



# Diversity and the law in public schools

*Shadya Y. Yazback, deputy director of legal services*

**D**iversity permeates schools. The Merriam-Webster Dictionary defines diversity as “the quality or state of having many different forms, types, ideas, etc.” The mention of diversity and inclusion typically evokes thoughts of issues related to race and ethnicity, gender equality in the workplace and individuals with disabilities. However, in the public schools context, diversity and inclusion encompass a much wider variety of students who are protected by certain legal requirements.

Articles abound about the obligations of school districts under Title IX (prohibiting discrimination by sex in federally funded education programs); Title VI (prohibiting discrimination on the basis of race, color and national origin); and Section 504 and Title II (prohibiting discrimination on the basis of disability). To learn more about basic legal requirements for school districts in these areas, visit the U.S. Department of Education Office for Civil Rights Web page at <http://links.ohioschoolboards.org/74648>.

This article provides a high-level review of legal considerations for other groups of diverse students and is not intended to be legal advice. Be sure to work with your board counsel to determine how these requirements apply to your district.

## **Economically disadvantaged students**

The Ohio Association of Foodbanks reported in 2014 that more than 570,000 Ohio children benefited from food bank services. According to 2015 Ohio Department of Education (ODE) data, more than 800,000 Ohio students

were economically disadvantaged. A student is economically disadvantaged if any child in the home qualifies for free or reduced lunch; if the household participates in public assistance programs, such as Medicaid, food stamps or public housing; or the child qualifies for Title I assistance.

School districts cannot charge economically disadvantaged students for costs associated with College Credit Plus. More generally, under Ohio Revised Code (RC) 3313.642, a school district cannot charge students eligible for free or reduced lunch fees “for any materials needed to enable the pupil to participate fully in a course of instruction.” The school board also has the ability to furnish free of charge any materials used in a course of instruction to pupils it determines are in “serious financial need” of such materials.

RC 3313.642 grants the school board discretion to determine if it will charge students eligible for free or reduced lunch fees to participate in extracurricular and pupil enrichment activities and for workforce readiness training equipment if the equipment is to be retained by the student after completing the class.

## **Foster children**

The Legal Center for Foster Care and Education reports the national graduation rate for foster children is below 50% compared to approximately 72% for all students. Foster children also are twice as likely to be absent from school or have an out-of-school suspension. They are expelled at a rate three times higher than their peers. Foster children can encounter several

transitions in a short period of time: 34% of foster children have changed schools more than five times.

Recent changes in federal legislation have sought to address the needs of foster children in the education system. Changes in 2014 to the Family Educational Rights and Privacy Act (FERPA) provided child welfare agencies access to education records for youth in foster care. Beginning in the 2016-17 school year, the recently passed Every Student Succeeds Act (ESSA) will require school districts to identify a point of contact to oversee foster youth enrollment and progress and work with social service agencies to support students in foster care. ESSA also requires states to permit a foster child to remain in his or her school of origin; allow for immediate enrollment of a foster child, even if the records of the child are not immediately available; and provide transportation for foster children that remain in their school of origin. ODE rules to implement ESSA are forthcoming.

## **Homeless students**

In 2013, the National Center on Family Homelessness reported 47,678 homeless children in Ohio. Under the McKinney-Vento Homeless Assistance Act (HAA), school districts must take certain steps to ensure homeless students have access to education and stability and support for education. School districts must designate a liaison to carry out their obligations under HAA.

A student is considered homeless under HAA if the child “lacks a fixed, regular and adequate nighttime residence.” This can include students who are

sharing housing with others due to the loss of housing or economic hardship; living in emergency or transitional housing; or living in motels, hotels and campgrounds, among other scenarios. Effective December 2016, ESSA removes children awaiting placement in foster care from the definition of homeless under HAA. Going forward, these children will be covered by ESSA's expanded foster care provisions.

Identifying homeless students is a case-by-case process, and the school district must consider the student's best interests in making decisions about placement.

If a student is identified as homeless, the school district of origin at the time the student became homeless must allow the student to continue attending in the district for the duration of homelessness and until the end of the academic year in which the student becomes permanently housed.

Alternatively, if the parent (or student, if unaccompanied) chooses, the student can immediately enroll in the district in which he or she is living. The district is not permitted to delay enrollment based on the need for documentation or enrollment deadlines that have lapsed. The district's liaison must work with the student and his or her family to obtain vaccinations and other required health screenings if the student does not have the necessary records.

