

**2020**  
**SOUTH CAROLINA**  
**SCHOOL BOARDS ASSOCIATION**  
**VIRTUAL**  
**SCHOOL**  
**LAW**  
**CONFERENCE**  
**AUG. 21-22**

**L I V E   A N D   I N T E R A C T I V E**



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## **school law conference meeting materials**

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# Agenda

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## Friday, August 21

9 - 10:15 a.m.

### Opening session

#### Greetings from the SCSBA Executive Director

Scott T. Price, *SCSBA Executive Director*

#### Welcome and purpose

Chuck Saylors, *SCSBA President, Greenville County Schools*

#### The National School Law Docket: A survey of selected cases from the NSBA Legal Advocacy Agenda

Join NSBA's Managing Director of Legal Advocacy Sonja Trainor for a survey of the NSBA School Law Docket. This dynamic session will include a look at three significant cases issued by the Court this year and examine their impact on public schools. From employment to vouchers to immigration, this view at the national school law landscape is essential for lawyers, administrators, and school board members.

Sonja H. Trainor, *Managing Director of Legal Advocacy, National School Boards Association*

10:15 - 10:30 a.m.

### Break

*Co-sponsored by Duff Freeman Lyon, L.L.C.*

10:30 - 11:30 a.m.

### Second session

#### Off-Campus Speech: School disruption

Technology is an ever-progressing field that offers students and employees creative ways to freely engage with their peers. Social media is often used as an outlet to express beliefs, opinions, concerns and values in response to social issues. While social media provides opportunities to engage in healthy discussion and debate, sometimes conflict can arise. Such conflict, which occurs away from the school environment, can enter the classroom and cause disruption in the educational environment. Come hear what the courts have to say about student and employee discipline regarding off-campus speech. During this session, you will also learn more about the legal and social implications of off-campus speech and explore districts' options

in addressing the behavior, while minimizing disruption to school operations and the education of students.

Charles J. Boykin, *Partner, Boykin & Davis, LLC*

Tierney F. Dukes, *Associate Attorney, Boykin & Davis, LLC*

11:30 a.m. - 12:15 p.m. **Lunch Break**

12:15 - 1:15 p.m. **Third session**

**So you want to play sports (and other extracurriculars) during a pandemic?**

Discuss best practices for beginning sports and other extracurricular activities during the COVID-19 pandemic. More specifically, you'll learn best tips and practices regarding South Carolina High School League guidance, including what you *must* implement and what you *should* implement. Get answers to your questions about Assumption of Risk Waivers, required Personal Protective Equipment (PPE) and funding for PPE.

Molly Flynn, *Associate Attorney, White & Story, LLC*

1:15 - 1:30 p.m. **Break**

*Co-sponsored by Halligan Mahoney & Williams, P.A.*

1:30 - 2:30 p.m. **Fourth session**

**Employee and student legal issues arising out of the pandemic**

Spend the afternoon hearing a thorough review of COVID-19 emergency employment laws and back-to-work issues for employees and students.

Tom Barlow, *Partner, Halligan Mahoney & Williams, P.A.*

2:30 p.m. **Announcements**

Chuck Saylors, *SCSBA President, Greenville County Schools*

**Saturday, August 22**

9 - 10:15 a.m. **Fifth session**

**Opening remarks**

Chuck Saylors, *SCSBA President, Greenville County Schools*

**Individual with Disabilities Education Act (IDEA)**

Come hear an overview of the lawsuit with the United States Department of Education regarding our state's Individuals with Disabilities Education Act (IDEA).

Barbara A. Drayton, *Deputy General Counsel, Office of General Counsel,  
South Carolina Department of Education*

10:15 - 10:30 a.m.

**Break**

*Co-sponsored by Morton & Gettys, Attorneys at Law*

10:30 - 11:30 a.m.

**Sixth session**

**What do the new Title IX regulations mean for school districts?**

Learn how the new Title IX regulations will impact school districts, with a focus on how schools should handle sexual harassment and sexual assault allegations.

David Lyon, *Partner, Duff Freeman Lyon, L.L.C.*

11:30 – 11:40 a.m.

**Break**

11:40 a.m. - 12:40 p.m.

**Closing session**

**2020 Legislative update**

In early March, the House passed its version of the Fiscal Year 2020-2021 state budget, and the Senate finally passed and sent to the House an omnibus education bill after eight weeks of gridlock. But shortly after, the governor ordered the shutdown of non-essential businesses to slow the spread of the deadly coronavirus pandemic and everything stopped. Get an overview of the legislative session so far and hear a discussion about what is still “on the table” when lawmakers return in September to complete work on a new state budget.

Debbie Elmore, *Director of Governmental Relations, SCSBA*

12:40 p.m.

**Closing remarks**

Chuck Saylors, *SCSBA President, Greenville County Schools*

**SCSBA Thanks all Co-Sponsors:**

Boykin & Davis, LLC

Duff Freeman Lyon, L.L.C.

Halligan Mahoney & Williams, P.A.

Morton & Gettys, Attorneys at Law

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2020  
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SCHOOL BOARDS ASSOCIATION  
**AUG. 21-22**  
**2020**

**VIRTUAL**  
**SCHOOL**  
**LAW**  
CONFERENCE

A TWO-DAY  
**ONLINE**  
EVENT



**Scott T. Price**  
*SCSBA Executive Director*



**Chuck Saylor**  
*SCSBA President  
Greenville County Schools*



**Sonja H. Trainor**  
*Managing Director of Legal Advocacy  
National School Boards Association*



**Charles J. Boykin**  
*Partner  
Boykin & Davis, LLC*



**Tierney F. Dukes**  
*Associate Attorney  
Boykin & Davis, LLC*



**Molly Flynn**  
*Associate Attorney  
White & Story, LLC*



**Tom Barlow**  
*Partner  
Halligan Mahoney & Williams, P.A.*



**Barbara A. Drayton**  
*Deputy General Counsel  
Office of General Counsel  
South Carolina Department  
of Education*



**David Lyon**  
*Partner  
Duff Freeman Lyon, L.L.C.*



**Debbie Elmore**  
*Director of Governmental Relations  
and Communications  
SCSBA*

# 2020 LUNCH and Learn

## SPECIAL WEBINAR SERIES

### THURSDAYS, NOON - 1 P.M.

#### Registration

Use the links below to register for each webinar. There is no registration fee for this special series, however you must register to participate.

After you register, you will receive a confirmation email. You will receive the link to participate in the webinar the morning of each webinar.

#### Boardmanship Institute

Participating board members will receive 1 point and 1 hour of SCSBA Boardmanship Institute credit for each webinar.

#### September 3, 2020

##### **COVID-19 and potential liability under IDEA — Providing a "FAPE" while employing alternative instruction delivery methods**

The Individuals with Disabilities Education Act (IDEA) requires that school districts provide eligible students with disabilities with a free appropriate public education or a "FAPE". What constitutes a FAPE when schools are operating under normal circumstances, with traditional face-to-face instructional delivery, has been litigated extensively and legal guidance can be gleaned from Supreme Court rulings. Now, with the COVID-19 pandemic, school districts are faced with unique, unprecedented circumstances that are requiring the use of alternative instructional delivery methods during the 2020-2021 school year. This session will help board members understand how the Supreme Court has defined FAPE,



Keup

and the core concepts relating to the provision of a FAPE. Participants will explore how the core concepts of providing a FAPE may be interpreted in light of the changes necessitated by the COVID-19 pandemic and how school districts can employ good practices to minimize potential IDEA liability.

**Peter Keup, Esquire, Boykin & Davis, LLC**

● **Click here to register now.**

#### September 10, 2020

##### **Funding long-term and short-term capital projects**

During this session board members will explore the financing options available to school districts under South Carolina law to finance short-term and long-term capital needs.



Heizer

**Francenia B. Heizer, Attorney,  
Burr Forman McNair**

● **Click here to register now.**



# Who to call

# 800.326.3679

**We welcome your calls and e-mails.** Call toll-free. After hours, dial the extension to leave a voice mail.

## SCSBA

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South Carolina School Boards Association

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## *The leading advocate for public education*

**The National School Law Docket:**  
**A Survey of Issues from the NSBA Legal Advocacy Agenda**  
*SCSBA Virtual School Law Conference*  
*August 21, 2020*

### Roadmap

- **Federal Agency Activity and NSBA Advocacy**
  - New publication
  - Agency Activity
    - Equitable Services and CARES Act funds
    - Title IX regulations
  - IDEA liability report
- **The Supreme Court's October 2019 Term**
  - Employment discrimination – Section 1981
  - Immigration policy – APA
  - Employment discrimination – Title VII
  - Public funds to religious schools – No-aid clauses
- **Circuit/Petitioned/Granted Cases to Watch**
  - B.L. v. Mahanoy
  - Kennedy v. Bremerton
- **Issue to Watch** -- Transgender student athletes



*The leading advocate for public education*

## Federal Agency Activity and NSBA Advocacy



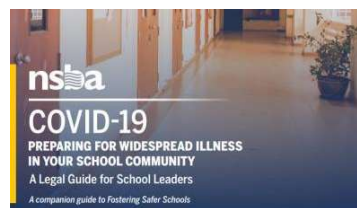
Download the Report at [nsba.org/publications](https://www.nsba.org/publications)

## NSBA Legal Guides

<https://www.nsba.org/Advocacy>



*Christine N. Casper, Esq., McDonald Hopkins LLC 2019*



*A companion guide to Fostering Safer Schools*



## Equitable Services and CARES Act Funds

### March 27 -- CARES Act

- established relief funds for K-12 education.
- directs states to distribute CARES Act funds to LEAs in proportion to their allocation under part A of Title I of ESEA in the previous fiscal year (based on the number of children who are economically disadvantaged).
- directs LEAs to use a portion of CARES Act funds to provide equitable services to eligible private-school students and teachers in the same manner as provided under Title I (based on the number of low-income students who attend private schools as a percentage of the total number of low-income students in public and private schools combined). LEA then provides equitable services to private-school students who are academically at-risk.



## Equitable Services and CARES Act Funds

### April 30 – ED Guidance

- directed LEAs to allocate funds to private schools based on the *total number* of students enrolled in private schools.



