.Z.'s religious beliefs, the comments did not cause a substantial burden on R.Z.'s ability to express or practice her religious beliefs.

B. First Amendment Cases - Speech

Board and Principal Did Not Violate Student's Free Speech Rights by Temporarily Isolating Student Pending an Investigation of Incident

Cox v. Warwick Valley Central School District
654 F.3d 267 (2nd Cir. 2011)

Middle school principal placed student in an in-school suspension room for an afternoon after reading an essay the student submitted to his English teacher. The essay described the student getting drunk, smoking, doing drugs, then taking cyanide and shooting himself in the head in front of his friends. While the student was in the suspension room, the principal contemplated whether he should discipline the student, or whether the student was a risk to himself or others. At the end of the day, the principal allowed the student to go home and did not discipline him. The next morning, the principal referred his concerns to Children's Services. When the parents found out about the referral, they withdrew student from school and home-schooled student for the remainder of the school year. Children's Services took no action after meeting with the parents and student except to demand the parents have student complete a psychological evaluation.

Parents sued the board and principal, alleging they violated student's free speech rights by disciplining him for his essay. The trial court granted summary judgment to the board and principal, holding that although placing the student in an in-school suspension was an adverse action, the student's speech was not protected by the First Amendment.

The court of appeals affirmed, but for different reasons. The court of appeals did not reach the issue of whether the student's speech was protected by the First Amendment because the court disposed of the claim after holding that there was no discipline or retaliation for the essay. Absent clear evidence that the principal did not have a reasonable suspicion that the

student was dependent, neglected, or abused, the report to children's services was not adverse action because the report was required by law. Placement in the suspension room for a few hours was not an adverse action because a school administrator must be permitted to temporarily sequester a student while conducting an investigation to determine whether to discipline the student or whether the student poses a danger to himself or others. The court characterized the principal's decision to sequester the student temporarily to be "objectively protective and precautionary," not disciplinary, and stated that courts must show school administrators "unusual deference" when making such decisions.

School District May Discipline Student for Essay Describing Student's Wish to Blow Up the School and Teachers

Cuff v. Valley Central School District
2012 U.S. App. LEXIS 6024 (2nd Cir. 2012)

Teacher assigned her fifth grade students to write an essay about a wish, any wish, they had. One student wrote an essay describing his wish to "blow up the school with the teachers in it." Before the essay was turned in, a classmate read it, became worried, and alerted the teacher. When the teacher asked the student if he really wanted to do what he described in the essay, the student remained serious and refused to answer. The teacher sent the student to the principal's office.

The student had a history of drawing violent images with violent commentary, as well as a history of discipline for pushing other students. The principal, assistant principal and school psychologist had previously been involved with the student as a result of his behaviors. Although the student told the principal that his essay was a joke, the principal suspended him out-of-school for six days.

Student's parents sued the school district and principal, alleging that the discipline violated the student's free speech rights. The trial court granted summary judgment to the school and principal, and parents appealed.

The appellate court affirmed. The court first noted that school officials deserve wide latitude when dealing with threats of violence by students. The court applied *Tinker*, holding that discipline was warranted because school officials had a reasonable belief that substantial disruption of the school environment might occur if the student's statement went unpunished. The court described the potential substantial disruption to be other students copying or escalating the student's behavior if it went unpunished, leading to a substantial decrease in discipline, an increase in behavior distracting students and teachers, and "tendencies to violent acts."

The court also indicated that a substantial disruption in the school environment may have actually taken place: the student's drawing scared a classmate, causing a disruption in the classmate's learning when the classmate stopped her school work to alert the teacher.

Student's Out-of-School Cyber Speech to Classmate, Threatening to Kill Specific Students at School, is Not Protected by the First Amendment.

D.J.M. v. Hannibal Public School District
647 F.3d 754 (8th Cir. 2011)

High school student sent instant messages ("IMs") after school from his home computer to a classmate on her home computer. Student's IMs discussed getting a gun, bringing it to school and shooting particular students. The classmate who received the IMs called an adult friend and forwarded the IMs to her. The adult then called the principal, and both the adult and classmate forwarded the IMs to the principal. The principal notified the superintendent, and they called the police. That evening, the police interviewed the student who sent the IMs, arrested him, and transported him to juvenile detention.

After the principal suspended the student, word of the IMs spread throughout the school community. Numerous parents called the superintendent to ask what was being done to keep students safe and whether their children were on the student's "hit list." The superintendent expelled the student for the remainder of the school year.

The student sued the Board and the superintendent, alleging the discipline violated his right to free speech. The trial court granted the superintendent's motion to dismiss based on qualified immunity. The trial court also granted the Board's motion for summary judgment, holding that the student's speech was a "true threat" that was not protected by the First Amendment, and that even if the speech were protected by the First Amendment, the Board could discipline the student for his speech because it caused a substantial disruption to the educational environment. Student appealed the grant of summary judgment to the Board.

