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OHIO SCHOOL BOARDS ASSOCIATION
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"Top 10 Ways to Minimize District Liability Issues"

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I. Introduction.

II. Ensuring Adequate Insurance Coverage.

A. Authority to obtain insurance coverage.

1. A political subdivision may procure insurance against its and its employees' potential liability in civil actions for injury, death, or loss to persons or property. O.R.C. §2744.08(A)(1).

2. The political subdivision may determine the limits, terms, and conditions of the insurance at its discretion.

3. A political subdivision may also establish a self-insurance program. O.R.C. §2744.08(A)(2)(a).

   a. The political subdivision may reserve the funds that it determines are appropriate in a special fund established pursuant to an ordinance or resolution.

b. The political subdivision may contract with any person, or political subdivision, or regional council of governments for the administration of this program.

4. The purchase of liability insurance or establishment of a self-insurance program does not constitute a waiver of any immunity or defense, except that the political subdivision may specifically waive any immunity or defense if a provision to that effect is specifically included in the insurance policy, written plan of operation of the self-insurance program, or the legislative enactment authorizing the purchase of the insurance or the establishment of the self-insurance program.

B. Types of coverage.

1. Liability/casualty.

a. Insures members of the board of education and employees against liability for damages or injury to persons or property resulting from an act or omission while the person was in his/her official capacity.

b. May include insurance against employment practices.

2. Automobile insurance.

A board of education must maintain insurance covering the district's officers, employees, and students against liability due to damage or injury to persons and property resulting from the operation of a motor vehicle owned or operated by the district. O.R.C. §3313.201.

3. Uninsured/underinsured.

May pay for damages when the covered person is injured and the person at fault does not have insurance, or does not have adequate insurance.

4. Umbrella policy.

Provides additional liability coverage when other policies have been exhausted, or for claims that may be excluded under other policies.

5. Workers' compensation.

a. Ohio's workers' compensation system provides benefits to employees and survivors for injury, disease, or death, sustained in the course of, or arising out of, their employment.

b. All school districts participate in the state fund unless they elect and are approved for coverage under another option.

(1) Districts pay semiannual premiums in an amount fixed by the workers' compensation administrator.

(2) Districts also make an additional payment based on claims made during a five-year look back period.

c. School districts are permitted to self-insure for workers' compensation if they meet the O.R.C. §4123.35 criteria.

(1) Must have a Moody's debt rating of AA3 or a comparable rating from another agency;

(2) Must have an unvoted debt capacity equal to twice the annual premium; and

(3) Must have an undesignated fund balance for each of the two years preceding self-insurance of five percent of all of the general funds for that year.

C. Fidelity bonds for the Treasurer.

1. Fidelity bonds are required to indemnify losses in one of the following conditions:

a. The failure of the treasurer to faithfully perform his/her duties or to account properly for all moneys or property receives;

b. Fraudulent or dishonest acts committed by the treasurer. O.R.C. §3.06(C).

2. "A bond payable to the state, or other payee as directed by law, reciting the election or appointment of a person to an office or public trust under or in pursuance of the constitution or laws of this state, and conditioned for the faithful performance, by such person, of the duties of the office or trust, is sufficient, notwithstanding any special provision made by law for the condition of such bond." O.R.C. §3.31.

D. Indemnification clauses.

1. Such clauses require first party to "defend and indemnify" or "hold harmless" second party in the event of the second party is sued by a third party. Purpose is to limit vendor's exposure to risk. Such clauses are typically seen in finance agreements.

2. While lawful, such clauses are subject to proper appropriation by the board of education. The Ohio Attorney General has opined that a political subdivision may enter a contract that includes an indemnification provision, provided that (a) the indemnification is capped at a certain amount, (b) the amount of potential indemnification is appropriated in the public body's budget, and (c) the funds to pay the amount of indemnification are certified in accordance with O.R.C. §5705.41. *See* Ohio Atty. Gen. Ops. 99-049, 96-060.

3. To avoid such issues, one alternative is to purchase liability insurance to cover the indemnified risk.

4. Vendor contract indemnification clauses are distinct from the authority of a board of education under O.R.C. §3313.203 to indemnify, defend and hold harmless board members, employees, volunteer bus rider assistants, and nonprofit entities formed for the support of school district programs (such as a band booster club).

III. Document Employment Decisions

A. Importance of documenting decision making process.

1. Contemporaneous record of why and how decisions were made.

2. Decision makers/participants in decision making process may leave district, taking institutional knowledge with them about employment decisions.

3. In some instances, required under state or federal law.

   a. Federal law requires that all school districts with 100 or more employees prepare and periodically file with the EEOC form EEO-5, which sets forth statistical information about the make-up of the school district's workforce. 29 CFR §1602.41.

   b. School districts are under an obligation to make and preserve for a period of three years all records necessary for the completion of an EEO-5, even if the district is not required to file an EEO-5. 29 CFR §1603.39.

4. The collection of these records must be in such a manner as "to preclude their inadvertent or deliberate use for discriminatory purposes and to avoid possible misinterpretation by applicants of the purpose for which such data will be used." Ohio Admin. Code §4112-5-04.

