Montgomery County ESC

August 1, 2024

Back to School 2024-2025
Student Issues Presentation

Presented By

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I. Recent Legislation Regarding Student Issues

A. **House Bill 250** – *Student cell phone use policy*
(R.C. 3313.753; conforming amendments to R.C. 3314.03, 3326.11, and 3328.24) (effective Aug. 14, 2024)

1. By July 1, 2025, boards of education must adopt a policy governing the use of cellular telephones by students during school hours. The policy must:

   a. Emphasize that student cell phone use be as limited as possible during school hours;

   b. Reduce cell phone-related distractions in classrooms; and

   c. If the school board determines it is appropriate, or if included in an IEP plan or Section 504 plan, the policy must permit students to use cell phones or other electronic communications devices for student learning or to monitor or address a health concern. (R.C. 3313.753(C).)

2. Policies adopted after the amendment's effective date (Aug. 14, 2024) must be adopted at a public school board meeting. (R.C. 3313.753(F).)

3. Cell phone policies must be made "publicly available" and must be posted "prominently" on the district's publicly accessible web site, if it has one. (R.C. 3313.753(G).)

4. A school board is not required to adopt a policy that prohibits all cell phone use by students. However, if the board adopts such a policy, it will be considered to have met the requirement to adopt a policy under division (C). (R.C. 3313.753(D).)

5. District boards that adopt a policy meeting the requirements of division (C) prior to the amendment's effective date are also considered to have met the policy adoption requirement. (R.C. 3313.753(E).)

6. DEW must adopt a model policy that takes into account available research concerning the effect of cell phone use by students in school settings. Districts and schools "may" utilize the model policy. (R.C. 3313.753(H).)[1]

B. **House Bill 214** – *Staff/Student Expression and Religious Expression Days* (effective Oct. 23, 2024)

1. Staff and student expectations policy (R.C. 3319.614 enacted) – Within 90 days of the bill's effective date, school district boards of education must adopt a policy stating that the school district:

   a. Will not solicit or require an employee or applicant for employment or academic admission to affirmatively ascribe to, or opine about, specific beliefs, affiliations, ideals, or principles concerning political movements, or ideology;

[1] A model policy and additional resources are available at https://education.ohio.gov/Topics/Student-Supports/School-Wellness/Cell-Phones-in-Ohio-Schools.

b. Will not solicit or require a student to affirmatively ascribe to specific beliefs, affiliations, ideals, or principles concerning political movements, or ideology;

c. Will not use statements of commitment to specific beliefs, affiliations, ideals, or principles concerning political movements, or ideology as part of the evaluation criteria for employees or applicants for employment, or employees that are seeking career progression or benefits; and

d. Will not use statements of commitment to specific beliefs, affiliations, ideals, or principles concerning political movements or ideology as part of the academic evaluation of students.

e. Also applicable to community and STEM schools. (R.C. 3314.03 and 3326.11 amended.)

f. R.C. 3319.614(B) specifies that the Act shall <u>not be construed</u> to:

i. prohibit, limit, or restrict a district's authority to comply with federal or state law (including anti-discrimination laws), or to take action against a student or employee for violating federal or state law.

ii. prohibit, limit, or restrict educators' academic freedom; or their ability to research or write publications about their beliefs, affiliations, ideals, or principles concerning political movements, or ideology. Schools may consider an employment applicant's scholarship, teaching, or subject matter expertise in the applicant's given academic field.

iii. prohibit schools from offering an established character education program.

g. R.C. 3319.614(C) requires schools to make "publicly available" their policies, guidance, and training materials used for students, educators, and staff on all matters regarding specific beliefs, affiliations, ideals, or principles concerning political movements, or ideology.

i. However, it does not require districts to make protected legal communications or guidance publicly available.

2. <u>Religious Expression Days ("R.E.D.") Act</u> (R.C. 3320.04 enacted; R.C. 3314.03, 3326.11, and 3328.24 amended)

a. Requires school district boards of education to adopt a policy that reasonably accommodates the sincerely held religious beliefs and practices of individual students with regard to all examinations or other academic requirements and absences for reasons of faith or religious or spiritual belief system.

b. The policy must:

i. Permit students in grades K-12 to be absent for up to three religious expression days each school year. Districts are prohibited from imposing an academic penalty for such absences, and must permit students to participate in interscholastic athletics or other extracurricular activities.

ii. Require students to be provided with alternative accommodations for exams and other academic requirements a student missed if, within 14 school days after the first day of school or enrollment, the parent or guardian provided written notice to the school principal of up to three specific dates for which alternative accommodations are requested.

a) The principal must approve no more than three written requests per school, and may not inquire into the sincerity of a student's religious or spiritual belief system. The principal can verify a request by contacting the parent or guardian who signed the request. If the parent disputes signing the request, the principal can deny it.

b) For approved requests, the principal must require the appropriate teachers to schedule a time and date for an alternative examination or other academic requirement if the absence creates a conflict. This can be before or after the originally scheduled date.

iii. Require the district to post the policy in a prominent location on the district's website, along with contact information for additional information, and a non-exhaustive list of major religious holidays, festivals, and religious observations for which an excused absence will not be unreasonably withheld or denied. (The state superintendent must provide a non-exhaustive list. A district can adopt this list, or choose which holidays to include on its list. When posting, printing, or publishing the policy, districts must include a statement that the list is non-exhaustive and will not be used to deny accommodation for a day that does not appear on the list.)

iv. Require districts to annually convey the policy to parents and guardians, including a description of the procedure for requesting accommodations.

v. Include a grievance procedure.

c. Excused absences for religious expression days must not be considered for purposes of R.C. 3321.191 parental notification.

d. Also applicable to community, STEM, and college-preparatory board schools. (R.C. 3314.03, 3326.11, and 3328.24 amended.)

