



Federal Update

Selected Rulings and Guidance
Affecting Public Schools

August 27, 2016



SCOTUS: KEY 2015 TERM DECISIONS AND A LOOK AHEAD



Highlights: SCOTUS Decisions Affecting Schools – 2015 Term

- Race-Based Admissions - *Fisher v. University of Texas II* (S. Ct.)
- Union Agency Fees - *Friedrichs v. California Teachers Association*



Highlights: SCOTUS Decisions Affecting Schools – 2015 Term, cont'd

- Protected Political Activity - *Heffernan v. City of Paterson, NJ*

- Attorney's fees in Title VII cases – *CRST Van Expedited v. EEOC*

- Time for filing constructive discharge claim – *Green v. Brennan*



Race-Based Admissions

- Fisher v. University of Texas at Austin II*, 136 S.Ct. 2198 (2016).

- Question Presented: Can Fifth Circuit's re-endorsement of University of Texas at Austin's use of racial preferences in undergraduate admissions decisions be sustained under Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Texas at Austin*?



Fisher v. UT at Austin



Facts:

- Two Texas residents were denied undergraduate admission, and sued UT for racial discrimination.
- UT used "a holistic, multi-factor approach, in which race [was] but one of many considerations."
- Admissions policy premised on the *Grutter* decision.
- Texas Top Ten Percent Law

Fisher v. UT at Austin – Round One

Court dynamics:

- Justice Kagan recused herself, leaving a 5-3 Court with conservatives in a strong majority position.
- Only Ginsburg and Breyer on original *Grutter* decision remained on the Court.
- Kennedy was expected to be a crucial voice.

Fisher v. UT at Austin -- Round One

- On June 24, 2013, the Supreme Court vacated Fifth Circuit’s decision upholding constitutionality of UT’s admissions policy.
- Fifth Circuit was required to conduct an exacting analysis, but it did not.
- The case was sent back to the Fifth Circuit to “assess whether the University has offered sufficient evidence that would prove that its admissions program is narrowly tailored to obtain the educational benefits of diversity.”

Fisher v. UT at Austin – Round One

- On remand, a three-judge panel of Fifth Circuit again rejected Fisher’s claim that UT’s race-conscious admissions policy violated the Fourteenth Amendment.
- Panel applied a “more exacting scrutiny” to UT’s policy.
- Panel concluded that the “holistic review” of “what little remains after over 80% of the class is admitted on class rank alone — does not, as claimed, function as an open gate to boost minority headcount for a racial quota.”

Fisher v. UT at Austin – Round Two

- Fisher again appealed the Fifth Circuit’s decision to the U.S. Supreme Court.
- NSBA again filed an amicus brief in support of UT’s “holistic” admissions policy, arguing:
 - The Court should retain the concept of diversity as an educational goal/benefit.
 - The diversification process is essential not only college-wide, but also with regard to programs and degrees, i.e., STEM programs....

Fisher v. UT at Austin – Round Two

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- As society and communities voluntarily re-segregate, schools remain one of the last vehicles for pluralistic educational experiences.
- Texas’ “Top Ten Percent” law alone rewards racial isolation at the secondary school level.
- Removing UT’s ability to rely on more “holistic” diversity practices discourages secondary schools from diversifying.
- Oral arguments were held in December 2015.

Fisher v. UT at Austin – Round Two

- Court dynamics:
 - With Justice Scalia’s death, the dynamic was unchanged, as Kagan remained recused
 - Kennedy was still expected to be a crucial voice, and be the swing vote in a decision involving only a 7-member court.

Fisher v. UT at Austin – Round Two

The outcome?

- In a 4-3 decision, the Court again upheld UT-Austin's undergraduate admissions policy, citing the **educational benefit in diversity for all students**.
- Justice Kennedy reiterated that "the decision to pursue the educational benefits that flow from student body diversity is, in substantial measure, an academic judgment," entitled to some judicial deference.

Fisher v. UT at Austin – Round Two

- The majority issued a caution, noting the decision "does not necessarily mean that the University may rely on that same policy without refinement. It is the University's ongoing obligation to engage in **constant deliberation and continued reflection** regarding its admissions policies."

