

8-1-2022

## A Stitch in Time Saves Nine: How the State of Ohio Can Save Money and Distress Through Legal Training for Pre-Service Teachers

Christine Mika

Karin Mika

*Cleveland-Marshall College of Law*

Follow this and additional works at: <https://ecommons.udayton.edu/udlr>

Digital Part of the Law Commons  
Commons

---

### Network Recommended Citation

Mika, Christine and Mika, Karin (2022) "A Stitch in Time Saves Nine: How the State of Ohio Can Save Money and Distress Through Legal Training for Pre-Service Teachers," *University of Dayton Law Review*. Vol. 47: No. 3, Article 3.

Available at: <https://ecommons.udayton.edu/udlr/vol47/iss3/3>

This Article is brought to you for free and open access by the School of Law at eCommons. It has been accepted for inclusion in University of Dayton Law Review by an authorized editor of eCommons. For more information, please contact [mschlangen1@udayton.edu](mailto:mschlangen1@udayton.edu), [ecommons@udayton.edu](mailto:ecommons@udayton.edu).

**A STITCH IN TIME SAVES NINE:  
HOW THE STATE OF OHIO CAN SAVE MONEY  
AND DISTRESS THROUGH LEGAL TRAINING  
FOR PRE-SERVICE TEACHERS**

*Christine Mika*<sup>\*</sup>

*Karin Mika*<sup>\*\*</sup>

I.	INTRODUCTION .....	383
II.	BACKGROUND AND HISTORY .....	385
III.	THE EXPANSIVENESS OF LITIGATION AGAINST SCHOOLS AND SCHOOL DISTRICTS .....	393
	A. Potential Causes of Action: Educational Malpractice .....	395
	B. Immunity .....	397
	1. The Eleventh Amendment .....	398
	2. School District Liability Under 42 U.S.C. § 1983 .....	399
	3. The Potential for Liability for “Failure to Train” .....	400
	4. Bullying .....	402
	5. Other Constitutional Claims .....	404
IV.	TRENDS AND THE NEED FOR CHANGE .....	405
V.	CONCLUSION .....	408

I. INTRODUCTION

Imagine the situation of Sally School, who has just started her first year as a high school teacher in Ohio. She has completed a four-year university education program, which included a multi-month student teaching experiential requirement as well as a state licensing exam. Partway through the semester, Sally gets a phone call from an out-of-school tutor for one of her students. The tutor asks Sally for information relating to this student’s grades. Sally has heard of the Family Educational Rights and Privacy Act (“FERPA”), the federal law protecting student data, and is aware

---

<sup>\*</sup> J.D., Cleveland-Marshall College of Law, Cleveland State University; B.S., Baldwin-Wallace University, 2011, Teaching Certification, Cleveland State University, 2014.

<sup>\*\*</sup> Senior Professor, Legal Writing and Research, Cleveland-Marshall College of Law, Cleveland State University.

that she should only share information with other educational professionals.<sup>1</sup> Believing that the tutor is an educational professional wanting to help her student, Sally gives the tutor the requested information. She later finds out that she has violated FERPA and receives a lecture from her principal as well as a verbal disciplinary warning.

During the first semester alone, Sally finds herself dealing with multiple legal situations in her classroom, including having a student of color kneel during a history lecture on Thomas Jefferson, having law enforcement come into her classroom seeking to seize the backpack of a student, and overhearing a conversation about a student being cyberbullied on social media.<sup>2</sup> During the second semester, Sally is accused of discrimination and breach of medical privacy laws when she attempts to arrange extra help for a student who has a newborn child at home. Her first year also includes being reprimanded for supporting—and allowing—a student walkout protesting gun violence and becoming embroiled in a controversy that wound up on national news when she supported a student whose editorial about Black Lives Matter was censored from the school newspaper. By the end of the year, Sally School has been both a hero and a villain and wonders whether she still wants to be a teacher.

Although all of the above are hypothetical situations, they are based on the real scenarios that most teachers deal with every day, though they are usually unprepared to handle them. Although Ohio teachers are required to learn the basics of education and the core content they will teach, there is no explicit requirement for teachers to learn laws that are pertinent to what they will encounter on the job. Currently, Ohio relies on its Department of Higher Education (“ODHE”) to issue requirements for undergraduate teacher preparation programs.<sup>3</sup> These programs prepare college students (pre-service teachers) for life in the classroom. The legislative standards for these programs include preparation for the resident educator program and student progress evaluation programs.<sup>4</sup> Both of these programs are performance-driven and do not focus on any preventative instruction in the form of legal literacy.

For simplicity, this Note will focus on the educational requirements for high school teachers rather than elementary or middle school teachers.

---

<sup>1</sup> FERPA, the Family Educational and Privacy Rights Act, is codified at 20 U.S.C. § 1232g. The regulations concerning to who information may be disclosed may be found at 34 C.F.R. § 99. For more information on FERPA, see *Family Educational Rights and Privacy Act (FERPA)*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (Aug. 25, 2021).

<sup>2</sup> The concept of “school” has expanded significantly since the advent of social media. Courts, legislatures, and school districts are constantly grappling with their legal rights and responsibilities for social media activity that is not on school grounds but relates to the classroom or classroom relationships. See generally Phillip Lee, *Expanding the Schoolhouse Gate: Public Schools (K–12) and the Regulation of Cyberbullying*, 5 UTAH L. REV. 831 (2016).

<sup>3</sup> OHIO REV. CODE § 3333.048.

<sup>4</sup> *Id.*

Here, the requirements include core content instruction, literacy instruction, and a 12-week student teaching experience.<sup>5</sup> Additionally, ODHE issues a vague requirement of preparation in six different Ohio school-related standards.<sup>6</sup> Only one of those standards, the Ohio Standards for the Teaching Profession, even mentions correctly applying the law.<sup>7</sup>

There is clearly a need for some form of legal preparation for teachers in Ohio that must take place before an individual becomes a teacher. Not only is there an ethical obligation to protect student rights, but there is a financial obligation to prevent the waste of taxpayer money on legal fees.<sup>8</sup> This Note will establish the need for the Ohio legislature or ODHE to require that teacher preparation programs contain a set number of hours devoted to instructing pre-service teachers in the basics of education law and ethics because of the liability being placed on school districts.

In reaching its conclusion, Part I of this Note discusses the history of education and education standards in Ohio and how the law is omnipresent in a teacher's day-to-day existence. In Part II, this Note covers the history of claims, the potential for school district liability for failing to train teachers and school personnel, and the ways school districts are immune from suits. In Part III, this Note sets out how more legal education could be added to the basic educational curriculum for pre-service teachers and explains why this move is both necessary and advantageous. The overall conclusion reached by this paper is that, while the state is immune from lawsuits due to a failure to train teachers, continual legal pressure on school districts could increase the support for legal training for teaching education law in universities to pre-service teachers.

## II. BACKGROUND AND HISTORY

The law has become an omnipresent part of a teacher's existence in the classroom. Not only do teachers have to be concerned with constitutional and privacy rights, but they must often be concerned with protecting the safety of students and trying to ensure safe environments both inside and outside the

---

<sup>5</sup> *Educator Preparation Institutions*, OHIO DEP'T OF HIGHER EDUC., <https://www.ohiohighered.org/educator-preparation/institutions> (last visited June 11, 2022).

<sup>6</sup> *Id.*

<sup>7</sup> *Ohio Standards for the Teaching Profession*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/getattachment/Topics/Teaching/Educator-Equity/Ohio-s-Educator-Standards/TeachingProfessionStandards.pdf> (last visited June 11, 2022).

<sup>8</sup> *See, e.g., Jury Verdicts and Settlements in Bullying Cases*, PUB. JUST. (Nov. 2018), <https://www.publicjustice.net/wp-content/uploads/2018/12/2018.12.03-Fall-2018-Edition-Bullying-Verdicts-and-Settlements-Final.pdf>.

actual physical classroom.<sup>9</sup> Teachers should also be familiar with their own rights and potential civil liabilities.<sup>10</sup>

Nonetheless, the practical knowledge of teachers regarding the law is disheartening. A 2007 nationwide study analyzed a test on educational rights given to teachers; in terms of students' rights, teachers scored only 41% correctly.<sup>11</sup> In terms of teachers' rights, they scored even lower at 39% correct.<sup>12</sup> This lack of knowledge has potential consequences for both teachers and school districts.

The legal consequences for teachers come in many forms; for example, students who believe that they have been a target of racial, disability, or gender discrimination may fill out a complaint with the federal Office for Civil Rights.<sup>13</sup> When these complaints are investigated, school districts must expend time and money on legal fees related to these complaints. Some end in large judgments that school districts must pay.<sup>14</sup> This is also true of constitutional violations. Many school districts expend time and money consulting attorneys about decisions that sometimes become embarrassing when covered by the national press.<sup>15</sup> This often happens after the fact when the scenario becomes one of damage control rather than prevention.<sup>16</sup>

Additionally, the careers of teachers are often at stake. Criminal and ethical complaints may be filed with the Ohio State Board of Education, which results in an investigation of the school and teacher.<sup>17</sup> The consequences of these investigations can be disastrous for teachers; if found guilty of offenses, teachers can have their licenses revoked or suspended.<sup>18</sup> There has been a steady increase in reports, with 14,696 cases

---

<sup>9</sup> See Lee, *supra* note 2.

<sup>10</sup> See generally Karen C. Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J. LEGAL EDUC. 1 (2001) (giving relevant background information about teachers' First Amendment rights).

<sup>11</sup> David Schimmel & Matthew Militello, *Legal Literacy for Teachers: A Neglected Responsibility*, 77 HARV. EDUC. REV. 257 (2007).

<sup>12</sup> *Id.*

<sup>13</sup> *How to File a Discrimination Complaint with the Office for Civil Rights*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/docs/howto.html> (last visited June 11, 2022).

