

**MISSOURI ASSOCIATION OF**  
**SECONDARY SCHOOL PRINCIPALS**

**Trending Issues in Education Law**  
**2014**

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# **Discrimination/ Harassment Review and Update**



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# Standard

## 1. Student on Student Harassment – Title IX

**Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities by recipients of Federal financial assistance, which include schools, colleges and universities. (20 U.S.C. § 1681)**



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## Standard (cont.)

- **A school district may be liable to a victim if a court finds that it was deliberately indifferent to the student's grievance.**

**“Deliberate indifference” appears to be defined as a school districts failure to act in the face of “actual notice” of an incident of sexual harassment or assault, where a court could conclude that the actions of the school district were clearly unreasonable in light of the known circumstances.**

**See Davis v. Monroe County Bd. of Educ., 526 U.S. 629 (1999). Even if the school district does not engage in the student-on-student harassment directly, it may still be liable for damages under Title IX if it acts with deliberate indifference to known acts of harassment, only for harassment that is so severe, pervasive and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.**

- ***Title IX claims require “actual knowledge” and “deliberate indifference.”***



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# Standard (cont.)

- 2. Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination on the basis of race, color, or national origin. (42 U.S.C. § 2000d)**
  - When is it discriminatory harassment?**
    - a) Trigger: hostile environment**
    - b) Conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by a school.**



# Standard (cont.)

- **To prevail on a discriminatory harassment claim under Title VI, the plaintiff must show that the school:**
  - 1. Had **actual knowledge**;**
  - 2. Was **deliberately indifferent**;**
  - 3. The harassment was so severe, pervasive and objectively offensive;**
  - 4. That victim was deprived access to the educational benefits or opportunities provided by the school district.**



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# Standard (cont.)

## 3. MHRA – State Law

**Doe ex rel. Subia v. Kansas City School District, 396 S.W.3d 387**  
**(Mo. Ct. App. 2012)**

- **Doe, an elementary student, alleged he reported sexual harassment and assault by another male student to school administrators, who allegedly allowed the perpetrator to use the bathroom – where the harassment and assault were alleged to have occurred – at the same time as Doe. As a result, Doe alleged the harassment and assault continued.**
- **Doe filed a Charge of Discrimination against the district, alleging its inaction deprived him of the “full, free and equal use of a public accommodation” in violation of the Missouri Human Rights Act (MHRA). (Chapter 213, RSMo.)**
- **The MHRA prohibits discrimination in “any place of public accommodation.”**



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# Standard (cont.)

- **The Court of Appeals found that public school districts are “places of public accommodation” and therefore subject to the MHRA.**
- **The Court in Doe applied the same standard for determining whether a school district should be held liable for student-on-student sexual harassment as that for determining whether an employer is liable under the MHRA for sexual harassment of one co-worker by another.**
- **A school district can be held liable “if it knew or should have known” of the harassment and failed to take prompt and effective remedial action.**



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## Standard (cont.)

- **The Court in Doe rejected the “actual knowledge” standard currently applicable to school districts under Title IX in favor of imposing liability where a school district merely “knew or should have known” about student harassment.**
- **The holding in Doe is significant to public school districts in that it creates a new source of damages for alleged victims of harassment and bullying.**



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# OCR Guidance on Harassment and Bullying

- 1. Summary - On October 26, 2010, DOE, through OCR, issued a detailed guidance for school districts regarding bullying and Federal discrimination laws.**
  - a) Warns school districts that they need to look at each bullying incident not only as a violation of bullying policy, but a possible action of discriminatory harassment.**
  - b) If discriminatory harassment has occurred, the school district must take steps to end harassment, regardless of discipline for bullying.**



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# **OCR Guidance on Harassment and Bullying (cont.)**

## **2. Discriminatory Harassment**

### **a) Race, Color or National Origin (Title VI)**

- **Include ancestry/ethnicity or citizenship/residency**

### **b) Sexual harassment/gender based harassment (Title IX)**

- **Sexual discrimination**
- **Sexual orientation issues may be present**

### **c) Disability (Section 504, Title 11 of ADA)**

## **3. When is it discriminatory harassment?**

### **a) Trigger: hostile environment**

### **b) Conduct is sufficiently severe, pervasive or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities or opportunities offered by a school.**



# **OCR Guidance on Harassment and Bullying (cont.)**

## **4. What must school district do?**

- a) Take immediate and appropriate action to investigate.**
- b) If harassment has occurred, take prompt and effective steps reasonably calculated to:**
  - End the harassment;**
  - Eliminate any hostile environment; and**
  - Prevent its recurrence.**
- c) Take steps to prevent retaliation against person(s) who made complaint or provided information.**
- d) Apply regardless of whether student makes complaint or identifies conduct as discriminatory.**

## **5. What actions should school employees take?**

- a) Follow your Policy**
- b) Report to Compliance Officer**



# OCR Investigations

## OCR Standard for Harassment Investigations:

**School officials are responsible for severe, pervasive or persistent harassment, of which they knew or should have known.**

**Enforcement position, not a re-statement of the law applicable to suits for money damages.**



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# **OCR Investigations (cont.)**

## **OCR Compliance Review**



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# OCR Investigations (cont.)

