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New Mexico School Boards Association
2021 Virtual
School Law Conference

The NSBA School Law Docket: A View From Inside the Beltway

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On today's docket….

- Transitions: The New Supreme Court
  - The Roberts Court
  - Justice Ginsburg's Legacy
  - The "New" Supreme Court
  - October 2020 Term – NSBA Amicus Cases
- Trending Topics
  - Federal Funding
  - Employee Free Speech
  - Transgender Student Rights
  - The New Department of Education

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Transitions: The New Supreme Court

The Roberts Court

- What is the Roberts Court?
- Why does it matter?
- How can the High Court's composition impact our legal strategies?
- Roberts on judicial restraint:

When courts fail to exercise self-restraint and instead enter the political realms reserved to the elected branches, they subject themselves to the political pressure endemic to that arena and invite popular attack.

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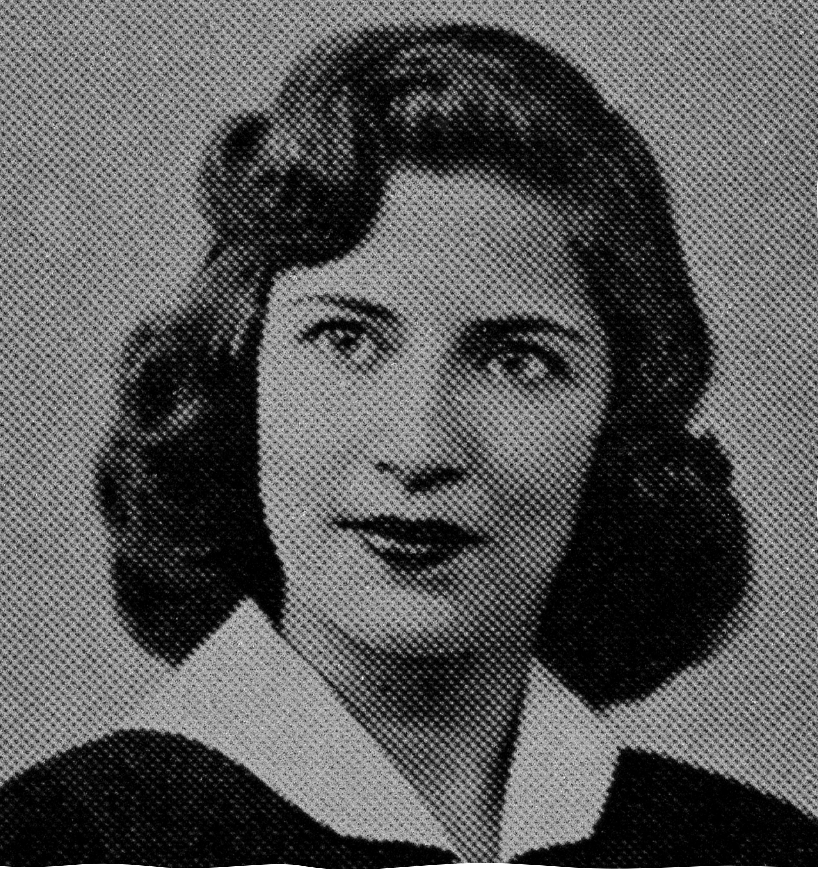


Justice Ginsburg's Legacy

- Liberal icon
- Dissenter
- Sex equity advocate

And…

- Pragmatist!