## Equitable Services and CARES Act Funds

### July 1 – Interim Final Rule 85 Fed. Reg. 39,479

Gave LEAs two options:

(1) follow the Guidance – apportion funds for equitable services based on the number of all private school children enrolled, rather than low-income private school children as required by ESEA; or

(2) apportion funds for equitable services based on the number of low-income non-public school children, but then

- don't use any CARES Act funds for non-Title I schools. ***So many economically disadvantaged and at-risk students not in Title I schools being excluded.***

and

- don't use any CARES Act funds or to supplant, rather than supplement, state and local funding. ***So LEAs couldn't use CARES Act funds for existing expenditures, which is nonsensical since filling the gap created by reduced state and local funding is a key purpose of the CARES Act funding.***

***Under either option, all private-school students would still be eligible to receive equitable services, negating ESEA eligibility requirements.***



## Equitable Services and CARES Act Funds

- NSBA and other national ed organizations sent letters to Congress and encouraged members to communicate with their delegation to reign in ED's erroneous interpretation.
- July 31: NSBA filed comment on the Interim Rule.
- Several states and organizations filed 3 law suits challenging the interim rule, asserting:



## Title IX/Sexual Harassment Final Regulations issued May 2020

### NSBA letter to ED:

- I. August 14 Effective Date Means Insufficient Time For:
  - A. Policy revisions
  - B. Appropriate training
  - C. Pandemic reopening efforts
- II. K-12 “Actual Knowledge” Standard Creates Confusion
- III. New Complaint Evaluation and Processing Standards Raise Questions
  - A. Title IX Coordinators bringing formal written complaint.
  - B. Managing a parallel discipline system.
- IV. Mandate to Release Confidential Information and Limitations on Early Disciplinary Intervention are Unduly Restrictive.

**3 lawsuits are challenging the regulations and implementation date.**



## IDEA Liability Report

“Evidence and data are imperative for policymakers to make sound policies. The information presented in this paper, while including both qualitative and quantitative facts, cannot cover every aspect of IDEA related legal challenges. Yet, the report gives insight into the hardship that school leaders are experiencing when making all efforts to serve every special education student during the pandemic.”

<https://nsba.org/-/media/Files/nsba-aasa-aesa-IDEA-white-paper-july-14-20.pdf>



*The leading advocate for public education*

## The Supreme Court's October 2019 Term

# The Roberts Court

What is the Robert's 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.*



## *Comcast Corporation v. National Association of African American-Owned Media, and Entertainment Studios Networks*, 140 S.Ct. 1009 (March 23, 2020)

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### ***Comcast Corp. v. National Association of African-American Owned Media*, 140 S.Ct. 1009 (2020)**

Issue:

- Whether a plaintiff bringing a Section 1981 claim must allege that the defendant's action would not have occurred if the plaintiff's race had been different ("but-for" causation),
- or whether it is sufficient to allege that discriminatory intent was simply a motivating factor ("mixed motive" causation), even though other factors motivated the action.

Facts:

- African American-owned operator of television networks sued Comcast under Section 1981 claiming its refusal to contract with the networks was racially motivated.
- Ninth Circuit applied the "mixed-motive" framework from Title VII to Section 1981 despite the fact that Section 1981 contains no "motivating factor" language like Title VII.

#### NSBA brief :

- The Ninth Circuit's approach will be harmful to school districts as employers and as contracting entities.
- NSBA argued that a mixed motive standard, not required by the statutory language, would:
  - disrupt established employment and contract law by making it easier for vendors to sue under Section 1981;
  - discourage employers from taking lawful employment actions for fear of litigation burdens.



#### The Court's unanimous decision overturning the 9<sup>th</sup> Circuit.

##### Unanimous Court (Gorsuch writing):

- A §1981 plaintiff bears the burden of showing that the plaintiff's race was a 'but-for' cause of its injury", and that burden remains constant over the life of the lawsuit.
- Title VII and §1981 have "two distinct histories, and not a shred of evidence that Congress meant them to incorporate the same causation standard."

##### **Concurrence:** Ginsburg

Although SCOTUS precedent now requires but-for causation, this decision will allow what would otherwise be impermissible racial discrimination to occur in the contract formation process.



## Comcast: Implications for Schools

- Clear national standard for liability under Section 1981 – plaintiff must allege and prove but-for causation.
- Narrows liability risks and reduces incentives for employees and vendors to sue school districts.
- A broad Section 1981 liability standard would have increased legal risk for school districts: longer statute of limitations, no damages cap, no exhaustion of administrative remedies.

*Dept. of Homeland Security v. Regents  
of the University of California, \_\_\_\_ S.Ct.  
\_\_\_\_, 2020 WL 3271746 (June 18, 2020)*

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**Consideration of Deferred Action  
for Childhood Arrivals**

Department of Homeland Security  
U.S. Citizenship and Immigration Services

**USCIS  
Form I-821D**  
OMB No. 1615-0124  
Expires 04/30/2021

**How we got here:**

- DACA program issued in 2012 by DHS. Allowed certain young people who arrived with undocumented parents to apply for protected status. Government would forbear removal action for a designated period.
- Rescinded on September 5, 2017 by DHS. After the expiration of grantees' current terms, grantees would immediately face loss of employment, loss of certain benefits, and be subject to deportation.
- Cases challenging the rescission of DACA were filed in New York, California, DC, and Maryland.
  - Injunctions halting the rescission were issued in NY and CA, and the 9<sup>th</sup> Circuit upheld one of those injunctions.
  - A case challenging an expansion of DACA was filed in Texas, and the 5<sup>th</sup> Circuit held the expansion of DACA was likely unlawful and should be enjoined. The Supreme Court upheld that decision in 2016.



**Consideration of Deferred Action  
for Childhood Arrivals**

Department of Homeland Security  
U.S. Citizenship and Immigration Services

**USCIS  
Form I-821D**  
OMB No. 1615-0124  
Expires 04/30/2021

***Dept. of Homeland Security v. Regents of the University of California, \_\_\_\_  
S.Ct. \_\_\_\_, 2020 WL 3271746 (June 18, 2020)***

**Supreme Court Agreed to Decide:**

- Was DHS's decision to wind down the DACA policy lawful?
- Can federal courts review DHS's decision to wind down the DACA policy?



## Consideration of Deferred Action for Childhood Arrivals

Department of Homeland Security  
U.S. Citizenship and Immigration Services

USCIS  
Form I-821D  
OMB No. 1615-0124  
Expires 04/30/2021

### NSBA filed an amicus brief with SCOTUS arguing:

- An agency's rationale must be adequately explained, any change in policy acknowledged, and reliance interests accounted for.
- The decision to rescind DACA was arbitrary and capricious.
- DHS did not adequately take into account reliance interests.

### The Court's 5-4 decision finding rescission arbitrary and capricious

**Majority:** Roberts, Ginsberg, Breyer, Kagan, Sotomayor

The reasons provided by Sec. Nielsen for rescission amounted to post hoc rationalization, unrelated to the reasons first asserted by Acting Sec. Duke.

DHS' actions were arbitrary and capricious because the Secretary failed to address the issue of forbearance (of deportation) or to consider the "legitimate reliance interests" that many of the DACA recipients had developed as a result of the original program.



### The Court's 5-4 decision finding rescission arbitrary and capricious

**Plurality:** Roberts, Ginsberg, Breyer, Kagan

Respondents had not stated a valid equal protection claim under the Fifth Amendment, which requires that a plaintiff "raise a plausible inference that an 'individual discriminatory purpose was a motivating factor' in the relevant decision."



## The Court's 5-4 decision finding rescission arbitrary and capricious

### Concurrence: Sotomayor

The Court's foreclosure of any challenge under the Equal Protection Clause is unwarranted. The impact of the rescission on Latinos as a group, she said, "must be viewed in the context of the President's public statements on and off the campaign trail" at the Motion to Dismiss stage.

### Dissent: Thomas, Alito, Gorsuch

The administration's decision to rescind DACA and the method by which it did so were "clearly reasonable" because the program was unlawful.



## ***Dept. of Homeland Security v. Regents of the University of California: Implications for Schools***

- The positive effects of the DACA program for school communities are safe - for now.
  - Motivation for young people to stay in school, further their education and choose productive careers, including in public schools.
  - DACA protects close to 9,000 education employees from deportation.
- Chilling effect of participation by dreamers in school communities is stayed -- for now.
- Schools do not face loss of teachers protected by DACA at different times throughout the school year – for now.
- K-12 public schools, obligated to educate all students under *Plyer v. Doe*, 457 U.S. 202 (1982), are not losing DACA-protected students – for now.
- The ruling may spur Congressional action to protect dreamers from deportation.

***Bostock v. Clayton County, Georgia, \_\_\_\_***  
**S.Ct. \_\_\_\_ 2020 WL 3146686**  
**(June 15, 2020)**

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

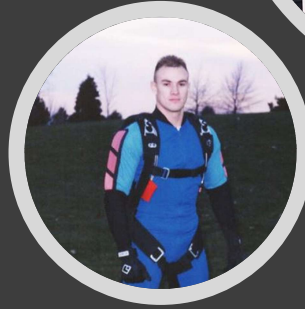
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*Altitude Express, Inc. v. Zarda*, 883 F.3d 100 (2d Cir. 2018)

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

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## The question:

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Does discrimination on the basis of homosexuality and transgender status constitute discrimination “because of sex” under Title VII of the Civil Rights Act of 1964?

### The NSBA brief:

- Focused on C.J. as swing vote, and Gorsuch, with a textualist argument:
  - Title VII’s plain text prohibits adverse employment action because of the employee’s sex.
  - The text of the statute governs and provides clear, administrative rules that both teachers and school districts can apply.
- Explained why it matters to public schools:
  - Clear legal standards in this area will help schools recruit, maintain, and support a diverse and effective workforce.
  - In the midst of a teacher shortage, it is crucial that schools are able to maintain the best workforce possible.
  - Eliminating irrelevant characteristics from school employment decisions promotes an inclusive school climate conducive to teaching and learning.



## The Court's 6-3 Decision in favor of the employees

**Majority:** Gorsuch, CJ Roberts, Ginsburg, Breyer, Sotomayor, and Kagan.

- Gorsuch used a textualist approach, as NSBA had suggested, finding “because of sex” includes homosexuality and transgender status.

**Dissents:** Alito (with Thomas) and Kavanaugh.

- Both dissents asserted that a textualist approach should have produced the opposite result.