The court of appeals affirmed, holding that the student's message was a "true threat" that was not protected by the First Amendment. A "true threat" is a "statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another" that the speaker communicates to "the object of the purported threat or to a third party."

Because the Supreme Court has not had occasion to review a free speech claim under a "true threat" analysis, the court of appeals also applied *Tinker*, noting that the Supreme Court in *Tinker* contemplated a school disciplining a student for "out-of-class" speech if that speech caused a substantial disruption to the school environment. The appellate court agreed with the trial court that the student's threat caused a substantial disruption to the school environment because administrators had to address the concerns of numerous parents and provide extra security at school.

School District and Administrators Not Entitled to Attorney's Fees Incurred in Defending Cheerleader's Free Speech Retaliation Claim

Doe v. Silsbee Independent School District
440 Fed. Appx. 421 (5th Cir. 2011)

Texas high school cheerleader accused two classmates, including a basketball player, of sexually assaulting her at a weekend party. Criminal charges were filed, but after a grand jury refused to indict either alleged perpetrator, the school allowed the basketball player to return to the team. The cheerleader refused to cheer for the basketball player when he was attempting free throws, instead crossing her arms and remaining quiet, or sitting with her coach. The superintendent and principal told her to cheer for the player or "go home." The cheerleader went home, and the school subsequently removed her from the cheerleading squad because of her refusal to cheer for her alleged attacker.

Cheerleader sued the district, alleging violations of 42 U.S.C. § 1983 based on violations of her due process rights, right to equal protection under the law, and free speech rights (the First Amendment prohibits government-imposed speech). The trial court granted summary judgment to the school and administrators and dismissed the lawsuit, and the appellate court affirmed. The school district applied to the trial court for an award of attorney's fees. A plaintiff, i.e., a student, who prevails in a 42 U.S.C. § 1983 claim is presumed to receive an award of attorney's fees. In contrast, an award of attorney's fees to a prevailing defendant, i.e. a school board or administrator, is presumptively unavailable and is proper only upon a finding that the lawsuit was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly becomes frivolous or unreasonable to do so. The trial court granted the motion for attorney's fees, and the cheerleader appealed.

The appellate court affirmed the award for attorney's fees for the due process and equal protection claims, stating that the lack of evidence presented by the cheerleader during arguments for summary judgment indicted the claims were frivolous. The appellate court, however, reversed the award of attorney's fees for defense of the free speech claim. The appellate court determined that although the claim was dismissed, the cheerleader's claim was not frivolous because there was at least some arguable merit to her claims that the school retaliated against her because of protected speech (the appellate court had affirmed the dismissal of the free speech claim because it deemed the speech (cheerleading) to be the school's "speech," not the cheerleader's speech, and because the cheerleader's silent protest caused a substantial interference with the work of the school).

Superintendent Enjoys Qualified Immunity from Claim That he Took Insufficient Steps to Stop Teacher's Alleged Retaliation For Relative's Speech Against the Levy

Teare v. Independence Local School District Board of Education
2011 U.S. Dist. LEXIS 113239 (N.D. Ohio 2011)

Former middle school student sued the Board of Education, the superintendent, and her former teacher, alleging a violation of her First Amendment free speech rights and her Fourteenth Amendment right to familial association. Student alleged that her former teacher had retaliated against her by making threats and giving her a zero on an assignment because of the student's uncle's vocal opposition to a school levy and student's refusal to speak in favor of the levy. Student alleged that the superintendent failed to stop the teacher's conduct and that Board policy was to be deliberately indifferent to employees who retaliated against students who engaged in constitutionally protected activities.

The trial court granted the Board and superintendent's motion for judgment on the pleadings. The trial court afforded the superintendent qualified immunity on the First Amendment claim because the student failed to allege that the superintendent directly participated in the teacher's alleged retaliation or encouraged the teacher's behavior. The superintendent was immune from the familial association claim because student failed to allege any action by the superintendent that interfered with her right to associate with her uncle, and no court has ever held that there is a constitutional right to familial association between an uncle and niece where the uncle is not acting in place of the parent. The trial court granted judgment to the Board because a board of education cannot be held liable for the unconstitutional conduct of an employee, only for its own unconstitutional policies. Here, the student failed to identify any Board policy or action that caused the student's constitutional rights to be infringed.

The trial court granted the teacher's motion for summary regarding the familial association claim but denied the motion regarding the First Amendment claim. The trial court determined that the teacher enjoyed qualified immunity from the familial association claim because no court had applied the Fourteenth Amendment's guarantee to associate with a family member to a relationship other than husband and wife or parent and child, unless the more distant relative was acting in place of the parent. The trial court denied the teacher qualified immunity regarding the First Amendment retaliation claim because previous courts had, in some circumstances, allowed a person (i.e., the student) to assert such a claim when the adverse action was retaliation for a third party's (i.e., the student's uncle) speech.