136 S.Ct. 2198 (2016).

Union Agency Fees - Friedrichs v. California Teachers Association

- SCOTUS was poised to overrule *Abood v. Detroit Board of Education* (1977), which held that "agency shop" arrangements, are not prohibited by the First Amendment.
 - Agency shop = non-union employees are required to pay "fair share" fees for union activities that benefit them, including collective bargaining, contract administration, and grievance adjustment. This prevents "free-riders."
 - Justices Alito, Scalia and Kennedy had criticized *Abood* in *Knox* (2012) and *Harris* (2014).

Union Agency Fees - *Friedrichs v. California Teachers Association* – cont'd

- Plaintiffs were non-union teachers who objected to making financial contributions in support of the union, and to the opt-out procedures based on their rights to free speech and association under the First and Fourteenth Amendments.
- The federal district court ruled for the state defendants in a brief decision upholding the agency shop arrangement under *Abood*.
- The Court of Appeals for the 9th Circuit affirmed in one paragraph.

Union Agency Fees - *Friedrichs v. California Teachers Association*

SCOTUS was briefer still:

- “The judgment is affirmed by an equally divided Court.”

136 S.Ct. 1083 (March 23, 2016), *petition for rehearing denied* 136 S.Ct. 2545 (June 28, 2016).

- Agency fees are preserved for the time being.

Protected Political Activity - *Heffernan v. City of Paterson, NJ*

- Heffernan was a police officer who worked in the Chief’s office. He picked up a political sign as a favor to his ill mother and put it up in her yard.
- The problem: the sign promoted Heffernan’s friend, Spagnola, who was running for mayor against the incumbent, Heffernan’s boss. Heffernan was demoted.
- He sued, alleging that the demotion was based on perceived exercise of political activity protected under the First Amendment.

Protected Political Activity - Heffernan v. City of Paterson, NJ – cont'd

- SCOTUS held Heffernan had a claim under the First Amendment, even though he didn't engage in *actual* political activity.
- The employer's motivation is the important factor – the City's motive was to retaliate against him for political activity.

136 S.Ct. 1412 (April 26, 2016)



Attorney's Fees in Title VII Cases – CRST Van Expedited v. EEOC

- 67 employees sued CRST under Title VII (sexual harassment).
- CRST won at the district court because the EEOC had failed to meet its statutory obligation to investigate the allegations and conciliate with the employer.
- Even though the employer prevailed, the district court held that the decision was not “on the merits” of the employee's claim, so the employer was not entitled to attorney's fees
- SCOTUS held the employer “prevails” regardless of whether the decision is “on the merits.” The employer is eligible to recover attorney's fees.

136 S.Ct. 1642 (May 19, 2016)



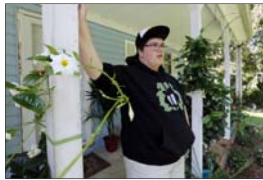
Time for Filing Constructive Discharge Claim – Green v. Brennan

- An employee's *resignation* triggers the limitations period for a constructive-discharge claim under Title VII, not the employer's *last discriminatory act*.
- If an employee gives “two weeks' notice”—telling his employer he intends to leave after two more weeks of employment—the limitations period begins to run on the day he tells his employer, not his last day at work.
- Green was a federal employee (45-day period to initiate contact with EEOC). Nonfederal employees have 180-300 days.

136 S.Ct. 1769 (May 23, 2016)

SCOTUS School Cases to be Considered in the 2016 term

- Exhaustion of Administrative Remedies under IDEA (service animal): *Fry v. Napoleon Comm. Sch.* (6th Cir.)
- *Gloucester County School Board v. G. G.* (4th Cir.)???



***Fry v. Napoleon Comm. Sch.*,
15-497, 788 F.3d 622 (6th Cir.)**

- Question Presented: May parents of a disabled child bypass IDEA procedures to bring directly a suit for damages under the Americans with Disabilities Act and the Rehabilitation Act, as damages are not available under the IDEA?
- Parents alleged harm from school district's refusal to allow service dog to accompany elementary school child with cerebral palsy.