**OCR looks for discrimination by:**

- 1. Different Treatment and**
- 2. Disparate Impact**

- 1. Different Treatment**

**Intentional discrimination occurs when a policy is discriminatory on its face, but the more frequent circumstance is a facially neutral discipline policy which school administrators implement in a discriminatory manner.**

**For example, where similarly situated students of different races are disciplined differently for the same offense.**



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# **OCR Investigations (cont.)**

**OCR will typically ask 3 questions to determine whether a school intentionally discriminated in the administration of student discipline:**

**1. Did the school limit or deny educational services to a student or group of students of a particular race by treating them differently from a similarly situated student or group of students of another race in the disciplinary process?**

**2. Can the school articulate a legitimate, nondiscriminatory reason for the different treatment?**

**3. Is the reason articulated a “pretext for discrimination?”**



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# OCR Investigations (cont.)

## 2. Disparate Impact

**Disparate impact exists, and violates federal law, when schools “evenhandedly implement facially neutral policies and practices that, although not adopted with the intent to discriminate, nonetheless have an unjustified effect of discriminating against students on the basis of race.”**



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# **OCR Investigations (cont.)**

**OCR will use the following three-part inquiry to assess whether a facially neutral policy has an unlawful disparate impact:**

- 1. Has the discipline policy resulted in an adverse impact on students of a particular race as compared with students of other races**
- 2. Is the discipline policy necessary to meet an important educational goal?**
- 3. Are there comparably effective alternative policies or practices that would meet the school's stated educational goal with less of a burden or adverse impact on the disproportionately affected racial group, or is the school's proffered justification a pretext for discrimination?**



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# Discipline Reminders

- 1. Investigate Incidents thoroughly;**
- 2. Interview all witnesses;**
- 3. Act for specific, relevant, school-related reasons only;**
- 4. Be able to prove that you did so;**
- 5. Avoid stereotypes;**
- 6. Be consistent with all students;**
- 7. Use objective, as opposed to subjective, criteria for disciplinary decisions;**
- 8. Remain cognizant of discrimination and harassment;**
- 9. Follow established policies and regulations; and**
- 10. Ensure there is no retaliation.**



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# Right to Search



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# Right to Search

## 1. New Jersey v. T.L.O.

**Determining the reasonableness of the search involves a two-fold inquiry:**

- 1. whether the action was justified at its inception; and**
- 2. whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. Id.**

**A student search is 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.**

**Such a search is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.**



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# **Right to Search (cont.)**

**Reasonable Suspicion is less than probable cause but more than a hunch or apprehension**

**Evidence must raise “a moderate chance of finding evidence of wrongdoing.” Safford Unified Sch. Dist. v. Redding, 557 U.S. 364, 129 S.Ct. 2633 (2009).**

**Articulate Facts Supporting Reasonable Suspicion**



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# **Right to Search (cont.)**

## **2. Smart Phone Searches**

### **a) Recent U.S. Supreme Court Case Requiring Law Enforcement to Obtain Search Warrant**

- **Incident to arrest/person and area under his immediate control/evidence destruction, escape and protection of officer**
- **Instructive as to value courts will place on right of privacy**
- **Does it apply to school personnel?**



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# Right to Search (cont.)

## 2. Smart Phone Searches

### b) Amendment 9

- **Recent Amendment to Missouri Constitution**

- **On August 5, 2014, Missouri voters approved the following amendment:**

**Shall the Missouri Constitution be amended so that the people shall be secure in their electronic communications and data from unreasonable searches and seizures as they are now likewise secure in their persons, homes, papers and effects?**

- **Missouri the first state in the nation to offer explicit constitutional protections of electronic communications and data from unreasonable search/seizure**
- **Electronic communications and data: phones, laptops, emails, texts, cloud storage?**



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# Right to Search (cont.)

## 2. Smart Phone Searches

**Unreasonable Search and Seizure Prohibited – Contents and Basis of Warrants. – That the people shall be secure in their persons, papers, homes [and], effects, and electronic communications and data, from unreasonable searches and seizures; and no warrant to search any place, or seize any person or thing, or access electronic data or communication, shall issue without describing the place to be search, or the person or thing to be seized, or the data or communication to be accessed, as nearly as may be; nor without probable cause, supported by written oath or affirmation.**



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# **Right to Search (cont.)**

## **2. Smart Phone Searches**

**The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.**

**U.S. Const. amend IV.**



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# Right to Search (cont.)

