SW Ohio Education Law Seminar

October 26, 2017

Search In Schools

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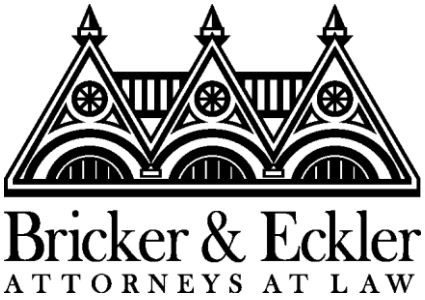

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I. Search Standards

A. **Probable cause** is defined as the "facts and circumstances within the officer's knowledge that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that [an individual] has committed, is committing, or is about to commit [a criminal] offense." Michigan v. DeFillippo, 443 U.S. 31, 37 (1979).

B. **Reasonable Suspicion** (e.g., a school official has a reasonable suspicion that a crime or school violation has been or is in the process of being committed, or reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policy). This is a lower standard than probable cause.

II. Searches and Seizures at School

A. School personnel and law enforcement officials are held to different legal standards when conducting student searches and/or seizures.

B. For SROs, the standard to be applied depends upon the specific circumstances surrounding the search/seizure and whether the SRO is functioning as a school official or law enforcement official.

C. Student Searches

1. Law Enforcement

a. Searches of students can only be performed by law enforcement officials if there is "probable cause" or a warrant to perform the search.

b. This standard applies to a student's person, as well his/her belongings, including his/her locker and cell phone. *Riley v. California*, 134 S. Ct. 2473 (2014) (police generally may not search the contents of a cellphone of someone who is in police custody without a warrant).

2. School Personnel

a. Student searches performed by school personnel require reasonable suspicion.

b. The U.S. Supreme Court has held that a finding of probable cause is unnecessary for school personnel because such requirement would "unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed" in the public school context. *Board of Ed. of Independent Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls*, 562 U.S. 822, 830 (2002).

3. School Resource Officer (SRO)

   a. If a student search is being performed by an SRO at the behest of a school administrator, the reasonable suspicion standard generally applies.

   b. If a student search is being performed for law enforcement investigation purposes or subsequent to arrest, an SRO must have probable cause to perform the search.

4. The search must be:

   a. Justified at its inception;

   b. Reasonable in scope; and

   c. Not excessively intrusive in light of the age and sex of the student(s) involved. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

5. A search will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating the law or the rules of the school. *Id.*

   - A school security officer's search of a student's abandoned backpack was justified when he emptied the entire contents of the bag based solely on rumors that the student was in a gang. While the officer's initial search of the bag (to determine to whom it belonged and to confirm that it did not contain a bomb) was justified, the school official also had reason to conduct a second search, emptying the bag, after confirming the owner of the bag in order to eliminate any related safety concerns. *State v. Polk*, 150 Ohio St.3d 29, 2017-Ohio-2735, 78 N.E.3d 834 (2017).

     NOTE: This case involved the exclusion of the evidence discovered by the officer's second search (bullets) during the student's criminal trial. While an initial search conducted for safety reasons may be justified at its inception, a follow-up search conducted to make certain the contents are not dangerous is lawful.

6. The "reasonable suspicion" requirement also extends to a student's locker and/or belongings.

   a. School officials may only search a specific student's locker and its contents if the principal reasonably suspects that the locker or its contents contain evidence of a student's violation of a criminal statute or of a school rule. (R.C. 3313.20(B)(1)(a)).

b. School officials may conduct random locker searches at any time, without reasonable suspicion, if the board has adopted a policy permitting such searches and conspicuous notice that all lockers are subject to random search at any time is posted in every school building. (R.C. 3313.20(B)(1)(b).

c. A board's adoption or failure to adopt a written policy as stated in (ii), does not prevent the principal of any school from searching at any time the locker, and its contents, of any pupil in the school in an emergency situation that immediately threatens the health or safety of any person, or threatens to damage or destroy any board property, and if a search of lockers and their contents is reasonably necessary to avert that threat. R.C. 3313.20(B)(2)).

d. School officials must be careful when conducting searches of students' cell phones during investigations. There must be a reasonable suspicion that the cell phone will provide some evidence of a violation of a criminal statute or school rule.

e. Even when school officials have reasonable suspicion for a search, the search itself must not be excessively intrusive in light of the age and sex of the student involved and the nature of the infraction.

- School officials exceeded the scope of a reasonable search to find prescription pain killers when it searched a female middle school student's underwear. While searches of her backpack and clothing were considered reasonable, searching her underwear was considered excessively intrusive in light of her sex, age, and the degree of seriousness of the suspected conduct. *Safford Unified Sch. Dist. #1 v. Redding*, 129 S. Ct. 2633 (2009).