<sup>14</sup> See, e.g., *Justice Department Reaches Settlement with Toledo Public Schools to Resolve Complaints of Race and Disability Discrimination in Student Discipline*, THE U.S. DEP'T OF JUST., <https://www.justice.gov/opa/pr/justice-department-reaches-settlement-toledo-public-schools-resolve-complaints-race-and> (Aug. 10, 2021).

<sup>15</sup> See, e.g., Feroze Dhanoa, *Ohio Student Stayed in Class for Walkout; Why He Was Suspended*, PATCH, <https://patch.com/ohio/columbus/ohio-student-stayed-class-walkout-why-he-was-suspended> (Mar. 17, 2018 2:37 PM).

<sup>16</sup> See, e.g., *Ohio school district under civil rights investigation*, AKRON BEACON J. (May 28, 2015, 2:31 AM), <https://www.beaconjournal.com/story/news/state/2015/05/28/ohio-school-district-under-civil/10497174007/>.

<sup>17</sup> OHIO REV. CODE § 3319.311.

<sup>18</sup> *Id.* § 3319.31.

in 2018.<sup>19</sup> All of these situations result in time and money spent on matters unrelated to educating students.

The state of Ohio has always regarded education as important.<sup>20</sup> When the state was first created, land was set aside for schools as a part of the Northwest Ordinance.<sup>21</sup> In 1825, the state legislature created the first common schools in Ohio, with funding based on property taxes.<sup>22</sup> However, children were not legally required to attend school until 1921 with the passage of the Bing Act.<sup>23</sup> Further showcasing the importance of education in the state, Ohio's earliest constitution prohibited laws from being passed that would deprive poor children of an education.<sup>24</sup>

The current Ohio Constitution requires "a thorough and efficient system of common schools throughout the state . . . ."<sup>25</sup> This provision was originally adopted in the Ohio Constitution of 1851.<sup>26</sup> Most notably, this section was cited in *DeRolph v. State*, which held that Ohio's system of school funding was inadequate to meet this constitutional mandate.<sup>27</sup>

The Ohio Constitution also created the State Board of Education.<sup>28</sup> The Ohio Department of Education ("ODE"), which oversees all schools in Ohio, was more recently created by statute in 1956.<sup>29</sup> The ODHE, which oversees colleges, universities, and other post-secondary options, was created even later, in 1963.<sup>30</sup> As of 2009, the Ohio legislature tasked ODHE with creating standards for educator preparation programs in colleges and universities.<sup>31</sup> According to the statute, ODHE's standards must reflect other statutory training and education requirements, including standards created by the State Board of Education, Ohio's teacher residency program, and academic progress programs.<sup>32</sup>

The ODHE accreditation standards are split into categories based on the types of teaching licenses.<sup>33</sup> For simplicity, this Note will focus on the

---

<sup>19</sup> OFF. OF PRO. CONDUCT, *2018 Educator Conduct Report*, OHIO DEP'T OF EDUC. 5 (June 2019) (2018 Educator Report available through the office of ODE).

<sup>20</sup> STEVEN H. STEINGLASS & GINO J. SCARSELLI, *THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE* 205 (2004).

<sup>21</sup> *Id.*

<sup>22</sup> *Public Education*, OHIO HIST. CENT., [https://ohiohistorycentral.org/w/Public\\_Education](https://ohiohistorycentral.org/w/Public_Education) (last visited June 11, 2022).

<sup>23</sup> *Education*, OHIO HIST. CENT., <https://ohiohistorycentral.org/w/Category:Education> (last visited June 11, 2022).

<sup>24</sup> See STEINGLASS & SCARSELLI, *supra* note 20, at 205.

<sup>25</sup> OHIO CONST. art. VI, § 2.

<sup>26</sup> See STEINGLASS & SCARSELLI, *supra* note 20, at 206.

<sup>27</sup> 677 N.E. 2d 733, 747 (Ohio 1997); see also STEINGLASS & SCARSELLI, *supra* note 20, at 205.

<sup>28</sup> OHIO CONST. art. VI, § 4.

<sup>29</sup> OHIO REV. CODE § 3301.13; OHIO STATE BD. OF EDUC., *POL'YS. AND PROCS. MANUAL* 4 (2020).

<sup>30</sup> OHIO REV. CODE § 3333.01; *About the Ohio Department of Higher Education*, OHIO DEP'T OF HIGHER EDUC., <https://www.ohiohighered.org/board> (last visited June 11, 2022).

<sup>31</sup> OHIO REV. CODE § 3333.048.

<sup>32</sup> *Id.*

<sup>33</sup> *Educator Preparation Institutions*, *supra* note 5.

standards for high school teachers, although requirements are similar for different grade levels.<sup>34</sup> Currently, the standards for colleges and universities conducting teacher education programs for Adolescent to Young Adult (“AYA”) teachers include:

- Reading in the Content Area—3 semester hours . . .
- An academic major or its equivalent . . .
- Preparation in: Ohio Learning Standards, Ohio Standards for the Teaching Profession, Ohio Standards for Professional Development, Ohio School Operating Standards, Ohio Value-Added Model, Ohio Requirements for the Resident Educator License . . .
- A minimum of 100 hours of field experience prior to student teaching . . .
- A minimum 12-week student teaching internship . . . [and]
- Substance Addiction Content . . . .<sup>35</sup>

Additionally, colleges and universities are required to meet the standards established by national content area groups, such as the National Science Teachers Association.<sup>36</sup>

The standards mentioned in the above requirements cover different subject matter related to education and the classroom. The Ohio Learning Standards are requirements for what is taught in each content-area class, such as math or science.<sup>37</sup> The Ohio Standards for Professional Development establish standards for professional learning for teachers.<sup>38</sup> The Ohio School Operating Standards discuss the requirements for schools in relation to special education.<sup>39</sup> The Ohio Value-Added Model is a method of analysis used to measure the impact of teachers and schools on student learning.<sup>40</sup> The Ohio Requirements for the Resident Educator License establishes the standards for the four-year residency program for all new Ohio teachers.<sup>41</sup>

---

<sup>34</sup> *See id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Ohio Learning Standards*, OHIO DEP’T OF HIGHER EDUC., <http://education.ohio.gov/Topics/Learning-in-Ohio/OLS-Graphic-Sections/Learning-Standards> (April 1, 2021, 12:57 PM).

<sup>38</sup> *Ohio Standards for Professional Development*, OHIO DEP’T OF EDUC., <https://education.ohio.gov/Topics/Teaching/Professional-Development/Organizing-for-High-Quality-Professional-Developme> (Jan. 3, 2020, 9:19 AM).

<sup>39</sup> *Operating Standards and Guidance*, OHIO DEP’T OF EDUC., <https://education.ohio.gov/Topics/Special-Education/Federal-and-State-Requirements/Operational-Standards-and-Guidance> (July 9, 2021, 4:40 PM).

<sup>40</sup> *Value-Added Student Growth Measure*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Teaching/Educator-Evaluation-System/Ohio-s-Teacher-Evaluation-System/Student-Growth-Measures/Value-Added-Student-Growth-Measure> (Aug. 17, 2021, 10:25 AM).

<sup>41</sup> *Resident Educator Program*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Teaching/Resident-Educator-Program> (last visited June 11, 2022).

Based on the nationwide statistics, the current requirements are either not occurring or are ineffective. For purposes of this Note, the relevant standards are the Ohio Standards for the Teaching Profession. The Ohio Educator Standards Board created these standards to provide standards for all stages of an educator's career.<sup>42</sup> Section 7.1 of the standards requires teachers to "understand, uphold and follow professional ethics, policies and legal codes of professional conduct."<sup>43</sup> However, other than this general standard, no other standard makes reference to what, if any, legal study a teacher must do prior to or after becoming licensed.

Twenty-three studies done between 1976 and 2006 reported that teachers possessed an inadequate level of knowledge of education law.<sup>44</sup> These studies were primarily doctoral dissertations that covered states from across the country, including Ohio.<sup>45</sup> While people may assume that teachers would learn education law on the job, these studies indicate otherwise.<sup>46</sup> Seven studies found that teaching experience does not affect legal knowledge; in contrast, four studies found that more experience led to a better understanding.<sup>47</sup> Interestingly, a study in Georgia found that the teachers with the most experience had the least understanding of educational law.<sup>48</sup> If nothing else, these disparate results show that legal training for teachers is not standardized.

The most recent—and largest—survey taken of teachers was completed in 2007 with 1,317 participants from seventeen states.<sup>49</sup> This survey showcased dramatic results. Responses showed that 85% of teachers had taken no course in school law.<sup>50</sup> When taking a multiple-choice survey, teachers answered only 41% of students' rights questions correctly and only 39% of teachers' rights questions correctly.<sup>51</sup> More importantly, 57% of respondents said that if they knew the answers to the survey questions, they would have acted differently in their school positions.<sup>52</sup> Survey questions dealt with varied and important topics, such as student freedom of expression, search and seizure, religion, and liability for student injury.<sup>53</sup>

---

<sup>42</sup> *Ohio's Educator Standards*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Teaching/Educator-Equity/Ohio-s-Educator-Standards> (Oct. 8, 2020, 1:33 PM).

<sup>43</sup> *Ohio Standards for the Teaching Profession*, *supra* note 7.

<sup>44</sup> Mark Littleton, *Teachers' Knowledge of Education Law*, 30 ACTION TCHR. EDUC. 71, 72–73 (2008).

<sup>45</sup> *Id.* at 72.

<sup>46</sup> *Id.* at 73.

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 73–74.

<sup>49</sup> David Schimmel & Matthew Militello, *The Risks of Legally Illiterate Teachers: The Findings, the Consequences and the Solutions*, 6 U. MASS. L. REV. 37, 38 (2011).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.* at 38–39.

<sup>53</sup> *Id.* at 38–45, 47.