## 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.”

## Dissenting Opinions

- Alito: Don’t be “fooled” by the opinion, which is a “like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should ‘update’ old statutes so that they better reflect the current values of society.” What the majority has done is to legislate from the bench.
- Kavanaugh: the majority gives too much weight to the *literal* meaning of the statute’s text, rather than the *ordinary* meaning. The ordinary meaning of discrimination “because of ... sex” does not encompass sexual orientation (or transgender status).

## ***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

*Espinoza v. Montana Department of  
Revenue*, \_\_\_ S.Ct. \_\_\_, 2020 WL  
3518364 (June 30, 2020)

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### **The Supreme Court on Funding Religious Instruction: Where We’ve Been**

*Locke v. Davey* (2004): Washington did not violate the Free Exercise clause when it excluded devotional theology majors from its college scholarship program. States have a “historic and substantial interest” in excluding religious instruction from public funding, and nothing in the history of the program suggested animus toward religion.



## The Supreme Court on Funding Religious Instruction: Where We've Been

*Trinity Lutheran Church of Columbia v. Comer* (2017): Missouri's playground resurfacing grant program could not exclude a church "because of what it *is* – a church." That's a violation of the Free Exercise Clause.

The state's fear of an Establishment Clause violation was not enough to justify the restriction on religious freedom.

MO constitution's no-aid clause prohibits public money from going "directly or indirectly, in aid of any church, sect or denomination of religion...."



### ***Espinoza v. Montana Dept. of Revenue***

Montana's state constitution prohibits public entities including school districts from making "any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination."



### ***Espinoza v. Montana Dept. of Revenue*,**

The Montana Supreme Court ruled that the state's tax credit scholarship program was invalid because, as written, it would allow state funds to go *indirectly* to religious institutions in violation of the state constitution.

Parents of students in private parochial schools who cannot use the program petitioned the Supreme Court to hear the case.



### Issues Presented:

...whether it violates the Religion Clauses or Equal Protection Clause of the United States Constitution to invalidate a generally available and religiously neutral student-aid program simply because the program affords students the choice of attending religious schools.



### NSBA's strategy...

- Urge the Court to maintain its historic commitment to public education and resist attempts by public interest groups to weaken it through programs that choke off public tax dollars that public schools desperately need.
  - Montana program would reduce state's general fund revenues by up to \$9.6 million annually by fiscal year 2022.
- Also, target C.J., with:
  - potential for regulation of sectarian schools.
  - Uphold precedent particularly as applied to k12.

### The Court's 5-4 decision in favor of Espinoza

**Majority:** Roberts, Thomas, Alito, Gorsuch, Kavanaugh

- Under *Trinity Lutheran*, disqualifying otherwise eligible recipients from a public benefit "solely because of their religious character" imposes "a penalty on the free exercise of religion that triggers the most exacting scrutiny."
- The MT Supreme Court's application of the state no-aid provision here was based on religious status, not religious use of public funds, so *Locke v. Davey* doesn't apply.



## The Court's 5-4 decision in favor of Espinoza

**Majority:** Roberts, Thomas, Alito, Gorsuch, Kavanaugh

*A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.*



## The Court's 5-4 decision in favor of Espinoza, cont'd

**Majority:** Roberts, Thomas, Alito, Gorsuch, Kavanaugh, cont'd

- Rejected compelling interests put forward by MT and its amici.
  - Separation of church and state – no compelling interest if state action goes beyond what free exercise will allow.
  - Promotion of religious freedom – churches can opt out of the program if they want, but not being able to participate does not enhance liberty.
  - Support of public schools – MT could choose not to fund private schools, but can't ask religious schools to bear the weight of exclusion alone.



## The Court's 5-4 decision in favor of Espinoza, cont'd

**Concurrence:** Thomas, Gorsuch

- By repeatedly finding a compelling interest in avoiding an Establishment Clause violation, which 'may justify' abridging other First Amendment freedoms, Free Exercise now "rests on the lowest rung of the Court's ladder of rights."

**Concurrence:** Alito

- Under the Court's recent ruling in *Ramos v. Louisiana*, the "uncomfortable past" of state no-aid clauses must still be examined. It is not clear that the anti-Catholic animus behind the clauses and the common school move was scrubbed.

**Concurrence:** Gorsuch

- "Whether the Montana [no-aid provision] is better described as discriminating against religious status or use makes no difference: It is a violation of the right to free exercise either way..."



## The Court's 5-4 decision in favor of *Espinoza*, cont'd

**Dissent:** Ginsburg, Kagan

- The petitioner was treated neutrally because no private school, whether religious or not, could benefit from the funds after the state supreme court's ruling. The petitioner's religious freedom was not burdened because she could still send her children to religious school if she saw fit – she just would not be able to use public funds to pay for it.

**Dissent:** Breyer, Kagan (as to Part I)

- The majority should have considered the necessary balance between the Religion Clauses. By applying *Trinity Lutheran* rather than *Locke*, "the majority's approach and its conclusion in this case, I fear, risk the kind of entanglement and conflict that religious clauses are intended to prevent."

**Dissent:** Sotomayor

- SCOTUS should not have decided whether MT's no-aid provision was facially invalid under the Free Exercise Clause, because no such claim was presented, and there is no program left. Plus, differentiating based on religious status is not necessarily discrimination.



## *Espinoza*: Implications for Schools

- There will be efforts in some states to pass or expand voucher/tax credit programs. State no-aid provisions cannot be applied to exclude religious entities *as such*.
- Thomas got Gorsuch to join his view that the Free Exercise right has been weakened because of Court precedent finding avoiding an Establishment Clause violation is a compelling interest. Is the "play in the joints" between the two clauses disappearing?
- Do we have to look at proportionate share services under IDEA differently?

The *Espinoza* Dominos – State Funding of Religious Schools in MI and ME

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**Council of Organizations and Others for Education About  
Parochial v. State of Michigan, 931 N.W.2d 65 (Mich. App. 2018);  
929 N.W.2d 281 (Mich. Supreme Court order granting appeal,  
June 24, 2019).**

- In 1970, the Michigan electorate adopted a change to the state constitution to prohibit financial aid to nonpublic schools.
- The Michigan Supreme Court interpreted that provision in 1971, in *Traverse City School District v. Attorney General*, 18 N.W.2d 9 (Mich. 1971), to mean the state could provide funding that was 'incidental' to the private schools [sic] support and maintenance."
- Michigan legislature relied on that opinion in 2016 to pass a law to reimburse private schools for the cost of complying with certain state "health, safety, or welfare" laws and regulations.
- MASB and others filed suit challenging constitutionality of law.
- Now before the Michigan Supreme Court.



## NSBA amicus brief:

- Michigan's no-aid provision is constitutional.
- Federal courts have recognized (1) that public education is a state function; and (2) that there is "play in the joints" between the Free Exercise and Establishment Clauses permitting states leeway to support their public education mission by limiting funding to religious and other private schools.
- Michigan's constitution applies uniformly to all non-public schools, and does not burden religious schools more than other private schools.
- The state constitution reflects the Michigan electorate's dedication to preserving public funding for public education, a crucial and uniquely state-based undertaking.

## Current posture....

- After new Governor (Democrat) came in, the State changed position:
  - Statute is unconstitutional except with respect to transportation costs.
  - The state constitution's bar on directing public monies to support nonpublic schools does not violate the federal constitution; it as article 8, protects scarce state resources and is facially neutral, applying to all nonpublic schools.
- Case held in abeyance February 5, 2020, pending the Supreme Court's decision in *Espinoza*.

***Carson v. Makin*, 401 F.Supp.3d 207 (D. Maine 2019), on appeal (1st Cir.)**

**Issue:** whether Maine's exclusion of religious schools from its program of paying tuition to parent-chosen private schools when the local school administrative unit does not provide a public school violates the First Amendment.

- Plaintiffs are parents who live in towns served by school administrative units that do not operate a secondary school. The parents would prefer to send their children to sectarian schools, but such schools are excluded from the program.
- They challenged the program, arguing that it violates the Free Exercise Clause under *Trinity Lutheran*.
- The district court decided that it was bound by the First Circuit's 2004 decision in *Eulitt ex rel. Eulitt v. Maine, Dep't of Educ.*, and upheld the state's program. Plaintiffs appealed.



**NSBA amicus brief:**

- NSBA urges the First circuit to uphold its precedent and the state's tuition program.
- In *Trinity Lutheran*, the Supreme Court did not disturb its precedent recognizing some "play in the joints" between the First Amendment's Free Exercise and Establishment Clauses.
- State programs that **may** include religious organizations under the Establishment Clause are not necessarily **required to** include religious organizations under the Free Exercise Clause (THIS MAY NO LONGER BE TRUE AFTER *ESPINOZA*).
- Here, the public benefit at issue is very different from the playground resurfacing grant involved in *Trinity Lutheran*. Here, the benefit at issue is the provision of a public education, which is secular. If the court requires Maine to fund the pervasively religious education sought by the plaintiffs, it will undermine support of public education throughout the First Circuit.

The case was argued January 8, 2020.



**Cases to Watch**

In ***Kennedy v. Bremerton School District***, a high school football coach sued his employer after he was disciplined for conducting prayers on the 50-yard-line with players after games.

9th Circuit upheld denial of injunction, finding coach had failed to show a likelihood of success on the merits of his First Amendment retaliation claim because his speech, i.e., praying on the fifty-yard line immediately after games, was pursuant to his official duties as a coach, applying *Garcetti v. Ceballos*, 547 U.S. 410 (2006) and finding the former coach's praying was not protected speech under the First Amendment.

SCOTUS denied cert., but....

Alito + Thomas, Gorsuch, and Kavanaugh, issued a statement concurring:

- Denial doesn't mean we agree with the 9th Circuit's decision or opinion.
- Important factual questions are unresolved – the likely reason for the school district's conduct – so it is difficult-to-impossible to decide the free speech question.
- The coach's free speech claim may ultimately implicate important constitutional issues.
- 9th Circuit interpreted *Garcetti* to allow employers to fire employees "if they engage in any expression that the school does not like while they are on duty."
- 9th Circuit's opinion could "be understood to mean that a coach's duty to serve as a good role model requires the coach to refrain from any manifestation of religious faith—even when the coach is plainly not on duty."