D. Student Seizures

1. Law Enforcement

a. Seizures of students by law enforcement officials are governed by the same standard as student searches; they are only permissible if there is "probable cause" or a warrant for the seizure.

b. In the ordinary law enforcement setting, a seizure occurs if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *Ebonie S. v. Pueblo Sch. Dist*., 60, 695 F.3d 1051, 1056 (10th Cir. 2012).

c. This standard applies when law enforcement officials interview students in the school setting, if the interviews are being conducted

as part of a criminal investigation and/or for law enforcement purposes.

- Nine-year old student was unconstitutionally seized when she was interviewed by a state caseworker and a deputy sheriff in a private office at her school for two hours without a warrant, probable cause, or parental consent.

  The presence of the deputy sheriff indicated that the interview was for law enforcement purposes, namely a criminal investigation into suspected child abuse, even though the interview was held at the student's school.

  As a result, the student was entitled to all procedural protections appropriate in the criminal context, rather than the school context. *Greene v. Camreta*, 588 F.3d 1011 (9th Cir. 2009).

2. School Personnel

   a. A different standard for seizures applies to student interviews conducted directly by school personnel, because students are generally not at liberty to leave the school building as they wish.

   b. Illegal seizure of students occurs in the public school context only if the limitation on a student's freedom of movement "significantly exceed[s] that inherent in every-day compulsory attendance." *Ebonie S. v. Pueblo Sch. Dist.*, 60, 695 F.3d 1051, 1056 (10th Cir. 2012).

      - Nine-year old student was unconstitutionally seized when an SRO handcuffed her for five minutes after she threatened to hit her physical education teacher in the head. *Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295 (11th Cir. 2006).

F. Student Interviews – Miranda Rights

1. Law enforcement officials are required to advise an individual of his/her Miranda rights when the individual is interrogated while "in custody," even if the questioning occurs in the school setting. *Miranda v. Arizona*, 384 U.S. 436 (1996).

2. The U.S Supreme Court has held that age properly informs the custody analysis, as a child's age can affect whether s/he would feel free to go when being questioned by police. *J.D.B. v North Carolina*, 131 S. Ct. 2394, 2399 (2011).

   - Thirteen-year old student was considered to be "in custody" when questioned by uniformed police officer in closed conference room

at school and thus was entitled to be advised of his Miranda Rights. *Id.*

3. The presence of a police officer (or an SRO) can also affect the custody determination, even if other school administrators are present and/or involved in the questioning.

    a. Court upheld the suppression of statements made by a 13 year old student in response to school district's Executive Director of Safety and Security ("Director"). The court found the student was in custody for Miranda purposes and the Director was acting as an agent of law enforcement. Two uniformed officers stood five to fifteen feet from the juvenile while he was questioned. *In r: L.G.*, 2nd Dist. No. 27296, 2017-Ohio-2781.

4. It is important to be aware of who is actually questioning the student and the level of involvement of each individual, in determining whether a student is entitled to be advised of his/her Miranda rights.

    a. Student considered in custody when questioned by assistant principal and SRO. *N.C. v. Commonwealth of Kentucky*, 396 S.W.3d 852, 853 (Ky. 2013).

    b. Student called to Principal's office and then escorted to SRO's office, where he met with the SRO and investigating detective was in custody and should have been read Miranda rights. *In re P.K.M.*, 724 S.E.2d 632 (N.C. Ct. App. 2012).

    c. Student brought to conference room in school by school personnel to be questioned by sheriff and social welfare case worker about several crimes was not in custody because a reasonable student of the same age would have felt free to leave. *In the Matter of C.M.A.*, No. 03-12-00080-CV (Tex Ct. App. July 2, 2013).

    d. Student who was questioned by school administrator and SRO about weapon in administration conference room was not in custody for purposes of Miranda. *In re Marquita M.*, 970 N.E.2d 598, 601 (Ill. 2012).

    e. Student not in custody for purposes of Miranda when questioned by school principal in presence of SRO regarding stolen cell phone where SRO did not participate in questioning and principal was not police officer's agent for interrogation purposes. *S.G. v. State*, 956 N.E. 2d 668, 680 (Ind. Ct. App. 2011).

5. Law enforcement reads Miranda rights, not school officials.

C. Interviews on School Property

1. Courts have held that school officials stand *in loco parentis* (in the place of parents) while minors are in school. *Kirchner v. Crystal*, Cuyahoga App. No. 46232, 1983 Ohio App. LEXIS 12863 (Sept. 22, 1983); *Laurcher v. Simpson*, 28 Ohio App. 2d 195 (5th Dist. 1971); *Holroyd v. Eibling*, 1961 Ohio Op. 2d 23 (Franklin C.P. 1961).

2. School officials do not need parental permission or parent's presence to interview students about school related incidents.

3. A SRO when acting as a school official does not need parental permission or parent's presence to interview students about school related incidents.

4. Absent extenuating circumstances (imminent danger, risk of flight, parental involvement in crime, threat of destruction of evidence, etc.), law enforcement officials should only be permitted to interview students with parental permission or presence.

    a. If parent is not present consider having school official present during interview.