B. Initial considerations.

1. Board policies regarding employment decisions.

2. Public records issues.

3. Record retention policies.

4. Collective bargaining agreement provisions.

C. Documenting the hiring process.

1. Decision to create and/or fill a vacancy.

2. Collection and retention of applicant information.

3. Interview/hiring process.

D. Documenting the employment history and job performance of employee.

E. Documenting the investigation and determination of adverse employment actions.

1. Written rules regarding staff conduct.

2. Know the history of how rules have been applied and interpreted in the past with respect to other employees.

3. Investigation procedure for allegations of misconduct.

4. Discipline decision should be clearly communicated to employee.

5. If employee is required to take certain action as part of discipline (receive training, undergo testing, etc.), then should ensure that such action by employee occurs and is documented.

6. If discipline requires Board action, should have a clearly worded resolution for adoption by the Board as to what action it is taking.

7. All such documentation must be retained for at least two years, preferably in a central location.

IV. Address Complaints of Misconduct or Wrongdoing.

A. Nationally, 50 percent of students are bullied at some time during the school year and 10 percent of students are repeatedly bullied on a regular basis.[1]

B. Definition of bullying – O.R.C. §3313.666(A)(2).

1. Harassment, intimidation, or bullying means either of the following:

a. 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 or physical harm to the other student;

[1] *What Can School Personnel Do about Bullying at School?*, Ohio Department of Education, http://education.ohio.gov/getattachment/Topics/Other-Resources/School-Safety/School-Safety-Resources/Anti-Harassment-Intimidation-and-Bullying-Resource/What_Can_School_Personnel_Do_Fact_Sheet.pdf.aspx.

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

b. Violence within a dating relationship.

2. "Electronic act" means an act committed through the use of a cellular telephone, computer, pager, personal communication device, or other electronic communication device.

C. Jessica Logan Act – H.B. 116.

1. Effective May 4, 2012.

2. Added electronic acts to the definition of harassment, intimidation, and bullying.

3. Included a school bus as a location where a board of education's policy regarding bullying will apply.

4. Requires school districts to incorporate training on the board's harassment, intimidation, or bullying policy into the in-service training.

5. Added additional requirements to a board's bullying policy.

D. Boards of education must establish a policy regarding bullying that includes the following:

1. A statement prohibiting harassment, intimidation, or bullying of any student on school property, on a school bus, or at school-sponsored events and expressly providing for the possibility of suspension of a student found responsible for harassment, intimidation, or bullying by an electronic act;

2. A definition of harassment, intimidation, or bullying that includes the statutory definition;

3. A procedure for reporting prohibited incidents;

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

5. A requirement that the custodial parent or guardian of any student involved in a prohibited incident be notified and, to the extent permitted by FERPA, have access to any written reports pertaining to the prohibited incident;

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

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

8. 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;

9. A disciplinary procedure for any student guilty of harassment, intimidation, or bullying, which shall not infringe on any student's rights under the first amendment to the Constitution of the United States;

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

11. A requirement that the district administrator semiannually notify the president of the district board in writing of all reported incidents, and post the summary on its web site if the district has a web site.

E. O.R.C. §3313.66 does not create a new cause of action, but does state that the statute does not prohibit "a victim from seeking redress under any other provision of the Revised Code or common law that might apply." O.R.C. §3313.66(F).

F. Potential civil causes of action arising from bullying incidents include various negligence claims, a 42 U.S.C. §1983 claim, or a violation of Ohio's hazing statute, O.R.C. §2307.44.

G. Relevant case law.

1. Golden v. Milford Exempted Village School Dist., 2011-Ohio-5355 (12th Dist.).

   a. R, a high school basketball player, was sexually assaulted by another basketball player, T, while waiting for a bus to take the team to practice. R's parents filed a lawsuit against the school, asserting the basketball coach's failure to adequately supervisor the students was wanton and reckless.

   b. On appeal, the Court ruled in favor of the school district. Although the evidence demonstrated that T had a history of bullying other students, the Court found that the bullying occurred outside of the coach's presence and that the students had not reported the incidents to the coach. Since the coach was unaware of the bullying, the Court determined there was no evidence that he disregarded a known risk.

2. Wencho v. Lakewood School Dist., 2008-Ohio-3527 (8th Dist.).

   a. Wencho alleged that, as a new sixth grader, he was subject to a pattern of violence and threats culminating in an attack. Wencho further alleged that although his parents and he complained, the school did not discipline the perpetrators, did not assist him, and attributed the problems to Wencho's inability to deal with stress and anxiety. Wencho alleged that the school district's conduct was willful, wonton, and reckless, setting forth claims for negligence, negligent infliction of emotional distress, and assault. The school district argued they were immune from Wencho's claims.

   b. The Court found that the school district was not immune, and, that based on Wencho's allegations, Wencho had asserted an adequate claim that he was hazed at the middle school and the school's response had been wanton and reckless. The Court thus denied the school district's motion to dismiss the complaint on the basis of immunity.

V. Complying with Mandatory Reporting Requirements.

A. Ohio law imposes a duty on a wide variety of professionals, including every school teacher, school employee and school authority, who is acting in an official or professional capacity, to report known or suspected child abuse or neglect. O.R.C. 2151.421(A)(1).