District Court ruled again in March 2020 on cross-motions for SJ:

- Kennedy's prayers at the 50-yard line were not constitutionally protected. Kennedy's speech at the 50-yard line reasonably could be viewed as belonging to the school district, as it "owes its existence" to his coaching position. Additionally, the prayer raised concerns recognized by the Supreme Court about "protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." Kennedy's duties as a coach "involved modeling good behavior while acting in an official capacity in the presence of students and spectators," and Kennedy himself testified that what he says or does while coaching serves as an influential example for his players to "do what is right."
- The school district gave Kennedy multiple options to continue praying after games that would not have amounted to an Establishment Clause violation. Kennedy, however, rejected these accommodations and did not respond to the District's requests for further input

On appeal to Ninth Circuit.



## The First Amendment:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*



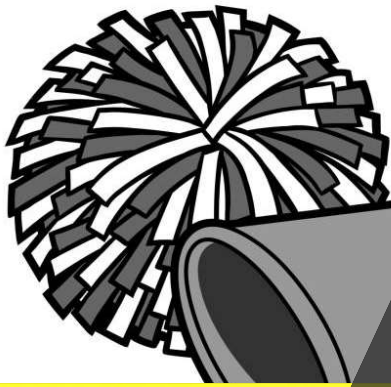
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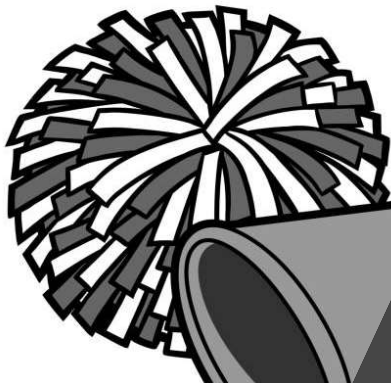
## The First Amendment:

*Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*



- 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*, \_\_ F.3d \_\_, 2020 WL 3526130 (3<sup>rd</sup> Cir. June 30, 2020)



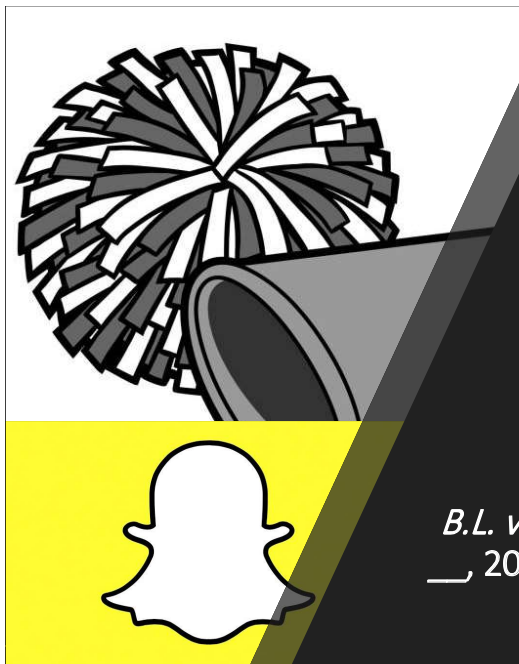
- B.L. and her family filed a complaint in federal district court, which issued a preliminary injunction reinstating B.L. to the cheerleading team, and later granted B.L.'s motion for summary judgment, awarding \$1 in damages (though her attorney is expected to file a request for attorney's fees). The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

*B.L. v. Mahanoy Area School District*, \_\_ F.3d \_\_, 2020 WL 3526130 (3<sup>rd</sup> Cir. June 30, 2020)



## NSBA amicus brief:


- 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.



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.)

***B.L. v. Mahanoy Area School District*, \_\_ F.3d \_\_, 2020 WL 3526130 (3<sup>rd</sup> Cir. June 30, 2020)**



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## Issue to Watch – Transgender Student Rights

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***Adams v. School Bd. of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_ F.3d. \_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**

### FACTS

- Student was assigned as a female at birth but suffered gender dysphoria and had begun presenting and living as a boy by the time he entered Nease High School in Ponte Vedra, Fla., in 2015.
- Student used the boys' restroom for his first nine weeks of 9th grade, but after a complaint administrators informed him he could use only the girls' restroom or a gender-neutral, single-stall restroom in the school office.
- School district had adopted a "best practices" policy for LGBTQ students that included using transgender students' preferred pronouns, but it declined to allow transgender students to use restrooms or locker rooms consistent with their gender identity.
- Student and his mother sued the district under Title IX and 14th Amendment's Equal-Protection clause.



***Adams v. School Bd. of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_\_\_ F.3d. \_\_\_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**

DISTRICT COURT RULING AFTER 3-DAY TRIAL

- School board's bathroom policy was not substantially related to its interest in student privacy or student safety;
- The meaning of "sex" in Title IX includes "gender identity" for purposes of its application to transgender students;
- The transgender student proved a Title IX violation where a school board denied him from using male restrooms, causing him harm
- Declaratory, injunctive, and monetary relief:
  - Injunctive relief limited to prohibiting school board from enforcing its bathroom policy against student, rather than broader injunctive relief applicable to all transgender students; and
  - \$1,000 in compensatory emotional distress damages.
- The school district appealed.



***Adams v. School Bd. of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_\_\_ F.3d. \_\_\_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**

11<sup>th</sup> Circuit panel (2-1):

- School district's policy barring a transgender male student from the boys' restroom violated the student's rights under both the Equal Protection clause and Title IX.
- **Student's Title IX claim was bolstered by the U.S. Supreme Court's recent decision in *Bostock v. Clayton County, Ga.*, that transgender workers are protected from discrimination under Title VII.**



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***Adams v. School Bd. of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_\_\_ F.3d. \_\_\_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**

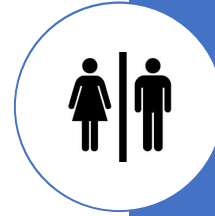
11<sup>th</sup> Circuit panel (2-1) on Title IX

- "Congress saw fit to outlaw sex discrimination in federally funded schools, just as it did in covered workplaces. ... 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."
- Rejected SD's claims that TIX does not proscribe discrimination against transgender people, and TIX differs from TVII, holding:
  - "*Bostock* teaches that, even if Congress never contemplated that Title VII could forbid discrimination against transgender people, the "starkly broad terms" of the statute require nothing less... This reasoning applies with the same force to Title IX's equally broad prohibition on sex discrimination."
  - "[T]he Supreme Court's interpretation of discrimination based on sex applies in both settings. 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*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_\_ F.3d. \_\_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**  
11<sup>th</sup> Circuit panel (2-1) on Equal Protection

- “The school board's bathroom policy singles out transgender students for differential treatment because they are transgender. ... The policy places a special burden on transgender students because their gender identity does not match their sex assigned at birth.”
- It’s not that everyone is treated the same based on biological sex; it’s that transgender people are treated differently based on sex stereotypes.
- The School Board demonstrated no substantial relationship between excluding Mr. Adams from the communal boys’ restrooms and the important interest of protecting student privacy.
- And – it administered the policy arbitrarily even among transgender students by relying on the gender indicated at enrollment.



***Adams v. School Bd. of St. Johns County*, 318 F.Supp.3d 1293 (M.D. Fla. 2017); affirmed \_\_\_ F.3d. \_\_\_ (11<sup>th</sup> Cir. Aug. 7, 2020)**

11<sup>th</sup> Circuit panel discusses harm to the individual v. Title IX regs’ allowance of sex-segregated restrooms.

Dissent:

The majority "reaches the remarkable conclusion that schoolchildren have no sex-specific privacy interests when using the bathroom.... [T]he logic of this decision would require all schoolchildren to use sex-neutral bathrooms."

"There is nothing unlawful, under either the Constitution or federal law, about a policy that separates bathrooms for schoolchildren on the basis of sex."

Majority (Footnote):

The dissent's "central flaw is that it does not meaningfully reckon with what it means for Mr. Adams to be a transgender boy. ... The dissent fails to acknowledge Mr. Adams's gender transition, his gender dysphoria and clinical treatment, or the unique significance of his restroom use to his wellbeing."



***Soule v. Connecticut Interscholastic Athletic Conference et al.* (D. Conn.), filed February 2020**

Complaint filed in federal district court asks for:

- Declaration of violation of Title IX;
- Injunction prohibiting participation by males (XY genotype) in events designated for females;
- Injunction requiring correction of records;
- Nominal and compensatory damages; and
- Attorneys’ fees.



***Soule v. Connecticut Interscholastic Athletic Conference et al. (D. Conn.), filed February 2020 – OCR complaint***

May 15, 2020 -- OCR issued Letter of Impending Enforcement Action.

By permitting the participation of biologically male students in girls' interscholastic track CIAC and participating districts denied female student-athletes benefits and opportunities and treated students differently based on sex, by denying opportunities and benefits to female student-athletes that were available to male student-athletes, in violation of 34 C.F.R. § 106.41(a).



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**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 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.

Asks for declaratory and injunctive relief:

- 14<sup>th</sup> Am. Equal Protection, Substantive DP
- 4<sup>th</sup> Am. Search & Seizure
- Title IX
- 14<sup>th</sup> Am. Fair Notice



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**AND ON THE OTHER SIDE,  
*Hecox et al. v. Little et al. (D. Idaho), filed April 2020***

DOJ Statement of Interest: "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."

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."



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# OFF-CAMPUS SPEECH: SCHOOL DISRUPTION

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**FREE SPEECH IN  
PUBLIC SCHOOL**

“First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”

*-Tinker v. Des Moines Independent School District, 1969*





“I can say what I want! I have First Amendment Rights!”

“I have free speech!”

“Nobody can tell me what I can say!”

“They can’t do anything to me for expressing my opinion!”



- Protects freedom of speech and other forms of expression from unreasonable regulation by the government.
- Applies to federal, state, and local government actors. This is a broad category that includes not only lawmakers and elected officials, but also public officials in schools and universities, courts, and police officers. It does not include private citizens, businesses, and organizations.
- Generally, content-based [topic] restrictions on speech are presumptively unconstitutional, with certain exceptions.

## THE FIRST AMENDMENT



- Speech is generally protected under the 1<sup>st</sup> amendment, unless it falls within a narrow category of speech:
  - Obscenity
  - Defamation
  - Fraud
  - Incitement
  - Fighting words
  - True threats
  - Speech integral to criminal conduct
  - Child pornography
- What about “hate speech?”

- The First Amendment encourages and protects the expression of and debate of ideas among individuals...
- However, the right to free speech is NOT absolute and is subject to certain limitations.
- Employees and students have a right to free speech subject to certain considerations . . .

