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SCHOLARS IN EDUCATION LAW

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GCSSA Legal Update 2023

March 7, 2023

ESCNEO

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GCSSA Legal Update 2023

Introduction, Hot Topics and Quick Hitters

“Zoning” in on School Levy Campaign Compliance

Gender Law and Schools – An Update

Going Public: Records, Meetings and Participation

Selected Cases

Q & A

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Hot Topics and Quick Hitters

- House Bill 1 and Other Budget Priorities
- School Choice Update & Vouchers
- Title IX and Girl's Basketball – What's Next?
- "Paid Administrative Leave" – When, Where, How and Why?
- Proper Notice for Board Meetings
- Smile – You're on Candid Camera!

Smile – You’re on Candid Camera!

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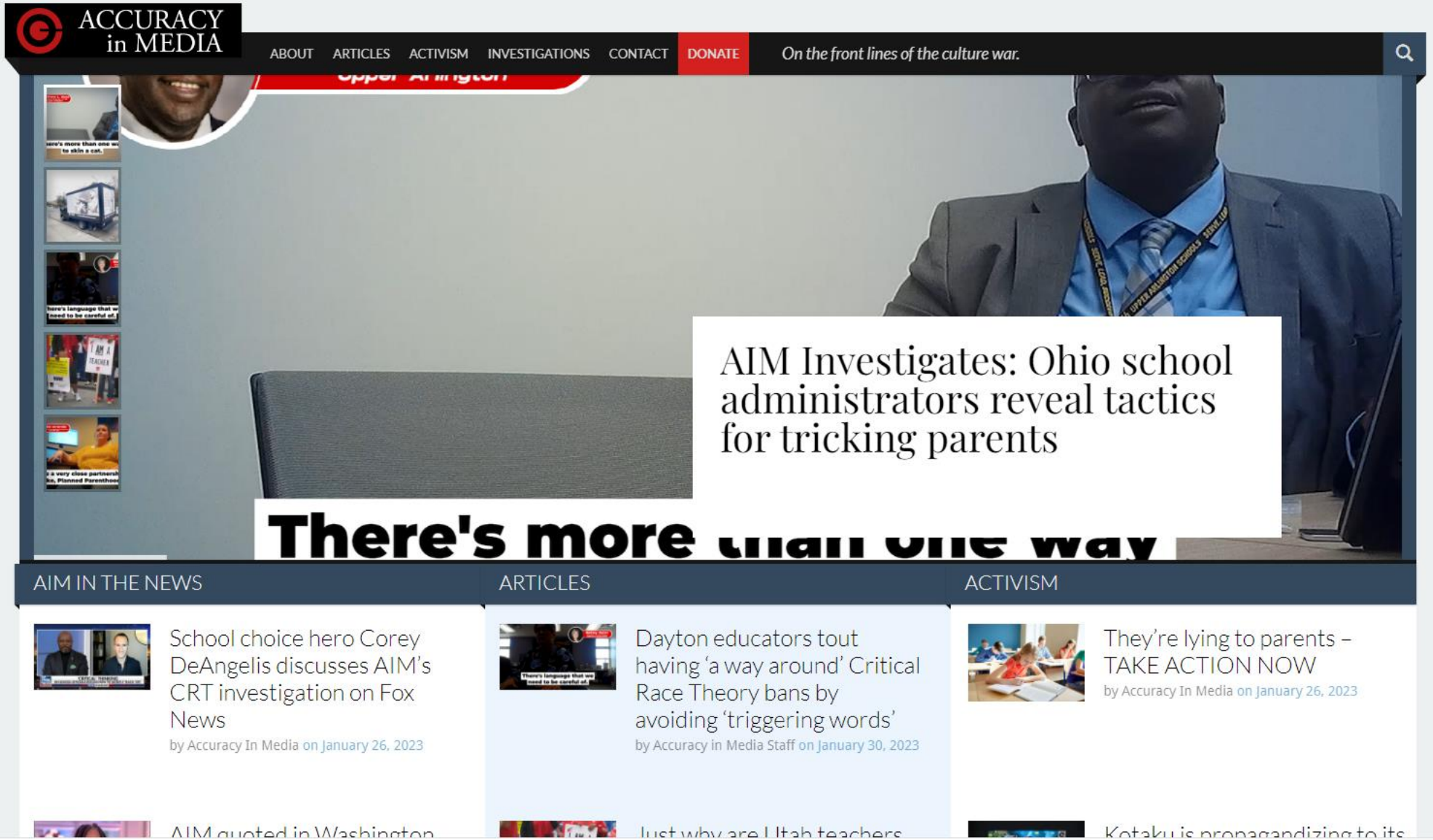
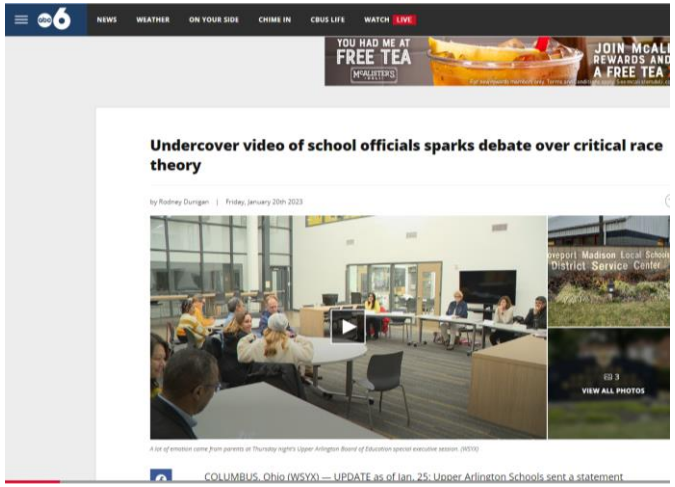
Hillary Staten
Administrative Assistant
Groveport
We "trick them." You know?

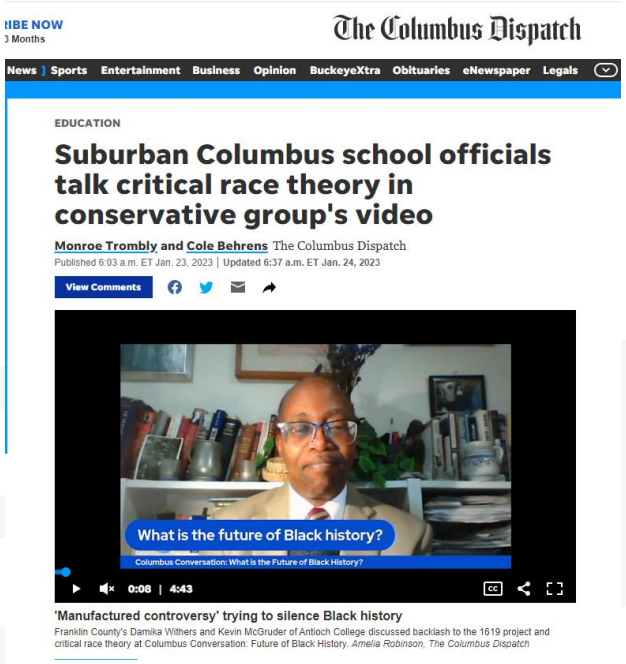

ACCURACY in MEDIA
ABOUT
ARTICLES
ACTIVISM
INVESTIGATIONS
CONTACT
DONATE
On the front lines of the culture war.
AIM Investigates: Ohio school administrators reveal tactics for tricking parents
There's more
AIM IN THE NEWS
School choice hero Corey DeAngelis discusses AIM's CRT investigation on Fox News
by Accuracy In Media on January 26, 2023
ARTICLES
Dayton educators tout having 'a way around' Critical Race Theory bans by avoiding 'triggering words'
by Accuracy in Media Staff on January 30, 2023
ACTIVISM
They're lying to parents – TAKE ACTION NOW
by Accuracy In Media on January 26, 2023

So far, AIM has infiltrated the following Districts:

- Cincinnati
- Kettering
- Bellbrook-Sugarcreek
- Groveport Madison
- Bexley
- Upper Arlington



Central Ohio school employees recorded while discussing critical race theory



In Ohio, only one party to a conversation needs to consent to recording

RC 2933.52(B)(4) provides it is not a crime to record a conversation:

> if the [recording] person is a party to the communication or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing a criminal offense or tortious act in violation of the laws or Constitution of the United States or this state or for the purpose of committing any other injurious act

Discussion

“In a digitally connected world a byte of data can boost or bite your brand”

– Bernard Kelvin Clive

“Everything you say should be true, but not everything true should be said.”