5. Board may require by rule, adopted pursuant to R.C. 3313.20, that an investigator from a county children services board obtain parental consent or permit a school official to be present before allowing such investigator to interview a child on school property. OAG Op. 82-029 (1982).

    a. While schools have authority to regulate the activities at their facilities they may not regulate in such a manner as to unreasonably restrict a public children services agency from carrying out its duties. OAG Op. 89-108 (1989).

Employee Searches

I. Search of District Owned Property

A. Governmental employers can search property they provide to employees. *City of Ontario v. Quon*, 560 U.S. 746 (2010). The Supreme Court found that the employee did not have a privacy interest in the text messages that were sent during work hours on a government supplied and owned cell phone. Moreover, the city had a policy which regulated use of city-owned equipment to city business. Finally, the fact that the city limited its search to messages sent during work hours was also found as reasonable as the employee personally paid for overages on the equipment.

II. Search of Employee's Personal Property

A. Employees have a strong expectation in personal property even when they possess those items on government property.

B. Absent consent from the employee, warrantless searches of personal property of an employee is unlawful, even if the search is for a work-related purpose.

1. Searches of personal cell phones, purses, and briefcases would likely be unlawful. See *Port Auth. Police Benevolent Ass'n v. Port Auth. of N.Y. & N.J.*, No. 15-CV-3526, 2017 U.S. Dist. LEXIS 162389 (S.D.N.Y Sept. 29, 2017).

III. Policy Regarding Employee Searches

A. A policy puts an employee on notice that they may not have an expectation of privacy in certain property.

B. Polices should include the areas of the Employer's control such as hallways, offices, desks and file cabinets.

IV. Employee Speech at Work

A. Employee Speech in their role as a public employee rather than a citizen is generally not protected. *Fox v. Traverse City Area Public Schs. Bd. of Educ.*, 605 F.3d 345 (6th Cir. 2010). The court in *Fox* held that a public employee's statements receive First Amendment protections only when the public employee speaks as a citizen and addresses a matter of public concern. Under the standard, employee speech addressing a matter that may also be of public concern is not protected if it is made pursuant to the employee's official duties. The Teacher made complaints solely to her supervisor and were not made know to the general public.

B. Inappropriate comments made by a teacher in a school setting are not protected speech. See *Johnson v. Edgewood City Sch. Dist. Bd. of Edn.*, 2010-Ohio-3135 (12th App. Dist. 2010), discretionary appeal not allowed, 127 Ohio St.3d 1446 (2010). Teacher was terminated for just cause when teacher read specific excerpts from the students' life predictions about other students aloud – excerpts he had previously screened – naming those students in the class who were predicted to become pole dancers, reside in trailer parks, father multiple children by multiple men, and undergo plastic surgery.

V. Employee Speech on Social Media

A. Blogs, Facebook posts, or tweets that have a direct and negative impact on the school district would likely not be considered protected speech. Employers should keep in mind these types of unwise behavior:

1. Unauthorized disclosures of a student's confidential information;
2. The posting of false or defamatory information about your school district or its employees;
3. Engagement in inappropriate social media relationships with students (e.g., boundary violations, online flirting, bantering with sexual overtones, sharing of explicit, discriminatory, or obscene jokes, solicitation of a personal or sexual relationship with a student, invitations to parties, etc.);

4. Posting of material that causes a disruption within the school setting or affects an employee's ability to perform his/her duties in the workplace.
5. Social media use that violates the school district's other policies (discrimination, harassment, etc.);
6. Use of school district e-mail addresses to register for social media sites;
7. Using the school district's logo, mascot, or other protected marks.

VI. Discipline Related to Free Speech

A. Employees cannot be terminated or non-renewed when they engage in constitutionally protected speech.
   1. Courts look to see if the protected speech was a substantial or motivating factor in terminating an employee.
   2. If the speech was a motivating factor, an employer has the ability to present evidence that it would have taken the action in the absence of the protected speech. See *Banks v. Wolfe County Bd. of Educ.*, 330 F.3d 888 (6th Cir. 2003).

The Law Regarding Searches of Students' Cell Phones by School Personnel

A. The Fourth Amendment to the United States Constitution protects individuals against unreasonable searches and seizures. Warrantless searches are, by definition, "unreasonable searches," except in some narrowly drawn exceptions. Searches of information/data on cell phones are considered "searches" that fall under the Fourth Amendment.

B. In March 2013, the United States Court of Appeals for the Sixth Circuit reaffirmed the rule set forth by the U.S. Supreme Court concerning searches of students' cell phones by school personnel. *G.C. v. Owensboro Pub. Sch*., No. 11-6476, 2013 U.S. App. LEXIS 6159 (6th Cir. March 28, 2013)

C. Decision addresses the constitutional limits on student cell phone searches. Court found that school officials acted unconstitutionally when they searched a student's cell phone after he was discovered sending text messages during class. The case involved a high school student who had disciplinary problems arising from mental health issues, including depression, anger, and suicidal ideation. He had also admitted using illegal drugs. When he was found violating school policy by using a cell phone in class, his phone was confiscated. The assistant principal read four text messages that had been sent that day, because she was aware of the student's prior record of suicidal feelings and drug use.