The consequences of ignorance of the law can be extreme. There is a financial cost to school litigation, as well as a cost associated with time lost in preparing for lawsuits.<sup>54</sup> Additionally, there is the worry that teachers may be inadvertently violating their students' constitutional rights.<sup>55</sup> Misunderstandings about the law may lead to teachers ignoring misbehavior because of a fear of liability, unintentionally violating their students' rights, or jeopardizing their jobs.<sup>56</sup> When teachers misunderstand case law, they tend to overestimate legal requirements.<sup>57</sup> This confusion can lead educators to fail to act when they should or to overreact when they should not.<sup>58</sup> Increased awareness can lead to empowered educators who can participate in the educational reform movement and advocate for beneficial policy change.<sup>59</sup> A survey of teachers who completed a school law course found that 88% of participants believed that legal training improved their confidence, and 85% of participants responded that the training altered their behaviors.<sup>60</sup> The implication is that prior to taking a school law course, 85% of the participants were unknowingly violating some of their students' constitutional rights.<sup>61</sup>

In Ohio, if a student or parent has an ethical complaint about a teacher, it is handled by the Office of Professional Conduct, a subset of ODE.<sup>62</sup> The Office investigates any complaints of alleged criminal or ethical violations, and they have the power to initiate disciplinary action against the educator.<sup>63</sup> In 2018, the Office received 2,786 referrals unrelated to applications for new licensure.<sup>64</sup> Of these referrals, 1,140 were subject to a full investigation.<sup>65</sup> The Office revoked the teaching licenses of seventy-eight teachers in 2018 while also suspending six teachers.<sup>66</sup> These decisions can be appealed to the court system, lengthening the legal process.<sup>67</sup> While these numbers are small in comparison to the total number of teachers within the state, these statistics are still concerning.<sup>68</sup>

---

<sup>54</sup> *Id.* at 48.

<sup>55</sup> *Id.* at 49.

<sup>56</sup> *Id.* at 50.

<sup>57</sup> Perry A. Zirkel, *Paralyzing Fear? Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J.L. & EDUC. 461, 488 (2006).

<sup>58</sup> Janet R. Decker, *Legal Literacy in Education: An Ideal Time to Increase Research, Advocacy, and Action*, 304 EDUC. L. REP. 679, 681 (2014).

<sup>59</sup> *Id.* at 681.

<sup>60</sup> See Janet R. Decker et al., *The Attitudinal and Behavioral Impact of School Law Courses*, 14 J. RSCH. ON LEADERSHIP EDUC. 160, 162 (2019).

<sup>61</sup> *Id.* at 169–70.

<sup>62</sup> OFF. OF PRO. CONDUCT, *supra* note 19, at 3.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 6.

<sup>65</sup> *Id.* at 10.

<sup>66</sup> *Id.* at 15.

<sup>67</sup> *Id.* at 16.

<sup>68</sup> *May 2021 State Occupational Employment and Wage Ohio*, U.S. BUREAU LABOR STATISTICS, [https://www.bls.gov/oes/current/oes\\_oh.htm#25-0000](https://www.bls.gov/oes/current/oes_oh.htm#25-0000) (per 2021 there are over 55,000 secondary teachers in Ohio).

At the district level, schools can be investigated by the federal Office for Civil Rights (“OCR”).<sup>69</sup> The OCR investigates complaints relating to racial discrimination, sex discrimination, disability discrimination, and age discrimination.<sup>70</sup> The number of complaints received by the OCR has increased by 188% from 2006 to 2016.<sup>71</sup> This indicates that it is more important than ever to prepare teachers and school employees for potential civil rights violations. In 2016, the OCR resolved twenty-two investigations in the state of Ohio.<sup>72</sup> Complaints may also be filed with ODE when parents believe that a school has violated a state or federal law.<sup>73</sup>

Schools, of course, can also be sued in the court system. Across the United States in 2016, there were 554 civil rights cases filed against schools in the federal court system.<sup>74</sup> This represented a 106% increase in cases since 2013, with no indication of slowing down.<sup>75</sup> In 2017, the Northern District of Ohio received the ignominious ranking of the fifth-worst district in the country for civil rights suits against school districts.<sup>76</sup> The Ohio Southern District saw thirteen cases for the year, bringing the state’s total number of civil rights suits to 33.<sup>77</sup> While this number seems low, considering that many cases take years to complete, these numbers represent a large investment of time and money from school districts. Additionally, this data does not take into account any cases in the state court system.<sup>78</sup>

In most cases, the school districts will succeed in defending themselves or their teachers, but that should not necessarily be considered a “win.”<sup>79</sup> Since the 1970s, the trend has been to increasingly favor schools over students.<sup>80</sup> However, this trend is not true in special education cases, where the schools are still favored, but only by a slim majority.<sup>81</sup> This does not reduce the need for more legal training for teachers. Although the schools are winning the cases and avoiding damages, there are still legal defense fees to consider. Much of this could be avoided by better preparing for the various legal situations that teachers may encounter.

---

<sup>69</sup> See *Overview of the Agency*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/aboutocr.html> (Jan. 10, 2020).

<sup>70</sup> *Id.*

<sup>71</sup> *Securing Equal Educational Opportunity*, U.S. DEP’T OF EDUC. 7 (Dec. 2016), <https://www2.ed.gov/about/reports/annual/ocr/report-to-president-and-secretary-of-education-2016.pdf>.

<sup>72</sup> *Id.* at 42.

<sup>73</sup> *Dispute Resolution*, OHIO DEP’T OF EDUC., <http://education.ohio.gov/Topics/Special-Education/Dispute-Resolution> (July 27, 2021, 12:39 PM).

<sup>74</sup> *Civil Rights Suits Against Schools More Than Double in Last Four Years*, TRAC REP.’S (Aug. 16, 2017), <https://trac.syr.edu/tracreports/civil/478/>.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> Zirkel, *supra* note 57, at 491–92.

<sup>80</sup> See *id.* at 491.

<sup>81</sup> *Id.* at 492.

There is an ethical argument to be made as well for implementing more requirements concerning legal training. Although it is well-documented that the court system does give greater deference to the school systems, just because a school wins the court case does not mean that its actions were correct.<sup>82</sup> Children or their parents might have still been harmed in some way. Moreover, poor national publicity can have broader implications for a community, such as when a school district seeks to pass a levy.

In the modern technological age, schools and teachers often face the judgment of the public.<sup>83</sup> Due to the prevalence of cell phones, very little that goes on in the classroom may be considered private. For example, a teacher in West Geauga used an insensitive meme on one slide of a PowerPoint, which led to a leave of absence and an investigation.<sup>84</sup> In another instance, a different Ohio teacher and principal are under investigation for aggressive behavior documented on a recording made by a student.<sup>85</sup> In both instances, investigations occurred. Even though firings do not always occur, teachers are not only subject to professional discipline, but often endure the embarrassment of their situation being made public on the internet.<sup>86</sup>

These incidents are not uncommon, even when schools have rules prohibiting the use of cellphones. The public “optics” further drives home the need for training teachers in the basics of the law concerning situations in the classroom. At any moment, their actions could be caught on camera. Even if an action is not technically illegal, the ensuing publicity for the teacher and school district can have wide-ranging repercussions.<sup>87</sup>

---

<sup>82</sup> Phillip T.K. Daniel, *Violence and the Public Schools: Student Rights Have Been Weighed in the Balance and Found Wanting*, 27 J.L. & EDUC. 573, 578 (1998).

<sup>83</sup> See, e.g., Martin Slagter, ‘I’m embarrassed to be part of a school district that made national news just because of racist remarks,’ *Saline student tells board*, MLIVE, <https://www.mlive.com/news/ann-arbor/2020/02/im-embarrassed-to-be-part-of-a-school-district-that-made-national-news-just-because-of-racist-remarks-saline-student-tells-board.html> (Feb. 12, 2020, 2:26 PM).

<sup>84</sup> Reis Thebault, *Teacher uses a meme of Dora the Explorer as an illegal border crosser in a lesson about voting*, WASH. POST (Nov. 16, 2019), <https://www.washingtonpost.com/education/2019/11/16/teacher-uses-meme-dora-explorer-an-illegal-border-crosser-lesson-about-voting/>.

<sup>85</sup> Tori Yorgey, *UPDATE: Teacher at focus of viral audio recording involving student returns to school*, WSAZ, <https://www.wsaz.com/content/news/Crowd-gathers-to-address-viral-audio-recording-between-teacher-and-student-567415581.html> (Jan. 30, 2020, 11:56 PM).

<sup>86</sup> *Id.*; see also Tyler Carey, *Canton McKinley teacher placed on leave after asking students if she can use the N-Word*, WKYC.COM (Feb. 23, 2022), <https://www.wkyc.com/article/news/local/canton-mckinley-teacher-on-leave-asking-class-use-n-word/95-7c42eb2a-2117-4de1-b7ee-c319d0ffd009>.

<sup>87</sup> See, e.g., Benjamin Brown, *Teacher Who Called Military ‘Lowest of the Low’ Is Fired*, MILITARY.COM (Mar. 21, 2018), <https://www.military.com/daily-news/2018/03/21/teacher-who-called-military-lowest-low-fired.html>; Peter Bodkin, *High school teachers being filmed and targeted with hate messages online*, DAILY TEL. (Sept. 16, 2013, 12:00 AM), <https://www.dailytelegraph.com.au/news/nsw/high-school-teachers-being-filmed-and-targeted-with-hate-messages-online/news-story/30561de003096646f672538b4a2e2b2c>.