– Voltaire

“The universe is listening, be careful what you say in it.”

– Jay Electronica

Take away: ***Stress to staff the need to watch what they say and to whom they are saying it***

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March 7, 2023

“Zoning” in on School Levy Campaign Compliance: Draft of Auditor of State’s FAQ

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Context – Bellbrook–Sugarcreek Schools

- District hired consulting firm to help with the levy and a polling firm to conduct a survey
- District sent mailers to residents
  - First said “An investment in our schools is an investment in our community” adjacent to an announcement that the operating levy was on the May ballot.
  - Second said “Continue the Excellence with the passage of Issue 4!”
- Superintendent faced four charges each of illegal transaction of public funds and dereliction of duty. BOE members charged with one count of same crimes. These are first-degree misdemeanors.
- Superintendent accepted plea deal to a single count of dereliction of duty

Supporting Statutes – Use of School Funds

- **R.C. 3315.07(C)(1)**
  - "…[N]o board of education shall use public funds to support or oppose the passage of a school levy or bond issue or to compensate any school district employee for time spent on any activity intended to influence the outcome of a school levy or bond issue election."
- **Exception: R.C. 3315.07(C)(2)**
  - "A board of education may permit any of its employees to attend a public meeting during the employee's regular working hours for the purpose of presenting information about school finances and activities and board actions, even if the purpose of the meeting is to discuss or debate the passage of a school levy or bond issue."

Supporting Statutes – Political Subdivisions

- **R.C. 9.03(B)**
  - "… a political subdivision may use public funds to publish and distribute newsletters, or to use any other means, to communicate information about the plans, policies, and operations of the political subdivision to members of the public within the political subdivision and to other persons who may be affected by the political subdivision."

Political Subdivisions: Prohibited Use of Funds

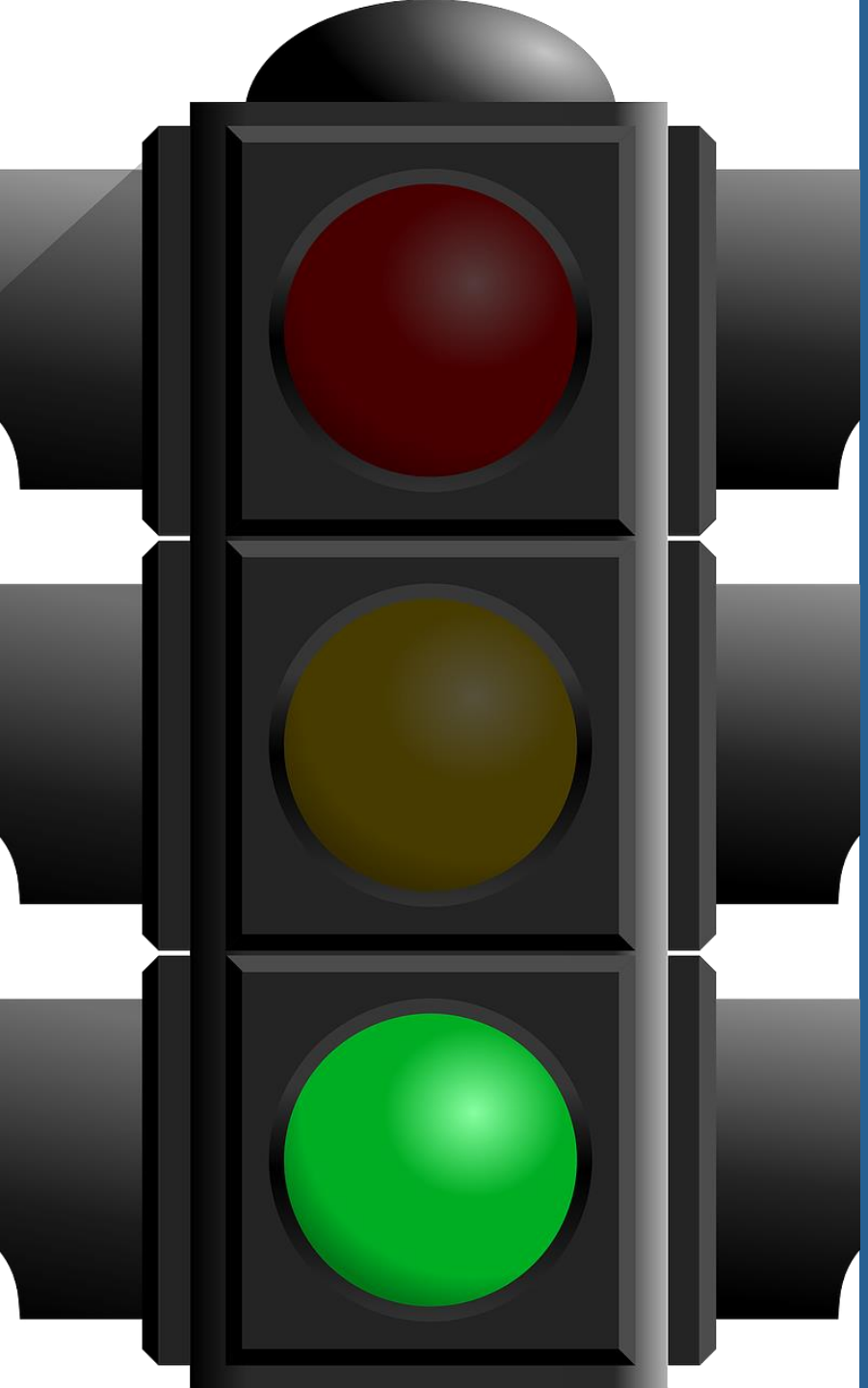
- **R.C. 9.03(C)(1)(e)**
  - Publishing, distributing, or otherwise communicating information that "Supports or opposes … the passage of a levy or bond issue."
- **R.C. 9.03(C)(2)**
  - Compensating employees for time spent on any activity to influence the outcome of an election; but may compensate employees to attend a meeting to present information that is not designed to influence the outcome of an election or the passage of a levy or bond issue, even though the levy or bond issue is discussed or debated at the meeting.

