The NSBA School Law Docket: Free Speech, Gender Identity and More in the "New" Supreme Court

South Carolina School Boards Association
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Francisco M. Negron, Jr.
Chief Legal Officer
fnegron@nsba.org

On Today's docket:

1. The "New" Supreme Court.

2. Snapchat, the Cocoa Hut, and the Supreme Court

3. Cases to watch

4. Bostock, the High Court & developing law on Rights of Transgender students

    a. restroom/locker room use
    b. participation in athletics

6. The New Department of Education

7. Q&A – People's Choice

The Roberts Court

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

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

Justice Ginsburg's Legacy

- Liberal icon
- Dissenter
- Gender equity advocate both on the court and off
- Not always on school side, but… crossed lines.

- Pragmatist!

The “New” Supreme Court

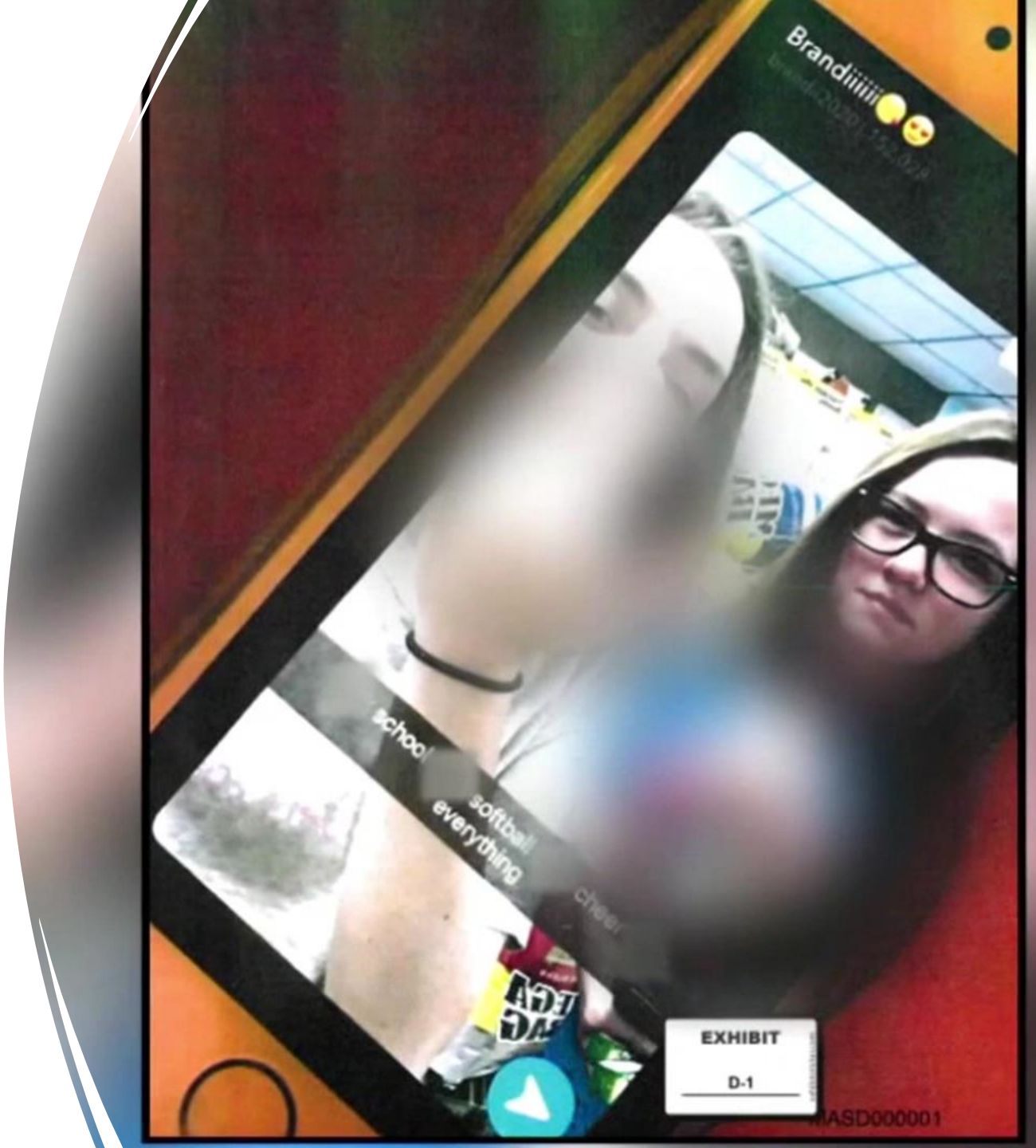
- Solid conservative majority
  - “Originalists”
  - “Textualists”
  - Expansion of Free Exercise of religion rights?
  - Limitation on government restriction on Free Speech. *Confluence of conservatives and liberals?*
- Conservative majority: Roberts, Thomas, Alito, Gorsuch, Kavanaugh, Coney-Barrett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