### III. THE EXPANSIVENESS OF LITIGATION AGAINST SCHOOLS AND SCHOOL DISTRICTS

Over the course of the past half-century, the nature of litigation brought against schools and school districts has changed greatly.<sup>88</sup> Schools, historically, have maintained a type of “in loco parentis” status where parents of the past, quite frankly, expected teachers to discipline their children as need be, including corporal punishment.<sup>89</sup> Litigation directed at schools and/or teachers generally had little to do with individual actions of teachers but more with the policies of districts as they related to larger issues such as integration and desegregation.<sup>90</sup> In the 1960s, other constitutional issues emerged, such as the right to student free speech and whether students could be compelled to pray in school.<sup>91</sup> By the early 1970s, various entities were bringing actions against school districts challenging how schools were funded and how the nature of funding denied an equal opportunity to education.<sup>92</sup>

The 1960s were also the genesis for various other “individual right” lawsuits to be brought against teachers and school districts. Many of these emerged from federal legislation, most notably the Civil Rights Acts, and especially Title IX, which originally afforded females the opportunity to challenge school districts when denied equal opportunities on the basis of gender.<sup>93</sup> Title IX also afforded students the opportunity to bring a cause of action for sexual discrimination and sexual harassment.<sup>94</sup> Although Title IX was originally enacted to deal with sexual discrimination and sexual harassment directed at females, the statute now covers discrimination and harassment on the basis of sexual orientation, gender identity, nationality, immigration status, race, or ability.<sup>95</sup> Males are not excluded from the protections of Title IX.<sup>96</sup>

The opportunity for individual actions to be brought was further increased during the 1970s with the enactment of the Family Educational

---

<sup>88</sup> See Derek W. Black, *Education's Elusive Future, Storied Past, and the Fundamental Inequities Between*, 46 GA. L. REV. 557, 558 (2012).

<sup>89</sup> See generally Herman Edward Harms, *A History of the Concept of In Loco Parentis in American Education* (1970) (Ph.D. dissertation, University of Florida) (on file with the George A. Smathers Libraries, University of Florida); see also Ryan Katz, *Spare the Rod: Two Centuries of School Discipline*, APM REP. (Aug. 25, 2016), <https://www.apmreports.org/story/2016/08/25/two-centuries-of-school-discipline>.

<sup>90</sup> See generally Black, *supra* note 88.

<sup>91</sup> *Tinker v. Des Moines*, 393 U.S. 503, 512 (1969); *Engel v. Vitale*, 370 U.S. 421, 424 (1962).

<sup>92</sup> See, e.g., *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) (Serrano I); *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (Serrano II); *Serrano v. Priest*, 569 P.2d 1303 (Cal. 1977) (Serrano III).

<sup>93</sup> See generally *Landmark US Cases Related to Equality of Opportunity in K–12 Education*, STAN. UNIV., <https://edeq.stanford.edu/sections/landmark-us-cases-related-equality-opportunity-education> (last visited June 11, 2022). Title IX was passed by Congress on June 23, 1972. *Equal Access to Education: Forty Years of Title IX*, U.S. DEP'T OF JUST. 1 (June 23, 2012), <https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf>. For a description of Title IX and its history, see generally *id.*

<sup>94</sup> *Equal Access to Education*, *supra* note 93, 1–2.

<sup>95</sup> See *id.* at 12–13.

<sup>96</sup> *Id.* at 13.

Rights and Privacy Act, the Individual with Disabilities Education Act, and the Rehabilitation Act of 1973.<sup>97</sup> In 1985, the United States Supreme Court decided the case of *New Jersey v T.L.O.*, which further opened the door to litigation concerning the alleged deprivation of the constitutional rights of students while in school.<sup>98</sup> In 1990, George Bush signed into law the Americans with Disabilities Act (“ADA”); recent amendments to the ADA have further expanded the rights of disabled students.<sup>99</sup>

During the early 21st century, schools saw a further redefinition of what constituted “the schoolhouse” in terms of the rights and duties of both teachers and students.<sup>100</sup> Moreover, as a result of the capabilities of cellphones and the reach of social media, states found themselves redefining privacy rights related to “the schoolhouse,” including employing compliance measures related to anti-bullying legislation.<sup>101</sup> Balancing the privacy rights with the duty to maintain a safe learning environment for all students has now become a day-to-day chore for all teachers and school districts.<sup>102</sup>

The expansion of laws and the legal interpretation of the constitutional rights afforded to students have correspondingly increased the various causes of actions that might be brought against teachers and school districts. It has likewise increased other causes of action that the teachers themselves could bring.<sup>103</sup> Overall, “education law” has become

---

<sup>97</sup> See generally *Legislative History of Major FERPA Provisions*, U.S. DEP’T OF EDUC., <https://www2.ed.gov/policy/gen/guid/fpco/ferpa/leg-history.html>. (June 2002); *About IDEA*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/idea/about-idea/#IDEA-History> (last visited June 11, 2022); Shirley Wilcher, *The Rehabilitation Act of 1973: 45 Years of Activism and Progress*, INSIGHT INTO DIVERSITY (Sept. 17, 2018), <https://www.insightintodiversity.com/the-rehabilitation-act-of-1973-45-years-of-activism-and-progress/>. “The Family Educational Rights and Privacy Act of 1974 (‘FERPA’), § 513 of P.L. 93-380 (The Education Amendments of 1974), was signed into law by President Ford on August 21, 1974, with an effective date of November 19, 1974, 90 days after enactment.” *Legislative History of Major FERPA Provisions*, *supra*, at 1. “On November 29, 1975, President Gerald Ford signed into law the Education for All Handicapped Children Act (Public Law 94-142), now known as the Individuals with Disabilities Education Act.” *About IDEA*, *supra*. “President Richard M. Nixon signed the Rehabilitation Act into law on September 26, 1973.” Wilcher, *supra*.

<sup>98</sup> See generally *N.J. v. T.L.O.*, 469 U.S. 325 (1985).

<sup>99</sup> See *Protecting Students with Disabilities*, OFF. FOR C.R., <https://www2.ed.gov/about/offices/list/ocr/504faq.html> (Jan. 10, 2020).

The primary purpose of these revisions is to incorporate information about the Americans with Disabilities Act Amendments Act of 2008 (Amendments Act), effective January 1, 2009, which amended the Americans with Disabilities Act of 1990 (ADA) and included a conforming amendment to the Rehabilitation Act of 1973 that affects the meaning of disability in Section 504. The Amendments Act broadens the interpretation of disability.

*Id.*

<sup>100</sup> See, e.g., *Morse v. Frederick*, 551 U.S. 393, 406 (2007).

<sup>101</sup> See generally SHAHEEN SHARIFF, *CONFRONTING CYBER-BULLYING: WHAT SCHOOLS NEED TO KNOW TO CONTROL MISCONDUCT AND AVOID LEGAL CONSEQUENCES* (2009).

<sup>102</sup> See Nandoli von Mareés & Franz Petermann, *Cyberbullying: An Increasing Challenge for Schools*, 33 SCH. PSYCH. INT’L 468, 472–73 (2012).

<sup>103</sup> See, e.g., *2 Jackson teachers sue, claiming district allows violent students to run wild*, NEWS 10 (Oct. 18, 2019, 5:25 PM), <https://www.wilx.com/content/news/2-Jackson-teachers-sue-claiming-district-allows-violent-students-to-run-wild-563402081.html>; Dave O’Brien, *Former Clearview teacher sues district for not accommodating disability*, CHRON.-TEL. (Dec. 10, 2019, 6:00 AM), <https://chroniclet.com/news/182915/former-clearview-teacher-sues-district-for-not-accommodating-disability/>.

a specialized field.<sup>104</sup> Litigation concerning what happens in schools increases yearly.<sup>105</sup> This has been especially true during the pandemic: various factions have been suing over both the alleged “poor” education being presented by way of the virtual classroom as well as the potential lack of safety where schools have been compelled to hold in-person classes.<sup>106</sup>

The pandemic has shed light on the various causes of action that might be brought against schools. Schools and how schooling is being conducted have been brought to the forefront of every American home with school-aged children now that parents have been forced—out of necessity—to participate in the education of their children.<sup>107</sup> As a result, many of these parents have taken it upon themselves to learn about the law in an effort to perhaps cure what they believe schools should be expected to provide for their children.<sup>108</sup>

#### A. *Potential Causes of Action: Educational Malpractice*

Although educational malpractice has been the tort of choice most associated with schools allowing functionally illiterate students to graduate, the pandemic has shined a brighter light on the concept of educational

---

<sup>104</sup> *Education Law*, L. OFF. OF NICOLE JOSEPH, <https://nicolejosephlaw.com/practice-areas/education-law/> (last visited June 11, 2022).

<sup>105</sup> See generally Evan Blad & Andrew Ujjifusa, *2010 to Now: A Turbulent Decade for Schools*, EDUC. WEEK (Dec. 18, 2019), <https://www.edweek.org/leadership/2010-to-now-a-turbulent-decade-for-schools/2019/12>. See, e.g., Matt Chandler, *Practitioners see rise in school-based litigation*, BUFF. L.J. (Aug. 9, 2010, 8:00 AM), <https://www.bizjournals.com/buffalo/blog/buffalo-law-journal/2010/08/practitioners-see-rise-in-school-based-litigation.html>.

<sup>106</sup> Stephen Sawchuk, *Schools May Get Sued Over COVID-19. 7 Things to Know About Managing That Risk*, EDUC. WEEK (Sept. 3, 2020), <https://www.edweek.org/leadership/schools-may-get-sued-over-covid-19-7-things-to-know-about-managing-that-risk/2020/09>; see also N’dea Yancey-Bragg, *Families sue California, claiming state failed to educate poor and minority students amid pandemic*, USA TODAY, <https://www.usatoday.com/story/news/education/2020/12/01/california-families-sue-remote-learning-inequities-coronavirus/3780771001/> (Dec. 1, 2020 5:40 PM). Ohio, like many other states, has enacted legislation giving schools immunity for COVID related issues that might occur when holding physical classes:

The new law has two primary parts. Section 1 provides qualified civil immunity to those providing health care and emergency services during a government-declared disaster or emergency. Section 2 provides qualified immunity to individuals, schools, businesses and other entities from liability in civil lawsuits alleging exposure, transmission or contraction of COVID-19.