Long-Awaited FAQ

- On February 21, 2023, the Auditor of State (“AOS”) circulated a “DRAFT” of the long-awaited FAQ related to RC 9.03’s prohibition on using public funds to support the passage of a political subdivision’s levy or bond requests.
    - Lists 44 separate questions
    - AOS acknowledges that the AOS “is not the final or only arbiter of a violation of ORC 9.03, but AOS is often the primary entity tasked with reviewing and determining if the actions of a political subdivision or individual when using public funds are in violation of the statue.”
    - “Crafted to lay out a conservative approach”

Divided into Zones

- FAQ assigns a “zone” to the various questions. Some activities are deemed to be allowed (Zone 1) while others are clearly not permitted (Zone 4) -- leaving a range of activity in between (Zones 2 and 3).
  - **Zone 1** – Permitted Activities
    - Green light
    - Consists of 7 of the questions
  - **Zone 2** – Be careful
    - Consists of the 20 of the questions
  - **Zone 3** – Be really careful
    - Consists of 4 of the questions
  - **Zone 4** – Don’t even think about it
    - Stop sign
    - Consists of 13 of the questions



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Zone 1 – Permitted Activities

- **<u>What can be done</u>**
  - Districts are permitted to share with the community and voters the financial position of the district (FAQ II, 1)
    - information shared during a levy campaign should be factual information and not crafted to influence the vote on the levy
    - neutral, accurate, factual information is appropriate
  - Districts may pay a lawyer to draft resolutions necessary to put a levy on the ballot (FAQ IV, 1)
  - Districts may provide factual information about the condition of its facilities it receives from the Ohio Facilities Construction Commission (FAQ IV, 2)

Zone 1 – Permitted Activities

- **What can be done**
  - Districts may pay a consultant to analyze the district's financial situation to ascertain how much money to ask for in a levy (FAQ IV, 5)
    - Caveats – no preordained results and no expectation for consultant to contribute to levy committee
  - Districts may use public funds to attend training to review what type of activity and use of public resources is and is not appropriate when a levy is on the ballot. (FAQ V, 1)
    - This includes district staff attending such training during their workday.

Zone 1 – Permitted Activities

- **<u>What can be done</u>**
  - Superintendent, treasurer, and board members may meet with the levy committee during school hours to answer their questions and provide factual information (FAQ V, 5)
    - Same opportunity should be afforded to any citizen group or committee opposing the levy
  - Districts must provide equal access to the same facilities and materials as levy committees (FAQ VI, 8)

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Zone 4 – Prohibited Activities

- **<u>Thou Shalt Not</u>**
  - 13 Commandments
  - District may not provide postage or allow a levy committee to use the district's bulk rate (FAQ I, 2)
    - Prohibited even if the district is reimbursed by the levy committee for the expense
  - District may not send home with students communications drafted by the levy committee (FAQ I, 5)
    - Theory is despite that the time is "insignificant," district employees would be compensated for time providing these communications to students and families

Zone 4 – Prohibited Activities

- **Thou Shalt Not**
  - District issued communication methods (e.g., all call or email) may not be used to disperse information for the levy committee (FAQ III, 4)
    - Violative of RC 9.03(C)(1)(e)
    - Whether this occurs on work hours is irrelevant
  - Superintendent and Treasurer should not approve payments by the levy committee for their mailers, signs, and communications (FAQs III, 5)
    - This responsibility falls on the levy committee
  - District may not hire an outside consulting or communication firm to assist in running the levy campaign (FAQ IV, 6)
    - This falls on the levy committee

Zone 4 – Prohibited Activities

- **<u>Thou Shalt Not</u>**
  - District may not condition the award of the design/build contract to an architectural firm on the firm's agreement or offer to run and or support the levy (FAQ IV, 7)
    - Quid pro quo
    - When awarding the contract, should be very cautious in considering the firm's support of the levy
  - District may not use school resources to thank a community for passing a levy (FAQ IV, 9)
  - District may not permit pro levy signs to be placed on school grounds (FAQ VI, 1)
    - AOS recognizes this is "insignificant," but recommends that the district be vigilant in not permitting signs on school grounds

Zone 4 – Prohibited Activities

- **Thou Shalt Not**
  - Levy signs may not be stored at the school (FAQ VI, 3)
  - District administrators, board members, and staff may not show support for the levy by wearing pins, stickers, shirts, etc. during the school day or while being compensated by the district (FAQ VI, 4)
    - First Amendment issues
    - “This prohibition extends to time not during the school day, to include: board meetings, staff meetings, district sponsored events where the administration, board and employees are paid to be present.”
  - Students may not promote the levy producing TV commercials or making signs in district owned facilities or with district owned equipment (FAQ VII, 1)
    - Would constitute the utilization of public funds, resources or facilities

Zone 4 – Prohibited Activities

- **Thou Shalt Not**
  - Staff may not be asked to contribute funds or volunteer their own time to support the levy committee fund (FAQ VII, 3)
    - Prohibited by RC 3517.092
    - Of course, district employees are free to contribute on their own volition
  - District cannot prepare or authorize a survey using public funds that is designed to gather, in whole or part, information on the community's support of a levy or specific amounts of increased tax burden (FAQ VIII, 1)
    - This is different from strategic planning
    - Problem, per AOS, is when the district attempts to gauge community support for a bond or levy

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Zone 2 – Be Careful

- **<u>Use Caution</u>**
  - District may send reminders to vote via district's notification system or email (FAQ I, 1)
    - Informational only
    - Not crafted to influence voters to support or oppose a levy
    - Best practice would be to send reminder for all elections, even if no levy on ballot
  - District might be permitted to allow a levy committee to use district resources and facilities in limited circumstances (FAQ I, 3)
    - Might allow use of telephones, computers, or other materials and property if a reasonable fee is paid and its pursuant to a content neutral policy
    - Employees may be permitted to attend public meetings during work hours to present factual information on district finances and board actions (just the facts)

Zone 2 – Be Careful

- **Use Caution**
  - Superintendent or district administrator may send a letter, include comments in newsletter, and include comments on a website providing details about an upcoming levy (FAQ 1, 4)
    - Just the facts
    - Not crafted to influence passage of the levy
  - District may tell the public what cuts will be made if the levy fails (FAQ II, 2)
    - Neutral, accurate, and factual
    - Recommended best practice is adoption of a resolution that details the cuts and reductions that would occur if levy fails
  - District may provide information on how to contact the levy committee (FAQ III, 1)
    - Must also provide information regarding opposition group

Zone 2 – Be Careful

- **<u>Use Caution</u>**
  - Board members may play a role in the formation of a levy committee, but district administrators and staff must exercise heightened caution to do so (FAQ III, 2)
    - Must be on own time and expense
    - Must be clearly outside regular school day, not during board meetings, and not during district sponsored events
    - First Amendment issue
    - Recommended that best practice is to not have administrators as the “face” of the levy campaign
  - Superintendent and Treasurer should be cautious participating in levy committee discussions since they are arguably never “off the clock.” (FAQ III, 3)
    - Stronger First Amendment argument for staff who are residents of the district
    - Must occur on their own time and at own expense
    - Those who are compensated for working irregular hours should take caution and be prepared to show that their activities were on their own time

Zone 2 – Be Careful

- **Use Caution**
  - District officials should exercise caution in granting an interview with local media about a levy during the school day (FAQ IV, 2)
    - Provide factual information
    - Do not advocate for levy passage
    - Recommended disclaimer: the information being provided is merely informational and based on the facts, and that district personnel are not allowed to advocate for or against the passage of the levy or bond issue while being paid with public resources.
  - District employees may answer questions from the public while “on the clock” if the information is neutral, accurate, and supported by the facts (FAQ IV, 4)
    - May not advocate for levy passage

Zone 2 – Be Careful

- **Use Caution**
  - Pursuant to a content neutral fair use policy, a district may permit the use of district logos on pro-levy campaign materials (FAQ IV, 8)
    - Must also permit opposition groups to use the logo
  - Administrators and staff may be compensated for preparing informational materials regarding a levy (FAQ V, 2)
    - Must be factual
    - Cannot advocate for passage

Zone 2 – Be Careful

- **<u>Use Caution</u>**
  - Administrators and staff might be able to advocate for levy passage if outside their typical work day (FAQ V, 3)
    - District leaders and staff who decide to step outside the role of providing merely factual information and into advocacy for passage of a levy or bond issue, carry the obligation of establishing the time spent in such activities were outside the time for which they received regular compensation from the district.
    - District administrators and staff who are compensated by the district to work irregular house will have a high burden to show that their activities in support of a levy were on their own time and expense.
    - The best practice is not to engage in these activities or for the district administrator to submit a request for paid time off during the time they elected to attend the rally.