C. **House Bill 147 –** *Interscholastic athletics; school-event ticket pricing*[2] *correction* (effective Oct. 21, 2024)

1. Interscholastic athletics participation at a different school (R.C. 3313.5313 enacted.)

a. In specified circumstances, permits a school district superintendent to afford a student the opportunity to participate in interscholastic athletics at a school of the superintendent's district, even if the district is not the student's resident district.

b. Applies to students who are home-educated, enrolled in a "qualifying school," or enrolled in a different school district. (Qualifying schools include community schools, STEM schools, and chartered and non-chartered nonpublic schools.)

c. Applies to a student who was subject to certain actions or offenses by a school official, employee, or volunteer or another student from the district or school in which the student is enrolled or participating in interscholastic athletics under R.C. 3313.537, 3313.5311, or 3313.5312.

d. The actions/offenses include harassment, intimidation, or bullying; a "qualifying offense" for which the person has been charged with, indicted for, convicted of, pled guilty to committing, or alleged to be or adjudicated a delinquent child for committing; and conduct by a school official, employee, or volunteer that violates the licensure code of professional conduct for Ohio educators. (A "qualifying offense" is an offense or attempted offense of violence or a violation of R.C. 2907.07 (importuning).)

e. Similar provision applies to the chief administrative officer of any community school, STEM school, or chartered or non-chartered nonpublic school.

f. Unless the student is home educated, the student must be the appropriate age and grade level for the school and must fulfill the same academic, nonacademic, and financial requirements. For home educated students, R.C. 3313.5312(C) to (E) apply.

g. Districts and schools cannot impose any additional rules or fees on a student that do not apply to other students participating in the same interscholastic athletics activity.

h. Districts, interscholastic conferences, or organizations regulating interscholastic conferences cannot require a student to meet eligibility requirements that conflict with this section, or penalize or restrict eligibility

[2] Other provisions are also in the bill but are not related to student issues.

of a student who participates at a different district or school during a school year under this section.

2. Ticket prices for school-affiliated events (R.C. 3313.5319 amended.)

a. Prohibits qualifying schools from establishing different ticket prices for school-affiliated events based on whether tickets are purchased using cash or any other payment method. However, schools may charge a processing fee for tickets purchased online or by credit card.

b. Requires a qualifying school to charge a student enrolled in any school participating in a school-affiliated event a ticket price that is less than the price the school charges for an adult for the same event.

c. Amends the definition of "qualifying school" in R.C. 3313.5319 (cash payments at school events) to include: 1) a school district or chartered nonpublic school that participates in athletic events regulated by an interscholastic conference or organization that regulates either interscholastic conferences or interscholastic athletic competition among member schools; and (2) an interscholastic conference or organization that regulates such conferences or competition.

D. **Senate Bill 29** – *Student data privacy* (effective Oct. 21, 2024)

1. Definitions – Enacts R.C. 3319.325 to define educational records, educational support services data, school-issued device, student, and technology provider as these terms are used in R.C. 3319.325, 3319.326, and 3319.327.

2. School-issued devices (R.C. 3319.327 enacted)

a. **Accessing or monitoring school-issued devices** – Enacts R.C. 3319.327 to prohibit a school district or technology provider from electronically accessing or monitoring the following:

i. Location-tracking features of a school-issued device;

ii. Audio or visual receiving, transmitting, or recording feature of a school-issued device;

iii. Student interactions with a school-issued device, including, but not limited to, keystrokes, and web-browsing activity.

b. **Exceptions** – The school-issued device prohibition does not apply in the following circumstances:

i. The activity is limited to a noncommercial educational purpose for instruction, technical support, or exam-proctoring by school district employees, student teachers, staff contracted by a district, a vendor, or the department of education, and notice is provided in advance.

ii. The activity is permitted under a judicial warrant.

iii. The school district or technology provider is notified or becomes aware that the device is missing or stolen.

iv. The activity is necessary to prevent or respond to a threat to life or safety, and the access is limited to that purpose.

v. The activity is necessary to comply with federal or state law.

vi. The activity is necessary to participate in federal or state funding programs. (R.C. 3319.327(B).)

c. **Notice required**

i. If a school district or technology provider elects to generally monitor a school-issued device for the reasons listed in R.C. 3319.327(B) (above), it must provide written notice of that monitoring to the parents of enrolled students. (R.C. 3319.327(C)(1).)

ii. If one of the circumstances described in R.C. 3319.327(B) (above) is triggered, the school district must notify the student's parent within 72 hours of the access. The notification must include a written description of the triggering circumstances, including which features of the device were accessed and a description of the threat, if any. This notice is not required at any time when the notice itself would pose a threat to life or safety, but must instead be given within 72 hours after that threat has ceased. (R.C. 3319.327(C)(2).)

d. Prohibits a person from releasing, or permitting access to, *educational support services data* concerning any student attending a public school for any purpose, unless otherwise provided by law. (R.C. 3319.327.) (see definition of "educational support services data" below)

e. Requires educational support services data to be made available to the opportunities for Ohioans with disabilities agency. (R.C. 3319.327.)