Although He Violated Students' First Amendment Free Speech Rights by Suspending Students from Extracurricular Activities for Speech that did not Cause a Substantial and Material Disruption to the Educational Environment Principal was Entitled to Qualified Immunity

T.V. v. Smith-Green Community School Corp.
807 F. Supp. 2d 767 (N.D. Ind. 2011)

High school volleyball players took sexualized pictures of themselves at a series of slumber parties and posted the pictures on-line. Other team members viewed the pictures from their home computers. Team members eventually divided into two "camps," with one group supporting the girls who posed for the pictures while the other group was upset by the behavior. The rift caused discord on the volleyball team. The parent of a girl who was not on the volleyball team (the court stated in a footnote that the girl "may have just been a busybody") printed the pictures and showed them to the principal. The principal suspended the girls in the photographs from six volleyball games because the behavior violated the school's athletic code of conduct, which required athletes to exhibit good behavior both in and out of school.

The girls sued the school district and principal, claiming the suspension from the volleyball team infringed on their right to free speech. After opining that "[n]ot much good takes place at slumber parties for high school kids," the trial court concluded that although the principal violated the students' free speech rights, the principal was entitled to qualified immunity because a student's free speech rights for off-campus speech was so ill-defined and the subject of vigorous debate in court opinions.

The court first noted that the photographs were entitled to First Amendment protection because the photographs were neither obscene nor child pornography, which would remove First Amendment protection. The girls stated they took and posted the photos to humor themselves and others, and speech for entertainment purposes is entitled to First Amendment protection to the same extent as is political and more serious speech. The court stated that "while the crass foolishness that is the subject of the protected speech in this case makes one long for important substantive expressions like the black armbands of *Tinker*, such a distinction between the worthwhile and the unworthy is exactly what the First Amendment does not permit."

The court declined to allow the school to discipline the students for "lewd and vulgar" speech because the speech occurred outside of school and the students were not responsible for bringing the speech to school. Without definitively stating that *Tinker* applied to off-campus speech, the court found a First Amendment violation because the speech did not cause a substantial and material disruption in the educational environment or cause a reasonable fear that such disruption would occur unless the girls were suspended. The court characterized the "petty disagreement" between volleyball team members caused by the photographs to be "utterly routine" rather than a substantial and material disruption to the school environment.

C. Fourth Amendment Cases

Seizure and Confinement of a Student does Not Violate Student's Fourth Amendment Rights, as long as it was Reasonable at its Inception and Reasonably Related to the Incident that Prompted it

Schafer v. Hicksville Union Free Sch. Dist.
2011 U.S. Dist. LEXIS 35435

A developmentally disabled student resided in Hicksville Union Free School District ("District"). At age fourteen he began attending classes at the Kennedy School (school for children with developmental disabilities). About a year after the student was placed at the Kennedy School, his parents visited and found him in a "time-out" room (4ft. x 5ft. room with no lighting). Parents found him crying and took him home and never returned him to Kennedy. He was placed in the time-out room approximately 27-40 times during his year at Kennedy. Parents maintain they were completely unaware of him being placed in the time-out room. According to his parents, the student was traumatized by the time-out room. Thereafter, parents arranged for home instruction and filed a due process complaint against the District. They were awarded ten months of compensatory home services. The parents also filed suit against the District in state court alleging violation of the student's Fourth Amendment rights, among other things. The District filed a motion for summary judgment, which was granted.

The District Court decided the relevant Fourth Amendment inquiry was whether there was a seizure and, if so, whether that seizure was reasonable. The court noted that the jury could conclude that Kennedy School employees intentionally restrained the student's movement by confining him in the room. With respect to the student's confinement, however, is whether it was reasonable. The court stated, "[A] schoolhouse seizure is reasonable when it is justified at its inception and reasonably related to the incident that prompted the seizure in the first place." Here, the student exhibited aggressive behavior noted on the time-out log, which indicates he was confined for refusing to do his school work. Moreover, there was no evidence indicating that the District or District employees were responsible for the student's confinement or participated in a conspiracy to deprive him of his Fourth Amendment rights. As such, the Fourth Amendment violation was dismissed as against the District.