***Gloucester County School Board v. G. G.* (4th Cir.)???**

- August 3, 2016: SCOTUS granted (5-3) the school district's emergency petition seeking a stay of the Fourth Circuit panel's April 2016 mandate and the district court's preliminary injunction allowing G.G. to use the boys' restroom at school. 136 S.Ct. 2442 (2016)
- The stay will be in effect pending the district's petition for certiorari.
- Petition denied = stay automatically terminates
- Petition granted = stay terminates upon SCOTUS' ruling.

Gloucester County School Board v. G. G., cont'd

- School district may file a petition for SCOTUS to hear the case by the end of August.
- At issue:
 - Whether the Title IX regulations on separation of students by “sex” are ambiguous; and
 - If so, whether the Department of Education’s interpretation is entitled to deference under *Auer v. Robbins* (1997).
- U.S. Court of Appeals for the 4th Circuit’s had decided in April:
 - Regulation is ambiguous *as applied to transgender students*;
 - ED’s interpretation was entitled to deference.

NSBA Resource Reminder

- **U.S. SUPREME COURT DOCKET CHART**
 - This week’s update from the current term
 - Color-coded to show status of the case

<http://www.nsba.org/us-supreme-court-docket>

FEDERAL APPELLATE RULINGS - HIGHLIGHTS

S.B. v. Bd. Of Ed. Of Harford Cnty., 819 F.3d 69 (4th Cir. 2016)

- Student with ADHD, visual-special difficulties, and nonverbal LD, was subject to peer harassment and bullying.
- School investigated and acted on each reported incident.
- Parents were teachers at the high schools; father was the athletic director.
- Parents filed suit alleging:
 - BOE discriminated against S.B. based on disability by filing to prevent peer bullying and harassment; and
 - BOE retaliated against the parents when they sought to remedy the discrimination.

S.B. v. Bd. Of Ed. Of Harford Cnty., 819 F.3d 69 (4th Cir. 2016), cont'd

- Court of Appeals affirmed the District Court's decision that peer harassment requires a showing of **deliberate indifference** by the federal funding recipient, just as in Title IX cases under *Davis v. Monroe County Board of Ed* (1999).

NOT, as the parents argued, a showing of "bad faith or gross misjudgment.

- No reasonable jury could find that the student had showed deliberate indifference to harassment based on disability. In fact, much of the chronicled harassment (S.B. was both target and perpetrator) appears to have been based on race.

S.B. v. Bd. Of Ed. Of Harford Cnty., 819 F.3d 69 (4th Cir. 2016), cont'd

"[S]chool administrators are entitled to substantial deference when they calibrate a disciplinary response to student-on-student bullying or harassment, and a school's actions do not become 'clearly unreasonable' simply because a victim or his parents advocated for stronger remedial measures."

- NSBA partnered with the Maryland Association of Boards of Education in an amicus brief noting:
 - Davis is the standard for peer harassment claims under Section 504 seeking monetary damages
 - The Supreme Court's intentionally narrow Davis standard should not be expanded
 - School officials are in the best position to respond to known incidents of bullying or harassment.

<http://www.nsba.org/amicusbriefs>

Seth B. v. Orleans Parish Sch. Bd., 810 F.3d 961 (5th Cir. 2016)

- Court held parents are entitled to reimbursement for an independent educational evaluation (IEE) under the IDEA, subject to a state cap, if they demonstrate that the IEE is in “substantial compliance” with the state and local school district criteria applicable to school-conducted evals.
- NSBA filed an amicus brief, with LSBA, MSBA, TASB LAF, NASDSE, arguing for an IEE to fulfill its purpose and provide parents the opportunity to submit relevant and meaningful data to the IEP team, the IEE must **meet** the same standards and criteria as the school district’s evaluation.

Andrew F. v. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015)

- Andrew’s parents unilaterally placed him in a private school and requested tuition reimbursement, claiming the district had failed to provide FAPE.
- U.S. Court of Appeals for the 10th Circuit upheld HO and district court’s decisions that Andrew had been receiving a FAPE, as defined in its precedent.
- Parents petitioned SCOTUS to hear the case, noting a split in the circuits about whether the substantive prong of the FAPE test requires a showing of “some” or “meaningful” educational benefit.