After reviewing the entire record, the court concluded that on the day in question, the student was merely violating a school rule, and nothing more. The Court acknowledged that a cell phone search would have been permissible had it been likely to produce evidence of ***(1) criminal activity, (2) an impending violation of other school rules, or (3) potential harm to persons in the school***. It concluded, however, that none of these circumstances were present. It declared that "general

background knowledge of drug abuse or depressive tendencies, without more," is an insufficient basis upon which to initiate a search of a student's cell phone.

D. Takeaway: The Court stated that the lawfulness of a search in a school setting is based on the "reasonableness, under all the circumstances, of the search." The determination of "reasonableness" is based on a two-part inquiry:

1. Was the search justified at its inception?
2. Was the scope of the search reasonably related to the circumstances that justified the search?

II. Justified At Its Inception

The Sixth Circuit provided some guidance for the application of these standards. A search will be justified at its inception if there are reasonable grounds to believe that the search will uncover evidence that the student is violating or has violated a rule or law or that a student is in imminent danger of harm on the school premises. The Court expressly cautioned that the fact that a student uses a cell phone in contravention of school rules does not automatically grant school personnel the right to search any and all content on the phone that is not related to the infraction. In this case, the Court ruled that school officials did not have justification to search text messages on the student's cell phone simply because the student was seen by his teacher sending a text message while in class. Based on these facts, there were no reasonable grounds to suspect that a search of the cell phone would uncover any misconduct or danger.

In contrast, the Court found the search of the student's cell phone to be justified when the student walked out of a meeting with a counselor, made a call on his cell phone in the parking lot, returned to the counselor's office, and admitted that he was having suicidal thoughts. In addition, a security officer observed tobacco products in plain view in the student's car. Under these facts, it was reasonable to believe that a search of the student's phone may uncover information that the student may harm himself or may be contemplating violation of school rules.

III. Reasonable in its Scope

In general terms, the Court stated that a search is reasonable in its scope when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The Court agreed that the scope of a search of a student's cell phone exceeded the bounds of "reasonableness" when, upon seeing a student using his cell phone in violation of school rules, the school officials seized the phone, accessed text and voicemail messages, reviewed contacts, used the phone to call other students and spoke with the student's brother on the phone. Even though the school officials eventually found evidence of drug activity by searching the phone, they had "no reason to suspect at the outset" that the search would uncover any evidence of misconduct. In assessing an alleged violation of the Fourth Amendment, the relevant analysis is of what the officials *knew at the inception of the search.*

IV. Recent U.S. Supreme Court Ruling on Cell Phone Searches

One exception to the Fourth Amendment prohibition against warrantless searches is a search "incident to arrest." In 2014, the U.S. Supreme Court ruled that the search of an arrestee's cell phone does not fall within the exception of a search incident to arrest.[1] Weighing the immense privacy concerns implicated by the volume of personal data that may be stored on a cell phone, the Court ruled that "a warrant is generally required before such a search, even when a cell phone is seized incident to arrest." This elevation of privacy over the government's right to search incident to arrest, although in the criminal context involving police searches, may have implications for the searches of student's cell phones by school officials. The case indicates a trend toward a heightened sensitivity to the privacy of the contents of cell phones.

At present, the legal standards by which searches of students' cell phones are assessed have not changed, yet school officials should be diligent in executing such searches in strict compliance with the existing standards by ***always ensuring that the search is justified at its inception and is reasonable in its scope***.

Sexting Hypothetical Scenarios

Scenario:

You receive an email from a parent with an image of a nude student attached. The parent's email indicates her daughter received the photo in a text message from another student. What do you do?

Answer:

- Do not open the attached image.
- Do not copy, distribute, or share the images with anyone who is not law enforcement.
- Notify law enforcement.

Ohio law makes it a crime for any person to "possess or view any material or performance that shows a minor who is not the person's child or ward in a state of nudity." R.C. 2907.323(A)(3). The exception to this rule is if the material is "presented. . . for a bona fide. . educational . . . or government. . . purpose". This exception would likely apply to brief possession by school officials as long as they come into possession of this material in the course of their duties, and quickly report it, stop its distribution and cooperate with law enforcement. Any other action risks falling outside of the statute and triggering criminal liability. Federal law provides a "safe harbor" for persons who "promptly" bring such material to the attention of law enforcement. 18 USC 2252(c)(2)(A).

[1] *Riley v. California*, 134 S. Ct. 2473; 2014 U.S. LEXIS 4497 (2014).

The safest course for any district official who comes into possession of such images is to not share them with anyone except law enforcement officers. While school officials may seek guidance on how to handle the situation, they should not allow anyone else to access the images.

Scenario:

A student reports that another student sent her a picture of a nude classmate. She offers to pull up the image on her phone to show you. What do you do?

Answer:

There could be a violation of child pornography laws if a school official viewed the images knowingly. The best response is to seize the phone but not to search its contents. Law enforcement should then be contacted.