Zone 2 – Be Careful

- **<u>Use Caution</u>**
  - Levy campaign restrictions apply to all district staff, not just administrators and the Board (FAQ V, 4)
    - District personnel should follow district policy on requesting paid time off and must not engage in activity to influence the passage of the levy during time when they are receiving regular compensation from the district.
  - Board members may participate in a levy campaign on their own time without using district resources (FAQ V, 6)
    - Board members are typically compensated for their time attending board meetings
    - Prohibited from advocating for passage while being compensated
  - District may permit the levy committee to access school facilities during the school day to collect background video (FAQ VI, 5)
    - Access must be content neutral
    - Would also have to permit access for levy opponents

Zone 2 – Be Careful

- **<u>Use Caution</u>**
  - Superintendent and Treasurer may use district facilities to host an informational meeting on upcoming levies (FAQ VI, 6)
    - Information must be factual in nature
    - Not designed to influence the vote
  - Levy committee may utilize school facilities pursuant to content neutral policy for allowing organizations to rent or utilize public space within buildings (FAQ VI, 7)
    - Must also provide access to anti-levy groups
  - District may use public funds to hire a firm to conduct a survey of the community to gather information on school finances, quality of facilities and programs, and need for additional or the elimination of specific facilities or programs. (FAQ VIII, 2)
    - Questions cannot be designed to gauge community support for a levy or the amount of any tax increase

Zone 2 – Be Careful

- **Use Caution**
  - If the board conducts, or hires a firm to conduct, a community survey for strategic planning purposes without crossing over into levy issues – those results can be used by the district to provide factual information to the public about an upcoming levy. (FAQ VIII, 3)
    - Levy committee could makes a public records request for the survey results and make use of the information
  - Caution is advised on asking a prospective candidate for superintendent or treasurer about their prior success in passing levies (FAQ IX, 1)
    - Fair to ask candidates to explain their roles in levy campaigns at prior districts
    - Done to confirm rules had been followed

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Zone 3 – Be Really, Really Careful

- **<u>Use Extra Caution</u>**
  - District may be able to permit levy committee to purchase advertising space on district signs or scoreboards (FAQ VI, 2)
    - Caution is warranted
    - Must be content neutral and paid for by the levy committee
  - Teachers and coaches may be permitted to send letters to their classrooms or teams if after hours and only personal funds are utilized (FAQ VII, 2)
    - “Extreme caution is advised”
    - Burden of showing actions occurred while not being compensated
    - District provided bulletin boards, paper, printers, take home folders, email or other resources may not be used

Zone 3 – Be Really, Really Careful

- **<u>Use Extra Caution</u>**
  - District should not make a superintendent's or treasurer's employment conditioned on the passage of a levy (FAQ IX, 2)
    - Doing so "would merely encourage the district administrators to stray outside the lines to pass a levy"
  - District should not make a superintendent's or treasurer's compensation or bonus contingent on the passage of a levy or bond issue (FAQ IX, 3)
    - Doing so "would merely encourage the district administrators to stray outside the lines to pass a levy"

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Questions?

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GCSSA
March 7, 2023

Gender Law and Schools: An Update

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WHO'S MINDING THE STORE?

The executive branch promised new Title IX regulations, but we have yet to see them in final form.

Neither the federal legislature nor SCOTUS took up the matter of Title IX in 2022.

- But several lower federal courts did!
  - Title IX
  - First Amendment
  - Equal Protection Clause
  - Due Process Clause

TITLE IX

“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.”

EQUAL PROTECTION/DUE PROCESS CLAUSE, 14TH AMENDMENT

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without DUE PROCESS of law; nor deny to any person within its jurisdiction the EQUAL PROTECTION of the laws."

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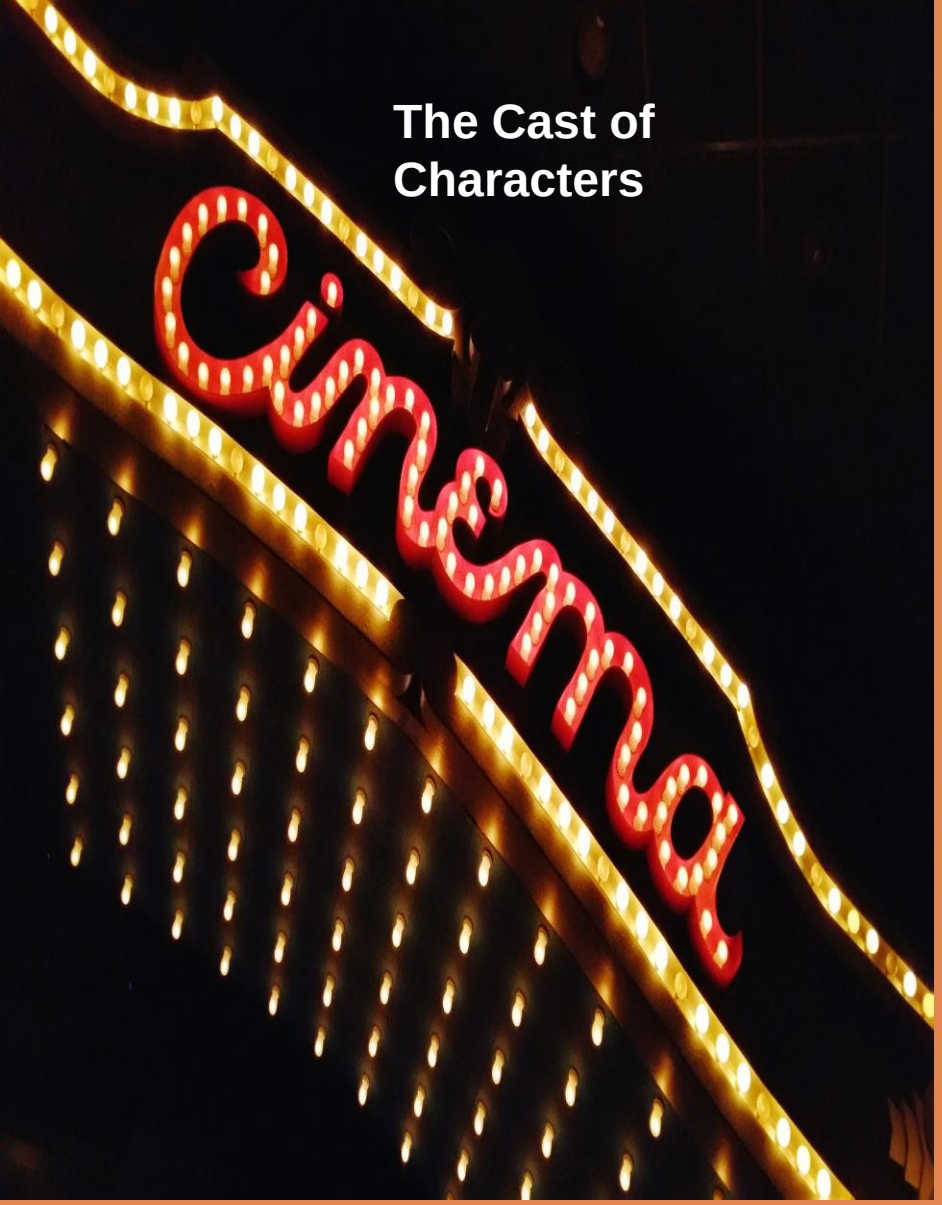
Foote v. Ludlow: A Case Study