## 2. Smart Phone Searches

- c) **Recent Case regarding search of student cellphone, Gallimore v. Henrico Cnty Sch. Bd, No. 3:14cv009 (E.D. Va. Aug. 5, 2014) (considering motion to dismiss)**
- **Upheld claim for violation of 4th Amendment when school official searched student's cellphone after receiving information that a student, fitting his general description, was seen smoking marijuana on the school bus – exceeded the scope of a reasonable search to find drugs**
  - **School officials' pat down of student and search of backpack, shoes, and pockets were justified under New Jersey v. T.L.O, 469 U.S. 325 (1985)**
  - **School official who searched cellphone not entitled to qualified immunity from suit because official had no basis for initiating a search of the student's phone**



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# **Right to Search (cont.)**

## **2. Smart Phone Searches**

### **Possible Consequences**

**Civil Lawsuit – ACLU could subsidize the costs**

**OCR Complaint – No costs to complainant**

**42 U.S.C. § 1983, commonly referred to as "section 1983" provides:**

**Every person who under color of any statute, ordinance, regulation, or custom of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . .**



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# Right to Search (cont.)

## Personal v. Official Capacity Lawsuits

**Award of damages against an official in his personal capacity can be executed against the official's personal assets**

**To establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. See, e.g., Monroe v. Pape, 365 U. S. 167 (1961).**



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# **Right to Search (cont.)**

## **Immunity**

**Personal capacity lawsuits – qualified immunity  
and absolute immunity**



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## **Right to Search (cont.)**

**Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known**

**TLO decided January 15, 1985**



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# **Responding to Subpoenas**



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# Responding to Subpoenas

## 1. Depositions of Non-Parties

- **To whom is the Subpoena addressed?**
  - **Specific Individual or**
  - **Records Custodian**
    - » **Business Records Affidavit**
- **Normally at attorney's office**

## 2. Hearings/Trials

- **Normally at Courthouse and involves testimony**



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# Responding to Subpoenas (cont.)

## 1. A Subpoena must:

- a) **Be served, not mailed, faxed or emailed;**
- b) **Be directed to a particular individual or representative of the District and identify who issued the Subpoena;**
- c) **State that a copy of the Subpoena was served on every party as if it were a pleading;**
- d) **Have a “Notice of Deposition” attached or otherwise proof of service that a Notice of Deposition was served on all parties; and**
- e) **State the name, address and telephone number of all attorneys of record and self-represented parties.**



## Responding to Subpoenas (cont.)

**With the agreement of all parties, the non-party may be excused from appearance at the deposition and may produce the subpoenaed items to the party responsible for issuance and service of the subpoena, who shall then offer to all other parties the opportunity to inspect or copy the subpoenaed item.**

**The party responsible for issuance and service of the subpoena is responsible for obtaining the agreement of all parties and advising the non-party in writing of the agreement, with a copy to all attorneys of record and self-represented parties. Absent such an agreement, the subpoenaed items shall only be produced at the deposition.**

**Upon request by any party, the non-party shall also produce with the subpoena items a business records affidavit of the custodian of records.**

**Mo. Rev. Civ. P. 57.09(c)**



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# New Issues



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# **Transgender Students**

## **Emerging Area of Law**

### **Legislation and Case Law**

**As of April 2013, seventeen states have passed laws clearly prohibiting discrimination against transgender people.**

**Missouri is not one of those states.**

**160 cities and counties have passed their own laws prohibiting gender identity discrimination.**

**Some school districts, including the Kansas City School District, have also implemented policies/regulations addressing the rights of transgender and gender non-conforming students.**



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# **Transgender Students (cont.)**

**Limited amount of cases nationally**

**Claims have been brought under**

**Title IX of the Education Amendments of 1972**

**the First Amendment**

**the Due Process Clause**

**the Equal Protection Clause, and**

**state statutes and constitutions**



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# **Transgender Students (cont.)**

**In April 2014, OCR issued a document entitled “Questions and Answers on Title IX and Sexual Violence.”**

**In it, the OCR specifically stated that Title IX protects all students at recipient institutions from sex discrimination, including transgender students.**



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# **Transgender Students (cont.)**

## **Recently Resolved OCR Investigation (California)**

**School district alleged to have discriminated against a student because he is transgender.**

**Allegations that the district prohibited the student from accessing facilities consistent with his male gender identity (including restrooms and locker rooms at school), as well as sex-specific overnight accommodations at a school-sponsored trip to an off-site academic camp.**