Andrew F. v. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015) – cont’d

- SCOTUS invited the Solicitor General to file a brief expressing the views of the U.S.
- SG filed an *amicus* brief August 18 telling the Court:
 - There is an entrenched and acknowledged circuit conflict on the question presented.
 - The Tenth Circuit’s “merely *** more than *de minimis*” standard is erroneous.
 - The question presented is important and recurring, and the court should resolve it in this case.

Andrew F. v. Douglas Cnty. Dist. Re-1, 798 F.3d 1329 (10th Cir. 2015) – cont'd

- FAPE is not currently defined in IDEA or its regulations re: level of educational benefit. Should it be?

Members of COSA's IDEA Reauthorization Working Group will discuss this and other recommendations at the 2016 School Law Practice Seminar in Portland.



Hively v. Ivy Tech Comm. College, No. 15-1720 (7th Cir. Jul. 28, 2016)

- U.S. Court of Appeals reluctantly upheld its precedent, and that of other circuits, to find that Title VII does not apply to discrimination in employment based on sexual orientation, despite the EEOC's recent ruling to the contrary.

BUT, it noted:

- Lower federal courts are taking heed of the EEOC's reasoning.
- Claims based on gender discrimination (including non-conformity to gender norms) are cognizable under Title VII.

Hively v. Ivy Tech Comm. College, No. 15-1720 (7th Cir. Jul. 28, 2016) – cont'd

- While it is difficult to distinguish gender discrimination from sexual orientation discrimination, it is not impossible.
- Either SCOTUS or Congress will have to act to include sexual orientation as a protected class under Title VII.

FEDERAL AGENCY ACTIVITY AFFECTING SCHOOLS



Another busy year--federal agencies have been churning out regs, DCLs, etc. on everything from IDEA dispute resolution to teacher exchange programs to workplace retaliation to educational rights of homeless children

ESSA Guidance Promised

At a June 29th Senate hearing, Secretary King stated that ED plans to issue "guidance" later this summer/early fall in the following areas:

- Homeless Students
- English [Language] Learners
- Foster Care Students
- Title II of ESSA (Teacher Quality)
- Title IV of ESSA (21st Century Schools
- Early Learning

In Fact, . . .

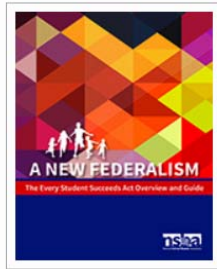
On June 23, 2016, ED and HHS jointly released guidance on foster care students:

- Foster Care Guidance: <http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercarenonregulatorguide.pdf>
- Dear Colleague Letter on Foster Care Guidance: <http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercaredcl.pdf>
- Dear Colleague Letter on Foster Care Timelines: <http://www2.ed.gov/policy/elsec/leg/essa/edhhsfostercaretimelinesdcl.pdf>

Note: Transportation deadline – December 10, 2016

NSBA Resource Reminder

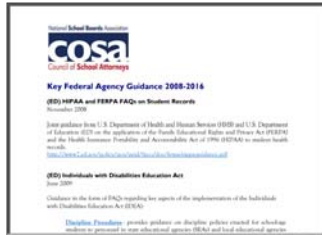
NSBA's "A New Federalism: The Every Student Succeeds Act Overview and Guide" (April 2016)



https://secure.nsba.org/pubs/item_info.cfm?who=pub&ID=791

NSBA Resource Reminder

NSBA's "Federal Agency Guidance 2008-2016" (Updated August 2016)



<https://www.nsba.org/key-federal-agency-guidance-2008-2016>

**2015-16 HIGHLIGHTS: Federal Agency
Guidance and Regulation**

- OSERS DCL on IDEA Dispute Resolution Procedures
- DOJ guide on commercial sexual exploitation of children
- DOL guide to restroom access for transgender workers
- ED English Language Learner “Toolkits” and other ELL resources
- EEOC Q&As on Workplace Discrimination
- EEOC Fact Sheet, “Living with HIV Infection: Your Legal Rights in the Workplace Under the ADA
- EEOC Final Rules under GINA on Disclosure of Spouse Information for Employer-Sponsored Wellness Program

2015-16 Highlights (cont'd)