B. What children are protected?

Applies to child under 18 years of age, or a physically or mentally handicapped person under 21 years of age. O.R.C. 2151.421(A)(1).

C. When does the duty to report arise?

1. When the school employee "knows or has reasonable cause to suspect based on facts that would cause a reasonable person in a similar position to suspect" that the child has "suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child." O.R.C. 2152.421(A)(1).

2. Caution needs to be used in asking questions of the child if you get information that leads you to know or suspect abuse or neglect.

a. The better procedure is to ask the child to repeat the information to verify.

b. Do not suggest facts/circumstances if child cannot remember or does not state the details.

c. Report the information immediately. Consider coordination of investigations.

D. When must the report be made?

1. The school employee shall not "fail immediately to report . . ." O.R.C. 2151.421(A)(1).

2. Purpose of statute is to prevent harm to children.

E. To whom are reports to be made?

The knowledge or suspicion of child abuse must be reported to the children services agency, or to a municipal or county peace officer in the county in which the child resides or in which the abuse or neglect is occurring or has occurred. O.R.C. 2151.421(A)(1).

F. How is the report to be made?

Any report shall be made "forthwith" by telephone or in person, and shall be followed by a written report, if requested by the receiving agency or officer. O.R.C. 2151.421(C).

G. What must the written report contain?

1. The names and addresses of the child and his/her parents or the person or persons having custody of the child, if known.

2. The child's age and nature and extent of the child's injuries, abuse or neglect, or of the known or suspected threat of injury, abuse, or neglect, including any evidence of previous injuries, abuse, or neglect.

3. Any other information that might be helpful in establishing the cause of the known or suspected injury, abuse, or neglect or of the known or suspected threat of injury, abuse, or neglect. O.R.C. 2151.421(C).

H. The report is confidential.

1. Although children services must inform the alleged child abuser that a report has been filed, the agency shall not provide the alleged child abuser any information that identifies the person who made the report, statements of witnesses, or police or other investigative reports. O.R.C. 2151.421(H)(5).

2. No person shall permit or encourage the unauthorized dissemination of the contents of the report of child abuse/neglect. O.R.C. 2151.421(H)(2).

I. Good Faith Immunity.

Anyone participating in good faith in the making of reports under this section or anyone participating in good faith in a judicial proceeding resulting from the

reports, shall be immune from any civil or criminal liability that otherwise might be incurred or imposed as a result of such actions. O.R.C. 2151.421(G).

J. Penalties for failure to make report.

1. Anyone who violates the duty imposed by O.R.C. 2151.421 to report known or suspected child abuse is guilty of a fourth degree misdemeanor. O.R.C. 2151.99 A fourth degree misdemeanor is punishable by imprisonment for not more than 30 days and a fine of not more than $250.00. O.R.C. 2929.24, 2929.28.

2. In addition, unauthorized dissemination of the contents of the report is also a fourth degree misdemeanor.

3. Violation of these provisions of the statute may also give rise to civil liability.

K. Penalties for making a false report.

1. A separate criminal statute, O.R.C. 2921.14, makes it a first degree misdemeanor for anyone to knowingly make or cause another to make a false report alleging child abuse/neglect. A first degree misdemeanor is punishable by imprisonment for not more than six months and a fine of not more than $1,000.00. O.R.C. 2929.24, 2929.28.

2. O.R.C. 2921.44 deals with the crime of dereliction of duty. Said statute provides in part that no public servant shall recklessly fail to perform a duty expressly imposed by law with respect to the public servant's office.

3. The term "public servant" has been broadly defined and probably does include a teacher, school employee, or school administrator.

4. Dereliction of duty is a 2nd degree misdemeanor which is punishable by imprisonment for not more than 90 days and a fine of not more than $750.00. O.R.C. 2929.21.

VI. Observing Equal Employment Opportunity Laws.

A. Protected Classifications Under State and Federal Law.

1. Sex: defined to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. Under 42 U.S.C. §2000e ("Title VII"), women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work. 42 U.S.C. §2000e(k).

a. Includes discrimination against women or men; determinative factor is whether the adverse employment action is motivated by the employee's sex. Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998).

b. Discrimination on the basis of sex may include male employer discriminating against male employee through promotion of female employee on the basis of sex. Johnson v. Transportation Agency, 480 U.S. 16 (1987).

2. Race or Color.

a. Fact that employer/supervisor is same race as employee does not bar a claim for race discrimination. Castaneda v. Partida, 430 U.S. 482 (1977).

b. Federal anti-discrimination law "prohibits racial discrimination in private employment against white persons upon same standards as racial discrimination against nonwhites." McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976).

3. Religion: includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that it is unable to reasonably accommodate an employee's religious observances or practices without undue hardship in the conduct of the employer's business. 42 U.S.C. §2000e(j).

The obligation to accommodate includes efforts to accommodate those employees who refuse to work on particular days of the week because of

their religious beliefs. Murphy v. Edge Memorial Hospital, 550 F.Supp. 1185 (M.D.Ala.1982).