FOOTE v TOWN OF LUDLOW, *et al* (D.C. Mass. 12/14/2022)

Stephen Foote and Marissa Silvestri allege that staff employed by the Ludlow School District:

1. Spoke about gender identity with two of their children (11 and 12 years old);
2. Complied with the children‘s wishes to use alternative names and pronouns; and
3. Did not share any information regarding these requests with their parents.

Plaintiffs sued the Town of Ludlow, the Ludlow School Committee, the interim Superintendent, the former Superintendent, the middle school principal, the middle school counselor, and the former middle school librarian.



The Cast of Characters

Todd Gazda, Former Superintendent – Expressed support for the board policy that instructed school staff to respect students expressed gender identities and follow students preferences on when to share information with their parents.

Stacy Monette, Middle School Principal - Received emails from the parents and met with the parents who asserted that the school was disregarding their parental rights. Notwithstanding, Monette instructed staff to follow board policy.

Marie-Claire Foley, School Counselor - Met with Foote's child on a weekly basis to touch base regarding safety concerns and to encourage the student to speak with a parent selected counselor for support.

Jordan Foley, School Librarian – Assigned a 6th grade class to make biographical videos inviting them to include their gender identity and preferred pronouns in their videos, and instructed students on language that is inclusive of students with different gender identities

Foley also encouraged Foote's child to visit website With resources relating to gender and gender identity.

FOOTE v LUDLOW (Cont.)

Plaintiffs alleged:

A. Violation of their fundamental parental right to direct the education and upbringing of their children;

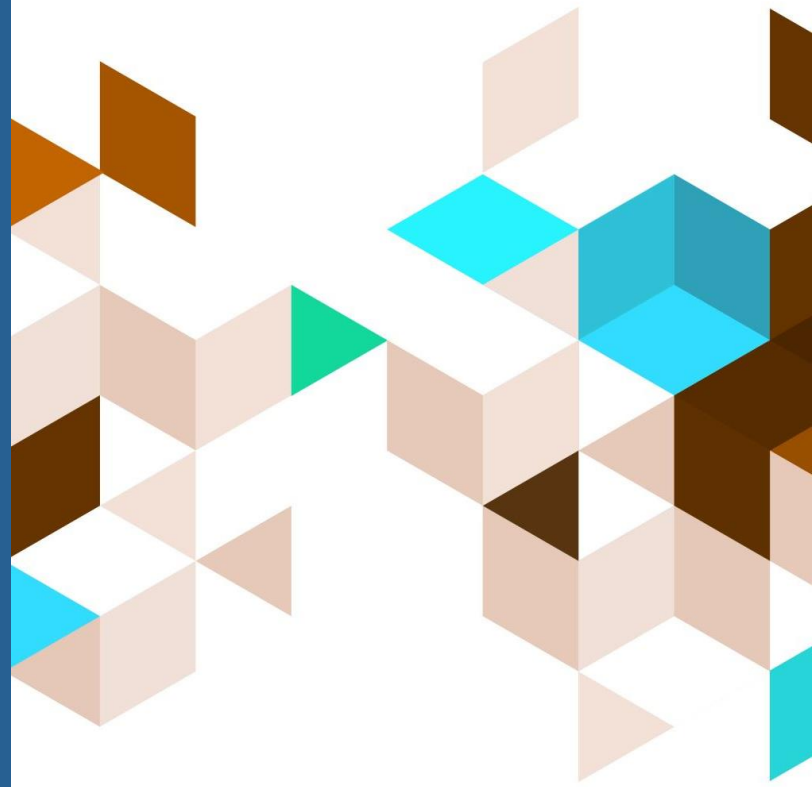
B. Violation of their right to direct medical/mental health decision making for their children; and

C. Violation of their fundamental right to familial privacy.

The court considered:

1. Massachusetts law that prohibited individuals from being excluded from or discriminated against in obtaining the advantages, privileges, and courses of study in a public school on account of gender identity.

2. Massachusetts Department of Elementary and Secondary Education's non-binding guidance provides that the responsibility of determining a student's gender identity rests with the students, or in the case of young students not able to advocate for themselves, with the parent.



FOOTE v LUDLOW (Cont.)

- The Court granted the Defendants' motion to dismiss the case without a trial.
- The State of Massachusetts had a strong government interest in providing all students with a school environment safe from discrimination based on gender identity.
- The State Education Department's Guidance advised schools to create a plan with input from parents or allow students to advocate for themselves.
- Even if the school's policy is imperfect, it is consistent with Massachusetts law.
- Having dismissed the complaint on substantive grounds, the court did not address the issue of qualified immunity. However, the court noted that if the complaint had survived dismissal, qualified immunity would warrant dismissal of the claims asserted against all individual defendants.

SOULE v CONNECTICUT ASSN OF SCHOOLS *et al* (2nd Cir. 12/16/2022)

Four female high school athletes filed suit challenging the Connecticut Interscholastic Athletic Conference's "Transgender Participation" policy.

- The policy permits high school students to compete on gender specific athletic teens consistent with their gender identity if that identity is different from the gender listed on their official birth certificates.
- Plaintiffs alleged this policy violates Title IX because it discriminates against students who are born female.
- The Policy results in materially fewer opportunities for victory, public recognition, athletic scholarships, and future employment , than those of students are born male.
- Plaintiffs requested the court alter the winning records of two transgender girls, and prohibit transgender females from participating in the outdoor track season.