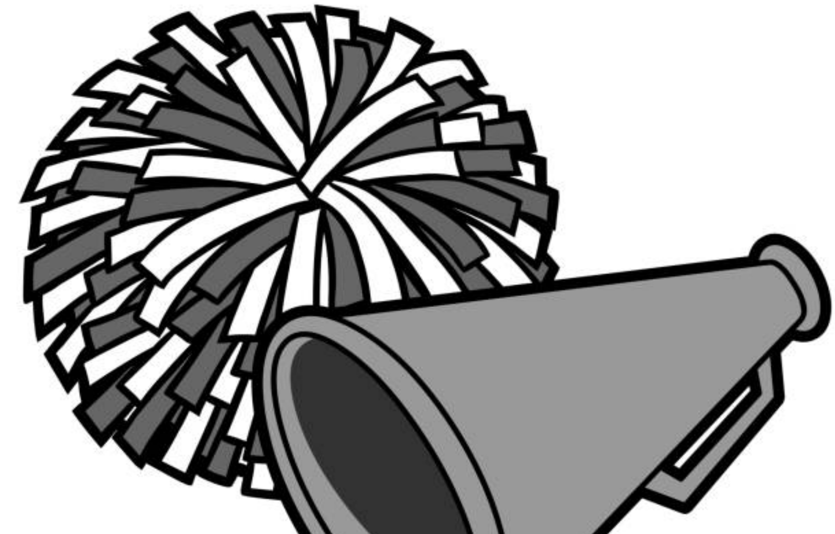
The “New” Supreme Court

- Solid conservative majority
  - “Originalists”
  - “Textualists”
  - Expansion of Free Exercise of religion rights?
  - Limitation on government restriction on Free Speech. *Confluence of conservatives and liberals?*
- Conservative majority: Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Coney-Barrett
- Liberal minority: Breyer, Kagan, Sotomayor

B.L. v. Mahanoy Area School District, 964 F.3d 170 (3d Cir. 2020), cert. filed August 28, 2020

B.L. v. Mahanoy Area School District, 964 F.3d 170 (3d Cir. 2020), cert. filed August 28, 2020

- B.L. did not make the varsity cheerleading squad. Upset that an incoming freshman had made the varsity squad, she posted a Snap in which she and a friend are pictured at a local convenience store holding up their middle fingers, with a caption containing vulgar and profane language directed at the school.
- The Snap was shared with 250 of B.L.'s friends, many of whom were students and members of the cheerleading squad at MAHS.
- B.L. was removed from the JV cheerleading for violating team rules requiring respect for others, discouraging foul language and inappropriate gestures, and prohibiting negative information about cheerleading, cheerleaders, or coaches from being placed on the internet.



B.L. v. Mahanoy Area School District, 964 F.3d 170 (3d Cir. 2020), cert. filed August 28, 2020

- B.L. and her family filed a complaint in federal district court, which issued a preliminary injunction reinstating B.L. to the cheerleading team, and later granted B.L.'s motion for summary judgment, awarding $1 in damages (though her attorney is expected to file a request for attorney's fees).
- The school district appealed the district court's ruling to the U.S. Court of Appeals for the Third Circuit.

NSBA amicus brief to the Third Circuit:

- The district court's decision departs from other case law recognizing school officials' authority to regulate student speech in the context of participation in extracurricular activities.
- Students who participate in extracurricular activities subject themselves to greater regulation, including limits on First Amendment free speech rights, that other students may enjoy in other contexts.
- Extracurricular coaches in public schools must be able to maintain team cohesion and morale by imposing consequences for behavior, including speech, that runs contrary to the standards set for participants, as student participants represent the school in competition and the school community at large.
- Off-campus online student speech that is lewd, obscene, disrespectful, and targeted at the school community can lead to "disruption" or a reasonable forecast of disruption under Tinker, and may be regulated by school officials without violating the First Amendment.

B.L. v. Mahanoy Area School District, 964 F.3d 170 (3d Cir. 2020), cert. filed August 28, 2020

- A 3-judge panel of the Third Circuit held:
- The school district violated B.L.'s First Amendment speech rights when school officials removed the student from the cheerleading team after she posted a profane and vulgar message on Snapchat off-campus during non-school hours.
- The school officials' action could not be justified under Bethel v. Fraser.
- Tinker does not apply to off-campus student speech, "outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school's imprimatur." (1 judge dissented on that point.)

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NSBA amicus brief at the petition stage:

- Brief drafted by Kelsi Corkran, a former Ginsburg clerk, and her team at Orrick.
- The Third Circuit's decision creates uncertainty for school discipline. It creates a clear circuit split as to whether and to what extent public school administrators may regulate off-campus student speech.
- The Third Circuit's categorical rule overlooks the distinction between core academic programs and extracurricular activities, frustrating school officials' ability to impose context-appropriate discipline.
- The line between on- and off-campus speech is arbitrary and anachronistic in the social media age, when students can disrupt the school community from anywhere with the touch of a button.
- This Court's guidance and clarification of Tinker is especially needed as schools shift to remote learning in the wake of the COVID-19 pandemic.