School District's Referral to Third Party May Result in an Illegal "Seizure" under the Fourth Amendment

Camac v. Long Beach City Sch. Dist.
2011 U.S. Dist. LEXIS 79997

Student's parents moved to Long Beach, NY and enrolled their son in 6th grade with the Long Beach City School District ("District"). Student had a 504 Plan from his prior school district. Parents informed the District that the student suffered from a disability and required special educational needs. At the beginning of the school year the student became ill and

requested he be permitted to eat his lunch early (as other students are permitted) but his teacher refused. Thereafter, the student suffered a panic attack. Parents met with the teacher who informed Parents she was unaware of the student's 504 Plan from his previous school and his special needs. Still, the District refused to implement a 504 Plan and because the student was not receiving any accommodations his attendance remained erratic and deteriorated. Due to the student's attendance issues, Parents went to the District and requested a 504 Plan be instituted. Instead, District administrators suggested the student be evaluated for his disability at a nearby University Medical Center. Parents agreed to the evaluation. The administrators left the room to get the student and returned, reporting the student had threatened to commit suicide. The student was taken by ambulance (administrators called 911) to a mental health facility where he was institutionalized based on the administrators' testimony that he threatened to commit suicide (Parents alleged this testimony was false, that the student never threatened suicide). Parents and the student filed suit against the District claiming a Fourth Amendment violation, among other constitutional violations. The District moved to dismiss Parents' and student's claims.

When a court analyzes a Fourth Amendment claim as to whether a search was reasonable it must determine whether the search was "justified at its inception" because "there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." Here, the Complaint did not allege that any of the defendants (or any other employees of the District) searched the student, much less unconstitutionally. Accordingly, plaintiffs' Fourth Amendment search claim was dismissed without prejudice, meaning the Parents could reassert the claim if facts were developed that there was a search.

In addressing whether there was an illegal seizure, the Court applied the two-pronged test: "A schoolhouse seizure is reasonable when it is justified at its inception and reasonably related to the incident that prompted the seizure in the first place." The parents argued those administrators' actions in calling 911 and falsely reporting to the police and the student's treating physician that he had expressed his desire to commit suicide directly caused the police and the mental health department to detain the student against his will.

In addressing this allegation, that a school caused another entity to seize the student, the Court stated "a defendant may be held liable for 'those consequences attributable to reasonably foreseeable intervening forces, including the acts of third parties.'" Therefore, Court found that the parents adequately stated a claim for an unconstitutional seizure by alleging that administrators intentionally contacted the police and provided false information that caused the police to confine the student. Therefore, the Fourth Amendment claims were not dismissed.

Student Lawfully Arrested After Administrators Witness Him Fighting With Another Student

C.H. v. Rankin County Sch. Dist.
Case No. 10-60380, 2011 U.S. App. Lexis 4494 (5th Cir. March 4, 2011)

The plaintiff high school student was involved in a physical altercation on school grounds with another student, who was injured enough to warrant medical care. An assistant principal separated the two boys. Shortly thereafter, police arrived and arrested the plaintiff student, taking him to the police station for questioning. Both boys were suspended from school and charged with disorderly conduct.

In the fall of the following year, the plaintiff student took an auto body class operated by a community college (in cooperation with area high schools) and was accused of sexual harassment for inappropriately using a blower in his jumpsuit. The instructor attempted to search and photograph the student, resulting in his two-day suspension. The student was told that he could not return to school without counseling, which he refused. He also refused, on religious grounds, to sign an "instructor-student classroom/lab contract" outlining proper behavior.

The plaintiff filed a fourth amendment false arrest claim, among others, against the city and the school district. The trial court dismissed this and other claims, and the appellate court affirmed that decision. The court rejected the student's argument that the police officers had no probable cause for his arrest, as the trial court found that the officers were entitled to a qualified immunity from liability because no constitutional violation occurred. The officers had probable cause to arrest based on their reasonable understanding from school administrators that the plaintiff hit and kicked another student. The court also rejected the plaintiff's due process and first amendment claims, as he did not have a liberty interest in "freedom from unlawful arrest," and he was not kept from the classroom based on his religious beliefs but instead based on his behavior.

Regarding the school district defendants, the court explained that the plaintiff's allegations were baseless. First, the school had probable cause regarding the fight, as administrators witnessed part of the violent fight. In addition, the school district offered the student all the process he was due before suspension by discussing that suspension with him and offering him a chance to explain. The trial court's decision was, therefore, affirmed.

Dismissal Denied Where Student's Cell Phone Revealed Nude Photos, and County Sought to Prosecute Based on Those Personal Photos

N.N. v. Tunkhannock Area Sch. Dist.
Case No. 3: 10-CV-1080, 2011 U.S. Dist. LEXIS 73637 (M.D. Pa. July 8, 2011)

The plaintiff student's high school had a policy requiring cell phones to be turned off during the school day. The school's handbook outlined penalties for violating the policy, which ranged from confiscation to a one-day suspension. Despite the policy, the student placed a call

from her cell phone on school property, and the phone was immediately confiscated. Later that day, she was called to the principal's office. The principal reviewed the plaintiff's cell phone, discovered inappropriate images, and handed the phone over to law enforcement. The photos were of the plaintiff—in some she was fully clothed and others included her exposed breasts. The photos were for her and her boyfriend's eyes only. The photographs were taken off school property and never shared. The student was suspended for three days.