4. National Origin or Ancestry: State anti-discrimination laws list both, although federal anti-discrimination laws do not; U.S. Supreme Court has determined the two terms to be synonymous. Espinoza v. Farak Mfg. Co., Inc. 414 U.S. 86 (1973).

   a. It is illegal to discriminate against an individual because of birthplace, ancestry, culture, or linguistic characteristics common to a specific ethnic group.

   b. Employee was entitled to protection of Title VII against employment discrimination regardless of his percentage of Native American ancestry if employer reasonably believed that employee was member of protected class based on some objective evidence, which may consist of physical appearance, language, cultural activities, or associations. Perkins v. Lake County Dept. of Utilities, 860 F.Supp. 1262 (N.D. Ohio 1994).

5. Age: Federal Age Discrimination in Employment Act, 29 U.S.C. §621 *et seq.* ("ADEA") and Ohio law prohibit discrimination against individuals 40 years of age and older on the basis of age.

   a. Employee under 40 cannot state a claim for age discrimination under ADEA, even if employer takes adverse action against younger employee on basis of age. Similarly, employer did not impermissibly discriminate against workers ages 40-49 in violation of ADEA by implementing collective bargaining agreement that eliminated employer's retiree health insurance benefits program for workers then under 50 but retained program for workers then over 50; Act's prohibition against discrimination "because of ... age" targeted discrimination against the relatively old, not the relatively young. General Dynamics Land Systems, Inc. v. Cline, 540 U.S. 581 (2004).

   b. Older employee may state a claim for age discrimination due to employer's discrimination in favor of younger employee, even where the younger employee is over the age of 40.

6. Disability.

a. "Disability" is defined under the Americans with Disabilities Act, 42 U.S.C. §12102(2) ("ADA") as (i) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (ii) a record of such an impairment; or (iii) being regarded as having such an impairment.

b. Disability under Ohio law is defined as "a physical or mental impairment that substantially limits one or more major life activities, including the functions of caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working; a record of a physical or mental impairment; or being regarded as having a physical or mental impairment." O.R.C. §4112.02(A)(13).

7. Miscellaneous.

a. Veterans.

b. Genetic information.

c. Pregnancy.

B. Conduct Prohibited Under State and Federal Anti-Discrimination Laws.

1. Under Title VII, "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race color, religion, sex, or national origin."

2. Discrimination on the basis of an employee's protected status is defined by the federal Equal Employment Opportunity Commission ("EEOC") as limiting, segregating, or classifying employees or applicants for employment in any way which would deprive or tend to deprive any individual employment opportunities or otherwise adversely affect his status as an employee, because of his protected status. Discriminatory intent may manifest itself in any of the following employment actions:

a. hiring decisions, including advertisements for positions;

b. job testing or recruitment;

c. transfer, promotion, and training;

d. discipline (*i.e.*, demotions, reprimands, suspensions, transfers, etc.), either in terms of the reasons for discipline, or the severity of discipline;

e. pay, fringe benefits, retirement plans, and leaves of absence;

f. layoff, recall, contract non-renewal, constructive termination, or termination;

g. use of employer's facilities;

h. other terms or conditions of employment.

3. Sexual (or other discriminatory) harassment of employee.

a. Defined as unwelcome sexual advances, request for sexual favors, and verbal, non-verbal, or physical conduct of sexual nature which occur when:

(1) Submission to such conduct is made explicitly or implicitly a condition of employment (quid pro quo); or

(2) Submission to or rejection of such conduct by an individual is used as a factor in decisions affecting that individual's employment (quid pro quo); or

(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance, or creating an intimidating, hostile or offensive employment environment (hostile environment).

4. Retaliation for exercise of EEO rights.

a. Employer may not take adverse employment action against employee for the exercise of his or her rights under state or federal equal employment opportunity laws.

b. Protects (i) employees who file EEO claims, (ii) employees who complain of alleged discrimination to employer even in the absence of having filed an EEO claim, and (iii) employees who provide testimony or other evidence in support of claim of unlawful discrimination or harassment.

c. It is not necessary that an employee have a valid underlying claim of discrimination in order to bring a claim of retaliation.

d. Adverse employment actions taken subsequent to an employee's exercise of EEO rights will result in presumption of retaliation, which can be rebutted through showing by employer that it had a legitimate, non-retaliatory reason for the employment action.

5. Discrimination against individuals because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group.

C. Civil liability may result from violations of the Civil Rights Act of 1946, the Americans with Disabilities Act, or Section 504 of the Rehabilitation Act.

VII. Respecting Students' Free Speech Rights.

A. Legal framework for applying the First Amendment within public schools.

1. Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

a. The Supreme Court found that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression," and added that "the record [in Tinker's case] does not demonstrate any facts which might reasonably lead school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."

b. This case established what is known as the "Tinker Test," under which schools may restrain student speech consistent with the First Amendment, where it is reasonably foreseeable that the speech will cause a substantial and material disruption to school activities.

2. Bethel School District v. Fraser, 478 U.S. 675 (1986).

a. The U.S. Supreme Court determined that, "[s]urely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse."

b. This conclusion was reached by conducting the following balancing test:

[T]he freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against society's countervailing interest in teaching students the boundaries of socially appropriate behavior.

