

# Avoiding the Boom!

## Navigating Uncertain Legal Waters

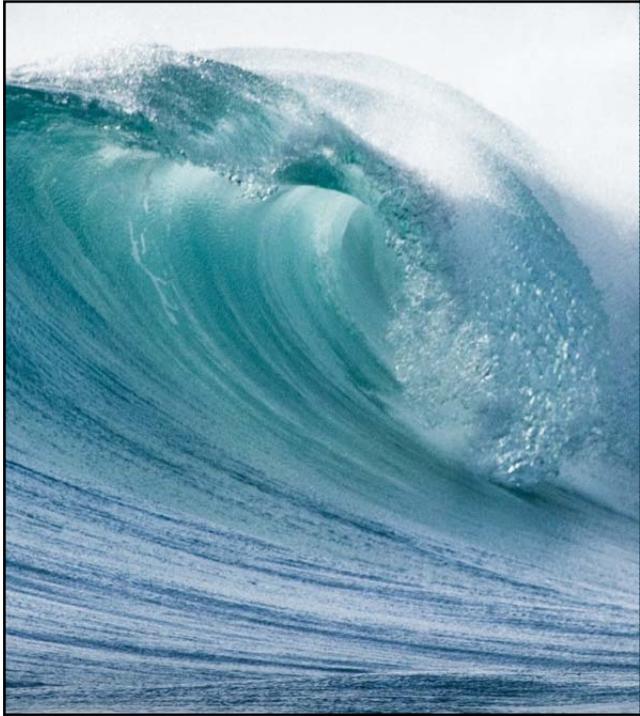
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SCSBA School Law Conference, August 19, 2017



## Areas of Law That Have Changed (and What Hasn't)?

- Transgender Students
- The Affordable Care Act
- FLSA/Overtime
- Healthy School Foods Initiative
- Special Education
- OCR Investigations
- Miscellaneous



# Transgender Students



## Transgender Basics

- Transgender Men – assigned female sex at birth, but identifying as male.
- Transgender Women – assigned male sex at birth, but identify as female.
- Transgender people are consistent, persistent, and insistent that they identify with the opposite gender.
- A person's gender identity is not necessarily indicative of their sexual orientation.





## Sources of Law

- SC Safe School Climate Act, 59-63-110 *et seq.* (protects students from bullying).
- First Amendment, US Constitution – (Freedom of Expression).
- Equal Protection (14<sup>th</sup> Amendment, US Constitution).
- Title IX (prohibits discrimination on the basis of sex in education).



## Transgender Issues

- Bathrooms and Locker Rooms
- Overnight trips/rooming arrangements
- Sports
- Names and Pronouns
- School records and Privacy
- Gender-based policies and procedures (dress codes, graduation attire, yearbook pictures)



## Department of Education Weighs In

- **May 13, 2016 – Joint DOE/DOJ Dear Colleague Letter**
  - the prohibitions on discrimination “on the basis of sex” in Title IX and its implementing regulations apply to transgender students and, among other things, requires access to sex-segregated facilities based on gender identity.
- **February 22, 2017 – Joint DOE/DOJ Dear Colleague Letter**
  - withdraws and rescinds the guidance in May 13, 2016 documents in order to further and more completely consider the legal issues involved.
- **June 6, 2017 - “Instructions to the Field” letter**
  - Directing OCR attorneys not to rely on old guidance but maintaining commitment to investigating “discrimination, bullying and harassment.”