The student and her mother met with the chief detective, who indicated her cell phone was sent to a crime lab for review. He told the student he would get her phone back, while winking at her. After that meeting, the plaintiff received a call from the district attorney, who threatened to bring child pornography charges against the plaintiff and other students whose similar conduct was reported to the police, unless they took a re-education course on sexual violence and victimization. The district attorney called the plaintiffs and other families into a courthouse meeting where the attorney had them review all of the children's photographs, and also indicated he intended to charge the students with child pornography unless they took the re-education course.

The plaintiff took the class, and her phone was returned to her with all images deleted. The plaintiff filed suit based on the county officials' alleged continued possession of the photographs, which she claims were the fruits of an unreasonable search and seizure. She also claimed the search and seizure, along with the threatened prosecution, violated her First and Fourth amendment rights.

The trial court denied the defendants' motion to dismiss the case. The court explained that the district attorney was acting as a local policymaker, not a state policymaker, when he allegedly failed to train and supervise his employees and, therefore, the county could be held liable for that conduct. Specifically, the attorney was not engaging in prosecutorial acts when he searched her phone, he was engaging in an administrative function of the local government. The county was immune from liability, however, for the attorney's conduct on behalf of the state—namely, his decision to threaten prosecution. The court also held that the plaintiff stated enough facts in her complaint to overcome a motion to dismiss her Fourth amendment and First amendment claims.

School District Not Liable for Swim Club Coach Videotaping Student Changing Clothes

Taflinger v. Hindson, et al.
Case No. 1:09-CV-00771-TWP-DML, 2011 U.S. Dist. LEXIS 8153 (S.D. Ind. Jan. 26, 2011)

A swim coach organized a club team under the auspices of U.S. Swimming, a non-profit organization comprised of thousands of coaches and hundreds of thousands of swimmers who are voluntary, paying members. The plaintiff first became acquainted with the swim coach defendant as a sophomore in high school. She joined his swim club, and the club used the high school pool for practices. On Fridays, the school relied on the swim coach to run the school's afternoon swim practice. He also did so on certain holidays and during off-season conditioning.

The swim coach offered to let the plaintiff use the school's coaches' office as a changing room. Unbeknownst to the plaintiff or school, the coach placed a video camera in a locker to record students. In 2008, the FBI received a report that the swim coach sold a computer containing pornographic images on eBay. The swim coach pled guilty to child pornography, among other charges.

The student sued the swim coach, U.S. Swimming, and the school district, alleging, among other claims, a violation of her Fourth amendment rights. She alleged the school turned a blind eye to the substantial risk that the swim coach would exploit his privileges at the school to satisfy his sexual appetite. The court dismissed this claim, because a Fourth amendment violation must be based on a state actor's conduct, and the swim coach was not a school district employee. In addition, the Fourth amendment is not implicated when an individual's conduct is to further his own ends, not to assist in law enforcement.

The court also dismissed the plaintiff's Title IX claim for gender discrimination. For a school district to be liable under Title IX, the court explained, it must be deliberately indifferent to known harassment. There was no allegation that the school knew about the coach's conduct. In addition, she did not allege she was subject to discrimination "under any educational program or activity."

D. Fourteenth Amendment Due Process Cases

Inappropriate Physical Restraint Can Result in Federal and State Liability for School Boards and Employees

Alexander v. Lawrence County Bd. of Developmental Disabilities
2012 U.S. Dist. LEXIS 32197 (S.D. Ohio Mar. 12, 2012)

A student was diagnosed with autism, attention deficit hyperactivity disorder, bipolar disorder, and a variety of other medical challenges. For four consecutive years, he was educated in a classroom run by the county board of developmental disabilities, pursuant to a contract between that entity and the local school district. The class was part of a self-contained school for students with multiple disabilities. The student was physically restrained on a frequent basis and his displeased mother eventually removed him from the school and filed suit.

Naming as defendants the board, its superintendent, the school principal, and the speech therapist, the parent sued for violations of the Fourteenth Amendment, Section 504 of the Rehabilitation Act ("Section 504"), the Americans with Disabilities Act ("ADA"), and state negligence and contract law. Plaintiff parent alleged that the school used inappropriate behavior modification techniques, inadequately trained its employees, and endangered her son through harmful and unnecessary restraint methods. Further, she claimed that her son regressed, that the defendants did nothing to stop his regression, failed to conduct a behavior analysis, and simply resorted to increased use of restraints. Finally, parent alleged that the student was not permitted to attend a full day program and, therefore, could not read at a first grade level at the age of fourteen. Defendant school board moved for dismissal of all claims.

In considering the Fourteenth Amendment claims, the court first dismissed the procedural due process allegations because there was no loss of custody or separation between parent and child, a necessary element of a familial relationship deprivation claim. Next, the court held that the substantive due process claim could proceed against the named employees but not the board.