B. The "True Threat" Doctrine.

1. Under the First Amendment, "Congress shall make no law . . . abridging the freedom of speech." However, this protection is not absolute. The U.S. Supreme Court has held that some categories of speech can be limited without giving rise to constitutional violations. Speech threatening violence – termed "true threats" – falls into one of these categories.

2. In Virginia v. Black, 538 U.S. 343, 359, (2003), the Supreme Court defined "true threats" to encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence on a particular individual or group of individuals.

3. The Sixth Circuit Court of Appeals, which is the federal appellate court in which Ohio is located, has interpreted this language to mean that a "communication containing a threat" must be such that a reasonable person:

a. Would take the statement as a serious expression of an intention to inflict bodily harm; and

b. Would perceive such expression as being communicated to effect some change or achieve some goal through intimidation.[2]

4. When student online speech evidencing a "true threat" is made in the school setting, *e.g.*, it is made or accessed on school computers, it is distributed during school hours, or it is directed at school officials or pupils, two responses should be taken:

a. Notification of law enforcement with possible delinquency proceedings for minor students or criminal proceedings for adult students; and

b. Implementation of school codes of discipline with appropriate sanctions following due process.

C. A violation of First Amendment rights could result in civil liability pursuant to 42 U.S.C. §1983.

D. Relevant case law.

1. Glowacki v. Howell Public School Dist., E.D. Mich. No. 2:11-CV-15481 (June 19, 2013).

a. In a debate with a teacher during the high school's observance of an "anti-Bullying Day," student Daniel Glowacki cited his Roman Catholic faith and stated, "I don't accept gays." Glowacki's teacher became emotional, removed Glowacki from the classroom, and told the remaining students that saying such things was inappropriate in a classroom setting. Glowacki sued the teacher and school district in the U.S. District Court on First Amendment grounds. With respect to the school district, Glowacki argued that its "anti-bullying" policies amounted to a "free speech restriction" as enforced by the school district's teachers, and sought to enjoin their enforcement.

b. The court found that while the teacher's interpretation of "anti-bullying" policies was erroneous and that his removal of Glowacki was unlawful, the anti-bullying policies were constitutionally permissible because they focused on preventing substantial disruption of school activities and interference with the rights of

[2] United States v. Alkhabaz, 104 F.3d 1492, 1495 (6th Cir. 1997).

other students. The court held that "school policies may ban harassing speech in anticipation of disruption, even if disruptive events have not yet occurred," and awarded the school district's motion for summary judgment.

2. Rosario v. Clark Cty. School Dist., D. Nev. No. 2:13-CV-362 JCM (July 3, 2013).

   a. The student was a member of the boys' varsity basketball team. After the last game of the season, the student made several comments on his Twitter account about school officials while having dinner with his family at an off-campus restaurant. He made eight profanity-laced tweets about four school officials.

   b. The officials filed a discipline complaint against the student charging him with violating the school district's cyber bullying policy, which states that a student should not engage in bullying, cyber bullying, harassment, or intimidation on the premises of any public school, at an activity sponsored by a public school, or on any school bus. The student was disciplined for a violation of the policy.

   c. The student and his parent filed suit in federal court claiming the discipline he received because of off-campus tweets violated numerous rights, including his First Amendment right of free speech. The school district filed a motion to dismiss arguing the tweets were not entitled to First Amendment protection because they were obscene and that schools may regulate off-campus student speech that causes a substantial disruption on campus. The Court denied the motion to dismiss the First Amendment claim, determining that while some courts have found school officials can discipline students for off-campus speech on social media websites, the ability of officials to impose punishment depends on the facts.

3. Layshock v. Hermitage School Dist., 650 F.3d 205 (3rd Cir. 2011).

   a. While at his grandmother's house, a student created a fake MySpace profile for his high school's principal, which contained offensive pictures and descriptions. The high school disciplined the student for violations of the school district's discipline code,

suspending him for 10 days, placing him in an alternative education program for the rest of the school year, banning him from extracurricular activities, and prohibiting him from participating in his graduation ceremony.

b. The Third Circuit Court of Appeals ruled the school's discipline violated the student's First Amendment rights. The Court held the school could not discipline the student for conduct that occurred while he was at his grandmother's house when the district did not demonstrate that the student's conduct disrupted the school. The Court stated it was not determining when a school could discipline a student a student for conduct that occurs outside of the school.

VIII. Promptly and Completely Responding to Public Records Requests.

A. What is a "public record"?

1. A "public record" is a record kept by a public office.

2. A "record" is any item that:

a. Contains information stored on a fixed medium (i.e. paper, computer, film, etc.);

b. Is created, received, or sent under the jurisdiction of a public office; and

c. Documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

B. Specific Exemptions Under Public Records Act.

1. Medical records.

2. Trial preparation records.

3. Security records.

4. Infrastructure records.

5. Adoption records.

6. Probation and parole records.

7. Records falling within attorney-client privilege.

8. Counseling records.

9. Individual STRS and SERS information.

C. Other Records/Information Prohibited from Disclosure by Law.

1. Student education records (Family Education Rights & Privacy Act).

2. Social Security numbers (State ex rel. Beacon Journal Publ. Co. v. City of Akron, 70 Ohio St. 3d 605 (1994)).

3. Criminal background check information (O.R.C. §3319.39(D)).

4. School Safety Plan (O.R.C. §3313.536).

5. Audit Report, until a certified copy is filed with the district treasurer (O.R.C. §117.06).

D. Ambiguous and Overbroad Requests.

1. If a requester makes an ambiguous or overboard request or has difficulty in making a request for inspection or copies of public records such that the public office cannot reasonably identify what public records are being requested, the public office may deny the request.