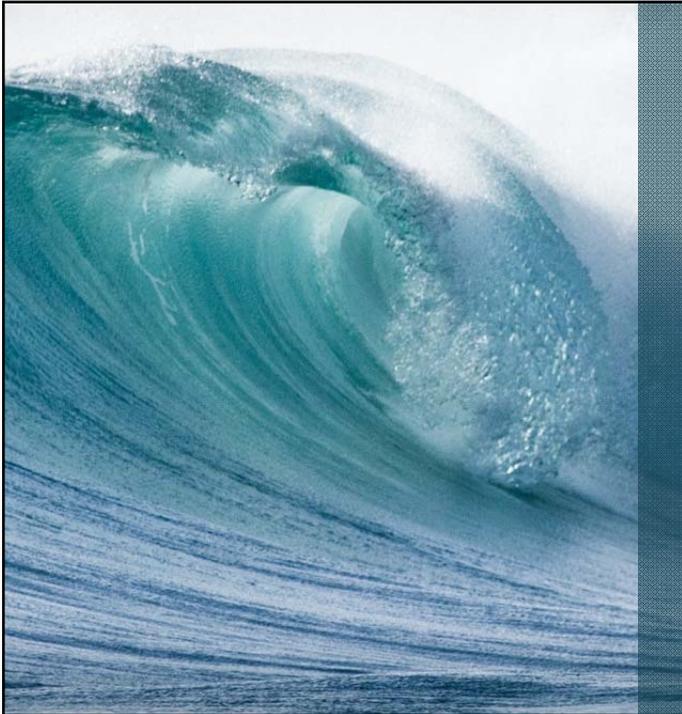
## The Courts Weigh In

- G.G. v. Gloucester Cnty. Sch. Bd., (4th Cir. Apr. 19, 2016).
- Whitaker v. Kenosha Unified Sch. Dist., (7th Cir. May 30, 2017).
- Evancho v. PineRichland Sch. Dist., (W.D. Pa., Feb. 27, 2017).



## On The Horizon

- School personnel should remain attuned to bullying and other forms of discrimination.
- To have a policy or not?
- Case-by-case basis.
- Transgender employee issues are on the horizon.



## The Affordable Care Act



# The Affordable Care Act

“ObamaCare”

- No coverage exclusions for preexisting conditions
- Employer mandate
- Individual mandate
- Insurance exchanges
- Federal subsidies for individuals purchasing coverage

“TrumpCare”

?



## FLSA Overtime Regulations



## Overtime Regulations (FLSA)

- An employee is exempt from the FLSA overtime provisions if:
  - 1) paid on salary basis;
  - 2) meets or exceeds a certain salary level or \*threshold; and
  - 3) performs the duties required under one of the stated exemptions (executive, administrative, professional, etc.).
- \* Old Threshold – \$23,660/year (\$455/week).
- \* New Threshold – \$47,476/year (\$913/week)  
(to have gone into effect December 1, 2016).



## Overtime Regulations (FLSA)

- **November 22, 2016** - A Federal Court in Texas grants an injunction filed by 21 states, including South Carolina, to stop the implementation of the new regulation.
- **December 1, 2016** - DOJ, on behalf of the DOL, appeals.
- **June 30, 2017** - DOJ's brief states DOL will not advocate for specific salary level.
- **July 26, 2017** - the DOL issued a Request for Information seeking notice and comment from the public before issuing revised proposed regulations regarding the minimum salary level.



## School Meals



## School Meals

- In 2012, Congress passed the Healthy Hunger-Free Kids Act, which was created by then-Secretary of Agriculture and Michelle Obama.
- The HHFKA set rigorous standards for nutrition in school lunches.
- In May, those standards were relaxed by a proclamation of the current Secretary of Agriculture.
- Three areas of food service were affected: whole grains, salt, and milk.



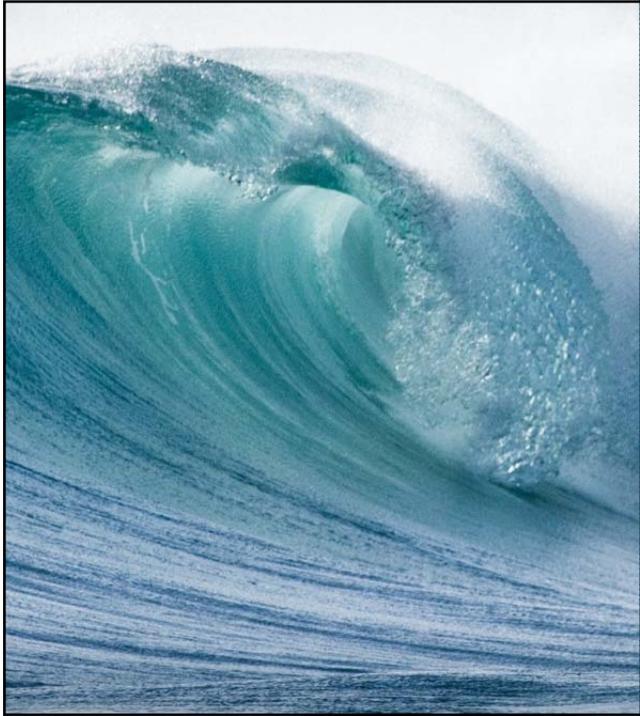
## School Meals

- **Whole grains:** states will be able to grant exemptions to schools experiencing hardship in meeting the 100% whole-grain-rich standard; now at least half of the grains offered in schools must be whole grains.
- **Salt:** schools will no longer be required to hit the strictest sodium target, and can offer slightly more sodium in foods.
- **Milk:** schools may now serve 1% flavored milk instead of only fat-free flavored milk.
- **NO change** to the SmartSnacks requirements; what can be sold as fundraisers, or what schools can have in vending machines.