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## FREE SPEECH IN PUBLIC SCHOOLS



# BACKGROUND...FREE SPEECH IN PUBLIC SCHOOLS

- ▶ Speech offensive to prevailing community standards
  - Bethel Sch. Dist. No. 403 v. Fraser (1986). The Court upheld suspension of a student who used lewd and explicit sexual metaphors during high school assembly. ("Plainly offensive" innuendos).
- ▶ School sponsored speech
  - Hazelwood v. Kuhlmeier (1988). Court upheld principal's removal of article from school newspaper. The Court stated that school officials "[m]ay impose content-based restrictions on school-sponsored speech so long as those restrictions are reasonably related to legitimate pedagogical concerns."
- ▶ Speech contrary to the basic educational mission of school
  - Morse, et al. v. Frederick (2007). The Court upheld the suspension of a student for displaying a banner that read "Bong Hits for Jesus" during the Olympic Torch Parade. The Court held that schools may sanction student speech that can reasonably be understood as encouraging "illegal drug use" whether or not the speech is disruptive.



# BACKGROUND...FREE SPEECH IN PUBLIC SCHOOLS

- ▶ Speech poses a substantial threat of disruption.
  - Tinker v. Des Moines Ind. Comm. Sch. Dist. (1969). The Court found in favors of students who were disciplined for wearing armbands in protest of the Vietnam War. The Court found that political expression could not be prohibited unless the expression "materially and substantially disrupted the work and discipline of the school."
    - Moreover, the Court stated that students' 1<sup>st</sup> Amendment rights are not equal to those of adults.





# STUDENT OFF-CAMPUS SPEECH

## SCENARIO 1

- Principal receives a report from a student that she has been the subject of offensive, vulgar, and derogatory comments on Facebook, Snapchat, and Instagram by another student. Other students also commented on the posts and posted pictures of the reporting student. After seeing the messages, you see that the messages all occur in the evening after school or on the weekends.
- Can school officials discipline the student who created the post?
- Students who commented on the posts?



# SCENARIO 2

Student posts pictures on social media depicting the principal as a caricature and ridiculing the principal for her weight. Other students also commented on the post. When asked to remove the post, the student refused.

Can school officials discipline the student?

# SCENARIO 3

- Student sent text messages to a classmate in which he mentioned getting a gun and shooting other students at school. The student stated that he had a .357 Magnum and sent the student a picture.
- Can school officials take disciplinary action?

# OFF-CAMPUS SPEECH



SCHOOL OFFICIALS MUST BALANCE STUDENTS' FIRST AMENDMENT RIGHTS WITH THEIR DUTY TO ENCOURAGE, FOSTER A SAFE LEARNING ENVIRONMENT FOR ALL STUDENTS AND PROTECT STUDENTS FROM CONDUCT CONTRARY TO THE DISTRICT'S EDUCATIONAL OBJECTIVES.

## STANDARD

CONDUCT THAT: (1) MATERIALLY OR SUBSTANTIALLY DISRUPTS OR INTERFERES WITH THE OPERATIONS AND DISCIPLINE OF THE SCHOOL, (2) INVADES THE RIGHTS OF OTHER STUDENTS AND TEACHERS, OR (3) THREAT OF INTENT TO HARM OR CAUSE INJURY, MADE AT HOME OR SCHOOL

## MODEL POLICY

“The district may investigate students’ digital communications/social media accounts, including off-hours use, in the event of creditable allegations of conduct that violates student discipline policies, violates any law or regulation, or otherwise causes a material and substantial disruption to the school environment or constitutes a serious safety risk.”

“Examples of inappropriate digital communications that may result in disciplinary action include, but are not limited to, those that: contain verbal or physical conduct that threatens another with harm; seek to coerce or compel someone to do something in violation of the law or district policy; constitute cyberbullying, or otherwise exclude or promote the exclusion of individuals from peer groups for purposes of humiliation or isolation; contain discriminatory statements or hostile acts based on a race, religion, sex, color, disability, national origin, immigrant status, English-speaking status, or any other applicable status protected by local, state, or federal law.”

# MODEL POLICY

“Students, parents/legal guardians, teachers and staff members should be aware that the district may take disciplinary actions for conduct initiated and/or created off-campus involving the inappropriate use of the Internet or web-based resources if such conduct poses a threat or substantially interferes with or disrupts the work and discipline of the schools, including discipline for student harassment and bullying.”

## ANALYTICAL FRAMEWORK

- Does the conduct violate District policy?
- Does the conduct pose a threat or substantially interfere with or disrupt the work and discipline of the school?
  - School officials should be able to articulate the threat or potential disruption and have evidence to support.
  - Should the matter be turned over the enforcement?
- Note: School officials and Board members should consider the future implications of any disciplinary action in light of the District’s mission, objectives, and core principles.

# EMPLOYEE OFF-CAMPUS SPEECH

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- ▶ Private Citizen on a Matter of Public Concern
  - Pickering v. Board of Education (1968). The U.S. Supreme Court held that a teacher's right to comment on matters of public concern outweighed District's interest. The teacher's speech did not interfere with school operations or negatively impact his effectiveness to perform his job duties.
- ▶ Speech on Matters of Private Interest
  - Connick v. Myers (1983). The Court upheld the employee's termination finding that the employee's speech was a matter exclusively of private interest. Established a threshold test-speech a matter of private interest or public concern.

**BACKGROUND.....  
PUBLIC EMPLOYEE  
SPEECH**



- ▶ Statements Made Pursuant to Official Duties
  - Garcetti v. Ceballos (2006). Court upheld termination of public employee. Employees are not speaking as private citizens when making statements pursuant to their job duties.

## BACKGROUND..... PUBLIC EMPLOYEE SPEECH

### SCENARIO 4

- Employee posts several disparaging remarks and negative stereotypes about undocumented immigrants. The series of posts comes to the attention of several parents who share the posts with several Board members. More than 30% of the district's students are Hispanic.
- What actions may the district take, if any?

# EMPLOYEE SPEECH STANDARD



## ➤ Private Citizen

- Speech pursuant to an employee's job duties is not entitled to protection under the 1<sup>st</sup> Amendment.

## ➤ Matter of Public Concern

- Speech merely about a private concern related to employment is not protected.

## ➤ Balancing of Interests

- Speech that sufficiently disrupts the school district's mission or operations tilts the balance in favor of the school district.



# MODEL POLICY

- "The personal life of an employee, including personal use of privately-owned electronic equipment outside of working hours such as email, text messages, instant messages, or social media, will be the concern of and warrant the attention of the board only as it may directly prevent the employee from effectively performing his/her assigned job duties or disrupts the educational environment or as it violates local, state, or federal law, board policy, or contractual agreements."
- "The personal life of an employee will be the concern of and warrant the attention of the board only as it may directly prevent the employee from effectively performing assigned functions during duty hours or as it violates local, state or federal law or contractual agreements."



# ANALYTICAL FRAMEWORK



- Was the speech made as a part of the employee's job duties or as a private citizen?
- Is the topic a matter of public concern?
  - Speech involves a matter of public concern when it involves an issue of social, political, or other interest in the community.
- Does the conduct have the potential to disrupt the operation or mission of the district?
- Does the conduct limit the employee's ability to effectively perform his/her job duties?

# THANK YOU!

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## 2020 SCSBA Conference: SCHSL and COVID-19

Molly Flynn

## Agenda

South Carolina High School League

SCHSL May 28, 2020 Memo

The Reality

SCHSL Guidelines for Return to Play/Practice Team Sports

Guidelines for Return of High School Sponsored Team Sports

Guidelines Specifically for High School Sports

SCHSL Phases Overview

SCHSL Phase 1

SCHSL Phase 1- Heat Stress & Acclimation

SCHSL Phase 1- Sports (Individual and Team)

SCHSL Phase 1- "Other Considerations"

SCHSL Phase 2 and 3

Recent Updates: Pushed Back Dates

Recent Updates: Fall Sports Start Date

Recent Updates: Specific Sports' Fall 2020-21 Calendars

Activities' Identified Infection Risk

Personal Protective Equipment (PPE)

Things to Do

Questions?

# South Carolina High School League

- The mission of the South Carolina High School League is to provide governance and leadership for interscholastic athletic programs that promote, support, and enrich the educational experience of students.
- The purpose of the League is to formulate and maintain policies in accordance with its mission and beliefs that will:
  - Safeguard the educational values of interscholastic athletic competition;
  - Advance high ideals of sportsmanship;
  - Develop and direct a program which will promote, protect, and conserve the health and physical welfare of all participants; and
  - Promote uniformity of standards in all interscholastic athletic competition

## SCHSL May 28, 2020 Memo

- In a May 28, 2020 memo that was addressed to Superintendents, Principals, and Athletics Directors, the SCHSL Commissioner, Jerome Singleton, discussed the SCHSL's plans regarding Fall Sports and addressed some considerations that must be made:
  - Some families may not feel it is safe or appropriate to begin in-person workouts at this time
  - Student-athletes should be allowed to return to team activities without repercussions when they feel it is appropriate to do so
  - Schools continue to have the option of utilizing technology to communicate and train student-athletes if they decide not to implement in-person, on-campus contact currently
  - In these unprecedented times, please allow for participation without mandatory attendance requirements during the summer period

# The Reality

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- Following these guidelines does not guarantee that transmission of the virus will not occur
- Participating in organized sport(s) undeniably comes with a risk of contracting COVID-19
- Students, coaches, or staff who either
  - 1) Have pre-existing medical conditions that place them at higher risk of infection, or
  - 2) Those who do not want to risk contracting COVID-19 should refrain from participating in high school sports.

## SCHSL Guidelines for Return to Play/Practice Team Sports

- “The goal is to allow the athletes, coaches, and staff to begin in-person training and group workouts while maintaining a safe environment.”
- “This document is intended to provide guidance for schools to consider with their stakeholders in designing return-to-activity protocols in accordance with state and county restricts. It allows for a coordinated reopening following the initial stay at home orders and may also be used if conditions dictate the need for increased restrictions in the future.”
- Detailed guidelines for spectators are not addressed in these recommendations.
  - Those guidelines should be addressed by Executive Order of the Governor and DHEC

# SCHSL Guidelines for Return to Play/Practice Team Sports ctd.

- The South Carolina High School League has adopted “Guidelines for Return to Play/Practice Team Sports”
- The return of team sports comes with specific guidelines to be followed
- This information has been compiled by a task force of representatives including:
  - Representatives from the League staff
  - SC Superintendents
  - Member School athletics directors and coaches
  - SCHSL Sports Medicine Advisory Committee (SMAC)
- This information has been “reviewed and vetted” by the SC Department of Education’s AccelerateED Task Force, DHEC, and discussed with a representative from the SC Governor’s office.