NSBA amicus brief on the merits filed March 1st:

- Brief drafted by Gregory Garre, former Solicitor General in Bush Administration, and his team at Latham & Watkins.
- Tinker gives schools the needed leeway to address disruptive student conduct.
- The Third Circuit's location limitation on the Tinker standard is misguided.
  - Tinker has never been strictly confined to on-campus speech or conduct.
  - A categorical rule is particularly ill-suited for the social media age.
  - Tinker has built-in limitations on when schools may discipline students for disruptive conduct.
- The Third Circuit's categorical rule would prevent schools from addressing harmful and disruptive speech that occurs online and off-campus but affects the school environment, including harassment and bullying.

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The Oral Argument.

- Where is the "school house gate" in the 21st Century?
- Where is speech made? Where it is written or where it is read?
- If all speech that occurs outside of school is off limits, what does this do to a school's ability to address bullying and harassment?
  - On the way to school?
  - Where there is no actual threat or aggression
- Does it matter that the discipline relates to extracurricular activities, and not academic instruction?
- What about religious, political and moral speech?

NSBA offers the School Board perspective on the Mahanoy case…

- NEW NSBA video! Friends of the Court: Implications of the Mahanoy Case for Schools and School Districts on Vimeo
- Student free speech makes it to the Supreme Court in former high school cheerleader’s case | PBS NewsHour
- Snapchat and the Schoolhouse Gate | The National Constitution Center
- Teen's Snapchat post case headed to Supreme Court (today.com)

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Trending Topic – Federal Funding

- Governor Henry McMaster announced a plan to use 2/3 of the SC's CARES Act Governor's Emergency Education Relief fund to create "Safe Access to Flexible Education Grants."
  - $6500 per private school student to subsidize education
  - Paid directly to private school
- The Orangeburg County School District, several educators, parents, and resident-taxpayers, and the South Carolina Education Association filed suit asking state trial court to issue a preliminary injunction as well as declaratory and injunctive relief finding the Safe Grants program violated several requirements of state law including the state constitution's prohibition on public funds being used "for the direct benefit of any religious or other private educational institution."

Adams v. McMaster, 851 S.E.2d 703, (S. Carolina Oct. 7, 2020, refiled Dec. 9, 2020)

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Adams v. McMaster, 851 S.E.2d 703, (S. Carolina Oct. 7, 2020, refiled Dec. 9, 2020)

NSBA filed an amicus brief explaining:

- The CARES Act education fund was intended to support public school children and families in poverty; not to serve as a conduit to funnel public money to private schools.
- Voucher programs divert public money to private schools, harming public education and the students they serve.
- Congress has explained its intent with the CARES Act through letter: to help schools meet the increased costs of school closures and remote learning, disproportionately borne by low-income, rural, and isolated communities
- Congress clearly set out how private schools were to receive a portion of CARES Act funding: through "equitable services" based on Title I formula.
- 3 federal courts have now invalidated efforts by the Department to divert additional CARES Act dollars to private schools.

Adams v. McMaster, 851 S.E.2d 703, (S. Carolina Oct. 7, 2020, refiled Dec. 9, 2020)

- Justice Hearn mentioned NSBA’s brief in oral argument.
- The court issued a declaratory judgment finding the governor’s allocation of CARES Act dollars for the SAFE Grants program constitutes the use of public funds for the direct benefit of private educational institutions within the meaning of, and prohibited by, Article XI, Section 4 of the South Carolina Constitution.
- The court further found “the issuance of an injunction unnecessary, as we are assured Governor McMaster, as a duly elected constitutional officer of this State, will adhere to this Court's decision.”
- Governor McMaster filed petition for rehearing Oct. 23. The court filed a second – nearly identical – opinion December 9.

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Trending Topic – Employee Free Speech

Kennedy v. Bremerton School District, 991 F.3d 1004 (9th Cir. 2021)

- A high school football coach sued his employer after he was disciplined for conducting prayers on the 50-yard-line with players after games.
- District Court in Seattle did not grant an injunction….
- U.S. Court of Appeals for the Ninth Circuit upheld that decision….
- SCOTUS denied cert., but, two justices said the Ninth Circuit was on thin ice….
- Case went back to the District Court….
- District Court found in favor of the school district….
- Coach appealed to the Ninth Circuit again.

NSBA Amicus Brief

- Teachers and coaches hold positions of trust and authority and interact with a captive audience of “impressionable young minds.”
  - School districts have an adequate justification in restricting an employee’s on-duty religious expression to avoid the appearance that it is school sponsored and to avoid a collision with the Establishment Clause.
- School district employers’ longstanding legal authority to regulate employee speech occurring as part of their official duties enables them to fulfil their educational mission.
- By affirming, this court will not expose to regulation truly private expression by teachers, coaches, and other employees.
- Oral argument was held Jan. 25, 2021.