## School Meals

- By July 1, 2017, all SC school districts should have created a "charging policy" regarding the ability of students to charge meals; whether students with unpaid balances would be given "alternative meals," and how schools would collect unpaid debts.
- SCDE states that all policies must be fair and treat students consistently.
- Students with unpaid balances should never be singled out or embarrassed for having school lunch debt.



# Special Education

## Supreme Court addresses FAPE standard for special education students

- The United States Supreme Court last addressed the standard of education that must be provided to special education students in Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester Cty. v. Rowley, 458 U.S. 176 (1982).
- Rowley held that schools must provide a free, appropriate public education that was "reasonably calculated to enable the child to receive educational benefits."
- Fourth Circuit had held that those educational benefits must be "merely more than *de minimis*." Other circuits held that a child must receive "some benefit," "a meaningful benefit," and "more than simply *de minimis*."



## Supreme Court addresses FAPE standard for special education students

- The Supreme Court addressed the circuit split in March in *Andrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist.*
- Ruling: “To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child’s circumstances.”
- Did the Court’s ruling really change anything? Probably not—at least not significantly.



## Supreme Court allows some special ed cases to bypass due process

- On February 22, the Supreme Court unanimously held in *Fry v. Napoleon Comm. Schls.* that the exhaustion of the IDEA’s administrative remedies is unnecessary where the gravamen of the plaintiff’s lawsuit is something other than the denial of the IDEA’s core guarantee of a FAPE.
- Under this ruling, some cases involving special education students can go directly to federal court instead of going through due process.
- Parents cannot receive monetary damages under IDEA due process suits; parents can receive monetary damages under ADA & 504.

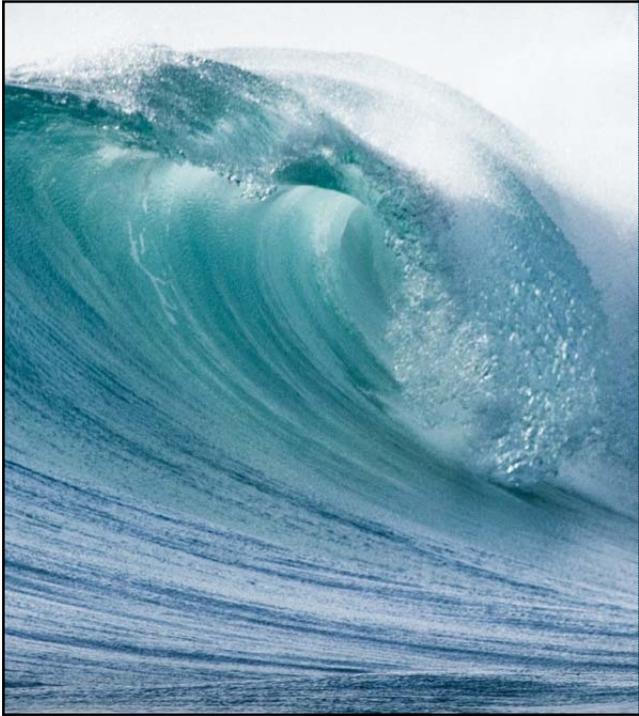


## Fry v. Napoleon Community Schools

- To determine whether a case is a 504/ADA case and go directly to court or if it is an IDEA case that must go through due process, the Court instructs us to ask two questions:
- 1. Could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school—say, a public theatre or library?
- 2. Could an adult at the school—say an employee or visitor—have pressed essentially the same grievance?
- If the answer to either question is yes, the complaint is probably a Section 504 or ADA claim that can go straight to federal court.
- If the answer to one question is no, the complaint is probably about the provision of FAPE under the IDEA and must go through the due process avenues.



OCR  
Investigations



# Questions