Scenario:

A student tells you that a group of students is sexting, and gives you the names of those involved. Should you bring in the students and search their phones? Should you confiscate their phones?

Answer:

As stated above, there could be a violation of child pornography laws if a school official viewed the images knowingly. The best response is to seize the phones but not to search their contents. Law enforcement should then be contacted.

Question:

Should the images be reported as potential child abuse?

Answer:

School officials have a duty to report when a 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." R.C. 2151.421 Given the potential effects of sexting on the subjects of such images, it could be argued that in these types of cases, the child is facing a mental injury as a result of the sharing of the images.

To avoid action against school officials under the child pornography statutes and the child abuse reporting statute, the safest course is for school officials to immediately hand over such material(s) to law enforcement without making copies or allowing any other person to view the material.

II. <u>Steps to Take Upon the Discovery of Such Images</u>

- Do not copy, distribute or share the images with anyone (including a parent) who is not a law enforcement officer.
- Determine if the image provides reasonable cause to suspect that there is child abuse. Consult legal counsel if necessary.
- If there is reasonable cause to suspect child abuse or another crime, contact law enforcement.
- If there is not reasonable cause to suspect child abuse or another crime, destroy the image.

III. <u>If the District receives a report of sexting:</u>

- Seize the cell phone (do not give it to parent).
- Do not inspect its contents to see if what the students are saying is true. Let the police determine that.
- Do not copy, distribute or share the images with anyone (including a parent) who is not law enforcement.
- Notify law enforcement so they can take possession of the phone and take any steps they deem necessary to search the images.

Other steps:

- Investigate to determine which students are involved.
- Talk with the parents.
- Get counseling for the person depicted.
- Take any steps necessary to avoid harassment or bullying of the person depicted.

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Title IX:
Athletics and More

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I. Title IX Prohibits Discrimination on the Basis of Sex

A. The Law – 20 U.S.C. § 1681

1. "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…"

2. There are a number of exceptions listed to the law (i.e. fraternities/sororities), but none that are relevant for our purposes today.

3. Note: Title IX is not just a law that applies with regard to students. It also applies to employees.

B. The Regulations – 34 C.F.R. Part 106

1. The U.S. Department of Education's Office for Civil Rights is responsible for drafting regulations that help educational entities apply the anti-discrimination requirements of the law to specific situations.

   a. The regulations make clear that the discrimination prohibition applies very broadly to every "academic, extracurricular, research, occupational training, or other education program or activity" operated by the educational entity. 34 C.F.R. § 106.31(a).

2. The regulations include specific prohibitions stating that when providing any aid, benefit, or service to a student, the educational entity cannot, on the basis of sex, do any of the following things:

   a. Treat one person <u>differently</u> from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

   b. Provide <u>different</u> aid, benefits, or services or provide aid, benefits, or services in a different manner;

   c. Deny any person any such aid, benefit, or service;

   d. Subject any person to separate or <u>different</u> rules of behavior, sanctions, or other treatment:

   e. Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

   f. Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which

discriminates on the basis of sex in providing any benefit or service to students or employees; or

g. Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b).

C. General Requirements

1. Adopt a non-discrimination notice. A sample notice can be found online here (scroll to the bottom of the page): https://www2.ed.gov/about/offices/list/ocr/docs/nondisc.html.

2. Designate a Title IX Coordinator that will coordinate compliance efforts, including investigations. All students and employees must be notified of the name, office address and telephone number of the Title IX Coordinator. 34 C.F.R. § 106.8(a).

3. Adopt and publish grievance (complaint) procedures providing for "prompt and equitable resolution of student and employee complaints" alleging discrimination or harassment on the basis of sex. 34 C.F.R. § 106.8(b).

   a. NEOLA Districts typically have policies 5517 and 5517.02.

   b. OSBA Districts typically have policy ACAA.

   c. There may also be administrative guidelines/regulations accompanying these policies.

   d. Colleges and Universities typically have a policy that has grown out of their student misconduct procedures.

4. Notify applicants for admission/employment, students, parents, employees, and unions that it does not discriminate on the basis of sex and that it is prohibited from doing so. 34 C.F.R. § 106.9(a).

5. Widely publish its notice of non-discrimination. 34 C.F.R. § 106.9(b).

6. Work to "eliminate the harassment, prevent its recurrence, and remedy its effects." 2001 Revised Sexual Harassment Guidance.

7. Practical tip: Make sure that discrimination/harassment is included as types of misconduct in your Student Code of Conduct. (Yes, school districts: this is different than "harassment, intimidation, and bullying" under R.C. 3313.666.)

II. General Types of Discrimination

D. What does "sex" mean?

1. Biological sex
2. Gender
3. Sex stereotyping
4. Sexual orientation
5. "Sex" as a verb
6. Gender identity

E. Sex/Gender Discrimination – "Discriminate" as in "treat differently"

1. "You can't do that because you are a man."
2. "Only men can do that."
3. "Women have to… but men don't."