3. Technology provider requirements (R.C. 3319.326 enacted)

a. **Contracts between a technology provider and a school distric**t must ensure appropriate security safeguards for educational records and include:

i. A restriction on unauthorized access by the technology provider's employees or contractors; and

ii. A requirement that the technology provider's employees or contractors may be authorized to access educational records only as necessary to fulfill the official duties of the employee or contractor.

b. **Parent and student notification** – By August 1 of each school year, a school district must provide parents and students direct and timely notice (by mail, electronic mail, or other direct form of communication), of any curriculum, testing, or assessment technology provider contract affecting a student's educational records. The notice shall do all of the following:

i. Identify each curriculum, testing, or assessment technology provider with access to educational records;

ii. Identify the educational records affected by the curriculum, testing, or assessment technology provider contract; and

iii. Include information about the contract inspection and provide contact information for a school department to which a parent or student may direct questions or concerns regarding any program or activity that allows a curriculum, testing, or assessment technology provider access to a student's educational records.

c. **Contract inspection** – Each school district shall provide parents and students an opportunity to inspect a complete copy of any contract with a technology provider.

d. **Technology provider obligations**

i. A technology provider must comply with R.C. Chapter 1347 (personal information systems) with regard to the collection, use, and protection of student data as if it were a school district.

ii. Specifies that educational records created, received, maintained, or disseminated by a technology provider pursuant or incidental to a contract with a school district are solely the property of the school district.

iii. In the event of a breach, requires a technology provider to disclose to a school district all information necessary to fulfill the requirements of R.C. 1347.12 (agency disclosure of security breach of computerized personal information data).

iv. When a contract expires (unless renewal is reasonably anticipated), a technology provider must destroy educational records or return them to the appropriate school.

v. Prohibits a technology provider from selling, sharing, or disseminating educational records except as otherwise provided by this section or as part of a valid delegation or assignment of its contract with a school district. Also prohibits a technology provider from using educational records for any commercial purpose. A technology provider can use aggregate information removed of any personally identifiable information for improving, maintaining, developing, supporting, or diagnosing the provider's site, service, or operation.

4. Excludes educational support services data (as defined in R.C. 3319.325) from the definition of public record. (R.C. 149.43(A)(1)(tt).)

a. *Educational support services data*: "Data on individuals collected, created, maintained, used, or disseminated relating to programs administered by a school district board of education or an entity under contract with a school district designed to eliminate disparities and advance equities in educational achievement for youth by coordinating services available to participants."

5. Adds to the list of reasons for which the state board of education may refuse to issue or may limit a license to an applicant, or suspend, revoke, or limit a license, to include "[u]sing or releasing information that is confidential under state or federal law concerning a student or student's family members for purposes other than student instruction." (R.C. 3319.31(B)(5).)

E. House Bill 68 –Save Women's Sports Act, SAFE Act
(veto overridden; effective April 24, 2024)

1. Bill History / Status

   a. Vetoed by Gov. DeWine, then overridden.

   b. Lawsuit by ACLU of Ohio (Mar. 26, 2024); TRO issued (Apr. 16, 2024)

      i. The ACLU of Ohio filed a lawsuit in Franklin County Common Pleas Court to prohibit enforcement of H.B. 68's gender-affirming care prohibition (*Moe v. Yost*, Case No. 24 CV 002481). The ACLU's complaint alleges H.B. 68 violates the Ohio Constitution's single-subject rule, the "Preservation of the freedom to choose Health Care and Health Care coverage" provision, the equal protection clause, and the Due Course of Law provision. The complaint specifically challenges H.B. 68's gender-affirming care prohibition, but also asks the court to declare the entire bill void as it violates the single subject rule.

      ii. The Franklin County Court of Common Pleas issued a 14-day temporary restraining order to enjoin enforcement of H.B. 68 (2024 WL 1657858). On May 3, 2024, the TRO was extended until the conclusion of the hearing on the motion for preliminary injunction and trial on the merits (scheduled for July 15, 2024). On May 22, 2024, the Ohio Supreme Court denied an emergency motion to narrow the scope of the TRO (05/22/2024 Case Announcements #14, 2024-Ohio-1936).

   c. U.S. Supreme Court case

      i. The U.S. Supreme Court agreed to consider a decision of the Sixth Circuit Court of Appeals (83 F.4th 460) that upheld a similar law enacted in Tennessee. The question presented is whether the Tennessee law violates the Equal Protection Clause of the Fourteenth Amendment. (Case No. 23-477; cert. granted June 24, 2024.)

2. <u>The Save Women's Sport Act</u> (R.C. 3313.5319 enacted (enacted as 3313.5319 but recodified as R.C. 3313.5320))

a. **Sex-separated teams** – The bill requires schools that participate in athletic competitions or events administered by an organization that regulates interscholastic athletic conferences or events to designate interscholastic athletic teams based on the sex of the participants. There must be separate teams for participants of the female sex within female sports divisions and for participants of the male sex within male sports divisions, and, if applicable, co-ed teams for participants of the female and male sexes within co-ed sports divisions.

b. Schools, interscholastic conferences, or organizations that regulate interscholastic athletics must not knowingly permit individuals of the male sex to participate on athletic teams or in athletic competitions designated only for participants of the female sex. However, the bill does not restrict the eligibility of any student to participate on any athletic teams or in athletic competitions that are designated as male or co-ed. The bill also prohibits state agencies and political subdivisions from processing a complaint, investigating, or taking any other adverse action against a school or district for maintaining separate single-sex interscholastic athletic teams or sports, and creates a private cause of action for any school or school district that suffers any direct or indirect harm as a result.