Aaron D. Rothey, *Ohio Legislature grants qualified immunity to schools for COVID-19 related lawsuits*, BRICKER & ECKLER (Sept. 18, 2020), <https://www.bricker.com/insights-resources/publications/ohio-legislature-grants-qualified-immunity-to-schools-for-covid-19-related-lawsuits>.

<sup>107</sup> Emily Tate, *Do Families Now Understand What It Takes to Be a Teacher?*, EDSURGE (May 6, 2020), <https://www.edsurge.com/news/2020-05-06-do-families-now-understand-what-it-takes-to-be-a-teacher>.

<sup>108</sup> See generally Amber Garbe et al., *COVID-19 and Remote Learning: Experiences of Parents with Children during the Pandemic*, 4 AM. J. QUALITATIVE RESEARCH 45 (2020), <https://www.ajqr.org/download/parents-experiences-with-remote-education-during-covid-19-school-closures-8471.pdf>. See e.g., Jon Valant, *School reopening plans linked to politics rather than public health*, BROOKINGS INST. (July 29, 2020), <https://www.brookings.edu/blog/brown-center-chalkboard/2020/07/29/school-reopening-plans-linked-to-politics-rather-than-public-health/>. It has caused even those without children to become much more familiar with the “law” of schools and education, as the concept of school lockdowns and reopenings have become a major political issue. *Id.*

malpractice related to educating special needs students as well as on the disparity of education between the privileged and the urban minorities.<sup>109</sup> Few, however, think about educational malpractice in terms of a teacher who might bring an action against their alma mater if that teacher becomes subject to litigation or administrative discipline based on a lack of legal training prior to being assigned responsibility for a classroom. Moreover, although hinted at, lawsuits generally do not implicate the licensure standards as translating into deficiencies in the classroom.<sup>110</sup>

Since 1990, educational malpractice has not been considered a valid claim in Ohio, and there is no movement in Ohio towards allowing educational malpractice claims.<sup>111</sup> However, the nature of the pandemic may change how courts view actions brought against educational institutions. This is especially true concerning causes of action that could be brought against colleges and universities, as these suits have also become much more prevalent during the pandemic.<sup>112</sup> With schools being at the forefront of publicity in the pandemic, it is not out of the question to believe that schools will be under even more legal scrutiny, especially given the number of individuals who are now re-assessing whether their tax dollars are being effectively managed when educating their children.<sup>113</sup>

Even though educational malpractice is not, in and of itself, considered a tort comparable to medical malpractice, it is still an offshoot of negligence. Many, if not most, causes of action brought against schools and/or teachers implicate negligence, such as a school's failure to protect students from bullying or sexual harassment/abuse, or from failing to properly implement protocols for special needs students.<sup>114</sup> Many of these claims often

---

<sup>109</sup> See, e.g., Kimberly A. Wilkins, *Educational Malpractice: A Cause of Action in Need of a Call for Action*, 22 VAL. UNIV. L. REV. 427, 427 (1988); Anya Kamenetz, *Families of Children with Special Needs are Suing Several States. Here's Why*, NPR (July 23, 2020, 7:06 AM), <https://www.npr.org/2020/07/23/893450709/families-of-children-with-special-needs-are-suing-in-several-states-heres-why>; Donna Ford, *Miseducating Black Students as a Form of Educational Malpractice and Professional Betrayal*, DIVERSE (Sept. 14, 2020), <https://diverseeducation.com/article/19005>.

<sup>110</sup> See, e.g., Alisha Trusty & Rhonda Richetta, *Poor Training for new teachers does permanent harm to students*, BALTIMORE SUN (June 24, 2013, 10:12 AM), <https://www.baltimoresun.com/opinion/op-ed/bs-ed-teacher-training-20130624-story.html> ("From what we see in our classrooms, there is a growing disconnect between what their programs do and the actual skills and knowledge aspiring teachers need to flourish from Day One. While we believe that educational institutions that prepare our teachers have good intentions, their methods are based on a passé model.").

<sup>111</sup> *Malone v. Academy of Ct. Rep.*, 582 N.E. 2d 54 (Ohio 10th Dist. Ct. App. 1990).

<sup>112</sup> See Peter F. Lake, *Will Your College Be Sued For Educational Malpractice?*, STETSON, <https://www.stetson.edu/law/conferences/highered/archive/media/Will%20Your%20College%20Be%20Sued%20for%20Educational%20Malpractice.pdf> (last visited June 11, 2022) (stating "Higher education's role in American society is undergoing a seismic shift, similar in magnitude to that experienced in the 1950s and 1960s. The unmistakable trend this time: public demand for greater accountability from colleges for the fulfillment of their core missions and a cry for demonstrable value, results, and efficiency.").

<sup>113</sup> See Lindsey M. Burke, *School Districts Owe Taxpayers a COVID-19 Tax Refund*, HERITAGE FOUND. (May 27, 2020), <https://www.heritage.org/education/commentary/school-districts-owe-taxpayers-covid-19-refund>.

<sup>114</sup> See, e.g., *N.A.D. v. Cleveland Metro. Sch. Dist.*, 2012-Ohio-4929 (Ohio 8th Dist. Ct. App. Oct. 25, 2012); *Yates v. Mansfield Bd. of Educ.*, 808 N.E.2d 861 (Ohio 2003); *Tanya by & ex rel. v. Cincinnati Bd. of Educ.*, 651 N.E.2d 1373 (Ohio 1st Dist. Ct. App. 1995).

implicate an individual's civil rights as recognized by the state (e.g., sexual harassment/discrimination).<sup>115</sup> When constitutional rights are implicated, individuals may bring causes of action in either state or federal court.<sup>116</sup> Federal statutory law also may be the impetus for a cause of action alleging a violation of Title IX in schools that receive any amount of federal funding.<sup>117</sup> In 2020, Ohio schools received approximately 489 million dollars in federal funds.<sup>118</sup>

### B. Immunity

All public institutions have some form of immunity to legal causes of action.<sup>119</sup> These are generally related to actions that occur within the scope of performing one's duties on the job.<sup>120</sup> As opposed to sovereign immunity, where there is no liability for governments or government actors, public institutions—like schools and police departments—have qualified immunity.<sup>121</sup> This qualified immunity is defined by statute, and it is the statute that sets out the criteria for when and how causes of actions may be brought against a public institution or against those employed by a public institution.<sup>122</sup>

Like with most statutes, understanding immunity is often tricky, and the concept of engaging in an activity “within the scope of [one's] employment and authority” is subject to interpretation.<sup>123</sup> The Ohio liability statute for political subdivisions, chapter 2744.02 of the Ohio Revised Code, details some specific scenarios, including those related to vehicle collisions, but also includes more general language for an exemption from immunity when a public employee negligently performs his/her duties or engages in conduct “manifestly outside the scope of the employee's employment.”<sup>124</sup>

In 1975, the Ohio Court of Claims was created in order to determine the resolution of cases brought against political subdivisions.<sup>125</sup>

<sup>115</sup> See, e.g., *E.F. v. Oberlin City Sch. Dist.*, 2010-Ohio-1370, at ¶2 (Ohio 9th Dist. Ct. App., Mar. 31, 2010).

<sup>116</sup> See, e.g., *Shively v. Green Local Sch. Dist. Bd. of Educ.*, 579 Fed. App'x 348 (6th Cir. 2014).

<sup>117</sup> Title IX was an addition to the Civil Rights Act of 1964 and is codified at 20 U.S.C. §§ 1681–1688.

<sup>118</sup> See Jeremy P. Kelley, *\$489M coming to Ohio schools to fill gaps, but there are clear winners and losers*, SPRINGFIELD NEWS-SUN (May 18, 2020), <https://www.springfieldnewssun.com/news/local/489m-coming-ohio-schools-fill-gaps-but-there-are-clear-winners-and-losers/yPukGDvjGGScZsyhS1aSN/>.

<sup>119</sup> See generally Frank D. Celebrezze & Karen B. Hull, *The Rise and Fall of Sovereign Immunity in Ohio*, 32 CLEV. ST. L. REV. 367 (1984).

<sup>120</sup> See *id.* at 369–73.

<sup>121</sup> Mark Walsh, *Curbing Immunity for Police Could Affect School Employees as Well*, EDUCATIONWEEK (June 11, 2020), <https://www.edweek.org/policy-politics/curbing-immunity-for-police-could-affect-school-employees-as-well/2020/06>.

<sup>122</sup> See OHIO REV. CODE § 2743.01; see also *id.* § 2744.01.

<sup>123</sup> See *id.* § 2744.02(B); see also W. Charles Curley, *Exceptions To Political Subdivision Immunity: How It Works In The Real World*, WESTON HURD, LLP, <https://www.westonhurd.com/wp-content/uploads/2015/12/2015-Political-subdivision-immunity-OMAA-presentation-December-WCC.pdf> (last June 11, 2022).

<sup>124</sup> OHIO REV. CODE § 2744.02; *id.* § 2744.03.

<sup>125</sup> See *Johns v. Univ. of Cincinnati Med. Assocs.*, 804 N.E.2d 19, 22 (Ohio 2004).