F. Sexual Harassment

1. Sexual harassment is unwelcome conduct of a sexual nature that can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. (January 2001 Guidance from OCR)

    a. Two types of sexual harassment:

        i. "Quid Pro Quo" – Sexual favors demanded in exchange for some benefit, or service.

        ii. "Hostile environment" – Unwelcome sexual advances, requests for sexual favors, or verbal or physical conduct of a sexual nature that unreasonably interferes with an individual's performance or creates an intimidating, hostile, or offensive educational environment.

            (a) Must be sufficiently severe, pervasive, and objectively offensive that it can be said to deprive the student of access to educational opportunities or benefits.

            (b) Must there be a pattern? No. Per the January 2001 OCR Guidance: "A single or isolated incident of sexual harassment may, if sufficiently severe, create a hostile environment."

2. Your policy probably defines it more extensively and offers examples.

G. Off-Campus Sexual Harassment

1. Keep in mind your policies on discipline for off-campus misconduct.

2. In the September 2017 Q&A released by the Office for Civil Rights, it states, "Schools are responsible for redressing a hostile environment that occurs on campus even if it relates to off-campus activities."

III. Handling Claims of Sexual Harassment

A. Your Policy is Key

1. It is critically important to follow your Title IX grievance/complaint policy.

2. It is important that the individuals who are charged with implementing the policy, investigating the alleged misconduct, and making determinations about sanctioning are all trained to do so.

B. Interim Measures

1. Individuals who are involved in the complaint process (the complainant and the respondent) should be offered appropriate interim measures during the course of the complaint process. Examples include:

a. Issuing a mutual "no contact" order

b. Changes in class schedule

c. Offering guidance counseling services

d. Changes in bus assignment

e. Extra supervision of one or both parties

f. Allow early departure from class to avoid crowds in the hallways and increase supervision

2. Document the interim measures that are offered and provided.

3. Interim measures should not be disciplinary in nature.

4. Interim measures should not be overly burdensome towards one party.

5. "Interim" measures are only interim during the pendency of the investigation. The same measures – or more restrictive ones – may be appropriate depending on what the investigation concludes.

6. Case study: *M.D. v. Bowling Green Indep. Sch. Dist.*, 2017 U.S. App. LEXIS 19651 (6th Cir. Oct. 6, 2017) – A female cheerleader was groped by a male teammate as they traveled home from a competition. The male student confused, and the district removed him from the high school and sent him to an alternative school. Based on the male student's good behavior at the alternative school and the alternative placement committee's recommendation, the district later allowed him to return to the high school to complete his senior year. The female student sued the district, alleging that it was deliberately indifferent to sexual harassment in violation of Title IX.

   The court held that the school's response was not in violation of Title IX. When the male student returned to the high school, certain conditions had been imposed, including that if he had any contact with the victim, he would be sent back to the alternative school. School officials were instructed to monitor his compliance, his classes were scheduled so that he did not share any classes with the victim, and he had to eat lunch in a classroom so that he was not in the cafeteria at the same time as the victim. When administrators learned he was assigned to take yearbook photographs at sporting events, he was reassigned so the victim would not have to see him while cheerleading. While their paths crossed while going to sixth period classes, and when the male student picked up his lunch in the cafeteria, they never had any on-campus interaction.

   While the victim would have preferred not to see her harasser at school, school administrators "face the unenviable task of balancing victims' understandable anxiety with their attackers' rehabilitation" and have to make judgment calls as to how best to balance those competing interests. Unlike cases finding deliberate indifference where school districts had actual knowledge that their efforts to remediate harassment were ineffective, the victim in this case did not allege that the male student harassed her after he returned to the district.

C. Informal resolution

   1. Most policies allow for informal resolution.

   2. Guidance is currently unclear as to whether informal resolution may be used in cases involving sexual assault, although the 2001 Guidance, which went through notice and comment procedures, states that it cannot be used in such cases.

D. Investigation

   1. Generally, your policy should provide for:

      a. notice to the parties,

b. an investigation that provides each party the opportunity to be heard and to provide evidence,

c. a finding as to whether the policy has been violated, and

d. notice to the parties of the outcome and any ongoing protections that will apply to the party to which the notice is provided.

2. You should document the steps you take to investigate. Most policies require the development of a report. Most policies do not require the report to be shared with the parties.

3. Your Title IX policy does not circumvent your Notice of Intent to Suspend and Notice of Suspension.

E. Remember that if you are conducting a sexual harassment investigation, it may trigger your bullying and harassment policy also. Do they play well together? Read it in advance and make necessary revisions so that you are not trying to conduct two simultaneous investigations on two different timelines using two different investigators.

F. When working with employees, remember that the Licensure Code of Professional Conduct for Ohio Educators may be triggered. Also, consider collective bargaining agreements in handling employment-related cases.