Snapchat, the Cocoa Hut, and the Supreme Court

Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (June 23, 2021)

“f--- school f----softball f--- cheer f--- everything….

“Love how me and [another student] get told we need a year of jv before we make varsity but that[] doesn’t matter to anyone else?🙃.”



Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (June 23, 2021)

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.

BONUS SLIDE – *Tinker* and *Fraser*

Tinker v. Des Moines Independent School District (1969)

Neither students nor teachers "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

"But conduct by a student, in class or out of it, which… materially ***disrupts classwork*** **or involves** ***substantial disorder*** or ***invasion of the rights of others*** is, of course, not immunized by the constitutional guarantee of free speech."

Bethel School District No. 403 v. Fraser (1986)

The First Amendment did not prevent the School District from disciplining respondent for giving the ***offensively lewd and indecent speech at a school assembly.***

NSBA amicus brief to the 3rd Circuit:

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

Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (June 23, 2021)

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.)**

NSBA amicus brief supporting the school district's cert. petition

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

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NSBA amicus brief on the merits

- Brief drafted by Gregory Garre, former Solicitor General in Bush Administration, and his team at Latham & Watkins:
- *Tinker* has been applied to off-campus speech and it works.
  - gives schools the needed leeway to address disruptive student conduct.
  - has built-in limitations on when schools may discipline students for disruptive conduct.
- A categorical rule is particularly ill-suited for the social media age.
- The Third Circuit's location rule would prevent schools from addressing harmful and disruptive speech that occurs online and off-campus but affects the school environment, including harassment and bullying.

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Oral argument April 28, 2021

Hypos!!

Where are the lines?

Justices appeared to be looking for a way to draw a narrow rule on this difficult issue in order to avoid “writing a treatise” with broad implications for other situations.

Oral argument April 28, 2021

School District: *Tinker* should apply off-campus when the student targeted both the school audience and a school topic. *Tinker* already allows schools to address student speech that is culpable, and that inherently compromises school functions, or that objectively interferes with the rights of others, like severe bullying.

SG: Is It School Speech? If so, the school should be able to show that it's likely to cause substantial disruption with operations to regulate it.

ACLU: A broad rule means students carry the school on their backs 24/7. Even political and religious speech will be subject to regulation.

Case docs, oral argument transcript, audio, and NSBA briefs

- https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/20-255.html
- https://www.scotusblog.com/case-files/cases/mahanoy-area-school-district-v-b-l/
- (Audio) https://www.c-span.org/video/?510036-1/mahanoy-area-schools-district-v-bl-oral-argument
- https://nsba.org/Advocacy/Legal-Advocacy/Legal-Briefs-and-Guides

Mahanoy Area School District v. B.L., 141 S.Ct. 2038 (June 23, 2021)

THE DECISION

Issue: May public school officials discipline students for speech that occurs online and off-campus?