c. **Private cause of action** – A participant deprived of an athletic opportunity, or who suffers direct or indirect harm as a result of a violation of this section, has a private cause of action for injunctive relief, damages, and any other relief available against the school, school district, interscholastic conference, or organization that regulates interscholastic athletics. A participant also has a private cause of action if the participant is subject to retaliation or other adverse action as a result of reporting a violation of this law.

d. Civil actions must be initiated within two years of the violation, and prevailing persons or organizations are entitled to monetary damages, including for any psychological, emotional, or physical harm suffered, reasonable attorney's fees and costs, and any other appropriate relief.

3. **The SAFE Act (Ohio Saving Adolescents from Experimentation (SAFE) Act** (Sections 3109.054, 3129.01, 3129.02, 3129.03, 3129.04, 3129.05, and 3129.06 of the Revised Code, as enacted by this act).

a. The SAFE Act portion of the bill prohibits physicians from performing gender reassignment surgery on a minor, and from prescribing cross-sex hormones or puberty-blocking drugs for a minor individual to assist the minor with gender transition. The bill does permit a physician to continue prescribing such medicines or hormones after the section's effective date in specified circumstances, and includes exceptions for those with a medically verifiable disorder of sex development. (R.C. 3129.02 enacted.)

b. It also requires mental health professionals to obtain the consent of a parent, legal custodian, or guardian before diagnosing or treating a minor for a gender-related condition. A mental health professional must also first screen

the minor for other comorbidities that may be influencing the minor's gender-related condition, as well as for physical, sexual, mental, and emotional abuse and other traumas. (R.C. 3129.03 enacted.)

c. Newly enacted R.C. 3129.01 defines terms used in Chapter 3129, R.C. 3129.05 sets forth penalties for violations of these laws, R.C. 3129.06 prohibits Medicaid program coverage for gender transition for minors, and R.C. 3109.054 concerns a court's obligations when determining allocation of parental rights.

II. Recent Cases Regarding Students

A. Sixth Circuit finds district liable under Title IX for its deliberate indifference to social media threats – *S.C. v. Metropolitan Government of Nashville & Davidson County,* No. 22-5125, 86 F.4th 707, 2023 WL 7644306 (6th Cir., Nov. 15, 2023)

A student sued a school district for Title IX deliberate indifference, raising both a "before" claim and an "after" claim. The student alleged she was video-recorded engaging in unwelcome sexual contact. The recording was then shared on social media and third-party websites, and the student and her family were threatened on social media after she participated in the school district's investigation of the incident. The district court dismissed the student's "before" Title IX claim at the summary judgment phase, prior to the Sixth Circuit's decision in a related case in which the Sixth Circuit set forth the standard for Title IX "before" claims[3] (*Doe v. Metro. Gov't of Nashville & Davidson Cnty*., 35 F.4th 459 (6th Cir. 2022)). Therefore, the Sixth Circuit remanded this claim to the district court.

Addressing the student's Title IX "after" claim, the Sixth Circuit affirmed the district court's ruling that the school district was liable for its deliberate indifference to the threats and harassment the student and her family were subjected to after participating in the district's investigation. The district was aware of the ongoing threats, as well as the educational disruption the student experienced. The student was hospitalized after the incident and continued her coursework remotely rather than returning to the school. The threats continued, leading the student and her family to move to a different county for the following school year. When the student reported the threats to district officials, they did nothing in response other than telling the student she should contact the police.

The school district argued it lacked substantial control over the context of the threats: social media. The Sixth Circuit found that while the district did not control the physical location of the threats, it had disciplinary authority over the students involved as demonstrated by the district's discipline of students involved in circulating the video on social media. The school district also argued the threats were not based on gender because they were made against the student's entire family. The Sixth Circuit disagreed, finding the threats were gender-oriented as they were based on the student's cooperation with the investigation as well as the video itself, and the U.S. Supreme Court

[3] For a Title IX "before claim, a student must show: (1) that the school "maintained a policy of deliberate indifference to reports of sexual misconduct," (2) that indifference "created a heightened risk of sexual harassment that was known or obvious," (3) the risk of harassment was "in a context subject to the school's control," and (4) "as a result, the plaintiff suffered harassment that was so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school."

has held that "retaliation in response to a complaint about sex discrimination is 'discrimination' 'on the basis of sex.'"

B. School board not deliberately indifferent to student harassment – *Jane Doe, et al. v. Ohio Hi-Point School Dist. Bd. of Educ., et al.,* No. 2:20-cv-4798, 2024 WL 555898 (S.D. Ohio, Feb. 12, 2024)

A student with disabilities (Doe) alleged the school district acted with deliberate indifference to the student-on-student sexual assault and harassment she experienced during the approximately two-month period she attended the school. The school board moved for summary judgment on the student's Title IX sex discrimination claim, arguing that much of the harassment and bullying was not based on sex and was not severe and pervasive, and that it was not deliberately indifferent to Doe's reports of harassment. The court found that viewing the evidence in a light most favorable to Doe, she was sexually harassed by at least one student, and this harassment was severe, pervasive, and objectively offensive. However, the school board was not deliberately indifferent to the harassment.