IV. Athletics – Equal Athletic Opportunity for Members of Both Sexes

A. Regulations establish the factors that OCR considers in determining whether an educational entity has complied with Title IX with regard to equal opportunity for participation in interscholastic, intercollegiate, club, or intramural athletics. See Appendix A to this handout. Factors to be considered include:

1. whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes (see next section);

2. the provision of equipment and supplies;

3. Scheduling of games and practice time;

4. travel and per diem allowance;

5. opportunity to receive coaching and academic tutoring;

6. assignment and compensation of coaches and tutors;

7. provision of locker rooms, practice and competitive facilities;

8. provision of medical and training facilities and services;

9. provision of housing and dining facilities and services;

10. publicity.

B. The regulations make clear that "unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but OCR may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex."

C. How is this evaluated?

1. In practice, OCR tends to look at:

a. disparities between girls' and boys' teams;

b. substandard equipment, facilities, etc. for each particular team, weighed in total to determine whether substandard opportunities are offered to either boys or girls

D. Examples of Non-Compliance per OCR – Indianapolis Public Schools, Feb. 26, 2014:

1. Facilities:

a. At one high school, there were not enough uniforms for the girls' basketball team. There were also not enough softball and girls' track uniforms. Softball athletes had to wash their own uniforms. None of these things affected boys' teams.

b. At one high school, the softball field did not have lights, outfield fencing, dugouts, bullpens, or a scoreboard, nor did it have restrooms or a concessions stand. The baseball field had all of these things. Boys' basketball had its own locker room, but girls' basketball did not.

c. At one high school, the softball field's outfield fence was 45 feet too close to home plate on one side than regulation allowed. This was considered a significant disadvantage that outweighed the poor football field and lack of padding on the walls of the wrestling room.

d. At one high school, the softball field was unfinished and lacked dugouts, outfield fencing, or a backstop, while the baseball field had all of these features. While the wrestling room had poor ventilation, OCR found that this did not offset the deficiencies of the softball field.

2. Scheduling:

a. Where the boys' basketball team competed on Friday nights/Saturday nights (considered "prime time") for 69.4% of its games, the girls' basketball team played only 11.1% of its games on Friday/Saturday nights.

b. The girls' basketball team competed in 59% of allowable events, whereas the boys' basketball team competed in 70% of allowable events.

c. The boys' basketball team was granted scheduling preference over the girls' basketball team.

E. Practical Tips:

1. If your donor will not fund something for both the boys' and girls' teams, your institution is on the hook for funding it for the other team. It is not an excuse to say that one team has something better than the other because of an outside donor. Outside funding is imputed to the institution's expenditures.

2. If you are building a new facility for one team, you should plan on building one for the other team.

3. If you are handing equipment down from the boys' team to the girls' team, you are looking at a potential disparity.

4. Where teams share facilities, alternate schedules to provide equal access during "prime time" for games and during convenient times (e.g. immediately after school) for practices.

5. Make sure your safety equipment for all athletes is not substandard. Setting aside the Title IX issues that would result from a disparity, this is a liability concern.

V. Athletics – Nondiscriminatory Participation Opportunities

A. Three-Part Test

1. The "Three-Part Test" was originally issued in 1979 regarding Intercollegiate Athletics, but OCR has since made clear that it applies to K-12 school districts as well.

2. To be in compliance with the three-part test, the educational entity must meet ONE of the parts of the test.

B. Part One: The number of male and female athletes is substantially proportionate to their respective enrollments.

1. Who counts as an "athlete"? Note that athletes can be counted in more than one sport. Must meet all three of these factors:

a. Individuals using the institution's coaching, equipment, medical, and training room services on a regular basis during a sport's season; and

b. Individuals who are participating in organized practice sessions and other team meetings and activities on a regular basis during a sport's season; and

c. Individuals who are listed on the eligibility or squad lists maintained for each sport.

2. What is "substantially proportionate"?

a. This is determined by OCR on a case-by-case basis. We will use fractions that compare MALE/FEMALE. Examples:

i. COMPLIANT: Enrollment is 52 percent male and 48 percent female (52/48); participation is 52 percent male and 48 percent female (52/48).

ii. COMPLIANT: The following year, enrollment is 51/49 and participation is still 52/48. This is compliant because OCR will not expect the institution to "fine tune its program in response to this change in enrollment."

iii. NOT COMPLIANT: Where there are 600 athletes, enrollment is 48/52, but participation is 53/47. OCR notes that if there were 600 athletes in this program, providing women with 52 percent of athletic opportunities would allow 62 more women to participate. This would likely support an additional sport.

iv. COMPLIANT: Where there are only 60 athletes, enrollment is 48/52, but participation is 53/47. OCR notes that if there were only 60 participants in this program, providing equal opportunities would allow 6 more female participants – likely not enough to support a viable team.

C. Part Two: Is there a history and continuing practice of program expansion for the underrepresented sex?

1. To make this determination, OCR reviews the entire history of the athletic program and the efforts made towards expanding opportunities for the underrepresented sex.