Kennedy v. Bremerton School District, 991 F.3d 1004 (9th Cir. 2021)

The Ninth Circuit's ruling in favor of the school district March 18, 2021:

- **Free Speech**: Kennedy spoke as a public employee and the district was justified in treating him differently from other members of the public under the Pickering-Garcetti analysis.
  - Performed prayers "on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students…."
  - Job responsibilities extended at least until the players were released after going to the locker room."
  - An objective observer would view his demonstrations as the school district's endorsement of a particular faith. His own actions of making the speech public belie any comparison with person, private speech such as praying before a meal. For that reason, the school district had adequate justification (avoidance of an Establishment Clause violation) for its treatment of Kennedy.

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Kennedy v. Bremerton School District, 991 F.3d 1004 (9th Cir. 2021)

Cont'd…

Free Exercise: The school district's directive that Kennedy stop the public prayers on the field was narrowly tailored to the compelling state interest of avoiding a violation of the Establishment Clause. The district had tried repeatedly to work with Kennedy to develop an accommodation for him that would avoid violating the Establishment Clause while nevertheless offering him options that would protect his rights.

Court upheld dismissal of Title VII retaliation, disparate treatment, failure to accommodate claims.

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (June 15, 2020)

“The Title VII” Cases

Bostock v. Clayton County, Georgia, 723 Fed.Appx. 964 (11th Cir. 2018)

Altitude Express, Inc. v. Zarda, 883 F.3d 100 (2d Cir. 2018)

R.G. & G.R. Harris Funeral Homes v. EEOC, 884 F.3d 560 (6th Cir. 2018)

Majority Opinion

- "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."
- "[H]omosexuality and transgender status are inextricably bound up with sex. … because to discriminate on these grounds requires an employer to intentionally treat individual employees differently because of their sex."

Bostock: Implications for Schools

- School districts should make sure that their policies and procedures are consistent with the Bostock holding.
  - Does "based on sex" in a policy cover it?
- School districts should consider the need to re-train or conduct follow-up training on any changed policies.
- School districts should work with the state association and COSA attorneys to ensure operational compliance with Bostock.
- The door may be open for future litigation:
  - Religion-based employer exemptions (Religious Freedom Restoration Act or First Amendment).
  - Use of sex-segregated bathrooms, locker rooms, and dress codes.

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NSBA Legal Guide

https://nsba.org/-/media/NSBA/File/nsba-protections-for-lgbtq-employees-and-students-guide-2020.pdf

What are some of questions addressed in the NSBA guide?

- What policies and practices should schools develop to protect LGBTQ students from discrimination, including harassment and bullying?
- Must school districts include affirming representation of LGBTQ communities in curricula? Should they?
- Are school districts prohibited from discriminating against LGBTQ students in allowing non-curriculum related clubs?
- Do any laws prohibit school districts from discriminating against LGBTQ students in extracurricular activities?
- Are there any laws that specifically address participation by transgender girls who want to participate on girls' sports teams?
- What should schools take into consideration as they develop policies and procedures that address transgender athletics?

Trending Topic – Transgender Student Rights

How are the federal courts treating *Bostock vis-à-vis students*? In the 11th Circuit…

- Four U.S. Court of Appeals have decided that Title IX's anti-discrimination provisions apply to transgender students. Two in 2020.
- Eleventh Circuit specifically applied Bostock to the student context, and ruled that a school district's bathroom policy that did not permit a transgender student to use the bathroom of his gender identity, violated Title IX.
- "With Bostock's guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."
- Adams v. School Bd. of St. Johns County, 968 F.3d 1286 (11th Cir. 2020), petition for rehearing *en banc* filed August 28, 2020.
- As of 6-3-21 Court has not ruled on the petition.

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And, in the 4th Circuit…

- In one long-running case, *Grimm v. Gloucester County School Bd.,* 972 F.3d 586 (4th Cir. 2020), the Fourth Circuit decided that a school board policy requiring restroom use based on biological gender violated Equal Protection Clause and Title IX.
- The Court found that:
  - Title IX: Bostock expressly does not answer this sex-separated restroom' question. But Grimm was treated worse than similarly situated students because unlike other boys, he had to use either the girls' restroom or a single-stall option.
  - Equal Protection: The Board's policy is not substantially related to its important interest in protecting students' privacy.