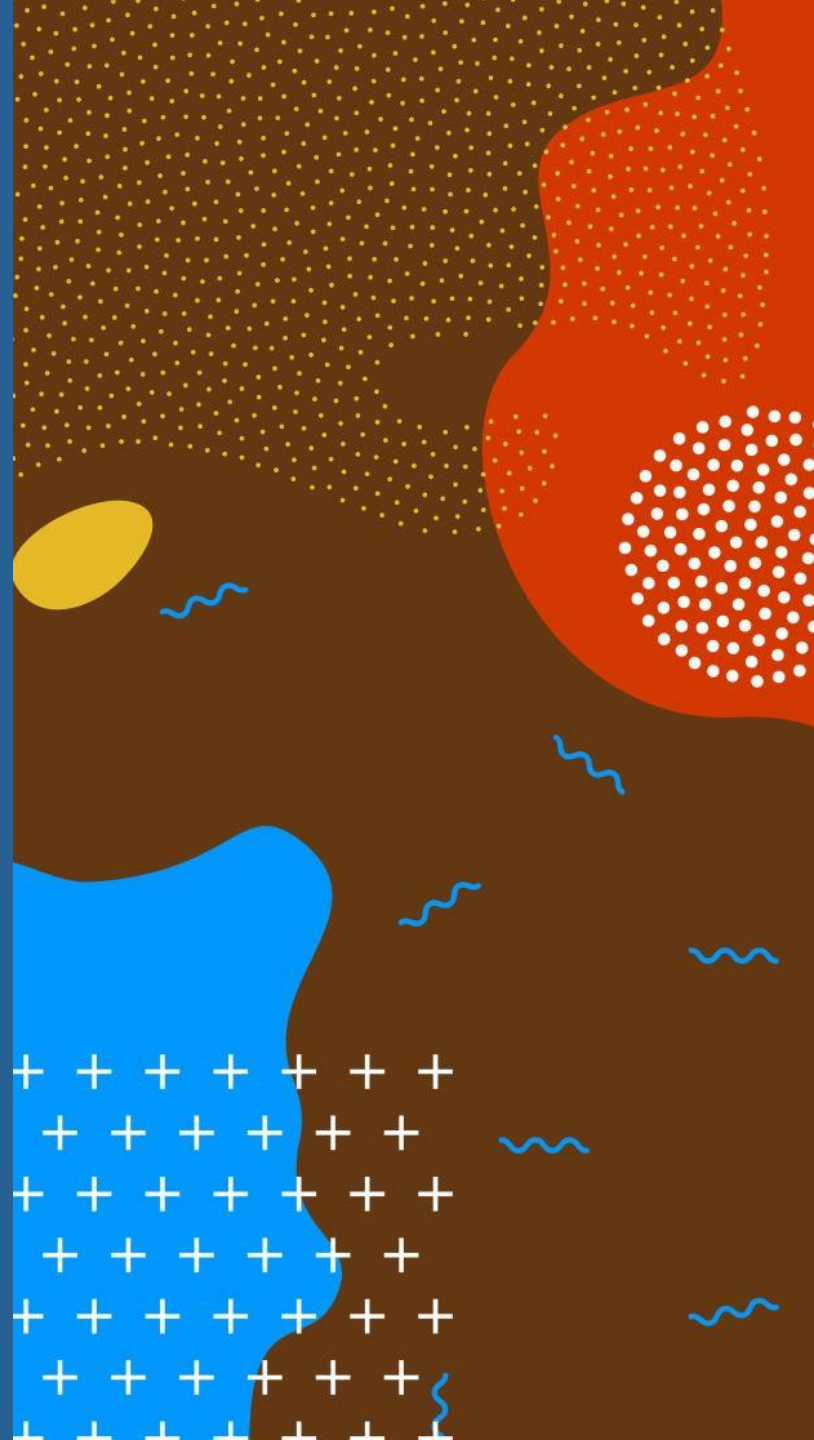
SOULE V. CIAC, Cont.

The case was delayed due to the pandemic

The District Court dismiss the case, finding that the request for injunctive relief was moot since the intervening transgender females had graduated, and that the plaintiffs lack standing to correct past athletic records because their theory for relief was too speculative.

On appeal, the Federal Circuit Court of Appeals affirmed the decision and found:

- Being deprived of a “chance to be champions” does not create standing to sue, Since they were not denied the opportunity to compete.
- The fact that 94% of female business executives participated and recorded achievements in inelastic sports does not mean that the plaintiffs future employment opportunities were harmed.



ADAMS V. SCHOOL BOARD OF ST. JOHNS COUNTY

I THOUGHT WE WERE DONE TALKING ABOUT BATHROOMS??

ADAMS v. SCHOOL BOARD OF ST. JOHNS COUNTY, *et al* (11th Cir. 12/20/2022)

Despite the very strong likelihood that the decision will be overturned on appeal, the 11th Circuit Court of Appeals (AL, FL, GA) held that separating the use of male and female bathrooms on the basis of biological sex does not violate the Equal Protection Clause or Title IX.

Several Circuit Courts of Appeals found such an arrangement to be in violation of the law:

- 3rd Circuit Court of Appeals (DE, NJ, PA) – *Doe v. Boyertown ASD*
- 4th Circuit Court of Appeals (MA, NC, SC, VA, WV) - *Grimm v. Glouchester County*
- 6th Circuit Court of Appeals (MI, OH, KY) – *Dobbs v. U.S. Dept of Edn.*
- *7th* Circuit Court of Appeals (IL, IN, WI) – *Whitaker v. Kenosha United Schools*
- *9th* Circuit Court of Appeals (AK, HI, OR, WA, ID, MT, NV) – *Parents for Privacy v. Barr*

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March 7, 2023

GOING PUBLIC:

- Meetings
- Records
- Participation

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Recent Ohio Supreme Court Case: Plaintiff Has Burden of Proving OMA Violations

State ex rel. Hicks v. Clermont Cty. Bd. of Commrs., Slip Opinion No. 2022-Ohio-4237

- The Ohio Supreme Court has rejected the burden-shifting analysis created by a previous 12th District Appeals Case *(Hardin).*
  - "the plaintiff must prove a violation of the OMA. There is no requirement for the public body to conversely prove that no violation occurred."
- **Presumption of regularity**, i.e., in the absence of evidence to the contrary, courts will presume public officers properly performed their duties and acted lawfully.
- "The only thing that the public body is required to record in its executive-session minutes is the statutorily permitted reason for the executive session." As such, the OMA does not impose a duty to maintain a detailed record of executive session discussions
- The Court also clarified that a Board can adopt a motion to include all the topics it might discuss in executive session, it does not have to discuss them all, but it cannot discuss anything additional not included in the motion.

Board Committees and Applicability of OMA Notice Requirements

- Board of Trustees created a land use committee to develop and make recommendations to Trustees
- One trustee sat on committee
- The committee met informally, did not announce the meetings to the public, did not take roll call and took no votes or minutes.
- Hamilton County Court of Appeals held that board committee meetings are subject to the Open Meetings Act
- Committee meetings must be announced and open to the public, with minutes available for review.

State ex rel. Mohr v. Colerain Twp., 2022-Ohio-1109, Ct. App. Hamilton, 2022

PUBLIC RECORDS:
Responding to Proper and Improper Requests

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Don’t Forget About Records…

- In some districts where things are particularly “hot” right now, there are a much larger number of records requests coming in.
  - Requests for records of requests made by others
  - Requests for a board member’s emails from the day
  - Broad requests having to do with a particular topic or communications between individuals….all communications between board members for the last month, etc.
- Be sure to centralize your requests and responses.

Don’t Forget About Records…

- Pushback on overbroad and ambiguous requests to save your staff time!
    - Don’t forget each denial of a public records request must be supported by an explanation and citation. Redaction counts as a denial so explain that too with citation to legal authority.
    - When denying a request, provide an opportunity for the requester to revise the request and explain how they may do so in a way that would be helpful.

Public Records Requests

- **Handling a public records request**
  - Request must be for specific, existing public records.
    - No duty to **create** a record!
    - No duty to provide records that **come into existence later**.
  - Options to “provide”:
    - Provide prompt inspection at no cost during regular business hours;

      OR
    - Provide copies at cost within a reasonable period of time.
  - May withhold or redact specific records that are exceptions.
  - Must provide an explanation, including legal authority, for each denial.
  - May deny an overly broad or ambiguous request, but **must** give the requester a chance to clarify.

Public Records Requests

What is An Ambiguous or Overly Broad Request?