The Court of Claims also has exclusive jurisdiction to determine whether an activity has occurred that is “manifestly outside the scope of . . . employment.”<sup>126</sup> When lawsuits are brought against school districts or employees in Ohio, they generally begin at the Court of Claims level to determine whether qualified immunity will limit any remedy.<sup>127</sup>

### 1. The Eleventh Amendment

The Eleventh Amendment to the Constitution provides, “The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.”<sup>128</sup> Although the Eleventh Amendment has most often been invoked in situations where one state has attempted to sue another state, it is also invoked in certain situations where a citizen has sued their own state for a violation of federal law.<sup>129</sup>

The application of the Eleventh Amendment is varied and dependent on the cause of action brought. Although the general rule regarding the Eleventh Amendment is often characterized as an entity or citizen being allowed to bring a suit against a state only if “Congress unequivocally expressed its intent to abrogate the States’ sovereign immunity,” its interpretation is much more complicated when applied.<sup>130</sup> For instance, in *Mount Healthy School District Board of Education v. Doyle*, the United States Supreme Court held that the state was not able to assert Eleventh Amendment immunity in a cause of action brought by an untenured teacher alleging he had been discharged, in part, in violation of the First Amendment.<sup>131</sup> In reaching this conclusion, the Court stated, “a local school board such as petitioner is more like a county or city than it is like an arm of the State.”<sup>132</sup>

In terms of specific actions, both the Rehabilitation Act of 1973 and the Individuals with Disabilities Education Act provide for an abrogation

---

<sup>126</sup> *Id.* at 23 n.2.

<sup>127</sup> *See e.g.*, *State ex rel. Cable News Net., Inc. v. Bellbrook-Sugarcreek Local Schs.*, 170 N.E.3d 748 (Ohio 2020) (observing that an action brought against the school did not implicate the immunity statutes). In this case, an action was brought to compel a school district to release the school records of the Dayton shooter based on an application for access to public records. *Id.* at 750. The Ohio Supreme Court held that releasing the records would violate the Ohio Student Privacy Act. *Id.* at 754 (citing OHIO REV. CODE § 3319.321(B)).

<sup>128</sup> U.S. CONST. amend. XI.

<sup>129</sup> *See* Brandon R. Clark & Vicki C. Jackson, *The Eleventh Amendment*, NAT’L CONSTITUTION CTR., <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xi/interps/133> (last visited June 12, 2022).

<sup>130</sup> RONALD D. WENKART, *DISTRICT LIABILITY* 66 (2018) <https://ocde.us/LegalServices/Documents/District%20Liability%20Workbook%20-%20January%202018.pdf> (citing *Seminole Tribe v. Florida*, 517 U.S. 44 (1996)).

<sup>131</sup> *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280–81 (1977).

<sup>132</sup> *Id.* at 280.

of state sovereign immunity for suits brought under the statute.<sup>133</sup> The Supreme Court has also held that qualified immunity is abrogated for those who bring causes of action under Title IX.<sup>134</sup> 42 U.S.C. § 1983 provides perhaps the most utilized avenue of bringing a federal cause of action against school districts for a violation of constitutional rights.<sup>135</sup>

## 2. School District Liability Under 42 U.S.C. § 1983

Even though there are some avenues for immunity from suit under both state and federal law, there is rarely immunity for school districts or municipalities on federal claims relating to constitutional violations. The Supreme Court has held “that Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies.”<sup>136</sup> These municipalities and local government units can be sued for monetary, declarative, or injunctive relief when an unconstitutional action occurs or a policy or custom causes the unconstitutional action to occur.<sup>137</sup> Persons under this law cannot be held responsible for the individual actions of tortfeasors in their employ but rather for practices that have become so entrenched as to be considered customs.<sup>138</sup> In educational terms, the school district cannot be held responsible for the individual action of one teacher who violates the Constitution, but could be held responsible if the practices of the school district have led to customs that violate students’ constitutional rights.<sup>139</sup>

Claims under § 1983 must be filed against policymakers. The United States Supreme Court described four aspects of a situation that must be examined when determining whether a case could be brought against a municipality or government official as a policy maker.<sup>140</sup> First, a majority of the Court agreed that municipalities may be held liable under § 1983 only for acts for which the municipality itself is actually responsible, “that is, acts which the municipality has officially sanctioned or ordered.”<sup>141</sup> Second, only those municipal officials who have “final policymaking authority” may, by their actions, subject the government to § 1983 liability.<sup>142</sup> Third, whether a particular “official had final policymaking authority is a question of state law.”<sup>143</sup> Fourth, the challenged action must have been taken pursuant to

---

<sup>133</sup> 42 U.S.C. § 2000d-7; 20 U.S.C. § 1403(a).

<sup>134</sup> See *Cannon v. Univ. of Chi.*, 441 U.S. 677 (1979).

<sup>135</sup> DARCY L. PROCTOR ET AL., CIVIL RIGHTS LIABILITY IN THE PUBLIC SCHOOLS—A 19TH CENTURY LAW WRESTLES WITH 21ST CENTURY PROBLEMS 1 (2016), <https://cdn-files.nsba.org/s3fs-public/09-Proctor-Foskett-Civil-Rights-Liability-in-the-Public-Schools-Paper.pdf>.

<sup>136</sup> *Monell v. Dep’t of Soc. Serv.*, 436 U.S. 658, 690–91 (1978).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 691–92.

<sup>140</sup> *City of St. Louis v. Praprotnik*, 485 U.S. 112, 123 (1988).

<sup>141</sup> *Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).

<sup>142</sup> *Id.* at 483.

<sup>143</sup> *Id.*

a policy adopted by the official or officials responsible under state law for making policy in that area of the city's business.<sup>144</sup>

When applying these considerations to schools, school districts and municipalities would only be held liable for the practices and customs for which they are directly responsible. School districts have policymaking authority because they are directed by law to direct professional development and create district school codes.<sup>145</sup> However, if the alleged action was done individually by a teacher, the alleging parties could bring an individual tort claim against the teacher.<sup>146</sup>

One of the most famous § 1983 cases relating to education is *Tinker v. Des Moines*.<sup>147</sup> In this seminal case, the school banned students from wearing black armbands to protest the Vietnam War.<sup>148</sup> The students who wore the armbands were suspended.<sup>149</sup> The district court dismissed the case, and the decision was upheld by the appeals court.<sup>150</sup> However, once at the Supreme Court, the case was reversed and remanded, with the opinion famously stating: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."<sup>151</sup> This case stands for the premise that not only do students retain their First Amendment rights inside of schools, but the school administration is charged with understanding and protecting those rights.

### 3. The Potential for Liability for "Failure to Train"

Congress passed 42 U.S.C. § 1983 for the purpose of enforcing the rights guaranteed by the United States Constitution, specifically allowing a person to recover damages from an actor who, under the color of state or local law, causes a deprivation of rights.<sup>152</sup> "Failure to train" is an offshoot of a direct deprivation of constitutional rights because it holds the larger entity responsible for the deprivation of rights.

The "failure to train" cause of action is generally held to be a byproduct of *City of Canton v. Harris*.<sup>153</sup> *Canton v. Harris* is a United States Supreme Court case that considered "a municipality's failure to train its employees in a relevant respect evidences a 'deliberate indifference' to the rights of its inhabitants . . . [and] such a shortcoming [may] be properly

<sup>144</sup> *Id.* at 482–83, 483 n.12.

<sup>145</sup> *See generally* OHIO REV. CODE § 3313.

<sup>146</sup> *See, e.g.,* Mohat v. Horvath, 2013-Ohio-4290, at ¶16–¶19 (Ohio 11th Dist. Ct. App. Sept. 30, 2013).

<sup>147</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

<sup>148</sup> *Id.* at 504.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 504–05.

<sup>151</sup> *Id.* at 506, 514.

<sup>152</sup> Gavin Justiss, *Deliberate Indifference Under § 1983: Do the Courts Really Care?*, 28 REV. LITIG. 953, 954 (2009).

<sup>153</sup> *See* 489 U.S. 378, 389 (1989).

thought of as a city ‘policy or custom’ that is actionable under § 1983.”<sup>154</sup> Currently, courts rarely find that a litigant meets the “deliberate indifference” standard when suing school districts; however, as more cases are brought, and as more deficiencies in understanding the law are brought to light, it will become harder to argue that a lack of training in the law does not amount to deliberate indifference.<sup>155</sup>

One of the more prevalent “failure to train” causes of action brought against schools and school districts is that of sexual harassment. It is well established that a school district can be held liable under Title IX for failure to train teachers to deal with student-on-student sexual harassment issues.<sup>156</sup> In *Davis v. Monroe County Board of Education*, the Supreme Court held that a school could be held liable “where the [school] acts with deliberate indifference to known acts of harassment in its programs or activities . . . [and that] harassment . . . is so severe, pervasive, and objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.”<sup>157</sup> In *Davis*, a fifth-grade girl, LaShonda, was the victim of constant sexual harassment by a classmate.<sup>158</sup> LaShonda and her mother reported the harassment to the school principal and a teacher, but—allegedly—no disciplinary action was taken against the classmate.<sup>159</sup> Eventually, this classmate was charged with sexual battery.<sup>160</sup>

Any recipient of federal funding may be held liable under Title IX for its own misconduct.<sup>161</sup> Harassment must take place where “the [school] exercises substantial control over both the harasser and the context in which the known harassment occurs.”<sup>162</sup> Schools do not need to eradicate harassment, but they must “merely respond to known peer harassment in a manner that is not clearly unreasonable.”<sup>163</sup> Here, deliberate indifference was described as, “at a minimum, ‘cause [students] to undergo’ harassment or ‘make them liable or vulnerable’ to it.”<sup>164</sup> The Court further defines this as “acts of student-on-student harassment only where the [school’s] response to

---

<sup>154</sup> *Id.* (quoting *Monell v. N.Y. City Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978) and *Polk County v. Dodson*, 454 U.S. 312, 326 (1981)).

<sup>155</sup> *See, e.g.*, *Ellis ex rel. v. Cleveland Mun. Sch. Dist.*, 455 F.3d 690, 700 (6th Cir. 2006); *H.M. v. Bd. of Educ.*, 117 F. Supp. 3d 992, 1009 (S.D. Ohio 2015); *Moeck v. Pleasant Valley Sch. Dist.*, 983 F. Supp. 2d 516, 524–25 (M.D. Pa. 2013).