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Is an accommodation a valid operational fix?

- The school district has appealed to the Supreme Court, arguing the 4th Circuit erred in upholding ruling for Grimm on Title IX and Equal Protection challenges to board's policy requiring student to use restroom according to biological gender.

- Question presented:
  - Does Title IX or the Equal Protection Clause require schools to let transgender students use multiuser restrooms designated for the opposite biological sex, even when single-user restrooms are available for all students regardless of gender identity?

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Participation in Athletics

- Soule v. Connecticut Interscholastic Athletic Conference et al. (D. Conn.), filed February 2020.
- Cisgender female athletes filed a complaint in federal district court claiming that allowing participation of transgender female athletes in their sports decreases their athletic opportunities in violation of Title IX.

Soule v. Connecticut Interscholastic Athletic Conference et al. (D. Conn.) -- OCR

- May 15, 2020 -- OCR issued Letter of Impending Enforcement Action. Then updated that after Bostock on Aug. 31
- Trump Administration's view was that by permitting the participation of biologically male students in girls' interscholastic track CIAC and participating districts treated students differently based on sex and denied opportunities and benefits to female student-athletes that were available to male student-athletes, in violation of 34 C.F.R. § 106.41(a).
- Administration's position was that:
  - *Bostock* does not alter the relevant legal standard under ED regulations, which ED interprets to authorize single-sex teams base only biological sex at birth.
  - Unlike Title VII, one of Title IX's purposes is to protect female athletic opportunities. Inclusion of transgender female athletes in female track competition denies opportunities to female athletes and violates Title IX.
- THIS LETTER AND THE FOLLOWING ONE WERE WITHDRAWN

  BY THE CURRENT ADMINISTRATION.

And, on the other side…

- *Hecox et al. v. Little et al.* (D. Idaho), filed April 2020
- Complaint filed by ACLU in federal district court on behalf of transgender female athlete challenges new Idaho law banning transgender women from competing in women's sports (the first such law in the nation).
- Extensive factual allegations include history of sex testing in sport, transgender status, importance of participation, science of sex, history and purpose of the bill.

Trump Administration weighed in…

- DOJ Statement of Interest in previous administration: “The Equal Protection Clause does not require States to abandon their efforts to provide biological women with equal opportunity to compete for and enjoy the life-long benefits that flow from, participation in school athletics in order to accommodate the team preferences of transgender athletes.”
- Former AG Barr: “Allowing biological males to compete in all-female sports is fundamentally unfair to female athletes.
- “[T]he Equal Protection Clause allows Idaho to recognize the physiological differences between the biological sexes in athletics. Because of these differences, the Fairness Act’s limiting of certain athletic teams to biological females provides equal protection. This limitation is based on the same exact interest that allows the creation of sex-specific athletic teams in the first place — namely, the goal of ensuring that biological females have equal athletic opportunities.

AND BIDEN ADMINISTRATION WITHDREW THIS POSITION IN

THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT.

New Administration, New Posture…

- Three Executive Orders on day one indicate administration priorities in education, including:
  - Combatting discrimination on the basis of sexual orientation, gender identity; and
  - Advancing racial equity and support for underserved communities through the federal government.

New Administration, New Federal Posture…

- On January, 20, 2021, the Biden Administration issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation, which specifically refers to school sports:

- “Section 1. Policy. Every person should be treated with respect and dignity and should be able to live without fear, no matter who they are or whom they love. Children should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.”