Student Doe alleged she first reported harassment on September 17, and first told school officials she was raped on October 7. The day after an administrator took written statements about the harassment, the alleged harasser was given a verbal warning. A no contact order was issued on October 2, and a Title IX investigation began the following day. As part of the investigation, 44 interviews were conducted. When Doe reported rape, the police were notified and class schedules were adjusted so Doe and the harasser did not have classes or lunch together. In early November, a support person was assigned to escort Doe to and from her classes. Students who were reported as harassing and bullying Doe were disciplined. "These actions do not amount to deliberate indifference to Jane Doe's plight." While Doe argued the school did nothing for a two-week period after her first report in September, at that time the school did not know that the Doe was raped the weekend of September 13, "and in light of Sixth Circuit precedents and the subsequent actions taken by [the school], does not amount to deliberate indifference."

Doe also argued the Title IX investigation "was a subterfuge to deflect responsibility for ongoing sexual harassment" and should have been conducted by an independent third party. However, she did not cite to any precedent, statute, or regulation that requires a school to use an independent third party for an investigation. In addition, the "tension" between Doe's testimony and the findings in the investigation report that no violation of the school's anti-harassment Title IX policy had occurred "does not demonstrate the Board was deliberately indifferent." Also, despite the findings in the report, the investigator recommended alerting staff to Doe's reports, continuing the no-contact order, providing Doe with an adult escort, and maintaining the modified class schedules.

"In sum, Jane Doe attended Hi-Point for about two months. The school spent about a month and a half of those two months investigating her complaints of sexual harassment and bullying. The school took many steps to attempt to keep Jane Doe safe—from no contact orders to changing class schedules to meetings and many interviews to attempting to change her busing situation. These actions do not demonstrate conscious disregard to known risk to Jane Doe."

Addressing Doe's claims under Title II of the ADA and § 504 of the Rehabilitation Act, the court found Doe's harassment claims were based on sex, not disability. Doe also did not establish that the school failed to accommodate her disability. For the substantive due process claim, the court found "the school did not take an affirmative act that made Jane Doe less safe. It tried to do the opposite." With the federal claims resolved, the court declined to exercise supplemental jurisdiction over remaining state-law claims. **Note**: Appealed to Sixth Circuit March 18, 2024 (No. 24-3226).

C. Jury must decide whether coach and school violated student's First Amendment and due process rights – *Place v. Warren Local School Dist. Bd. of Educ. et al.,* No. 2:21-cv-985, 2024 WL 964253 (S.D. Ohio, March 6, 2024)

Note: In July 2023, the court granted summary judgment to the school board and coach in this case. However, the court later vacated that opinion (2023 WL 4826292).

A student alleged she was cut from the basketball team her senior year in retaliation for complaints raised by her parents. The parents' complaints, which started during the student's sophomore year, alleged the coach bullied their daughter and did not give her enough playing time. The parents also expressed concerns about the coach's communication and interaction with players and parents. The student was not a team member in her junior year due to an injury, and did not make the team following tryouts for her senior year. The student sued, alleging First Amendment retaliation, violation of her due process rights, and various state law claims.

Considering the First Amendment claim, the court concluded the parents' complaints were constitutionally protected. The court cited the Sixth Circuit's recent decision in *McElhaney v. Williams* that held it was clearly established that a school official may not retaliate against a parent for the content of a parent's speech. The Sixth Circuit concluded the *Lowery* framework was not appropriate in the parental speech context. The court also found the student suffered an adverse action when she was denied the opportunity to play her senior year. Addressing the causation element, the court found there was a genuine dispute of material fact as to whether the decision to cut the student from the team was caused by the parents' speech. A memo about the decision specifically discussed the complaints and indicated they were "part of the conversation" around cutting the student.

There was also evidence that undermined the district's explanation that the student was cut from the team because of her ability level or because she was unhappy with her playing time. The student had received an offer from a college to play basketball with a scholarship, which a jury could infer as evidence that her playing ability was not lower than that of other students. A jury could also infer that the student's request to be on the team her junior year, even though she would not have much playing time because of her injury, discredited the coach's testimony that the student was cut because she would be unhappy with less playing time.

Addressing defendants' qualified immunity defense, the court concluded the coach was not entitled to qualified immunity in an individual capacity. There was a genuine dispute of material fact as to whether the coach violated the student's constitutional rights, and the right was clearly established. The school board was also not entitled to immunity for the alleged First Amendment violation. The student submitted evidence of a school policy that a student would be suspended for one game

if a parent made a negative social media post and refused to remove it. A reasonable jury could find this showed the district "had a custom of approving retaliation for protected speech, and that such a custom was the moving force behind Plaintiff's injury." Lastly, the court granted summary judgment to defendants on the due process and state law claims. **Note**: Defendants appealed this decision to the Sixth Circuit on April 2, 2024 (No. 24-3279).