<sup>156</sup> *See, e.g.*, Billie-Jo Grant et al., *A Case Study of K–12 School Employee Sexual Misconduct: Lessons Learned from Title IX Policy Implementation*, NAT’L CRIM. JUST. REFERENCE SERV. (Sept. 15, 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/252484.pdf>.

<sup>157</sup> 526 U.S. 629, 633 (1999).

<sup>158</sup> *Id.* at 632–33.

<sup>159</sup> *Id.* at 633–34.

<sup>160</sup> *Id.* at 634.

<sup>161</sup> *Id.* at 640–41.

<sup>162</sup> *Id.* at 645.

<sup>163</sup> *Id.* at 649.

<sup>164</sup> *Id.* at 645 (quoting *Subject*, RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1415 (1966) and *Subject*, WEBSTER’S NEW INTERNATIONAL DICTIONARY 2275 (3d 1961)).

the harassment or lack thereof is clearly unreasonable in light of the known circumstances.”<sup>165</sup>

The Sixth Circuit has further described what qualifies as deliberate indifference. In the case of *Vance v. Spencer County Public School District*, a group of students sexually harassed a female student over a period of years.<sup>166</sup> The principals and other school employees lectured the offending students, but the harassment continued.<sup>167</sup> Eventually, the female student withdrew from school and completed her studies at home.<sup>168</sup> The school district’s main argument against the student’s claim was that school personnel made an attempt to stop the harassment, and that was enough to show that the school was not deliberately indifferent.<sup>169</sup> The court disagreed with the school district and stated:

[W]here a school district has knowledge that its remedial action is inadequate and ineffective, it is required to take reasonable action in light of those circumstances to eliminate the behavior. Where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances.<sup>170</sup>

Thus, in Ohio, for a school to escape a Title IX deliberate indifference ruling, the district must show, not only that action was taken, but that the action was reasonable. In applying this standard to a “failure to train” theory, school districts may be held liable for failing to train teachers in appropriate responses to harassment. Districts must not simply train teachers and school personnel to identify sexual harassment but also how to respond appropriately.

#### 4. Bullying

In addition to sexual harassment claims, school districts are open to claims of general harassment, which are not necessarily related to gender. Ohio requires every school district to “establish a policy prohibiting harassment, intimidation, or bullying.”<sup>171</sup> One requirement of this policy is that “school personnel report prohibited incidents of which they are aware to the school principal or other administrator . . . .”<sup>172</sup> The statute further specifies that school employees are immune from liability in civil suits related

---

<sup>165</sup> *Id.* at 648.

<sup>166</sup> 231 F.3d 253, 256–57 (6th Cir. 2000).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 257, 259.

<sup>169</sup> *Id.* at 260.

<sup>170</sup> *Id.* at 261.

<sup>171</sup> OHIO REV. CODE § 3313.666(B).

<sup>172</sup> *Id.* at § 3313.666(B)(4).

to this action *if* the employee properly reports the harassment and follows the policy.<sup>173</sup>

A failure to prevent bullying can not only have legal consequences for a school district but tragic results for families. As an example, in *Meyers v. Cincinnati Board of Education*, Gabriel Taye, an eight-year-old student, committed suicide after bullying incidents at his school. Taye's parents alleged that the child had been a victim of bullying and aggressive behavior, and the school district concealed a number of incidents in which Taye had been physically assaulted.<sup>174</sup> As stated in the state bullying statute, the school was required to report any incidents of bullying; however, the school reported no incidents of Taye's bullying, including failing to report an attack that left the student unconscious.<sup>175</sup> The parents brought many claims against the school district; however, one of the claims was a municipal liability claim under § 1983.<sup>176</sup> Significantly, the parents asserted "that the Board Defendants had a custom of inaction related to bullying and aggression [and] that the Board Defendants failed to adequately train and supervise the [school employees] and other school officials."<sup>177</sup>

In finding for the plaintiffs, the court held that the school district's custom of not investigating incidents of bullying, not notifying parents of incidents, and not reporting the incidents were sufficient allegations to establish a custom of inaction.<sup>178</sup> Additionally, the court stated that the school's failure to communicate provided adequate evidence to allege inadequate training.<sup>179</sup> The key failure of the school district, in this case, was the concealment of bullying incidents.

Teachers may also face personal liability for a failure to report or prevent bullying. In *Mohat v. Horvath*, the court refused to dismiss the case against a teacher who failed to intervene when a student was bullied in his classroom.<sup>180</sup> The student, E.M., committed suicide after several months of name-calling, teasing, and verbal harassment in Horvath's classroom.<sup>181</sup> Allegedly, on the day E.M. committed suicide, another student, in front of Horvath, told E.M. "Why don't you go home and shoot yourself? No one would miss you."<sup>182</sup> The court held that the Mohats provided sufficient

---

<sup>173</sup> *Id.* at § 3313.666(E).

<sup>174</sup> 343 F. Supp. 3d 714, 720 (S.D. Ohio 2018).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 727.

<sup>177</sup> *Id.* (citations omitted).

<sup>178</sup> *Id.* at 728.

<sup>179</sup> *Id.* at 729. In another case with a similarly tragic outcome, the court dismissed a mother's claims, concluding that the school had not acted deliberately indifferent in relation to her son's suicide. *See Feucht v. Triad Local Schs. Bd. of Educ.*, 425 F. Supp. 3d 914 (S.D. Ohio 2019); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130 (9th Cir. 2003).

<sup>180</sup> 2013-Ohio-4290, ¶1 (Ohio 11th Dist. Ct. App. Sept. 30, 2013).

<sup>181</sup> *Id.* at ¶2-3.

<sup>182</sup> *Id.* at ¶4.

factual allegations to go forward with their claims of negligence against Horvath.<sup>183</sup>

### 5. Other Constitutional Claims

There have been various other constitutional claims brought implicating a school's "failure to train" and the deliberate indifference standard. One Ohio district court applied the deliberate indifference standard established by *Davis* to a First Amendment freedom of speech claim.<sup>184</sup> In this case, a student brought suit against the school for violations of his First and Fourteenth Amendment rights due to harassment for speaking out about gay rights.<sup>185</sup> Specifically, in regard to his First Amendment claim, the student did not allege that the school suppressed his speech but rather that the school did nothing when the student was harassed for his speech.<sup>186</sup>

The court held that the school's failure to act could constitute deliberate indifference and could objectively chill the student's speech.<sup>187</sup> However, because there was no evidence that the school officials, in this case, were acting on behalf of the school board, this was not a policy or custom of the school board.<sup>188</sup> While the student did not prevail in this case, it sets an interesting precedent in applying Title IX deliberate indifference definitions to potential First Amendment violations.

Another Ohio district court case held that deliberate indifference under Title VI would utilize the same definition as the *Vance* court.<sup>189</sup> In this case, which involved bullying rather than a constitutional issue, a student committed suicide after being bullied, partially based on her race.<sup>190</sup> Based on the allegations in the complaint, the school took little to no action in investigating the bullying incidents.<sup>191</sup> The court concluded that, under the circumstances, the lack of action by the school district was unreasonable and thus did not dismiss the claim.<sup>192</sup>

A "failure to train" claim under § 1983 does not necessarily have to relate to a more noteworthy claim, such as sexual harassment or a violation of First Amendment rights. In a Louisiana case—with an admittedly unsympathetic plaintiff—a district court allowed a failure to train claim to proceed in relation to a FERPA violation.<sup>193</sup> FERPA, or the Family

---

<sup>183</sup> *Id.* at ¶34.

<sup>184</sup> *Schroeder ex rel. Schroeder v. Maumee Bd. of Educ.*, 296 F. Supp. 2d 869, 877–78 (N.D. Ohio 2003).

<sup>185</sup> *Id.* at 870.

<sup>186</sup> *Id.* at 877.

<sup>187</sup> *Id.* at 878.

<sup>188</sup> *Id.*

<sup>189</sup> *Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.*, 341 F. Supp. 3d 793, 807 (S.D. Ohio 2018).

<sup>190</sup> *Id.* at 798.

<sup>191</sup> *Id.* at 808.

<sup>192</sup> *Id.*

<sup>193</sup> *Warner v. St. Bernard Parish Sch. Bd.*, 1998 WL 50016, at \*2, \*21 (E.D. La. 1998).

Educational Rights and Privacy Act, protects the privacy of student educational records.<sup>194</sup> In this case, a mother sued after her letter about disbelief in the Holocaust was leaked by a teacher to the local paper.<sup>195</sup> According to the parent, the school violated her privacy rights by failing to train the teachers in proper FERPA policies.<sup>196</sup> The court did not grant summary judgment but allowed the parent to proceed with her claim.<sup>197</sup>

Under § 1983 claims, the standard of deliberate indifference is difficult to meet. The Supreme Court has stated that the standard lies “somewhere between the poles of negligence at one end and purpose or knowledge at the other . . . .”<sup>198</sup> In effect, the only way to succeed on a deliberate indifference standard is to do something which actively puts a person into harm’s way.<sup>199</sup> Nonetheless, more and more public entities are being held liable for their deficiencies in failing to properly train their personnel. Assuming this trend continues, schools could be facing more lawsuits and more liability.

#### IV. TRENDS AND THE NEED FOR CHANGE

The current trend in courts and legislatures nationwide is to allow various lawsuits against schools and school districts to proceed, despite the various defenses of immunity that once protected schools from liability. In some circumstances, there have even been damage awards for the personal liability of teachers and/or administrators.<sup>200</sup> Litigation is so prevalent that it is not uncommon to find various entities, including the National Educators Association, warning about the potential costs associated with litigation and recommending professional insurance.<sup>201</sup> There are numerous websites offering legal help and guidance to school districts in an effort to prevent litigation.<sup>202</sup> Despite this, the standards regarding a teacher’s knowledge about the law is not something that is focused upon as a qualification for licensure.