Specifically, it found that the allegations of highly-dangerous physical restraint could be considered "egregious" and "shocking to the conscience;" accordingly, the substantive due process claim was sufficiently stated. The individual defendants were not entitled to qualified immunity from suit because the student's right to be free from unreasonable restraint and mistreatment was well established at the time of the alleged conduct. The complaint, however, did not allege sufficiently that the board failed to train its employees adequately or that the mistreatment of this student was part of a pattern and practice of physical harm to all special-needs students at the school. In sum, the allegations of physical restraint were considered egregious enough to withhold the standard protections of immunity from board employees, but the allegations were not so detailed as to permit an inference that the board was liable for the actions of those employees.

An equal protection claim under the Fourteenth Amendment was dismissed because the plaintiff did not allege any details indicating that the board discriminated against students with disabilities or treated non-disabled students more favorably.

With regard to the Section 504 and ADA claims, the court first noted that these do not apply to the individual defendants. Next the court explained that the parent settled her educational claims and that this suit concerned financial compensation for physical and emotional injury; accordingly, no standard exhaustion of administrative remedies was required. The court further held that the allegations of physical restraint were enough to support a reasonable inference of discrimination, and allowed the Section 504 and ADA claims to proceed.

With regard to state law claims of negligence and breach of contract, the court noted that the individual employees were not immune from suit when, as here, plaintiffs alleged facts sufficient to support claims of wanton, reckless, or malicious behavior. The board was found to be immune from suit pursuant to political subdivision immunity law. Notably, however, the court allowed the breach of contract claim to proceed because it found that the student could be considered a third-party beneficiary of the contract between the local school districts and the board; accordingly, the parent had standing to argue that this contract was breached at a detriment to her child.

In sum, plaintiffs were permitted to proceed with substantive due process and state negligence claims against the individual employees, and with Section 504, ADA, and contract claims against the board.

Biased Decision-Maker May Create District Liability

Heyne v. Metro. Nashville Pub. Schs.
655 F.3d 556, 567 (6th Cir. 2011)

After football practice, a Caucasian high-school senior drove his car out of the parking lot in a somewhat careless manner. An African-American student was hit by the vehicle, fell backwards, and sustained a bruised or sprained ankle. The driver stopped, exited the car, and apologized. The victim did not accept this gesture and threatened to kill the driver in return. The victim immediately reported this incident to the high-school principal, and the victim's parents threatened to sue the school, the driver, and the driver's parents. The principal initially suspended the driver for two days, citing the "reckless endangerment" violation of the school's Code of Conduct. This suspension was later extended to ten days and "cruelty to a student" and "use of object in an assaultive manner" were added to the driver's conduct violations. Before this incident, the principal had instructed his staff to be more lenient towards infractions by African-American students because too many minority students were serving in-school suspensions. The accident victim was not disciplined for his threat to kill the other student. In addition, the principal eventually admitted that the driver of the vehicle was suspended partially to protect the principal and the school from liability in case of a lawsuit by the victim's parents.

The student's attorney was not permitted to participate in the disciplinary hearing regarding the ten day suspension, beyond passing notes to the student and his parents. Further, the accused student was not allowed to call witnesses on his own behalf. School employees who wanted to testify in the driver's favor were threatened with termination if they attended the hearing. The disciplinary board eventually sustained the ten-day suspension for reckless endangerment, but dismissed the other charges. The accused student alleged that because of the ten day suspension, he missed two football games and lost scholarship opportunities, as well as a chance to apply to military service academies.

The student's subsequent lawsuit against the district alleged violations of the Fourteenth Amendment equal protection clause as well as substantive and procedural due process violations under 42 U.S.C. § 1983. The district court dismissed most of these claims, but allowed the equal protection and procedural due process violations to stand. Additionally, the district court found that the individual defendants were not entitled to qualified immunity.

The Sixth Circuit Court of Appeals held that the student's procedural due process rights were violated because an impartial decision maker is essential to the fundamental principles of due process. The principal was not an impartial decision-maker in this circumstance because he demonstrated bias against the student when he instructed staff to be more lenient with African-American students and when he suspended the student to protect himself and the school from liability. The court further found that the factual allegations pled by the student stated a plausible claim for violation of equal protection based on race. Therefore, concluded the court, neither the principal, discipline coordinator, or director of attendance and discipline were immune from suit.

Failure to Inform Expelled Student of All Evidence Against Him Violates Fourteenth Amendment Due Process Rights

McGath v. Hamilton Local Sch. Dist.

2012 U.S. Dist. LEXIS 10640 (S.D. Ohio Jan. 30, 2012)

On his way to school, a high school student was offered marijuana by several friends. Although he declined, the principal and the police later questioned him and searched his locker. Despite failing to find evidence of drug use, the district expelled the student for four months. The student and his parents appealed, and the board of education ("board") met privately, during an executive session, to consider this appeal. The student and his counsel were not permitted to attend the private session, although the student's counsel was later allowed to cross-examine the witnesses based on a summary of the testimony presented by the board. Further, the board accepted and considered hearsay statements from the witnesses regarding the alleged marijuana use. Thereafter, the student's expulsion was unanimously affirmed by the board.