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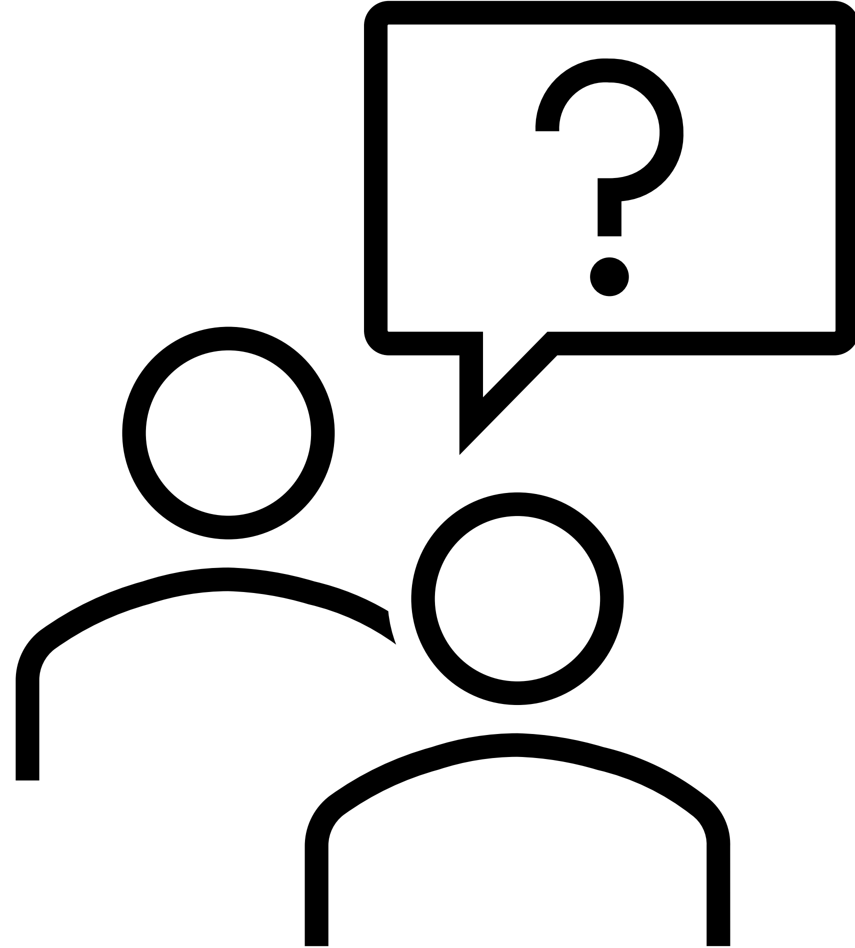
NSBA's
Q & A for Public Schools, January 2021…

https://www.nsba.org/-/media/NSBA/File/nsba-eo-sex-orientation-faq-legal-jan-2021.pdf



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What does the Executive Order require federal entities to do?

Every federal agency shall:

- Consult with the United States Attorney General as soon as practicable;
- Review all existing orders, regulations, guidance documents, policies, programs, or other agency actions that were promulgated or administered by the agency under any statute or regulation that prohibits sex discrimination;
- Ascertain whether agencies' policies are consistent with the Order's policy statements;
- Consider whether to revise, suspend or rescind agency actions and promulgate new ones, or take further action, to implement the Order's stated policies; and
- Within 100 days of the Order, work with the Attorney General to implement an action plan to carry out the actions identified in its review of its policies, programs, guidance, rules, or regulations and that may be inconsistent with the Order's stated policy.

What will the impact of the Executive Order be on local policies?

- The Order only addresses federal agencies, but we anticipate more robust federal agency investigation of complaints of discrimination based on gender identity and sexual orientation.
- Local school districts are wise to review their policies and determine whether to adjust them for consistency with the policy outlined in the Order.
- Department of Education will change its enforcement position regarding school policies that do not permit transgender students to use the bathrooms and locker rooms consistent with their gender identity.
- Also, in an attempt to address overlapping discrimination, more agencies will examine sexual harassment complaints alleging discrimination based upon gender identity and sexual orientation to see whether the violation overlaps into some other area of discrimination.

Trending Topic –
The New Department of Education

Back to the Future?
Will US ED and DOJ reinstate the guidance on the use of race student discipline?

- Jan. 8, 2014 Obama Administration guidance issued jointly by US ED and DOJ called for schools to carry out student discipline without disparate treatment or impact based on race, color, or national origin. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201401-title-vi.html
- Guidance was consistent with data and research on racial disparities in discipline, including out of school suspension, and emphasized positive reinforcement of student behaviors, and appropriate supports and interventions, and exclusionary discipline as a last resort.
- New E.O. directs federal agencies to (among other things):
  - conduct equity assessments; and
  - designate federal resources “to advance fairness and opportunity”

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Back to the Future? Will US ED reinstate the guidance on Title IX?

- The Obama Administration guidance of May 13, said that Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit discrimination in educational programs and activities operated by recipients of Federal financial assistance based on a student's gender identity, including discrimination based on a student's transgender status. https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
- This covered school policies regarding bathroom and locker room use, school records, and athletics.
- Title IX Regs were amended by previous administration and reissued with bent towards higher education, but also put in place legal definitions bringing consistency to legal standards and agency enforcement standards.