III. Hot Topics

A. Student Discipline

1. What laws affect student discipline?
    a. Constitutional "due process" rights relating to removal from school
    b. State laws regarding discipline for all students, such as R.C. §§ 3313.66 and 3313.661
    c. Federal laws regarding disabled or suspected disabled students, such as IDEIA and Section 504
    d. State laws regarding disabled or suspected disabled students, such as Ohio Revised Code Chapter 3323 and the Operating Standards (OAC Chapter 3301-51)
    e. Don't forget your Board policies and administrative guidelines and your Code of Conduct!
2. Posting Requirement (R.C. 3313.661(A))
    a. A copy of the Code of Conduct must be:
        i. Posted in a central location; and
        ii. Made available to students upon request.
        iii. Good practice: Put the Code of Conduct in the student handbook, give one to each student, and have each student sign that he or she received a copy.
3. Off-Campus Misconduct (R.C. 3313.661(A))
    a. Students may be disciplined for off-campus misconduct if:
        i. Board policy authorizes the discipline; and
        ii. The misconduct is connected to activities that have occurred on school property; or
        iii. The misconduct is directed at a school district official or employee or their property.
4. Student Searches
    a. Reasonable Suspicion Standard for Searches
        i. Is the search justified?

ii. Are there reasonable grounds to suspect the search will produce evidence of a violation?

iii. Is the search reasonable in scope?

(a) Student age and gender

(b) Nature of alleged violation

(c) Time, place, and scope of search

(d) Who will conduct search?

5. Suspensions (R.C. 3313.66)

a. Who may suspend?

i. Superintendent

ii. Principal

iii. Assistant principal or other administrator, if authorized under Board policy.

b. What must happen before the suspension?

i. Written notice of intended suspension to the student and the reasons for the intended suspension.

ii. If the student is 16 or older, has committed certain serious offenses,[4] and you might want to seek permanent exclusion, then a statement to this effect must also be included in the written notice.

c. The student must have the opportunity to attend an informal hearing to challenge the reasons for the intended suspension or otherwise explain his/her behavior.

i. May occur immediately.

ii. Before the principal, assistant principal, superintendent, designee, or person issuing the suspension.

d. Notice of Intent to Suspend (R.C. 3313.66(A)(1))

i. Describe the behavior – date, time, etc.

ii. Cite all applicable Code of Conduct sections violated. Use Code of Conduct language.

[4] The offenses are listed in R.C. 3313.662(A) and include: Conveyance or possession of deadly weapons or dangerous ordnance in school safety zone; Carrying a concealed weapon or Trafficking in Drugs if committed on property owned by, or at an activity held under the auspices of a board of education; Possession of drugs, other than a violation that would be a minor drug possession offense, if committed on property owned by, or at an activity held under the auspices of a board of education; Homicide, Felonious Assault, Aggravated Assault, Rape, or Gross Sexual Imposition if committed on property owned by, or at an activity held under the auspices of a board of education if the victim is an employee of the board; Complicity in any of the foregoing offenses.

iii. If a serious criminal offense, notice must include the possibility of permanent exclusion.

iv. Keep a copy of the notice.

e. Notice of Suspension Requirements (R.C. 3313.66(D))

i. Must be sent to the parent/guardian within one school day of the suspension.

ii. Include the specific reasons for the suspension – describe behavior and Code of Conduct section(s) violated.

iii. Specify beginning and ending dates and any applicable rules during suspension.

iv. Notify parent and student of right to appeal the suspension to the board/designee, to be represented during the appeal, to be granted a hearing, and to have the hearing held in executive session if it is before the Board.

v. Notification that the Superintendent may seek the student's permanent exclusion if the suspension is based on a violation listed in R.C. 3313.662(A) that was committed when the student was 16 or older and if the student is convicted of or adjudicated a delinquent child for that violation.

vi. The manner and date by which the student or his/her parent/guardian shall notify the board of their intent to appeal the suspension to the board or its designee.

vii. Cannot exceed ten (10) school days.

(1) If there are fewer than 10 school days remaining in the year, the superintendent may NOT apply any remaining part or all of the period of suspension to the following school year. (R.C. 3313.66(A))

(2) Superintendent may require the student to participate in a community service program or other alternative consequence for a number of hours equal to the remaining part of the period of suspension.

6. In-School Suspension

i. No due process procedures are required – no right to written notice, hearing and appeal. Must be served in a supervised learning environment.

7. Emergency Removal (R.C. 3313.66(C))

a. Student poses continuing danger to persons or property or ongoing threat of disrupting the academic process taking place either within a classroom or elsewhere on school premises.

b. No prior notice or hearing required. Student must receive a hearing on the next school day after the removal and written notice of the hearing and the reasons for the removal prior to the hearing.

c. If a teacher ordered the removal, he/she must submit a written statement to the principal as soon as practical.

d. If the student is reinstated before the hearing, the teacher, upon request, is entitled to a written statement of the reasons for the reinstatement.

e. Students in grades PK-3 may only be removed for the remainder of the school day and shall be permitted to return on the school day following the day in which the student was removed. No hearing needs to occur.

8. Expulsions (R.C. 3313.66(B))

a. Who may expel?

i. Only the superintendent.

b. What must happen before the expulsion?

i. The Superintendent must provide written notice of the intended expulsion to the student and the student's parent/guardian.

ii. The student and parent/guardian must have the opportunity to appear before the Superintendent/designee to challenge the reasons for the intended expulsion or to otherwise explain the student's behavior.

c. Notice of Intended Expulsion

i. Describe behavior – date, time, and all applicable Code of Conduct sections violated.

ii. If the student is 16 or older, has committed certain serious offenses, and you might want to seek permanent exclusion then a statement to this effect must also be included.

iii. Notify student and parent/guardian of right to appear before the Superintendent/designee to challenge the intended expulsion.

iv. State time, place and date of hearing – which must be not earlier than 3 nor later than 5 school days after the notice is given, unless the parent/guardian requests an extension which is granted by the superintendent.