- ED/HHS Guidance on Including Children with Disabilities in High-Quality Early Childhood Programs
- OSERS DCL on Oversight of Public Charter Schools
- DOS Final Rule on Teachers and Exchange Visitor Program
- EEOC Proposed Enforcement Guidance on Retaliation and Related Issues
- ED Practice Brief, “The Educational Rights of Children and Youth Experiencing Homelessness: What Service Providers Need to Know”
- ED Religious Discrimination Resources

2015-16 Highlights (cont'd)

- DOJ Guidance, “ADA Update: A Primer for State and Local Governments”
- FCC Final Rule implementing next steps to modernize the E-Rate program
- DOL resource guide, “Employer’s Guide to the Family and Medical Leave Act”
- EEOC resource document, “Employer-Provided Leave and the Americans with Disabilities Act”
- ED Guidance on Supporting Homeless Children and Youth under ESSA

2015-16 Highlights (cont'd)

- ED Actions to Address Religious Discrimination – website, updated complaint form, addition of religion-based bullying to CRDC
- ED Dear Colleague Letter and “Know Your Rights” document on Civil Rights of Students with ADHD
- ED Dear Colleague Letter on “Ensuring Equity and Providing Behavior Supports to Students with Disabilities”
- **ED/DOJ Dear Colleague Letter and OESE Best Practices Guide for Transgender Students**

May 13 DCL on Transgender Students

- **The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its regulations.**
- “This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.”

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

May 13 DCL on Transgender Students, cont’d

- “A school may provide separate facilities on the basis of sex, but must allow transgender students access to such facilities consistent with their gender identity. A school may not require transgender students to use facilities inconsistent with their gender identity or to use individual-user facilities when other students are not required to do so.”

<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>

New DCL Directives

- Parent notice sufficient
- Medical diagnosis/treatment, or birth certificate not required
- No discipline/exclusion from activities for behavior consistent with gender identity or that does not conform to stereotypical notions of masculinity or femininity
- FERPA prohibits schools from publicly disclosing a transgender student's birth name or biological sex; change the gender on school records and directories when asked
- Eligibility for single-sex teams may not rely on overly broad generalizations or stereotypes about the differences between transgender students and other students of the same sex.

New DCL Directives

- Schools must ensure nondiscrimination on the basis of sex includes providing transgender students equal access to educational programs and activities even in circumstances in which other students, parents, or community members raise objections or concerns.
- The desire to accommodate others' discomfort cannot justify a policy that singles out and disadvantages a particular class of students.

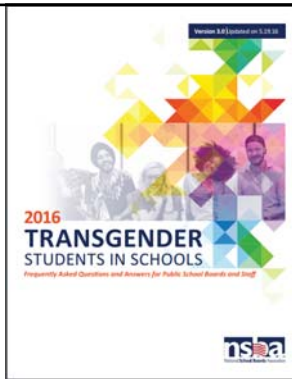
ED Transgender Students Resources

- **May 13, 2016 Guidance from ED/DOJ**
The Departments treat a student's gender identity as the student's sex for purposes of Title IX and its regulations.
<http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>
- **U.S. ED OCR LGBT guidance page (letters and Resolution Agreements)**
<http://www2.ed.gov/about/offices/list/ocr/lgbt.html>
- **U.S. ED OCR April 2014 guidance on sexual violence**
<http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>

NSBA Resource Reminder

Transgender Students in Schools:

Frequently Asked Questions and Answers for Public School Boards and Staff



<http://www.nsba.org/nsba-faqs-transgender-students-schools>

COSA Resource: Trans-gender Litigation Chart

STATE	CASE CAPTION	PROCEDURAL HISTORY	CURRENT STATUS	COMMENTS
GA	Student v. Board of Education, No. 18-11100 (2018), 18-11170 (2018)	In July 2017, Student v. Board of Education (No. 18-11100) and Student v. Board of Education (No. 18-11170) were filed in the Northern District of Georgia. The Board of Education (BOE) sought the federal government's investigation into allegations of discrimination against a transgender student. Under the resolution agreement, AUSD agreed to continue accommodations & target counseling over a year before. Under the agreement, AUSD agreed to continue to treat the student like all other male students. The agreement also provided that AUSD will: (1) work with a consultant to create a safe, non-discriminatory learning environment for all students who are transgender or at risk of being transgender; (2) attempt to join on its transgender gender identity as a form of discrimination; and (3) provide annual training on preventing gender-based discrimination. The provisions of the agreement related to the student will remain in place until he leaves the district. The other provisions under provisions are in place until the end of the school year.	Resolved	Under the resolution agreement , the student, who has attended to male schools since kindergarten and is now attending middle school, according to the agreement, he began the transition to being a male during 2017. The school district provided a gender identity bathroom for the student's use. In 2017, the Department of Education received a complaint because the district did not allow the student to use their restroom and locker rooms.