## Guidelines for Return of High School Sponsored Team Sports

- Intended for application in non-health care related places of employment
  - The foundation guidelines for businesses and employers remain the Center of Disease Control and Prevention (CDC)’s “Interim Guidance for Businesses and Employers to Plan and Respond to Coronavirus Disease 2019 (COVID-19).”
- Everyone individually and collectively must actively participate in the core recommendations:
  1. Self-Isolation
  2. Practice social distancing of at least six feet distance to the greatest extent possible
  3. Wash hands frequently
  4. Clean and disinfect frequently touched objects and surfaces or remove unnecessary frequently touched surfaces
  5. Avoid touching of eyes, nose and mouth with unwashed hands
  6. Strongly consider wearing a cloth face covering when in public
  7. Cover mouth and nose when you cough or sneeze and throw used tissues away immediately after use
  8. Avoid using other employees’ phones, desks, offices or other work tools and equipment when possible, or disinfect them before and after use
  9. Minimize the use of soft surfaces like cloth-covered chairs or area rugs that are more difficult to clean or disinfect

- 
- Prepared by the SCHSL
  - In addition to the previous general guidelines, these following recommendations are designed to further reduce the risk of transmitting COVID-19 during athletic workouts, training, or competition.
- 

## Guidelines Specifically for High School Sports

### SCHSL Phases Overview

- The SCHSL taskforce has proposed a three-phased approach to begin when group academic activities are permitted in the districts and/or schools.
- The overarching goal of ALL phases is minimizing or eliminating the number of COVID-19 cases that can be attributed to time spent in organized sports activities.
- Movement through the phases is contingent upon successfully meeting the challenges of each prior phase.
- We are currently in Phase 1
  - “Phase 1 will remain in place until further notice. The League staff will continue to have extensive communication with SCHSL Task Force, the Governor’s office and DHEC to establish triggers to move into Phase 2 and 3.”

# SCHSL Phase 1

- Phase 1 Guidelines include all of those previously listed, PLUS:
  1. Maintain minimum physical distancing of six feet between participants at all time
  2. Daily health screening of athletes, coaches, and staff by a health care professional or designated fulltime district/school employee. If an individual answers YES to any of these questions, then they cannot participate on that day.
    - a. Fever at 100.4 or higher in the past 72 hours?
    - b. Cough, difficulty breathing, sore throat or new loss of taste or smell, vomiting or diarrhea?
    - c. Contact with a person known to be infected with COVID-19 within the previous 14 days?
    - d. Compromised immune system or chronic diseases?
  3. Temperature screening will be done on each athlete, coach, and staff daily by a health care professional or designated fulltime district/school employee. If temperature is equal to or greater than 100.4 degrees Fahrenheit, then that individual will not be allowed to stay on site.

# SCHSL Phase 1 ctd.

4. Face coverings that completely cover the nose and mouth are required for everyone.
  - a. Athletes
    - i. Must wear a face covering when not actively participating in the sports activity.
    - ii. Face covering or mask should be worn in sports where the covering is not inhibitory.
    - iii. Face coverings should not be shared. Non-disposable face coverings should be cleaned and disinfected daily.
  - b. Coaches and Staff
    - i. Must wear a face covering at all times while on site.
5. Athletes, coaches and staff should come dressed for participation.
6. Use of locker rooms and/or offices is prohibited during Phase 1.
7. Bathroom access will be limited to every other stall, with no more people allowed inside than the number of stalls in use.
8. Alcohol based hand sanitizers with at least 60% alcohol or adequate hand washing facilities should be provided for all participants.
9. Weight rooms, restrooms, meeting rooms and other multi-use facilities that include high touch surfaces should be sanitized frequently during each event. Shared equipment should be cleaned and disinfected in between each user.

## SCHSL Phase 1 ctd.

10. Individuals should bring a personal water bottle to each workout and not share this bottle with anyone. Disposable cups should be used for those that do not have access to their own water bottle. Use of communal water fountains is not recommended.
11. Personal contact should be avoided at all times. This includes, but is not limited to: huddles, high-fives, handshaking, fist-bumping, and chest-bumping.
12. Times for starting and ending workouts should be staggered among multiple sports teams to avoid having large numbers of athletes in the same location at the same time.
13. Signs must be posted at the front entrance to alert athletes, coaches, and staff not to enter the facility if they have had known exposure to someone with COVID-19 in the past 14 days or have symptoms such as cough, sore throat, fever, shortness of breath, or loss of taste or smell.
14. Signs must be posted at all building entrances advising the public that they may wish to refrain from entering if they are 65 years of age or older or have underlying health conditions including high blood pressure, chronic lung disease, diabetes, severe obesity, asthma or weakened immunity.
15. No spitting of sunflower seeds, tobacco or sputum is allowed on site.
16. If spectators are permitted to attend, they should remain in an area that provides a reduced opportunity for transmission of any illness while providing an opportunity to observe. Maintain 6ft. Social distancing to the greatest extent possible. Face coverings should be worn in spectator area if at all possible.

## SCHSL Phase 1- Heat Stress & Acclimatization

With the temperatures rising in South Carolina it is imperative that coaches ease into conditioning and workout activities to prevent incidents of exertional heat illness, sickle cell, heat syncope, and minimize acute musculoskeletal injuries. It is recommended that coaches prioritize strength and conditioning workouts over skill development upon returning. In addition to:

- Following the Wet Bulb Globe thermometer guidelines
- Having Emergency Action Plans in place for all activities

# SCHSL Phase 1- Sports (Individual and Team)

- Team competition is prohibited
- Conditioning and Sports Specific Skill Development may occur if the following conditions are implemented, in addition to the General Guidelines:
  - Group size should be limited to 10 persons per facility including athletes, coaches, and staff whenever in an indoor or outdoor space.
  - No balls or sports equipment for first 10 days of workouts or 14 calendar days to minimize common contact points. Beginning with the 11<sup>th</sup> day of workouts, or 15<sup>th</sup> calendar day, properly cleaned and sanitized balls and sports equipment may be used. Must maintain 6ft. Social distancing.
  - When using weight rooms, practicing calisthenics, running, or other conditioning training where vigorous exercise occurs, proper spacing from others must be maintained by working out with 12 feet minimum between each person. (This may require closing or moving some equipment).
  - Stunting would not meet social distancing guidelines, therefore would not be allowed during Phase 1.

## SCHSL Phase 1- “Other Considerations”

- Consider the use of a digital thermometer to check temperature of athletes, coaches, and staff. If a touch thermometer is used, it must be disinfected between individuals.
- Consider providing COVID-19 testing for any athlete, coach, and/or staff that fails the screening process and not allowing them to return until they have tested negative or have a note from a health care provider other than an athletic trainer.
- Athletic Training Rooms should only be used for immediate care or emergencies.
- Student Athletes should remain with their assigned groups during each workout and during daily workouts to limit the number of people they come in contact with.
- Appropriate time will be given between use of facilities to allow for thorough sanitation of the facility and equipment.

## SCHSL Phase 1- “Other Considerations” ctd.

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- Use of communal water devices is not recommended and any non-disposable water bottles or cups should be sanitized thoroughly prior to re-use. Best practice is for athletes to bring their own water.
- Priority of facilities should be given to fall sports athletes if at all possible.
- Consideration should be given to the number of athletes, coaches, and staff allowed on campus each day to ensure that the facility can be cleaned thoroughly, and risk of transmission is reduced. Building occupancy should not exceed 20% of the number of people allowed by the fire marshal.
- Create and request athletes, coaches, and/or staff to sign “Assumption of Risk” form prior to participation.

## SCHSL Phase 2 and 3

- The previously mentioned guidelines will be in place until further notice. The guidelines for Phase 2 and 3 will supersede the previously mentioned requirements.
- Phase 2 will include less restrictive measures, such as allowing sports to conduct modified competition.
- Phase 3 will include returning to normal operations.

## Recent Updates: Pushed Back Dates

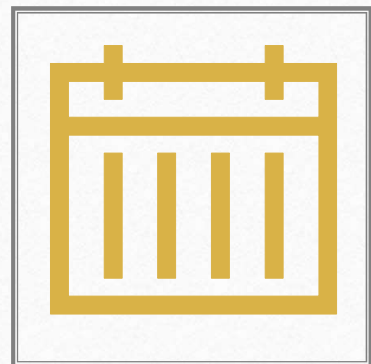
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- On July 15, the SCHSL announced a sports season revamp due to COVID-19
- Noteworthy decisions voted on by the Executive Committee include:
  - A shortened season for Fall sports
    - Approved to push back start of practice from July 31 to August 17
    - 7 game football season starting September 11
    - Region games (Girls Tennis, Volleyball, Football) played first and shortened playoff schedule

## Recent Updates: Fall Sports Start Date

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- Fall Sports start date moved from July 31<sup>st</sup> to August 17<sup>th</sup> for the first day of practice for all sports
  - Start date will be reviewed within 1 week prior to determine if it is possible to start on that specific date. If determined that it is not possible, then the anticipated start date will be moved/delayed to no less than one week from the original start date.
  - Each time the start date is moved/delayed, the length of the sports season as well as the playoffs will have to be evaluated to determine the best option for each sport.