- State ex rel. Dillery v. Icsman - request for all records "containing any reference whatsoever" to the requester was overly broad;
- Gupta v. City of Cleveland - requests for entire categories of records, such as 'complaints,' 'reports of safety violations,' 'communications,' and 'emails'" with no time specification or for multiple years overly broad;
- State ex rel. Bristow v. Baxter - requests for every incoming and outgoing email sent and received by certain public officials and their employees for one-month periods overbroad because it seeks "a complete duplication of the respondents' email files, albeit in one-month increments"
- **Compare:** State ex rel. Kesterson v. Kent State Univ. - Request for all communications between **specified individuals** regarding **certain subject** during **specified period of time** **not** overbroad;

Must a public entity teach citizens requesting records how to use its software?

***State ex rel. Huth v. Animal Welfare League of Trumbull Cty*,**

Slip Op. No. 2022-Ohio-3582 (October, 2022)

- A citizen, who also is an attorney, requested records from the Animal Welfare League of Trumbull County (AWL) about how many criminal complaints were filed by humane officers in any court for a period of seven years.
- The request was denied, because the AWL did not maintain a list of that nature and would have had to search every investigation file to determine whether charges were filed. The AWL responded that the request was overbroad, and provided the citizen with the opportunity to revise the request. The AWL suggested limiting the request to specify individual people, addresses, or dates.
- The citizen filed a mandamus action asking for the AWL to explain to her how its records were stored, and requested statutory damages, attorneys' fees, and court costs.

Must a public entity teach citizens requesting records how to use its software?

State ex rel. Huth v. Animal Welfare League of Trumbull County, Slip Op. No. 2022-Ohio-3582

- The court found that the AWL had provided additional information about how to revise the request for the records sought, and that was sufficient to meet its duty under the law. The citizen argued that the AWL did not tell her which software it used and how to search the software.
- The court explained that the law "…requires a public office to explain how its records are organized, so as to help requesters formulate reasonable public records requests. The statute does not require public offices to offer tutorials on how their software systems work."
- The court went on to note that even if the public office had explained it, the citizen would have had to have access to the AWL's files, unless she was planning to ask the AWL to generate reports for her, which it is not required to do.
- The court denied the request for statutory damages, court costs and attorney's fees.

Scenario: Public Records

A critic of the school district submits the following records request:

Please produce all of the invoices and bills from legal counsel for calendar years 2021-2022.

Details of invoices were redacted pursuant to attorney-client privilege

Was this appropriate?

State ex rel. Ames v. Baker, Dublikar, Wiley & Mathews et al., 2022-Ohio-0170, Ohio Supreme Court, 2022

- Decided in November 2022, the Ohio Supreme Court considered the question of whether the unredacted invoices of the law firm advising PERSO, the third-party claims service, were public records. Plaintiff sought the unredacted invoices outlining the services provided by the law firm for those cases.
- The law firm provided the invoices, but redacted the narrative portion describing the services provided, claiming that was protected by attorney-client privilege. The court of appeals agreed and dismissed the suit, and Plaintiff appealed.
- Applying the quasi-agency test applied in previous cases, the Ohio Supreme Court noted that private entities may be subject to public records law when a public entity has delegated a duty to it, such as defending against lawsuits, and the private entity prepared records to carry out the public office's duties. The court found that PERSO was not immune from a public records lawsuit.

State ex rel. Ames v. Baker, Dublikar, Wiley & Mathews et al., 2022-Ohio-0170, Ohio Supreme Court, 2022

- Second, the court remanded the case to the court of appeals, instructing it to conduct an in camera review (i.e., for the court itself to review the invoices in chambers) of the invoices to determine if they contained attorney-client privileged information.

What did we learn?

- Public entities participating in consortia and/or risk management entities which provide services may be subject to public records requests. This is because the public entity has delegated a duty it has to that entity, bringing the record generated into the ambit of public records law under the quasi-agency test.
- Information in attorney billings which would disclose privileged information concerning the lawyer's representation of a client are unlikely to be public records.

Scenario: Public Records

A critic of the school district submits the following records request:

Please provide me with all proposals shared by the Board of Education and teachers' union during the ongoing labor negotiations. I want to confirm my pre-conceived notion that you and the Board are not being fiscally responsible with my taxpayer dollars. I will immediately post these records on my Facebook page, which has quite a large following.

Sincerely, District Watchdog

Scenario: Public Records

The Board and union have been holding closed door negotiation sessions for several months. Would you turn these records over?

In *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 2000 Ohio 142 (2000), the Ohio Supreme Court found that a draft of a verbal collective bargaining agreement prepared by a City official and presented to City Council for consideration was a public record subject to disclosure because the draft documents the activities of the City and its officials. In addition, the fact that collective bargaining meetings between a public employer and public employee union may be conducted in private pursuant to the Open Meetings Act and R.C. 4117.21 does not shield collective bargaining agreements, tentative or otherwise, from disclosure.

State ex rel. Cincinnati Enquirer v. Dupuis, 98 Ohio St.3d 126, 2002 Ohio 7042 (2002) held that proposals exchanged for purposes of settlement of a potential lawsuit were not exempt from disclosure.

Scenario: Texting

Lowland Local School Board meetings are typically held in a small conference room. The Board President learns that an opponent challenging him for his seat at the upcoming election is planning on attending the upcoming meeting and bringing a large group of supporters. The following text exchange occurs with the Superintendent on their personal devices:

Scenario: Texting

Board President:

- The a**hole who doesn't stand a chance in hell of beating me in November is bringing supporters to our meeting. I think we need to move the meeting to the auditorium. Can you take care of that?

Superintendent:

- I'll do that. Let's hope he gets hit by a bus before the election!

Board President:

- Or run over by a train

Superintendent:

- Is this a public record? I'm copying our attorney so we can take advantage of the attorney-client privilege.

Board Member Speech, Public Participation and Facebook –

What Could Go Wrong?

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A GENTLE REMINDER:

Board Meetings are Meetings Held in Public, Not Public Meetings

Public Participation 101

- As a general rule, the public does not have an automatic right to be heard at board meetings (R.C. 121.22).

- However, a board may adopt a rule which allows the public an opportunity to participate during board meetings pursuant to the board's general rule-making power (R.C. 3313.20).

    - By adopting a rule to allow the public to participate in board meetings, the board establishes a constitutionally recognized and protected limited "public forum."

Public Participation 101

- Prohibitions on restricting public forums:
  - By establishing and allowing a limited public forum, Boards are restricted under the 1st Amendment Freedom of Speech Clause from limiting access to the forum other than **reasonable time, place, and manner** restrictions, such as:
    - Prior notification of the Board
    - Fixed time limits
    - Allowing the Board to stop speech which is disruptive (true threat), profane, or repetitive
  - Restrictions on speech may not be based on the **content** of the speech (violates the 1st Amendment)
  - Additionally, Boards may not discriminate by showing favoritism for one speaker (viewpoint discrimination) over another (violates the Equal Protection Clause of the 14th Amendment)

Weathering the Storms

- Complaining at a board of education meeting is one of America's prized freedoms.
- Perhaps now more than ever as public schools have become ground zero in the raging culture wars.
- Managing the complainers as a part of your commitment to public expression and community engagement is part of the job description. Period.
- People occasionally need to be heard and acknowledged – if they feel they have been heard, they are *much less likely* to sue.

Can you repeal your policy allowing public participation?

Should you?

Public Participation at School Board Meetings: The 6th Circuit Weighs In

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"A FUNNY THING HAPPENED ON THE WAY TO THE (1ST AMENDMENT) FORUM"

The U.S. Court of Appeals for the Sixth Circuit (Ohio, Michigan, Kentucky and Tennessee) recently confronted an Ohio school board's application of NEOLA policy on public participation at school board meetings.