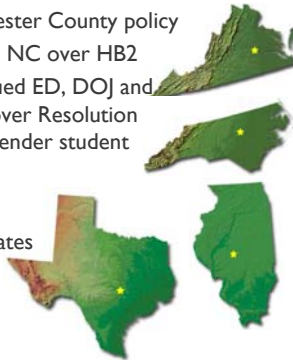
<http://www.nsba.org/transgender-litigation-chart>

NSBA Transgender Students Resources

- **NSBA Statement on OCR/DOJ guidance**
<https://www.nsba.org/newsroom/press-releases/nsba-statement-regarding-guidance-departments-justice-and-education>
- **NSBA/COSA chart on transgender student litigation**
<http://www.nsba.org/transgender-litigation-chart>
- **COSA Seminar Papers and I&A Articles**
Try a COSA Legal Research Database Search!

Federal Litigation on DCL, District Policies on Transgender Students

- VA: G.G. challenging Gloucester County policy
- NC: NC sues Fed/Fed sues NC over HB2
- IL: students and parents sued ED, DOJ and Palatine 211 school board over Resolution Agreement requiring transgender student access to locker rooms.
- TX: 11+ states allege ED/DOJ May 13 guidance violates federal law
- AND MORE



BONUS *State of Texas et al. v. U.S.* (N.D. Tex. August 21, 2016)

Preliminary injunction:

- U.S. barred from enforcing the ED/DOJ joint guidance interpreting Title VII and Title IX as protecting against discrimination based on gender identity against plaintiffs and their schools, school boards and "other public, educationally-based institutions."
- While the injunction is in place, the defendants are enjoined "from initiating, continuing, or concluding any investigation based on Defendants' interpretation that the definition of sex includes gender identity in Title IX's prohibition against discrimination on the basis of sex."


BONUS *State of Texas et al. v. U.S.* (N.D. Tex. August 21, 2016) – cont'd

- Guidance issued by the departments is a legislative rule, and Administrative Procedure Act requires notice-and-comment.
- The departments' interpretation of Title IX conflicts with the clear language of the law and the legislative history surrounding the law and "manufactures" ambiguity regarding the term "sex" in Title IX.
- Injunction applies nationwide.

BONUS BONUS

***Carcano v. UNC* Injunction Issued**

- Federal judge ruled YESTERDAY that UNC cannot enforce that portion of the state’s “bathroom bill” that requires institutions to limit multi-occupant restroom use to the sex shown on a person’s birth certificate.
- The judge’s order only applies to the three plaintiffs in this case, and only until the case is fully decided.
- The judge ruled the plaintiffs showed a likelihood of success on their Title IX claim based on the Fourth Circuit’s April ruling, but not a similar likelihood of success on their Equal Protection and Due Process claims.



Briefly noted:
ROBOCALL RULING

**Robocall Ruling
Federal Communications Commission
August 4, 2016**

- Schools may make robocalls and send automated texts to student family wireless phones pursuant to an 'emergency purpose' exception or with prior express consent without violating the Telephone Consumer Protection Act (TCPA).
 - weather closures
 - incidents of threats and/or imminent danger due to fires, dangerous persons, or health risks, and
 - unexcused absences.

Robocalls Ruling – FCC August 4, 2016

- Schools are deemed to have the requisite "prior express consent" to place other types of robocalls that are not emergencies, but are "closely related to the school's mission" to numbers that recipients have provided to the school.
 - notifications of upcoming teacher conferences
 - general school activities.
- Schools need to be able to show that recipients of the calls "consented" by providing their numbers to the school.



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