v. Keep a copy for your records.

d. Notice of Expulsion Requirements

i. Notice must be sent within 1 school day of the expulsion to the Parent/guardian and Treasurer and must contain:

(a) The reasons for the expulsion;

(b) Notice of the right to appeal to the Board/designee, to be represented during the appeal, and to have the hearing in executive session if before the Board;

(c) The manner and date by which the student or his/her parent/guardian shall notify the board of their intent to appeal the expulsion to the board or its designee;

(d) If the expulsion is for more than 20 school days or will extend into the next semester or school year, the notice must provide information about agencies that offer services that work toward improving those aspects of the student's attitudes and behavior that contributed to the incident that gave rise to the student's expulsion; and

(e) Notice if permanent exclusion is a possibility.

e. Expulsion may be for up to 80 days, or one year if authorized by Board policy and statute for certain specific offenses (i.e.; bomb threat, possession of firearm, possession of knife capable of causing serious bodily injury, or other act that results in serious physical harm to persons or property.

f. What if the student withdraws from school before the expulsion is imposed?

i. The Superintendent must, by law, proceed with the expulsion proceedings.

ii. If, following the hearing, the pupil would have been expelled, the expulsion must be imposed for the same amount of time as would have been imposed for a student who had not withdrawn from school.

g. Alternatives

i. During an expulsion, the Board may provide educational services to a student in an alternative setting.

ii. Also applies to any school board admitting a student during an expulsion period.

9. Abeyance

a. Option to enter agreement with parent to conditionally modify or hold in abeyance a disciplinary consequence

b. Conditions could include (but are not limited to):

i. Removal of discipline from student's record if certain conditions are met (e.g., no additional misconduct for certain period of time)

ii. Educational services in an alternative setting provided during period of removal, contingent on good behavior

c. Such an agreement should include waiver of right to appeal the discipline

10. Special Issues

a. Referral to Law Enforcement

i. School may report crime, but must ensure copies of the child's special ed and disciplinary records are transmitted for consideration by the appropriate authorities in accordance with law (i.e., FERPA)

b. Special Searches – Use balancing test above and your Board policies

i. Locker searches (random searches may be authorized)

ii. Drug-detecting dogs

iii. Motor vehicle searches

iv. Cell phone searches

11. Special Categories

a. **Students with disabilities**

i. The IDEA Amendments of 1997 addressed several issues related to the discipline of students with disabilities. The Office for Special Education Programs (OSEP) of the U.S. Department of Education explained the disciplinary provisions in the 1997 amendments as follows:

(a) All students, including students with disabilities, deserve safe, well-disciplined schools and orderly learning environments;

(b) Teachers and school administrators should have the tools they need to assist them in preventing misconduct and discipline problems and to address those problems if they arise;

(c) There must be a balanced approach to the issue of discipline of students with disabilities that reflects the need for orderly and safe schools and the need to protect the rights of students with disabilities to a free and appropriate public education; and

(d) Students have the right to an appropriately developed IEP with well-designed behavior intervention strategies.

ii. Free Appropriate Public Education (FAPE) – The law requires that states have in effect a plan that provides assurances that a FAPE is available to all children with disabilities residing in the state between the ages of 3 and 21, including children with disabilities who have been suspended or expelled. 20 U.S.C. § 1412(a)(1)(A). However, a school need not provide services to a child with a disability who has been removed from his or her current placement for 10 school days or less in that school year, if services are not

provided to children without disabilities who have been similarly removed. 34 C.F.R. § 300.531(d)(3).

iii. Proactive Approach -- The law encourages a proactive approach to managing student behavior by emphasizing the use of positive behavioral interventions, supports and services for students with disabilities who have behavioral challenges.

iv. Manifestation Determination (MD) – A student with a disability may not be removed from school for misconduct that is related to his/her disability. To determine the relationship between the disability and the misconduct, the law requires the district to convene a meeting with the parent and relevant members of the IEP team to conduct a manifestation determination.

(a) *When Required?* -- The MD process is only for disciplinary removals that constitute a change of placement. 34 C.F.R. § 300.530(e)(1).

(b) *Timing* – The MD must take place within 10 school days of any decision to change the placement of a child with a disability because of a violation of the student code of conduct. 34 C.F.R. § 300.530(c) and (e).

(c) If the conduct is determined not to be a manifestation of the disability, the district may impose the same disciplinary consequences that would apply to a child without a disability, except that if the disciplinary consequence constitutes a removal from school for more than ten days, the school must provide "Day 11 Services."

v. "Day 11" Services -- After a child has been removed for ten school days in a school year, the school must provide educational services to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the student's IEP goals, and provide, as appropriate, a functional behavioral assessment and behavior intervention services and modifications that are designed to address the behavior violation(s) so they do not recur. 34 C.F.R. § 300.530(d).

b. **Students in grades PK-3** (R.C. 3313.668)

i. May only be issued an out-of-school suspension or expulsion for:

(a) Bringing/possessing a firearm onto school property or to a school event (such as an interscholastic competition, extracurricular event or other school program or activity not located on district-owned property).

(b) Bringing/possessing a knife capable of causing serious bodily injury onto school property or to a school event (if authorized by Board).

(c) Committing an act that is a criminal offense and results in serious physical harm to persons or property while on school property or at a school event (if authorized by Board).

(d) Making a bomb threat to a school building (if authorized by Board).