2. Upon such denial, the public office must provide the requester with an opportunity to revise the request by informing the requester of the manner in which the records are maintained and accessed by the public office.

E. An individual allegedly aggrieved by a public office's failure to produce the requested public records may commence a mandamus action against the public entity to compel production. O.R.C. §149.43(C)(1).

1. The court has the authority to award statutory damages of one hundred dollars per day, for up to ten days.

2. The court may also award the requester his reasonable attorney's fees expended in obtaining the public records.

F. Relevant case law.

1. State ex rel. Zidonis v. Columbus State Community College, 133 Ohio St.3d 122, 2012-Ohio-4228.

a. Zidonis, a terminated member of CSCC's records-retention committee, appealed a Court of Appeals decision denying her request for public records as overbroad. Zidonis sought copies of all e-mails exchanged between herself and her supervisor, as well as access to all of CSCC's "complaint" and "litigation" files. CSCC denied both requests as ambiguous and overbroad, and encouraged Zidonis to narrow her requests by specifying a year or subject-matter for the e-mails and files to be retrieved. Zidonis revised neither request, arguing instead that her requests were sufficiently specific. Zidonis further argued that Ohio law imposes a duty on public offices to maintain e-mail records so that they can be retrieved based on "sender" and "recipient" status.

b. The Ohio Supreme Court affirmed the decision of the Court of Appeals, finding that a records request for whole categories of files (such as "complaint" and "litigation"), without any limitation as to content or time period, is overbroad. Further, the Court held that O.R.C. §149.43(B)(2) does not require public offices to maintain e-mail records according to "sender" and "recipient" status.

2. State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office, 133 Ohio St.3d 139, 2013-Ohio-4246.

a. McCaffrey, the attorney for two defendants named in a grand jury indictment, made a public records request for "all calendars" of three assistant county prosecutors during a specific two-year span. The prosecutor's office denied this request, citing a Twelfth Circuit Court of Appeals decision which held that the "personal" calendar of a public official was not a public record subject to disclosure absent evidence that the calendar documented any official purpose. McCaffrey filed a writ before the Ohio Supreme Court to compel

respondent's disclosure of all calendars, including such "personal" calendars.

b. Upon review of the evidence, the Court found that the three prosecutors made work-related entries on what the prosecutor's office considered their "personal" calendars. The Court held that these entries "serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office, and are considered public-records, subjecting those work-related entries on the "personal" calendars to disclosure under O.R.C. §§149.011(G) and 149.43.

IX. Complying with Substantive and Procedural Due Process Requirements.

A. Every board of education must adopt a policy which specifies the types of misconduct for which a student may be suspended, expelled, removed, or permanently excluded. O.R.C. §3313.661.

1. Copy of the policy must be posted in a central location in the school and made available to pupils on request.

a. Recommended that districts also provide the policy to every student at the beginning of the school year or upon a student's entrance, if mid-year.

b. Provisions of the policy should be addressed routinely at assemblies or during other announcements.

2. The policy 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.

3. The scope of a school board's jurisdiction over misconduct also includes misconduct by a pupil that occurs off of property owned or controlled by the district but that is connected to activities or incidents that occurred on property owned or controlled by the district and misconduct by a pupil that, regardless of where it occurs, is directed at a district official or employee or the property of a district official or employee.

4. The policy shall specify the date and manner by which a pupil or a pupil's parent, guardian or custodian may notify the board of their intent to appeal an expulsion or suspension. In the case of an expulsion, the policy shall not specify a date that is less than fourteen days after the date of the notice of the expulsion.

5. The policy is the document which governs student disciplinary action.

   a. No discipline except in accordance with the adopted policy.

   b. Discipline for infractions not in policy is a denial of due process.

B. Student Discipline Procedure under O.R.C. §3313.66.

1. Emergency removals:

   a. No notice or hearing required before emergency removal.

   b. Person who ordered removal must be in attendance at the hearing.

2. Suspensions:

   a. Prior to any suspension (except in-school suspension), the superintendent or principal, or if additional administrators have been granted authority to suspend, they must:

      (1) Give the student: (a) written notice of intent to suspend, (b) the reasons for the intended suspension, and, (c) if the proposed suspension is based on a violation for which the student could be permanently excluded and if the student is sixteen or older, the notice must include a statement that the superintendent may seek to permanently exclude the student if he/she is convicted of or adjudicated a delinquent child for that violation.

      (2) Provide the student an opportunity to appear at an informal hearing before an administrator granted such authority to challenge the reasons for the intended suspension or otherwise explain his/her actions.

(3) The notice and hearing can be held immediately following the alleged violation of the conduct code.

b. Within one school day after suspension, the superintendent or principal shall notify parent and treasurer in writing of the suspension. The notice shall contain:

(1) Reasons for suspension.

(2) Right to appeal to board of education or its designee.