---

<sup>194</sup> 20 U.S.C. § 1232g.

<sup>195</sup> *Warner*, 1998 WL 500016, at \*2–3.

<sup>196</sup> *Id.* at \*9.

<sup>197</sup> *Id.* at \*21.

<sup>198</sup> *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).

<sup>199</sup> Justiss, *supra* note 152, at 964.

<sup>200</sup> *See, e.g.,* Chancellor v. Pottsgrove School Dist., 529 F. Supp. 2d 571, 576 (E.D. Penn. 2008) (finding high school principal could be held personally liable for sexual abuse of student dependent on willful indifference to knowledge about the situation).

<sup>201</sup> *See Educators Employment Liability Program*, NAT’L EDUC. ASS’N (June 22, 2020), <https://www.nea.org/resource-library/educators-employment-liability-program>; *see also What Teachers Should Know About Insurance (Making sure you’re covered)*, TRUSTED CHOICE (March 2, 2020), <https://www.trustedchoice.com/professional-liability-insurance/teacher/>.

<sup>202</sup> *See, e.g., School District Liability in 2020: What Every Superintendent Should Prepare For*, FINAL FORMS MEDIA (March 3, 2020), <https://www.finalforms.com/blog/school-district-liability-in-2020-what-every-superintendent-should-prepare-for>.



The reasons for requiring more legal training for teachers is becoming more obvious, especially during the last few years when political activism has clashed with the prevalence of social media and instantaneous access to news. The school districts representing government officials in these cases should reasonably know that the lack of legal training for teachers can lead to constitutional violations or, at the very least, allegations of a failure to follow the law. The evidence is clear. Not only do frequent surveys show that teachers are uninformed about law as it relates to education, but numerous Office for Civil Rights investigations have shown a pattern of violations over time.<sup>203</sup> The Department of Education not only needs to work on a plan of action that would prevent many violations from happening but also needs to educate teachers on what their own rights are concerning speech or support for student efforts that violate school policies.<sup>204</sup>

Despite the fact that understanding and even implementing the law is part of a teacher's day-to-day duties, the profession has fewer training requirements than other professionals whose careers necessitate understanding the Constitution and constitutional rights. For example, police officers in Ohio receive 681 total hours of training, with 95 of those hours being devoted to legal training.<sup>205</sup> Of those hours, 38 hours are devoted to constitutional law training, while 49 hours are devoted to statutory law.<sup>206</sup>

Although one might expect police officers to especially be well-trained in matters relating to the Constitution, most do not normally envision that teachers must be similarly—if not more—knowledgeable in various aspects of the law. That is an incorrect assumption. Teachers must not only be aware of the constitutional rights of the students but of their own rights and responsibilities with respect to being the “caretaker” of those rights. Teachers must also be familiar with laws concerning sexual harassment, medical privacy, grading privacy, search and seizure, freedom of speech, freedom of religion, bullying prevention, and disability law. Moreover, not only must teachers be familiar with state laws and standards that govern their school district, but also federal laws.

---

<sup>203</sup> See discussion *supra* notes 69-78 and accompanying text.

<sup>204</sup> See, e.g., Katie Reilly, *Students Are Walking Out Over School Shootings; Can Schools Punish Them?*, TIME (Feb. 28, 2018, 5:27 PM), <https://time.com/5178187/students-teachers-walkouts-school-shooting-protest-rights/>.

Timothy Locke, a history teacher at Cherry Hill High School East in New Jersey, told Philly.com that he was placed on administrative leave last week because a student was upset by his discussion of the Parkland shooting, including his comment that a similar incident could happen at their own high school. “The bottom line is that I was very concerned about the security at my school,” Lock told Philly.com. “I was adamantly concerned with the welfare of my students.”

*Id.*

<sup>205</sup> Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M. L. REV. 1, 79 (2018).

<sup>206</sup> *Id.*

Although some might oppose requiring more of this type of pre-employment legal training for teachers, the effort would be worth it. Schools are already inundated with lawsuits concerning what should be done to better educate our children and how to keep them safe in a changing world. Comparably, there is already outrage over the need for enhanced police training, given the events that occurred in 2020.<sup>207</sup> What is happening in the world of law enforcement is instructive for the world of education: there needs to be a re-envisioning of exactly what being a part of the profession entails. Although educators and programs do well to focus on re-envisioning methods for learning and classroom instruction, failing to provide a basic level of competency in legal duties and responsibilities does a disservice to teachers, students, and the community. Communities should not have to consider funding defenses for litigation out of their tax dollars when preventative action could result in savings that could be reinvested in the classroom.

Not all teaching requirements end with one's education and licensure exam, but those are still not enough, nor are they timely. The State of Ohio requires that teachers receive select continuous training.<sup>208</sup> School districts are required to adopt in-service training programs on the prevention of child abuse, violence, substance abuse, and the promotion of positive youth development.<sup>209</sup> Teachers are required to complete four hours of the in-service training within two years of commencing employment and every five years thereafter.<sup>210</sup> Further subjects have been added to the required in-service training, including training on the district harassment policy, prevention of dating violence, and youth suicide awareness and prevention.<sup>211</sup> These training programs, if administered correctly, can help protect a school from liability. However, the training is not uniform and, too often, may occur after an incident has occurred rather than prior to it.

A better methodology would be to change the educational requirements to provide more preventative education regarding the law as it relates to schools. This would not necessarily be as onerous as might be believed. A modular, online course providing for an introduction to the law for pre-service teachers would provide for initial familiarity with the law while not impeding the time allotted to other educational courses.<sup>212</sup> This could be followed by a necessity to pass a proficiency exam similar to

---

<sup>207</sup> See Alana Semuels, *Society is Paying the Price for America's Outdated Police Training Methods*, TIME (Nov. 20, 2020, 8:00 AM), <https://time.com/5901726/police-training-academies/>.

<sup>208</sup> *How to Renew a Five-Year Professional, Advanced or Associate License*, OHIO DEP'T OF EDUC., <http://education.ohio.gov/Topics/Teaching/Licensure/Renew-Certificate-License/How-to-Renew-a-Currently-Valid-Five-Year-Professio> (Dec. 15, 2021, 1:44 PM).

<sup>209</sup> OHIO REV. CODE § 3319.073(A).

<sup>210</sup> *Id.*

<sup>211</sup> *Id.* § 3319.073(B)-(D).

<sup>212</sup> See, e.g., *Legal*, POLICEONE ACAD., <https://www.policeoneacademy.com/law-enforcement-training/legal/> (last visited June 12, 2022). Similar courses are offered for police officers who have a legal knowledge requirement prior to becoming officers. *Id.*

legal education's Multistate Professional Responsibility Exam.<sup>213</sup> At the very least, knowledge of the law should be added to the Pedagogical Knowledge Assessment test already given.<sup>214</sup> Post-certification training should also be enhanced by requiring continuing education credits dedicated to understanding the law and any changes occurring in the law.

The ODE must take action and require further legal training for its teachers and Education majors to not only prevent the tax costs which are already accruing from litigation but to avoid taking away any rights that students are granted under the Constitution. The ODE has the statutory power to require a change in curriculum for teaching colleges.<sup>215</sup> It has the statutory power to recommend training for current teachers.<sup>216</sup> The ODE must protect its teachers and school districts from further lawsuits and liabilities.

## V. CONCLUSION

Ohio's legislature owes a state constitutional duty to the state's students to provide "a thorough and efficient system" of schools.<sup>217</sup> It is difficult to understand how this system can be efficient when the facilitators of educational policy are not fully trained in this policy. School districts are open to liability from multiple types of claims, while the ODHE and the ODE are afforded immunity under the Eleventh Amendment. It is a wonder that school districts are not clamoring for more legal education for pre-service teachers when they must bear the consequences of a lack of training in the colleges and universities. Teachers do not need to personally complete investigations into all issues; however, they need to at least be aware of these laws so that they can report them to the proper administrators.

Teachers are government employees who have a great influence on the next generation of society. Multiple studies have shown the need and benefits of basic legal instruction for pre-service teachers, yet nothing has been done. The ODHE escapes consequences for this failure to train new teachers. If school districts are held liable more often for their employees' lack of training and more tax dollars are used defending these lawsuits, then the legislature may take notice of the issue. The Ohio legislature should pass a statute requiring that the ODHE must include legal education in their training for teachers. This is not only an economic issue. While it is true that

---

<sup>213</sup> See generally Paul T. Hayden, *Putting Ethics to the (National Standardized) Test: Tracing the Origins of the MPRE*, 71 *FORDHAM L. REV.* 1299 (2003). The MPRE was adopted when it became evident that law students needed more training in professional responsibility prior to becoming attorneys. *Id.* at 1303. Various states (including Ohio) also adopted a requirement for CLE credits in Professional Responsibility. *Id.* at 1302.

<sup>214</sup> Currently, pedagogical assessment varies by grade/age taught. Testing of legal knowledge should be tailored to the grade being taught, given that some aspects of constitutional and criminal law are more relevant depending on the age of the child.

<sup>215</sup> See OHIO REV. CODE § 3301.13.

<sup>216</sup> See *id.*

<sup>217</sup> OHIO CONST. art. VI, § 2.

the state can save money from a reduction in lawsuits, it is also true that each of these situations represents a time when students' rights have been impeded. It is likely that there are many students who do not report a violation of their rights due to fear or ignorance.

There is also a practical reason for greater legal training. The Ohio legislature and the federal government interact in passing education laws. The courts are constantly issuing rulings based on these laws. Without greater legal training, how is it possible to expect teachers to apply these laws? If lawmakers want a statute to be effective, it is in their best interest to educate the people who will be implementing that law daily. Obviously, lawmakers pass laws for a reason. As a society, we should ensure that all students receive their guaranteed rights under these laws because it is the right thing to do, and it is—in essence—a part of the democratic process.