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What a rollback would entail…

- Revocation and new Rule Making would require Notice & Comment.
- Department's Title IX website still lists previous administration rule, but change is expected:
  - https://sites.ed.gov/titleix/?utm_content&utm_medium=email&utm_name&utm_source=govdelivery&utm_term

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NSBA acts…

- NSBA Chief Legal Officer testifying in U.S. Department of Education's public hearing regarding the implementing regulations of Title IX of the Education Amendments of 1972, hosted by the Office for Civil Rights.
- Filing written comments concerning Title IX regulations:
  - Need for continued uniformity between enforcement and legal liability standards to reduce confusion
  - Need for flexibility in K-12 investigations of Title IX complaints
    - K-12 environment requires less formal processes, i.e., age of children; levels of development; impact on victims; social and emotional learning; FERPA

- **May 25: Letter to U.S. Department of Education Office of Special Education Programs Re: Pandemic-Related Recovery Services for Students with Disabilities.**
  NSBA urged the Department to inform states of their ability to use state ARP funds to innovate and create programs at the state level that fund prompt services to children while at the same time preventing prospective litigation.

  May 20: Comment on U.S. Census Bureau's proposed changes to how urban and rural areas are designated.
  NSBA urged the Bureau to reconsider proposed changes to the thresholds for the number of housing units and the population count for a community as the changes could result in some communities receiving less resources and losing certain designations that are critical to local economies and services for children and other residents.

  April 23: Comment on the Federal Communications Commission's efforts to implement the Emergency Connectivity Fund provisions and funding included in the American Rescue Act.
  NSBA urged the Commission to quickly distribute funds from the $7.17 billion Emergency Connectivity Fund to help close the digital divide in education and give school districts flexibility to distribute them based on local needs.

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2021 Supreme Court Term Preview

Accepted:

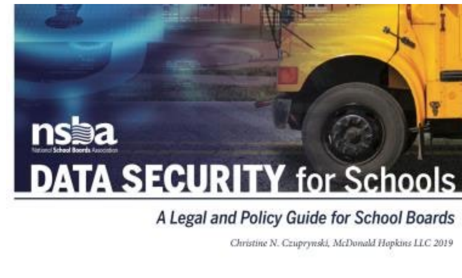
- **Houston Community College System v. Wilson**: Court of Appeals for the Fifth Circuit decided that a member of a public community college board could sue the board for First Amendment retaliation based on its public censure of him. The panel’s decision means a public body like a school board does not enjoy First Amendment protection to “speak” by issuing a censure against a board member who undermines the body.

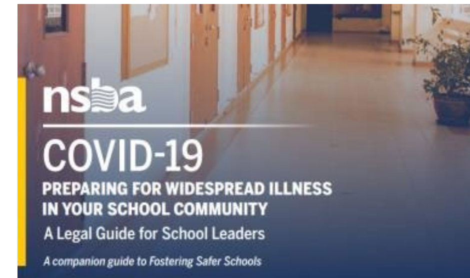
Petitions pending:

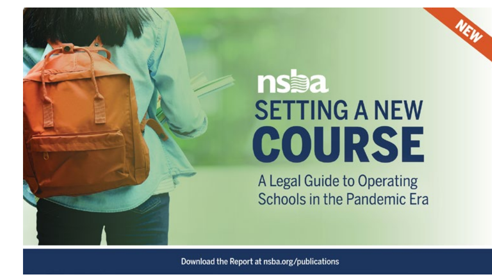
- **Gloucester County School Board v. Gavin Grimm**: Fourth Circuit decided that a school board policy requiring restroom use based on biological gender violated Equal Protection Clause and Title IX.
- **Carson v. Makin**: First Circuit decided Maine’s requirement that schools receiving public tuition payments be “nonsectarian” did not violate the Free Exercise Clause of the First Amendment. The Supreme Court’s rulings in Trinity Lutheran (2017) and Espinoza (2020) focused on whether the restriction at issue was based solely on the aid recipient's religious status. The “nonsectarian” requirement does not discriminate based solely on religious status or punish the plaintiffs' religious exercise nonetheless. It is a use-based restriction.

Petition that may be filed soon:

- **Kennedy v. Bremerton School District:** Ninth Circuit decided school district did not violate coach’s First Amendment Free Exercise Rights by asking that he stop public, student-involved prayers on the football field after games.







NSBA Legal Guides

https://www.nsba.org/Advocacy

Thank you.

The NSBA School Law Docket: A View From Inside the Beltway

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