- That policy previously provided in part (since revised) that during the board's public participation segment at a meeting:

G. The presiding officer may:

1. prohibit public comments that are **frivolous**, repetitive, and/or **harassing**;
2. interrupt, warn, or terminate a participant's statement when the statement is too lengthy, **personally directed,** abusive, off-topic, **antagonistic,** obscene, or irrelevant;
3. request any individual to leave the meeting when that person does not observe reasonable decorum or is disruptive to the conduct of the meeting; **[and]**
4. request the assistance of law enforcement officers in the removal of a disorderly person when that person's conduct interferes with the orderly progress of the meeting;

ISON V. MADISON LOCAL SCHOOL DISTRICT (6TH Circuit, 2021)

- The Plaintiff ("Billy") was originally precluded from speaking at a March, 2018 Board meeting when he failed to register by filling out a "public participation form" within two business days before that meeting.
- He ultimately did so and was thereafter recognized to speak at the May, 2018 meeting, where he made strong statements against what he believed to be the District's "pro-gun" agenda and for "threatening" school officials to punish student protesters (there had been a walk out during the school day to protest gun violence).
- Billy was interrupted in his remarks on two occasions, first for using the word "threatening" in relation to the Board and then to "stop putting words in [the Board's] mouth."
- Finally, the Board President asked Billy to stop speaking and warned that if he continued, he would be escorted out by security. The speaker concluded his remarks (which lasted under three minutes) and was, in fact, calmly escorted from the room by security.
- Billy returned to speak in January, 2019 and attempted to sign up for himself and several others. At that time, the Board refused to recognize anyone other than Billy, since the others had failed to fill out their own forms.

The Claims

- In his complaint, Billy argued that the policy – and the Board's discretion in implementing it – was unconstitutionally vague and, more specifically, that the restrictions on **"personally directed," "abusive," and "antagonistic"** statements by public participants allowed for impermissible content-based constraints on protected viewpoint speech.

- [*Editors note: As part of a 2018 review, NEOLA had already removed "personally directed" and "antagonistic" from its template*].

- While the District Court had granted summary judgment to the school on all claims, upon appeal, the Sixth Circuit took issue only with the Board policy as it was applied to Plaintiff during his strong statements made during the May, 2018 presentation.

Opposition/Offensive Speech Protected

- Recognizing that board meetings with public participation are “limited public forums” for which regulation of speech must be unrelated to content and only through “time, place and manner” restrictions, the appellate court ruled that the policy’s restrictions on “antagonistic,” “abusive,” and “personally directed” comments **served to prohibit speech simply because it opposes (or “offends”) the Board or others** in the public in violation of the First Amendment.

- It is not insignificant that the Court accessed video of the remarks and challenged the Board President’s conclusions that the speech was hostile and abusive, noting that Plaintiff had in fact refrained from personal attacks or vitriol and was focused on his strong opposition to Board’s policy on guns and questioning of the Board’s motivation.

What The Court Said

- The Court found not only that the restrictions on **“abusive,” “antagonistic,”** and **“personally directed”** speech to be facially unconstitutional, but also that their application in this particular instance constituted impermissible viewpoint discrimination.

- **The Court did let stand the preregistration and “one person, one registration” components of the policy as permissible time, place and manner regulations.**

- As for Plaintiff’s request that the entire policy be struck down as unconstitutionally vague in that the presiding officer’s discretion in applying such terms as “reasonable decorum” and the aforementioned terms could “change from day to day,” the Court disagreed and **limited its decision to the specific invalidation of the terms “abusive,” “antagonistic,” and “personally directed.”**

- In upholding the District Court’s grant of summary judgment on this over-arching claim, the Sixth Circuit panel noted that perfect clarity and precise guidance have never been required, even where such regulation restricts expressive activity to some extent.

What It Means

- Given the current environment as districts continue face difficult decisions concerning “Critical Race Theory,” the evolving guidance on transgender students, and the lingering effects of Covid, etc., the significance of this pronouncement cannot be understated.

- In no uncertain terms, particularly in light of the current cultural and political divisions within our communities, **school boards should be very cautious whenever regulating the content of an individual’s speech since such regulation may constitute unlawful censorship or impermissible viewpoint discrimination in violation of the First Amendment.**

- This decision, when seen in the context of the wider societal upheavals, makes it significantly more likely that such regulation by an uninformed board will be challenged.

- Districts are urged to carefully consider not only revisions to policy, but also to engage in meaningful discussions as to how to apply policy in your public forum. Minimally, parameters and procedures should be discussed with Board counsel.

What About Board Member Speech?

***Houston Comm. College System v. Wilson*, 142 S. Ct. 1253, 212 L. Ed. 2d 303 (2022)**

- The U.S. Supreme Court voted UNANIMOUSLY that a board of education's censure of one of its members over his speech **did not violate** the First Amendment.

- The case did involve a community college board but has implications for K-12 school boards of education. The Court opined that elected members of government bodies are expected to shoulder criticism from the public and their peers, and they may respond to such criticism with speech of their own.

- The court stated it was not ruling on certain concrete sanctions involved in the case, nor was it holding that verbal censures or reprimands could never give rise to a First Amendment claim.

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SUGGESTIONS ON MANAGING PUBLIC PARTICIPATION

- Review and (potentially) revise the public participation policy to meet the **community engagement** needs of your district – balanced with the need to transact school business.
- While the role of **Board President** is critical to managing public participation – the entire Board must be aligned on this!
- We should never discriminate based on **identity of speaker, viewpoint**.
- By the same token, we should absolutely regulate **time, place and manner** of public participation.
- **Set the tone** and refer people to the right resources – refrain from doing more than that.

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SUGGESTIONS ON MANAGING PUBLIC PARTICIPATION

- If community engagement and effective communication are the goal – implement concrete procedures for **promptly responding** to public speakers.
- For example, sending **follow up emails** thanking them for their interest in the District and providing them with specific answers and/or linking them with the appropriate personnel.
- These are not just Facebook warriors – **they showed up!**
- They want to be heard – hold space for them at the meeting, **acknowledge them** and then respond thoughtfully.

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SUGGESTIONS ON MANAGING PUBLIC PARTICIPATION

- Again, these are public meetings which occur “in front” of the public. **It’s not a dialogue**. Conversational format is a bad idea.
- Manage and enforce **time limitations**.
- Conduct the public business in a professional manner. **Don’t rise to the bait.**
- **Develop resilience to criticism** – this job was never going to be easy and sometimes people just need to be heard.

“Public officials may need to have thicker skin than the ordinary citizen when it comes to attacks on their views.” *Mattox v. City of Forest Park*, (6th Cir. 1999).

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SUGGESTIONS ON MANAGING PUBLIC PARTICIPATION

- Have a plan for when things go off track
  - How will **you** respond to a meeting with out-of-control public participation?
  - How will **you** address a board member speaking "out of school"?
  - How will **your district** manage a crisis? Spokesperson for the board, damage control, lines of communication.

  - **Bonus tip**: Remember the pause. Do not hesitate to request a recess if you need one. This is your meeting and the work of the district needs to be done.

"The arena of political discourse can at times be rough and tough. Public officials must expect that their decisions will be subjected to withering scrutiny from the populace. A public official's response to that criticism is subject to limits…. Without that limitation, the Constitution would change from the guarantor of free speech to the silencer of public debate."

Zherka v. Amicone, 634 F.3d 642, 647 (2d Cir. 2011).

Do you have any questions?

GCSSA Legal Update 2023

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