For children designated as unaccompanied homeless youth, Ohio Administrative Code 3301-51-05 permits the district to appoint the appropriate staff of emergency shelters, transitional shelters, independent living programs and street outreach programs as temporary surrogates to serve in a parental role until a permanent surrogate parent can be appointed. It is the school district's responsibility to assign a surrogate unless a court order has already done so. Students older than

18 may request a surrogate who must complete ODE training before acting on behalf of the student.

### Immigrant students

The U.S. Census Bureau estimates more than 41,000 Ohio children were foreign-born in 2014. Ohio's foreign-born population has increased steadily in the last two decades. The number of unauthorized youth in Ohio is not well documented. However, the Migration Policy Institute estimated in 2010 there were between 11,000 and 20,000 undocumented individuals under the age of 30 in the state.

A school district should not ask a student for proof of immigration status. In 1982, the U.S. Supreme Court held in *Plyler v. Doe* that undocumented students have a right to a free public K-12 education. The school district can ask for proof of residency pursuant to its policies and require the same documentation it would require of

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native-born students to register in the district. To the extent a student cannot provide such documentation, the district must consider if the student is homeless under HAA.

While 37.4% of foreign-born adults identified themselves as someone who speaks English “less than very well,” a 2014 report by the American Immigration Council indicated that 87.1% of children with immigrant parents in Ohio were considered English proficient. School districts must remain cognizant of documents and notices required by federal and state laws, such as the notice of rights under FERPA, when working with families that are not English proficient. The U.S. Department of Education Office for Civil Rights has a resource page with fact sheets in 20 different languages. You can access the page at <http://links.ohioschoolboards.org/13574>.

### Students requiring religious accommodation

Under the First Amendment, schools are prohibited from establishing religion and restricting an individual’s religious practices. As Ohio becomes increasingly diverse, schools should remain mindful of these obligations. Unfortunately, the legal landscape regarding religious accommodations is still developing. Recent decisions from the U.S. Supreme Court, such as *Equal Employment Opportunity Commission v. Abercrombie & Fitch Stores* in 2015, suggest a broader view of the need for religious accommodation in certain settings, but it is unclear how these cases impact school districts.

School districts should be aware that religious accommodations could arise in several contexts, including, but not limited to:

- the interplay of religious head coverings, such as hijabs for Muslim girls, patkas and dastars for Sikh boys, kippahs and yarmulkes for Jewish boys and student dress codes;
- whether a district must

accommodate dietary restrictions (many religious groups, for example, do not eat pork or pig byproducts such as lard) and if such accommodation includes labeling foods or just allowing parents to supply meals;

- for older Muslim students who abstain from all food and drink from sunrise to sunset in observance the Islamic month of Ramadan; school districts need to consider if an accommodation is appropriate to avoid physical overexertion in physical education activities.

Districts should work with counsel in responding to requests for religious accommodations to ensure compliance with the changing legal landscape.

### Transgender students

Transgender students internally identify as the gender opposite the gender they were assigned at birth. While case law is still developing in this area, the U.S. Department of Education Office for Civil Rights has taken the position that sex discrimination extends to claims of discrimination based on gender identity and that Title IX requires districts to accommodate transgender students.

School districts must be conscious of a variety of considerations for transgender students, including, but not limited to, names and pronouns used to address students in class, the privacy and accuracy of student records, athletic competition requirements and the gender neutrality (or lack thereof) of dress codes. Rather than establishing blanket policies, school districts should consider individualized plans for each transgender student requesting accommodation, as student needs will differ. You can read more about accommodating transgender students in the According to Law article in the December 2014 OSBA Journal at <http://links.ohioschoolboards.org/47520>.

### A final note: bullying

It is important to note that many

students discussed in this article are at risk of being bullied. For example, the U.S. Department of Education recently observed that children from Muslim families, Arab-American children and boys from Sikh families who wear religious head coverings are at increased risk of bullying as a result of backlash from recent domestic and international terror attacks.

Under RC 3133.666, school boards are required to adopt anti-bullying policies. The board’s anti-bullying policy must be included in employee training and appear in student handbooks and any publications that set forth the comprehensive rules, procedures and standards of conduct for the district’s schools and students. The board also must explain the seriousness of cyberbullying to students in the district and their custodial parents or guardians.

ODE and the U.S. Department of Education have resource pages to help school districts educate students, parents and staff about bullying. One such resource is [www.stopbullying.gov](http://www.stopbullying.gov), which provides resources addressing bullying against certain groups of students such as LGBT youth, special-needs students and youth who are minorities by virtue of race, faith or national origin.

### To learn more

OSBA has a resource page with more information on each of the groups discussed in this article. You can access the page at <http://links.ohioschoolboards.org/31452>.

You also can sign up for legal updates from the Legal Ledger, the legal division’s blog that highlights important legal issues facing schools. ■

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