## Recent Updates: Specific Sports' Fall 2020-21 Calendars

- Football
  - First Game: September 11<sup>th</sup>
    - (Begin with Region Play)
  - Maximum Regular Season Games: 7
  - Playoffs Start: October 30<sup>th</sup>
  - State Finals: November 20<sup>th</sup>
- Girls' Tennis and Volleyball
  - First Contest: August 31<sup>st</sup>
  - Playoffs Start: October 19<sup>th</sup>
  - State Finals: October 31<sup>st</sup>
- Swim and Girls' Golf
  - First Contest: August 31<sup>st</sup>
  - Swim State Finals: October 10<sup>th</sup> and 12<sup>th</sup>
  - Girls Golf Qualifiers: October 19<sup>th</sup>
  - Girls Golf State Finals: October 26<sup>th</sup> and 27<sup>th</sup>
- Cross Country
  - First Contest: August 31<sup>st</sup>
  - Qualifiers: Week of November 2<sup>nd</sup>-7<sup>th</sup>
  - State Finals: Week of November 9<sup>th</sup>-14<sup>th</sup>
- Competitive Cheer
  - First Contest: September 12<sup>th</sup>
  - Upper/Lower Qualifiers: Week of November 2<sup>nd</sup>-7<sup>th</sup>
  - State Finals: Week of November 9<sup>th</sup>-14<sup>th</sup>

## Activities' Identified Infection Risk

| Lower Infection Risk Activities  | Moderate Infection Risk Activities   | Higher Infection Risk Activities  |
|--|--|---|
| <ul style="list-style-type: none"><li>• Cross Country</li><li>• Track &amp; Field</li><li>• Swimming</li><li>• Golf</li><li>• Tennis</li></ul> | <ul style="list-style-type: none"><li>• Volleyball</li><li>• Soccer</li><li>• Baseball</li><li>• Softball</li><li>• Basketball</li></ul> | <ul style="list-style-type: none"><li>• Football</li><li>• Wrestling</li><li>• Competitive Cheer</li><li>• Lacrosse</li></ul> |

The guidelines are different for each sport. The sports have been grouped into three categories based on their determined level of infection risk. Schools are to follow the guidelines that specifically apply to each category.

# Personal Protective Equipment (PPE)

- Personal Protective Equipment (PPE) is equipment worn to minimize exposure to hazards that cause serious workplace injuries and illnesses.
- Ex: Gloves; Masks; Face Coverings/Shields; Respirators; Vests; Full-Body Suits; etc.
- If PPE is to be used, a PPE program should be implemented. This program should address:
  - The hazards present;
  - The selection, maintenance, and use of PPE;
  - The training of employees; and
  - Monitoring of the program to ensure its ongoing effectiveness.

## Things to Do

- Prior to allowing use of facilities, schools should review facility use agreements
  - Especially in the areas of sanitation requirements and liability
- Consider strategies to prevent groups from gathering at entrances/exits to facilities to limit crossover and contact
  - Including staggering starting/ending times
- Ensure and implement adequate cleaning schedules
- Create, and place:
  - Hygiene reminders
  - Rules, and any modifications
- Stay abreast to COVID-19 related updates
  - The SCHSL will disseminate more information as it becomes available
- Proactively address anticipated issues

Questions?

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2020 SCSBA VIRTUAL SCHOOL LAW CONFERENCE

August 22, 2020

The New Title IX Regulations

presented by:

David N. Lyon

DUFF | FREEMAN | LYON, LLC

DUFF | FREEMAN | LYON

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Agenda

- Title IX – What is it, and how did we get here?
- The New Regs – What are Districts required to do?
- What’s next?
- Questions?

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4 | Title IX of the Education Amendments of 1972

- *No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .*

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5 | Title IX of the Education Amendments of 1972

- No person in the United States
- On the basis of sex
- Shall be excluded from participation in, be denied the benefits of, or be subjected to discrimination
- Under any education program or activity
- Receiving Federal financial assistance

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6 | Sexual Harassment in School

- 51% of high school girls and 26% of high school boys experienced adolescent peer-on-peer sexual assault victimization.
- 1 in 4 young women experiences sexual assault before the age of 18.
- 10% of children were targets of educator sexual misconduct by the time they graduated high school.
- 79% of schools with students in grades 7-12 disclosed zero reported allegations of harassment or bullying on the basis of sex.

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## 7 | What Do the New Regs Require?

- A school or district must respond “promptly” when it has “actual knowledge” of “sexual harassment” in its “education program or activity” against a person in the United States.
- A school or district must not be “deliberately indifferent” in responding (i.e., the response must not be “clearly unreasonable in light of the known circumstances”).

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## 8 | What Do the New Regs require?

- Resolve allegations of sexual harassment promptly and accurately.
- Use a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment.
- Effectively implement remedies for victims.

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## 9 | What's New

- New Definitions
- New complaint, investigation, and grievance procedures
- Title IX teams
- Training
- Recordkeeping

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## 10 Definitions

- "Complainant" and "Respondent"
- "Actual knowledge"
- "Sexual Harassment"
- "Education program or activity"
- "Supportive measures"

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## 11 "Complainant" and "Respondent"

- **Complainant** – the person who is the alleged victim of the sexual harassment.
- **Respondent** – the person who has been accused.
  - During an investigation and the grievance process, parties should NOT be referred to as perpetrators, victims, etc. because all respondents are presumed innocent until the decisionmaker makes a decision regarding responsibility.

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## 12 "Actual knowledge"

A school or district has **actual knowledge** when notice or allegations of sexual harassment are reported to any school employee or when any employee personally observes such behavior.

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13 | "Sexual Harrasment" – Three Types

**Type 1 - Quid pro quo**

An employee of the recipient conditioning an aid, service, or benefit of the recipient on an individual's participation in unwelcome sexual conduct



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14 | "Sexual Harassment" – Three Types

**Type 2 – Hostile Environment**

- unwelcome conduct
- determined by a reasonable person
- to be so severe, pervasive, and objectively offensive
- that it effectively denies a person's equal access to the recipient's education program or activity

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15 | "Sexual Harassment" – Three Types

**Type 3 - Other conduct defined by federal law**

- Sexual Assault (20 U.S.C. 1092(f)(6)(A)(v))
- Domestic Violence (34 U.S.C. 12291(a)(8))
- Dating Violence (34 U.S.C. 12291(a)(10))
- Stalking (34 U.S.C. 12291(a)(30))

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16 | **“Education program or activity”**

- “Education program or activity” includes locations, events, or circumstances over which a school district exercised substantial control over the alleged perpetrator and the context in which the sexual harassment occurred.
- Depending on the circumstances, may cover incidents that occur off school district property or online (e.g., field trip, school district digital platform).

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**The New Procedures for Title IX  
Sexual Harassment Cases**

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18 | **Responding to a Formal Complaint:  
The New Grievance Procedures**

- Treat Complainants and Respondents equitably.
- Objectively evaluate the evidence and credibility of witnesses.
- Ensure that members of the Title IX Team have no conflicts of interest or bias toward the Complainant or Respondent.
- Start with a “presumption of non-responsibility” until a determination is made at the conclusion of the grievance process.

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### Responding to a Formal Complaint: The New Grievance Procedures

1. Initial Response/Supportive Measures offered
2. Determine whether there will be a formal complaint
3. Investigation
4. Investigative report
5. Decision as to responsibility and sanctions
6. Appeal
7. Decision on appeal

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### Title IX Teams

- Title IX Coordinator
- Investigator
- Informal Resolution Facilitator
- Decision-maker
- Decision-maker on appeal

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### Initial Response

- What are a school's first steps when allegations are reported?
- Who can make a complaint?
- When can a formal complaint be dismissed?

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## 22 | “Supportive Measures”

- Non-punitive, individualized services, offered as appropriate and without charge to a complainant or a respondent before or after the filing of a formal complaint, or where no complaint has been filed
- designed to restore or preserve equal access to the education program or activity without “unreasonably” burdening the other party
- Examples – counselling, schedule changes, increased supervision (probably not complete removal unless there is an emergency)
- Title IX Coordinator is responsible for the effective implementation

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## 23 | Written Notice to Parties

- After a formal complaint has been made, the school must provide the following written notice to the known parties:
  - The grievance procedure, including an informal resolution process if the school chooses to offer one.
  - Sufficient details of the allegations of sexual harassment.
  - Additional allegations, if the school learns of any during the investigation process.

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## 24 | Emergency Removal and Administrative Leave

- Generally, a school may not sanction an alleged perpetrator until after the grievance process is carried out.
- However, the regulations provide exceptions for emergency removal and administrative leave under certain circumstances and in compliance with disability laws.

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## 25 Investigation

- The burden of gathering evidence sufficient to reach a determination falls on the school, not the parties involved.
- Ensure Due Process for both parties during an investigation.
- Team must be trained, unbiased, no conflict of interest, no prejudgment.
- Write up investigation report.

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## 26 Informal Resolution Option

- Not required for schools to offer, but the regulations allow for the option.
- Must be voluntary by both parties.
- Must provide the opportunity a party to withdraw and resume formal grievance process at any point before a decision is made.

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## 27 Decision Making

- Decision-maker must issue a written determination regarding the decision of responsibility and any disciplinary sanctions.
- Effective implementation of any remedies.

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## 28 | Appeals

- Both parties must be notified of their right to appeal a decision.
- Parties can appeal a decision regarding responsibility or the dismissal of a formal complaint.

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## 29 | Training

- All staff should be trained on how to identify and report sexual harrasment.
- Title IX team must be trained on the grievance process and their roles.
- Training materials must be maintained for 7 years and posted on the District's website.

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## 30 | Record Keeping

Must keep the following records for a minimum of 7 years:

- Investigation records
- Disciplinary sanctions
- Remedies
- Any informal resolutions and the result therefrom
- Supportive measures
- Training materials

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### 31 | General Principles

- “Prompt and equitable” resolution of student complaints.
- Treat complainants and respondents equitably.
- Objective evaluation of all relevant evidence.
- Have a well-trained Title IX team.
- Avoid conflicts of interest or bias.

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### 32 | What’s Next?

- Get policies passed.
- Get Title IX team trained.
- Lawsuits?
- Will the regs survive a change in administration?

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QUESTIONS?

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# Managing Employee and Student Issues During the Coronavirus Pandemic – Back to School FAQ

## SCSBA 2020 VIRTUAL SCHOOL LAW CONFERENCE August 21, 2020

Thomas K. Barlow  
Halligan Mahoney & Williams, P.A.



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## Scope of Presentation

- Employment Issues
  - Brief Families First Coronavirus Response Act Overview
  - FFCRA Leave Issues and Interaction with Other Laws
  - Managing On-Site Work, Return to Work, Telework, and “Don’t Tell Me To Work” Issues

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## Scope of Presentation

- Student Issues
  - Mask Requirements and Exceptions
  - Waivers and Potential Liability Issues
  - Student Discipline Scenarios on and off Campus

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## Employment Observations

- Districts Generally Are Going Above and Beyond Legal Requirements
- Back to Work Issues for Employees With Underlying Health Issues Present Challenges
- Employees Have Figured Out Some Holes in the System

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## Student Observations

- Expect Face Covering Challenges
- Supervising Virtual Students Will be Difficult
- Waivers Are of Limited Utility

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### EMPLOYEE RIGHTS

PAID SICK LEAVE AND EXPANDED FAMILY AND MEDICAL LEAVE  
UNDER THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions will apply from April 1, 2020 through December 31, 2020.