(e) If necessary to protect the immediate health and safety of the student, other students, the classroom staff and teacher, or other school employees. (Out-of-school suspension limited to 10 days unless for conduct described in items 1-4 above.)

c. Whenever possible, the principal shall consult with a mental health professional under contract with the district prior to suspending or expelling a student in grades PK-3.

B. **Vaping**

1. Definitions – What is vaping?

a. From the Ohio Department of Education and Workforce:

i. E-cigarettes come in many shapes and sizes. They may look like regular cigarettes, cigars, pipes, or like pens, USB sticks and other everyday items.

ii. Most electronic smoking devices have a battery, a heating element and a place to hold a liquid. This liquid may also be called e-liquid or e-juice. The liquid in e-cigarettes usually contains nicotine (which is the addictive drug tobacco products), ultrafine particles, flavorings and other chemicals. E-cigarettes can also be used to deliver marijuana and other drugs.

iii. E-cigarettes produce an aerosol by heating the liquid inside the device. This aerosol is then inhaled by the user, entering their lungs. E-cigarette use has been linked to lung disease (e-cigarette, or vaping, product use associated lung injury or EVALI), increased risk of addiction, burns and other potential health and injury risks.

2. An "alternative nicotine product" (R.C. 2927.02) – illegal to distribute or permit children to use.

3. <u>Health education</u> - Now required to cover as part of comprehensive health education.

i. Instruction must include the harmful effects and legal restrictions against the use of drugs, alcoholic beverages, and tobacco, including electronic smoking devices.

ii. DEW has listed educational programming for all grade levels

4. <u>Alternatives to Suspension</u>

a. DEW: "The purpose of alternatives to suspension is to keep students in school and learning. Violations of tobacco policies can be addressed using

supportive disciplinary practices, which focus on recovery and reduction of tobacco product use and dependence."

b. DEW links to two programs:[5]

i. American Lung Association: *Intervention for Nicotine Dependence: Education, Prevention, Tobacco and Health (INDEPTH)*

ii. Stanford Univ: *Healthy Futures*

C. **Transgender Student Issues**

1. Legal Framework

a. *Bostock v. Clayton County, Georgia* (U.S. 2020) – The U.S. Supreme Court, in a 6-3 decision, held that "[a]n employer who fires an individual merely for being gay or transgender" violates Title VII, the employment non-discrimination law.

i. When an employer discriminates against gay or transgender employees, it is because of "traits or actions it would not have questioned in members of a different sex." Therefore, "[s]ex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

b. Title IX of the Education Amendment Acts of 1972 **prohibits discrimination based on sex in educational programs** that receive and utilize federal financial assistance – including all the academic, educational, extracurricular, athletics, and other programs of the school.

i. Text of statute: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance…"

ii. Applies to students and employees (and potentially other parties).

iii. Enforced by the Office of Civil Rights ("OCR").

c. Back and forth in courts between federal and state authorities with different views

i. State – HB 68 defines sex as "biological indication of male and female" (law currently **enjoined** – see above)

ii. Federal - The U.S. Department of Education released its final changes to the Title IX regulations. The new rule (§ 106.10) clarifies that discrimination based on sex includes discriminating based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. The final regulations also: revise the definition of various terms, including the

[5] *See details at:* https://education.ohio.gov/Topics/Student-Supports/School-Wellness/Prevention-Education/Updates-to-Health-Education-Instruction.

definition of sex-based harassment, hostile environment, complainant, complaint, and others; provide more opportunity for informal resolution (unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary or secondary school student, or informal resolution would conflict with federal, state, or local law); permit a single investigator model; expand training requirements; and more.

(a) On June 17, 2024, the U.S. District Court for the Eastern District of Kentucky issued a preliminary injunction/stay to prohibit the U.S. Department of Education from "implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule…" in Ohio, Tennessee, Kentucky, Indiana, Virginia, and West Virginia. ***The court found the Department exceeded its authority in defining "sex" to include "gender identity."***

(b) On July 10, the District Court denied the U.S. Department of Education's motion for a partial stay pending appeal. A motion for a partial stay was also filed in the Sixth Circuit of Appeals. (No. 24-5588.) On July 17, 2024, the Sixth Circuit denied the U.S. Department of Education's motion. The Sixth Circuit also expedited the appeal of the district court's issuance of a preliminary injunction so the case could be heard during the October sitting. On July 22, 2024, the U.S. Department of Education filed an application for a partial stay with the U.S. Supreme Court (No. 24A79).

2. Disclosure to School Personnel and Others

a. Generally recognized that students have a privacy interest in their sexual orientation or gender identity

i. School personnel generally not permitted to "out" students without consent

ii. Including to staff members with no legitimate educational interest in that information

iii. Including to other students or other students' parents

b. Disclosure to the Student's Own Parent

i. FERPA grants parents the right to personally identifiable information about their child, which would include info about the student's transgender status or preferred names or pronouns

ii. No legal exception right now which would permit a district to withhold this information from the parent

iii. Consider what resources are available to support the student

iv. Remember school personnel's mandatory reporting obligation if there are concerns about an unsafe situation at home

3. **Considerations Before Changing Policy**

a. Does the District need a policy?

b. Where does your school community stand?

c. Are any advocacy organizations or other organized groups involved in instigating or supporting litigation in your district?

d. What costs might the District face – not just monetarily, but in terms of impact on personnel, public opinion, etc.?

e. Based on current state of case law, difficult to predict whether a district can prevail if a policy change is challenged