Following that decision, the pupil received a letter providing the board's decision. In the "facts" section of the correspondence, the student learned, for the first time, of testimony from a parent who alleged seeing the student smoking marijuana and reported this to the principal on the morning in question.

The student and his parents sued the school board, the district, and the superintendent, alleging violations of the student's due process rights pursuant to the Fourteenth Amendment, as well as a variety of state claims. Plaintiffs sought declaratory judgment that the school's policies and actions were unconstitutional, as well as injunctive relief requiring the district to purge the pupil's school record of any information relating to his expulsion. Additionally, plaintiffs sought compensatory and punitive damages, as well as attorney fees.

Plaintiffs' process server left the summons with the board president's secretary, but the district court found this inadequate. The court, however, found that the plaintiffs showed good cause for their failure because previous service had been accepted when made upon individuals other than the board treasurer or the president. Accordingly, the court granted plaintiff 30 days within which to effect proper service. Further, the court dismissed plaintiff parents as the son had reached majority age, and dismissed state law claims against the district, relative to political subdivision immunity. Finally, the court found that the district is not an entity capable of being sued, and that naming the superintendent in his official capacity was redundant in light of the claim against the board.

Plaintiff student's claims for declaratory relief were held to be inappropriate as he had graduated from high school and there was no immediacy to his claim as to warrant issuance of a declaratory judgment. Likewise, his injunctive claims were dismissed for failure to show irreparable injury. With regard to the student's due process claim, the court found that notice of the hearing was sufficient, the student code of conduct was not overly vague, and hearsay statements at the hearing did not violate his due process rights. The court held, however, that the

board's failure to inform the plaintiff of the additional evidence against him, specifically, about the parent who allegedly reported the student's marijuana usage to the principal, violated plaintiff's due process rights. Accordingly, the board's motion for judgment on the pleadings was granted in all respects except with regard to violations of the pupil's Fourteenth Amendment due process rights.

Fourteenth Amendment Privacy Protections May Prohibit Disclosure of Students' Sexual Orientation

Wyatt v. Kilgore Indep. Sch. Dist.

2011 U.S. Dist. LEXIS 137836 (E.D. Tex. Nov. 30, 2011)

A sixteen-year-old female high-school student became involved with a young woman two years her senior. The high school student alleged she was confronted in an empty locker room by her two softball team coaches and grilled about the relationship. Both coaches allegedly threatened to reveal the student's sexual orientation to her mother and inform her that the student was involved in a sexual relationship with an older woman. Additionally, the coaches made it clear that the student would not be permitted to participate in softball until this was addressed.

Thereafter, the coaches met with the student's mother and informed her of her daughter's relationship with the eighteen-year-old woman. The mother became upset at what she perceived to be an invasion of her daughter's privacy, and filed a series of grievances with the school superintendent. The ensuing report upheld the coaches' actions, noting that they were legally obligated to share this information with the parent. Subsequently, the mother filed suit on behalf of her daughter, alleging, among other claims, a violation of the daughter's privacy rights pursuant to the substantive due process clause of the Fourteenth Amendment.

The coaches disputed this version of events and contended that the student generally did not conceal her sexual orientation and was, therefore, not entitled to any privacy on this topic. Moreover, they asserted their conversation with the parent reflected their genuine concern about the student, the other woman's influence on her, and possible statutory crimes due to the difference in age between the two. Further, the coaches claimed they never actually revealed the student's orientation to her mother, but merely informed her of the inappropriate relationship and disclosed the other individual's identity. The coaches conceded, however, that they do not generally disclose relationships between heterosexual sixteen-year-olds and eighteen-year-olds to those students' parents.

The Texas federal court denied summary judgment to the board and to the individual defendants. It found that there is a constitutional right to prevent the unauthorized disclosure of one's sexual orientation, that the student had a reasonable expectation of privacy in her orientation, and that the state's interest in disclosing this to her mother did not outweigh the student's right to confidentiality. The court further noted that the record evidenced considerable factual disputes with regard to the coaches' conduct, demeanor, and motivations. Accordingly,

granting summary judgment was inappropriate because ultimate liability for several issues rested on unresolved questions of fact. For example, whether the coaches were entitled to individual immunity would be determined in part by assessing whether they acted in an objectively reasonable manner, a question best evaluated by the trier of fact. Likewise, whether the school board had a policy requiring disclosure of sexual orientation, or failed to train staff appropriately with regard to student confidentiality, were both issues that could not be determined until a trial resolved the lingering questions of fact.