(3) The manner and date by which the pupil or the pupil's parent, guardian or custodian shall notify the board of their intent to appeal the suspension.

(4) Right to be represented in the appeal.

(5) Right to a hearing before board of education or its designee.

(6) Right to request that hearing be in executive session.

(7) Statement that superintendent may seek student's permanent exclusion if the suspension was based on a violation for which the student could be permanently excluded that was committed when the child was sixteen or older and if he/she is convicted of or adjudicated a delinquent child for that violation.

3. Expulsions:

a. Only the superintendent can expel a student.

b. Prior to any expulsion, the superintendent must:

(1) Give the student and parent written notice of intent to expel.

(2) Give the student and parent or representative opportunity to appear in person before the superintendent or designee to

challenge the intended expulsion or explain the student's actions.

c. Superintendent's notice must include:

(1) Reasons for intended expulsion.

(2) Notification of opportunity to appear before superintendent or designee to challenge the expulsion or explain the student's actions.

(3) Notification of date, time, and place to appear.

(4) The time to appear shall not be earlier than three school days nor later than five school days after the notice is given unless the superintendent grants an extension of time at the request of the student, parent, or representative.

(5) If an extension of time is granted, the superintendent shall notify the student, parent, or representative of the new date, time, and place to appear.

(6) If the proposed expulsion is based on a violation for which the student could be permanently excluded and if the student is sixteen or older, the notice must include a statement that the superintendent may seek to permanently exclude the student if he/she is convicted of or adjudicated a delinquent child for that violation.

(7) Kresser v. Sandusky Bd. of Edn., 140 Ohio App.3d 634 (Erie Cty. 2001).

A student was expelled for violating the district's dangerous weapons policy. The student appealed the expulsion, claiming that the district violated the requirement of O.R.C. §3313.66 that the time to appear for an expulsion hearing must be set at least three but no more than five school days after the notice is given. The student received the notice of intended expulsion on September 16, with the hearing not held until September 30. The court found that the plain language of O.R.C. §3313.66 had been

violated, and that the board was not able to provide an excuse for the delay.

d. Within one school day after the student's expulsion, the superintendent shall notify the parent and treasurer of the expulsion. The notice shall provide:

(1) Reasons for expulsion.

(2) Right to appeal to board of education or its designee.

(3) The manner and date by which the pupil or the pupil's parent, guardian or custodian shall notify the board of their intent to appeal the expulsion. However, the date specified shall not be less than fourteen days after the date the notice is provided to the pupil and the pupil's parent, guardian or custodian.

(4) Right to be represented in appeal.

(5) Right to a hearing before board of education or its designee.

(6) Right to request that hearing be in executive session.

(7) Statement that the expulsion may be subject to extension pending a criminal or juvenile court proceeding or permanent exclusion proceeding pursuant to O.R.C. §3313.66(F) if the student is sixteen or older.

(8) Statement that superintendent may seek student's permanent exclusion if the suspension was based on a violation for which the student could be permanently excluded that was committed when the child was sixteen or older and if he/she is convicted of or adjudicated a delinquent child for that violation.

(9) If the expulsion is for more than twenty school days or will extend into the following semester or school year, information about services or programs offered by public and private agencies 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. The information shall include the names, addresses, and phone numbers of the appropriate public and private agencies.

C. Violations of a student's due process rights can result in reversal of the discipline, and possible liability under 42 U.S.C. §1983.

D. Relevant case law.

1. Sellars v. Dublin City School Dist. Bd. of Edn., 2013-Ohio-3367 (10th Dist.).

a. Sellars, a middle school student, sold marijuana to a friend at school. The friend's parent found the marijuana and brought it to the school's resource officer, who reported the incident to Sellars' principal and gave the marijuana to a city detective. The principal then questioned Sellars about the marijuana, who admitted selling it. Based on this admission, Sellars was expelled from school.

b. Sellars appealed her expulsion to the Franklin County Court of Common Pleas, where it was overturned on the basis that the admission used to expel her was obtained as part of a police interrogation, during which Sellars was denied the opportunity to have a counselor, teacher, or parent/guardian present as required by the student handbook, in violation of her due process rights.

c. The Tenth District Appellate Court reversed that decision, finding that, although information obtained from the school's investigation may have been used by police in subsequent police investigations, the initial questioning of Sellars by the principal was not an interrogation done on behalf of law enforcement as "part of a police investigation," as was required for the provisions of the student handbook requiring the presence of a third person to be applicable.

2. Cisek v. Nordonia Hills Bd. of Edn., 2011-Ohio-1042 (9th Dist.).

The Court reversed the suspension of a student, concluding that the student's conduct was not an "assault" as defined in the student handbook.

The Court also held that the school district could not suspend the student for the use of profanity, because the school never cited profanity as a reason for the suspension.

X. Having an Adequate Basis for Employment Decisions.

A. Teacher termination or discipline – O.R.C. §3319.16.

1. Statutory grounds.

a. "The contract of any teacher *** may not be terminated except for *** good and just cause ***. The Board may suspend a teacher pending final action to terminate his contract if, in its judgment, the character of the charges warrants such action ***."

b. "Notwithstanding any provision to the contrary in O.R.C. Chapter 4117, the provisions of this section relating to the grounds for termination of the contract of a teacher prevail over any conflicting provisions of a collective bargaining agreement entered into after the effective date of this amendment.

c. The Ohio Revised Code is silent as to other forms of discipline, such as written reprimands and suspension without termination of an employment contract.