2. Factors considered by OCR:

a. Record of adding interscholastic teams and elevating club sports to interscholastic competition for the underrepresented sex;

b. Record of increasing the numbers of participants in interscholastic athletics who are members of the underrepresented sex;

c. Affirmative responses to requests by students or others for addition or elevation of sports;

d. Current implementation of a nondiscriminatory policy or procedure for requesting the addition/elevation of sports and the effective communication of the policy or procedure to students;

e. Current implementation of a plan or program expansion that is responsive to developing interests and abilities;

f. Efforts to monitor developing interests and abilities of the underrepresented sex by conducting periodic surveys and taking timely actions in response to the results.

3. What does OCR do when an institution eliminates a team for the underrepresented sex?

   a. They will look at the circumstances of the elimination and whether the institution meets Part Two of the text.

4. Institutions can't beat this test by reducing the number of opportunities for the overrepresented sex.

5. Examples:

   a. COMPLIANT:

      i. 1975 – School establishes seven teams for women.

      ii. 1984 – School adds a women's varsity team.

      iii. 1990 – School upgrades a women's club sport to varsity team status when there is a significant increase in interest for that sport.

      iv. 1996 – School adds a varsity women's team that has been identified by a regional study as an emerging women's sport in the region.

      v. School continues to expand participation rates.

      vi. The addition of these teams results in an increased percentage of female varsity participants.

   b. NOT COMPLIANT:

      i. 1980 – School establishes four teams for women.

ii. 1983 – School adds a varsity women's team.

iii. 1991 – School adds a varsity women's team after a survey shows a significant increase in interest in the sport.

iv. 1993 – School eliminates both a viable women's team and a viable men's team due to budget cuts.

v. No actions have been taken since 1993.

c. COMPLIANT:

i. 1975 – School establishes five teams for women

ii. 1979 – School adds a varsity women's team

iii. 1984 – School elevates a women's club sport with 25 participants to interscholastic competition; eliminates a women's varsity sport with only 8 participants

iv. 1987 – School adds a women's varsity team based on interest survey

v. 1989 – School adds a women's varsity team based on interest survey

vi. School continues to expand participation rates

D. Part Three: Is the institution fully and effectively accommodating the interests and abilities of the underrepresented sex?

1. OCR will look for evidence that, notwithstanding disproportionately low participation rates by students of the underrepresented sex, the interests and abilities of these students are, in fact, being fully and effectively accommodated.

2. If all three of these factors are met, OCR will find that an institution has not complied with Part Three of the Test:

a. Is there unmet interest in a particular sport? This is evidenced by:

i. requests by students that a particular sport be added;

ii. requests that an existing club sport be elevated;

iii. participation in club/intramural sports;

iv. interviews with students, coaches, administrators, and others regarding interest in particular sports;

v. results of questionnaires of students and/or information obtained in an open student forum regarding interests in particular sports;

vi. participation in particular interscholastic sports by students who will attend the institution;

vii. participation in regional/community leagues in a particular sport;

viii. note that OCR expects a regular assessment of this factor.

b. Is there sufficient ability to sustain a team in the sport? This is evidenced by:

i. athletic experience and accomplishments—in interscholastic, club, or intramural competition—of students interested in playing the sport;

ii. opinions of coaches, administrators and athletes regarding whether interested students have the potential to sustain a varsity team;

iii. if the team has previously competed as a club/intramural team, whether the competitive experience of the team indicates it has the potential to sustain an interscholastic team. (Note that it is not an option to say that the team will not be good in comparison to likely interscholastic competitors.)

c. Is there a reasonable expectation of competition for the team? This is evidenced by:

i. competitive opportunities offered by other schools against which the institution competes;

ii. competitive opportunities by other schools in the geographic area, including those offered by schools against which the institution does not now compete;

iii. active encouragement of development of interscholastic competition for a sport when overall athletic opportunities within the competitive region have been historically limited for members of the underrepresented sex.

d. Note that in 2010, OCR issued lengthy guidance on how to meet the factors of Part Three of the Three-Part Test. See: https://www2.ed.gov/about/offices/list/ocr/letters/colleague-20100420.pdf.

VI. Joining a Team of the Opposite Sex

A. Title IX Regulations

1. Where an institution operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have been previously limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. 34 C.F.R. § 106.41(b) – See Appendix A to this handout.

    a. Contact sports include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

VII. Transgender Participation

A. Title IX – The law and regulations are silent on gender identity but the *Highland Local* case stands for the proposition that Title IX prohibits discrimination on the basis of transgender status, at least in the Southern District of Ohio.

APPENDIX A
34 C.F.R. § 106.41 Athletics.

(a) *General.* No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports, the purpose or major activity of which involves bodily contact.

(c) *Equal opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) **whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;**

(2) **the provision of equipment and supplies;**

(3) **scheduling of games and practice time;**

(4) **travel and per diem allowance;**

(5) **opportunity to receive coaching and academic tutoring;**

(6) **assignment and compensation of coaches and tutors;**

(7) **provision of locker rooms, practice and competitive facilities;**

(8) **provision of medical and training facilities and services;**

(9) **provision of housing and dining facilities and services;**

(10) **publicity.**

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) *Adjustment period.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.