Gender Non-Conformity Harassment Can Create District Liability

Anoai v. Milford Ex. Vil. Sch. Dist.
2011 U.S. Dist. LEXIS 1159 (S.D. Ohio 2011)

During the 2009-2010 school year, J.A. was a male sixth grade student at one of the district's elementary schools, and was subjected to harassment by one of his teachers and the teacher's aide. Specifically, in late-September the student's teacher asked him to deliver a message to another teacher, and while he was gone, told the class that she was going to pull a prank on the student. When the student returned, the aide approached him from behind with a pair of scissors and pretended to cut his long hair. The student's teacher then grabbed the student's hair and put in into three ponytails, immediately introducing the student to the class as a new student with a female name. After the other students laughed at the student, the aide then walked the student to the other sixth grade classrooms to do the same. Although the student attempted to remove one of the ponytails, the aide told him to leave them in and forced him to show the entire sixth grade. Thereafter, a majority of his classmates referred to him as girl or called him "pigtails" or "ponytails." The student's mother informed the superintendent and principal of what had occurred, but little to no corrective action was taken. Sadly, the actions of the teacher and the aide were taken shortly after the student's sibling had died—a fact known to both the principal and superintendent.

As a result of the actions set forth above, the student and his mother filed a lawsuit against the district, superintendent, principal, teacher and teacher's aide containing both federal and state claims. Specifically, they alleged that the district had violated Title IX, Section 1983, the Fourteenth Amendment to the United States Constitution, and had committed assault and battery, negligence, and the intentional infliction of emotional distress. All defendants filed a motion to dismiss the plaintiffs' complaint. In addressing the viability of the Section 1983 and Fourteenth Amendment claims, the court noted that the equal protection clause prohibits discrimination by government which burdens a fundamental right, targets a suspect class, or intentionally treats people differently without a rational basis for the differential treatment. The court also stated, in regard to the student's substantive due process rights, that public school students possess a liberty interest in freedom from bodily injury.

Although the complaint was inartfully drafted by counsel, the court found that "by the slimmest of margins," the student and his mother had stated a viable claim for relief as to their equal protection claim. The court specifically found that, based on the facts alleged, the student's equal protection rights were violated when the defendants failed to take any corrective

action against the superintendent, principal, teacher, or teacher's aide because they were motivated by animus toward the student's gender non-conformity and effectively forced the student to return to the classroom of the offending teacher and aide. Even if the student were not targeted because of his gender non-conformity, the court said, it could still be found that the student was a "class of one" who was intentionally treated differently than other boys with no rational basis for the difference. Thus, the court allowed the student's equal protection claim, and the companion Section 1983 claim, to remain against the defendant superintendent and principal.

To the contrary, the student's substantive due process and related 1983 claims were dismissed. As to the substantive due process claim, the court found that the student had offered no factual allegations supporting a claim that the defendants violated his right to bodily integrity, let alone that they did so "inspired by malice or sadism rather than a merely careless or unwise excess of zeal" that amounted to "a brutal and inhumane abuse of official power literally shocking to the conscience." Thus, to the extent that the Section 1983 claim was based upon a deprivation of the rights secured by the due process clause of the Fourteenth Amendment, the claim was dismissed as to the district, superintendent, and principal. Further, because the student failed to allege any facts that his injuries were caused by a well-settled policy or custom of the district, the Section 1983 claim against the district was also dismissed. With respect to student's Title IX claim, the court dismissed the individual defendants because there is no individual liability under Title IX, which prevents any educational program or activity that receives federal funds from excluding an individual on the basis of their sex. As to the district, however, the court found that the student set forth sufficient factual allegations to support a claim that it acted with deliberate indifference when it was informed of the conduct of the teacher and teacher's aide but took no or minimal corrective action. Regarding the student's state-law claims, the court found that the district, superintendent, and principal were entitled to the immunities afforded by Chapter 2744 of the Ohio Revised Code.

The court addressed the claims against the teacher and teacher's aide separately, and dealt with them harshly. (The student brought only a Section 1983 claim alleging a violation of the equal protection clause; not a substantive due process claim.) Specifically, the court noted that it was "not persuaded" by their claim that the student failed to establish that they were operating under color of state law, stating "the harassment Defendants are alleged to have subjected J.A. to was done to him on school property, during class time, in front of his peers and other teachers at school. It was their positions as teachers that gave them the authority to force him to wear his hair that way and to parade him around introducing him as a girl; their positions and the authority those positions convey go very much to the heart of their conduct…. Defendants indisputably would not have been in the same position to humiliate J.A. except for their positions as teachers." As with the other defendants, the court found that the complaint again inartfully set forth sufficient factual allegations to survive the motion to dismiss the Section 1983 claim alleging a violation of the equal protection clause because one could plausibly infer that the motivation for the harassment was animosity toward the student's gender non-conformity. As with the other defendants, the teacher and teacher's aide were dismissed from the student's Title IX claim because no individual liability exists. The teacher and the teacher's aide did not move for dismissal of the state-law claims.