**Letter from OCR and Justice Department states that “[a]ll students, including transgender students and students who do not conform to gender stereotypes, are protected from sex-based discrimination.”**



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# **Transgender Students (cont.)**

**Following are Issues that may arise**

- 1. Privacy/confidentiality**
- 2. Official Records**
- 3. Names/Pronouns**
- 4. Gender Segregated Activities and Areas**
- 5. Dress Code**
- 6. Athletics**



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# **School Protection Officers**



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# School Protection Officers

## Senate Bill 656

- a) **Allows school districts to designate “school protection officers” (“SPO”)**
- b) **Requires the Peace Officer Standards Training (POST) Commission to establish training requirements of SPO’s**
- c) **Before a school district may designate a teacher or administrator as an SPO, the school board shall hold a public hearing on whether to allow such designation**
- d) **Responsibilities are voluntary; must request designation in writing to superintendent, along with proof of valid concealed carry endorsement or permit (if applicable) and completion of SPO training program**



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# **School Protection Officers (cont.)**

## **Senate Bill 656 (cont.)**

- e) SPOs authorized to carry concealed firearms or self-defense spray device; not permitted to allow firearm or device outside of his or her personal control**
- f) SPO with same authority to detain or use force against any person on school property as provided to any other person under Chapter 563, RSMo (“Defense of Justification”); may detain for no longer than 1 hour**
- g) District must notify Department of Public Safety within 30 days of SPO designation; may revoke designation for any reason**



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# **School Protection Officers (cont.)**

## **Senate Bill 656 (cont.)**

**Reported that Missouri now the 10th state to pass legislation allowing armed school employees since 20 children and six adults died during a mass shooting at Sandy Hook Elementary School in Newtown, Connecticut in 2012**



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# **Missouri Student Religious Liberties Act**



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# Missouri Student Religious Liberties Act

- 1. House Bill 1303 adds Section 160.2500, which shall be known as the “Missouri Student Religious Liberties Act.” For the most part, the U.S. Constitution, Missouri Constitution, and federal laws already protect many of the rights espoused in the Bill. For example:**
  - Section 160.2500.2 provides that school districts shall not discriminate against students or parents on the basis of religious viewpoint or religious expression. In addition, school districts must treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject, in the same manner the district treats a student’s voluntary expression of a secular or other viewpoint on an otherwise permissible subject;**



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# Missouri Student Religious Liberties Act (cont.)

- **Section 160.2500.3 provides that students may express their religious beliefs in homework, artwork, and other written and oral assignments free from discrimination and that these must be judged on ordinary academic standards of substance and relevance and against other pedagogical concerns identified by the school district;**
- **Section 160.2500.4 provides students are authorized to pray or engage in religious activities or expression before, during, and after school in the same manner and to the same extent they may engage in nonreligious activities and must be given the same access to facilities as other non-curricular groups, including the ability to advertise and announce meetings;**



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# Missouri Student Religious Liberties Act (cont.)

- **Section 160.2500.5 provides that students may wear clothing, accessories and jewelry that display religious messages or religious symbols in the same manner and to the same extent that other types of clothing, accessories and jewelry that display messages or symbols are permitted.**
- 2. Bill also requires that districts adopt a policy regarding a limited public forum for student speech.**
- **Specifically, “to ensure that school districts do not discriminate against a student’s publicly stated voluntary expression of a religious viewpoint and to eliminate any actual or perceived affirmative school sponsorship of that viewpoint,” Section 160.2500.6 requires school districts to adopt a policy which shall include the establishment of a limited public forum for student speakers at all school events at which a student is to publicly speak.**



# Missouri Student Religious Liberties Act (cont.)

- **Policy must require the District to provide the forum in a manner that does not discriminate against a student's voluntary expression of a religious viewpoint; provide a method for the neutral selection of student speakers at school events and graduation ceremonies; ensure that a speaker does not engage in obscene, vulgar, offensively lewd or indecent speech; and state that a student's speech does not reflect the District's endorsement, sponsorship, position, or expression of the District.**
- **Disclaimer shall be provided at all graduation ceremonies, and the school district shall continue to provide the disclaimer at any other event in which a student speaks publicly for as long as a need exists to dispel confusion over the district's non-sponsorship of the student's speech.**



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# Missouri Student Religious Liberties Act (cont.)

- 3. Bill also provides that it shall not be construed to limit the authority of any public school to maintain order and discipline on campus in a content and viewpoint neutral manner; to protect the safety of students, employees and visitors; and to adopt or enforce policies regarding student speech at school, provided that they are in accordance with law.**
  - Nor shall it be construed to allow the state or any of its political subdivisions to require a person to participate in prayer or in any other religious activity or to violate any person's constitutional rights.**



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# Questions???

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