#### PAID LEAVE ENTITLEMENTS

Generally, employers covered under the Act must provide employees:

Up to two weeks (80 hours, or a part-time employee's two-week equivalent) of paid sick leave based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, paid at:

- 100% for qualifying reasons #1-3 below, up to \$511 daily and \$5,110 total;
- ⅔ for qualifying reasons #4 and 6 below, up to \$200 daily and \$2,000 total; and
- Up to 12 weeks of paid sick leave and expanded family and medical leave paid at ⅓ for qualifying reason #5 below for up to \$200 daily and \$12,000 total.

A part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

#### ELIGIBLE EMPLOYEES

In general, employees of private sector employers with fewer than 500 employees, and certain public sector employees, are eligible for up to two weeks of fully or partially paid sick leave for COVID-19 related reasons (see below). Employees who have been employed for at least 30 days prior to their leave request may be eligible for up to an additional 10 weeks of partially paid expanded family and medical leave for reason #6 below.

#### QUALIFYING REASONS FOR LEAVE RELATED TO COVID-19

An employee is entitled to take leave related to COVID-19 if the employee is unable to work, including unable to telework, because the employee:

- |   |   |
|---|---|
| 1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;              | 5. is caring for his or her child whose school or place of care is closed (or child care provider is unavailable) due to COVID-19 related reasons; or |
| 2. has been advised by a health care provider to self-quarantine related to COVID-19;                       | 6. is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.                           |
| 3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis;                                    |   |
| 4. is caring for an individual subject to an order described in (1) or self-quarantine as described in (2); |   |

#### ENFORCEMENT

The U.S. Department of Labor's Wage and Hour Division (WHD) has the authority to investigate and enforce compliance with the FFCRA. Employers may not discharge, discipline, or otherwise discriminate against any employee who lawfully takes paid sick leave or expanded family and medical leave under the FFCRA, files a complaint, or institutes a proceeding under or related to this Act. Employers in violation of the provisions of the FFCRA will be subject to penalties and enforcement by WHD.



WAGE AND HOUR DIVISION  
UNITED STATES DEPARTMENT OF LABOR

For additional information  
or to file a complaint

1-866-487-9243  
TTY: 1-877-889-5627  
[dol.gov/agencies/whd](http://dol.gov/agencies/whd)



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## Families First Coronavirus Response Act Basics

- Emergency Paid Sick Leave Act (EPSLA)
  - 80 hours of paid sick leave for COVID-19 related or required absence
  - Paid at normal rate of pay, 2/3 rate for absence to care for others
  - Capped at \$511 per day, \$5,110 total
  - Can't require substitution or prior exhaustion of accumulated leave
- Emergency Family and Medical Leave Expansion Act
  - 12 weeks of leave for leave to care for child under 18 whose school or daycare is closed or unavailable due to coronavirus
  - Paid at 2/3 of normal pay rate (some exceptions)
  - Capped at \$200 per day, \$10,000 total
  - Can't require substitution or prior exhaustion of accumulated leave

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## FAQ 1

**Q:** We paid all of our full and part time employees during the school closure, trying to get as much work out of them as possible when we could. Are we complying with the FFCRA so far?

**A:** Yes. As long as you are continuing to pay your employees full pay, you are in compliance.

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## FAQ 2

Q: Our teachers were assigned telework this spring and did not report to the office. We had some employees on leave status who probably could have worked from home. What should we do about the leave we charged them, if anything?

A: Consider reinstating or allowing additional leave. If we go back to telework, they should be allowed to telework, perhaps with appropriate medical certification to return to work/telework.

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## FAQ 3

Q: So which of our employees were/are not entitled to paid leave under the FFCRA?

A: Technically, any employees who couldn't work or telework because there was no work available due to the Governor's closure of schools. Substitutes with no expectation of being called to work and after school workers, for example, were not entitled to paid leave under the DOL regulations and guidance.

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## FAQ 4

Q: How do we pay part-time employees who are out on COVID-19 leave?

A: Pay them based on what they would expect to work. DOL suggests, but does not appear to require, calculating 6-month average weekly hours for full-time, part-time employees whose hours fluctuate.

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## FAQ 5

Q: An employee does not want to come to work for fear of contracting coronavirus. He has no medical conditions of which we are aware or a doctor's excuse. Can we require him to use accrued leave to cover his absence or make leave unpaid?

A: Yes, but first give the employee an opportunity to provide a medical excuse. If a COVID-19 related excuse is provided, this triggers the 80 hours of paid EPSLA leave entitlement. Can't require prior use of accrued leave.

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## FAQ 6

Q: How much medical information can we require of the employee in FAQ 5?

A: Something from a medical professional that says the employee needs to be out for a COVID-19 related reason that looks legitimate.

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## FAQ 7

Q: Should we designate paid COVID-related leave as FFCRA leave?

A: Yes. Employees who are teleworking or otherwise still providing services to earn their pay are not on “leave,” so you would not designate for them, only the employees who have been *totally relieved of duty*. This will help prevent “no good deed goes unpunished” claims for more leave than the law requires later on this year.

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## FAQ 8

Q: Can we count any of the paid leave provided from April 1 until now toward our obligations under the FFCRA if we have not previously designated it as EPSLA or EFMLEA?

A: Unclear, but probably not.

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## FAQ 9

Q: Is all FMLA paid leave now?

A: No, only the narrow exception for COVID-19 related childcare leave.

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## FAQ 10

**Q:** A teacher has 4 elementary-age children. Our district is returning to school on A-B schedule with a virtual day on Friday. The teacher has no one available to take care of her kids on “B” or virtual days. Can she elect EFMLEA for just the “B” days?

**A:** Intermittent leave is up to the employer under the EFMLEA, so that leave could be denied. Options may be to allow a 12-week block of EFMLEA or provide childcare for the “B” days.

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## FAQ 11

**Q:** Teacher in FAQ 10 already took 10 weeks of FMLA this year for the birth of her fifth child. Is she entitled to an additional 12 weeks of paid leave to take care of her kids?

**A:** No, the EFMLEA does not increase the 12-week annual entitlement, she would get 2 additional weeks of leave (paid at 2/3).

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## FAQ 12

Q: Our teacher in FAQ 10 with all the kids wants to use her accrued leave to “gross up” the 2/3 pay, max \$200 per day she would get for EFMLEA. Do we have to allow that?

A: Yes, the regulations allow the teacher to use accrued leave for full pay.

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## FAQ 13

Q: Teacher started 12 weeks of FMLA leave pre-COVID on February 29 for birth of a child. She asserts now that she would have come back to work on April 1 had daycare been available. Is she entitled to 2/3 pay from April 1 to end of school year?

A: No, but points for creativity. But maybe with concrete proof of daycare efforts?

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## FAQ 14

- Q: Do school districts get any payroll tax relief or is it just the private sector?
- A: No tax or employee retention credits for school districts or other governmental employers.

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## FAQ 15

- Q: Is there any potential financial incentive to designating leave pay as EPSLA or EFMLEA?
- A: Employers, including public sector, do not pay or match Social Security up to maximum of \$5,110 per employee for EPSLA or up to \$10,000 for EFMLEA.

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## FAQ 16

Q: Are we supposed to stop garnishing wages now?

A: Only for defaulted federal student loans so far. You are supposed to be getting a notice from the U.S. Department of Education. IRS and SCDOR tax garnishments should continue.

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## FAQ 17

Q: We are reopening school on September 8 on an A-B-virtual day schedule. An employee with a disability has requested to work from home as a reasonable accommodation. Do we have to allow that?

A: Depends upon the job, but likely not. Will depend upon whether/how much virtual education is continuing and the nature of the job functions.

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## FAQ 18

Q: What are some other reasonable accommodations we may be required to consider for employees with underlying health conditions?

A: Work schedule modification, reassignment of non-essential functions that might increase exposure, additional PPE, additional distancing or barriers, additional leave.

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## FAQ 19

Q: Does the law require us to provide a reasonable accommodation to an employee who needs to take care of a child or parent with underlying health conditions?

A: Only in the form of leave, if available and eligible. Of course, discrimination against someone based on a relationship with an individual with a disability is prohibited.

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## FAQ 20

Q: Are we allowed to take temperatures and make other medical inquiries of employees we are bringing back to work?

A: Yes. EEOC rules against medical inquiries have been relaxed due to COVID-19. Err on the side of safety for employees vs. privacy.

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## FAQ 21

Q: Should we get employees to sign a waiver before they return to work?

A: No, OSHA and other job safety requirements would take precedence, it would serve no useful purpose. But consider one for volunteers.

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## FAQ 22

Q: Do we have to grant an employee's request for modification of the face covering requirement?

A: Not under most circumstances. Exceptions might be to accommodate a disability (such as asthma or COPD). Unclear if any legitimate religious exemption would apply.

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## FAQ 23

Q: Do we have to grant a student's request for modification of the face covering requirement for medical reasons?

A: Yes, for documented health-related reasons.

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## FAQ 24

Q: What can we do to protect the safety of others if a student can't wear a face covering?

A: Possibilities include additional spacing, plexiglass, staggered scheduling, testing, "mask breaks." In most circumstances, it is unlikely that you can require students with medical exemptions to attend only virtually without further consideration of other measures to mitigate risk.

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## FAQ 25

Q: Can we discipline a student for violating the face covering requirement if he or she has not received an exemption?

A: Yes, follow student code of conduct.

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## FAQ 26

Q: How should we deal with face coverings that contain messages or could possibly cause disruption?

A: Apply dress code/code of conduct analysis as you would with other clothing or accessories, keeping in mind that students and employees have First Amendment rights that we have to balance.

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## FAQ 27

Q: Can we apply our dress code to virtual instruction?

A: Yes, students can be required to comply with standards for attire during virtual instruction.

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## FAQ 28

- Q: Can we discipline students who engage in inappropriate conduct during virtual instruction?
- A: Yes, code of conduct would apply and students can be disciplined for conduct which violates policies.

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## FAQ 29

- Q: Are waivers enforceable and should we be asking for waivers from students?
- A: Not usually enforceable in the normal school context, SCHSL requires for sports and they may be useful for volunteers and extracurricular activities.

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## FAQ 30

Q: How do we know when to isolate or quarantine students and employees?

A: Follow DHEC guidelines and call DHEC. This is a medical, rather legal question.

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# QUESTIONS?

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Session Date/Time \_\_\_\_\_