2. Negotiated Agreement.

a. It is common for the Agreement to either reference just cause for discipline or to refer to the statutory grounds for discipline.

b. Negotiated Agreement can define just cause for purposes of discipline.

C. Generally Accepted Seven Tests to Satisfy Just Cause Standard.

1. Arbitrator standards ("Daugherty Test").

a. Did the employer give to the employee forewarning or foreknowledge of the possible or probable disciplinary consequences of the employee's conduct?

b. Was the employer's rule or managerial order reasonably related to (a) the orderly, efficient, and safe operation of the company's business, and (b) the performance that the employer might properly expect of the employee.

c. Did the employer, before administering discipline to an employee, make an effort to discover whether the employee violated or disobeyed the rule or order of management?

d. Was the employer's investigation conducted fairly and objectively?

e. At the investigation, did the "judge" obtain substantial evidence or proof that the employee was guilty as charged?

f. Has the employer applied rules, orders, and penalties evenhandedly and without discrimination to all employees?

g. Was the degree of discipline administered reasonably related to (a) the seriousness of the employee's offense, and (b) the record of the employee's service with the employer?

2. A negative answer to any of the inquiries within the test signifies that good or just cause is not present.

XI. Acting Within the Scope of Employment.

A. Defenses and immunities – O.R.C. §2744.03.

1. A political subdivision is immune from liability if:

a. The employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function;

b. The conduct of the employee involved, other than negligent conduct, was required or authorized by law, or was necessary or essential to the exercise of the employee or political subdivision's powers;

c. The employee's action or failure to act was within the employee's discretion with respect to policy-making, planning, or enforcement powers;

d. The political subdivision's action or failure to act resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision, or resulted in injury;

e. The injury, death, or loss to person or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.

2. An employee is immune from liability unless one of the following applies:

a. The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;

b. The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner; or

c. Civil liability is expressly imposed upon the employee by a section of the Revised Code.

B. An employee's failure to act within the scope of employment may prevent a defense of statutory immunity, resulting in potential civil liability.

C. Relevant case law.

1. J.H. v. Hamilton City School Dist., 2013-Ohio-2967 (12th Dist.).

a. An employee of the school district was transporting J.H., a severely disabled student, when J.H.'s leg was caught in the wheelchair and was injured. J.H. sued the school district alleging the district was responsible for the employee's negligent acts

because the employee was acting within the scope of her employment when the injury occurred. The school district filed a motion for judgment on the pleadings, asserting political subdivision immunity, which the trial court granted.

b. J.H. appealed, arguing the employee's act of transporting a student in a wheelchair was a "proprietary function" because it promotes or preserves the public peace, health, safety, or welfare, and is customarily engaged in by nongovernmental persons. The Court disagreed, ruling that the act of transporting a student in a wheelchair during school was a governmental function, so the exception to immunity did not apply.

2. McCoy v. Bd. of Edn., Columbus City Schools, 515 Fed. Appx. 387 (6th Cir. 2013).

a. An elementary teacher was sentenced to ten years of incarceration for several instances of gross sexual imposition involving his students. The McCoys, on behalf of their victim son, sued the Board and several administrators under Title IX and Section 1983. The District Court for the Southern District of Ohio dismissed the McCoys' claims on summary judgment, concluding the McCoys could not prove deliberate indifference on the part of the Board and its administrators to the threat of sexual abuse by the teacher, in light of the prior limited information known about the teacher's misconduct with the students.

b. The Sixth Circuit Court of Appeals affirmed the district court's dismissal of the claims against the board and the administrators. The court said that the administrators had knowledge of several situations of non-sexual physical contact with students by the teacher. However, in each of the situations there had been a full investigations with directives given to the teacher. The touching consisted of kicking a female student in her buttocks, grabbing a student's arm, and pinching students' chest and buttocks. The court concluded the prior investigations and subsequent directives to the teacher were reasonable responses, which weigh against the finding of deliberate indifference, which is necessary for both Title IX and Section 1983 claims.

3. Cain v. Field Local School Dist. Bd. of Edn., 2013-Ohio-1492 (11th Dist.).

   a. Cain was a nonteaching assistant working with learning disabled children. After her position was eliminated, she was assigned a position working with children with multiple handicaps and disabilities, some of who were known to behave violently and aggressively. Cain had occasionally assisted with the class, but had no prior training working with the children and did not receive any after the assignment. Cain was assaulted by two students and suffered severe injuries. Cain alleged the she was intentionally assigned to the class in retaliations for a grievance she had filed as a union representative, and that the District had committed an intentional tort against her.

   b. On appeal, the Court affirmed the trial court's grant of summary judgment to the District. The Court held that, to prove an employer intentional tort, an injured employee must prove a specific or deliberate intent by the employer to cause the injury. As a result, placing an employee in a dangerous situation without training is insufficient to prove an employer intentional tort.

XII. Conclusion