Decision (8-1): Public schools have *diminished* authority to regulate student's off-campus speech than on-campus speech, but they retain *significant* interests in addressing off-campus student speech in certain circumstances:

- Bullying/harassment
- Threats against teachers or students
- Failure to follow school rules on cheating, hacking, etc.

Under the facts of this case, in which a student posted an online, profanity-laced rant related to the school, and the school showed little disruption, the Court concluded school officials had overstepped their authority by punishing the student.

The majority:

- Rejected the Third Circuit's bright-line rule.
  - *The special characteristics that give schools additional license to regulate student speech do not always disappear when a school regulates speech that takes place off campus.*
- Declined to provide a complete list of exceptions or to set forth a broad, highly general First Amendment rule stating just what counts as "off campus" speech and whether or how ordinary First Amendment standards must give way off campus to a school's special need to prevent. **Relevant: age of the student, nature of the off-campus activity, and impact on the school.**
- Identified 3 features of off-campus speech that (together?) diminish schools' argument that it can be regulated:
    - Parents are in charge;
    - 24/7/365 regulation; and
    - "Nurseries of democracy," theory.

Reading between the lines:

1. Parents are in charge away from school time, activities, platforms. They need to be aware, engaged, on board re: school rules.
2. ACLU's school-on-the-back imagery had some effect. It cannot be that schools can regulate 24/7. So off-campus speech discipline should be rare.
   - **Especially political or religious speech.**
3. The teachable moment – it's important that our democracy protects even ugly speech so that all may speak, and policy choices are informed by input and discussion. Schools should be living this lesson and teaching it.

But words that truly harm or disrupt are not protected.

Mahanoy Area School District v. B.L.: Implications for Public Schools

- The familiar 1969 *Tinker* standard remains intact: Speech causing substantial disruption or a reasonable forecast thereof, or interfering with the rights of others, is not protected.
- BUT mere criticism of school programs or policies, vulgar venting without disruption or targeting of/harm to an individual may not be enough .
- Bullying and harassment generally may be addressed if it impacts the school community.
- Staff training is key: the Court said off-campus speech is generally protected without some impact on the school community.
- This is a good time to review student discipline policies.

Test your knowledge! Hypos

- Political or religious speech directed at the school from off-campus: “don't approve the school bond funding referendum because this school is terrible. Or, Mrs. Jones is a terrible teacher.”
- The same speech in the classroom.
- Political or religious speech that is directed at one student and causes harm.
- Student who is using a student’s biological pronouns contrary to the student’s gender identity.
- **A student saying something outside of school that relates to an important subject, like politics, religion, morality, but makes no reference to the school or to a teacher or student, but the remarks are so offensive that they will predictably cause controversy within the school and could distract the students from the educational process.**

Cases to Watch

Case to watch…
Doe v. Hopkinton Public Schools, 490 F.Supp.3d 448 (D. Mass. Sept. 22, 2020)

Public high school students were suspended for cyberbullying.

They sued the school district, seeking declaratory and injunctive relief based on alleged violations of their First Amendment freedoms of speech and association.

They also sought a declaratory judgment that Massachusetts' anti-bullying statute and the district's anti-bullying policy were overbroad and vague in violation of First Amendment.

Both parties asked for summary judgement, so the district court decided the case based on the facts as stated in the court filings – there was no trial.

Doe v. Hopkinton Public Schools, 490 F.Supp.3d 448 (D. Mass. Sept. 22, 2020)

(BEFORE *MAHANOY*) The district court applied *Tinker*'s "rights of others" prong, finding that substantial disruption was unnecessary.

"*A reasonable official could have found Doe and Bloggs to be participants in group bullying that invaded Roe's rights*."

The court said it didn't matter whether the conduct was initiated off-campus, because it was part of a group effort that included on-campus bullying.

- Students' suspensions did not violate their First Amendment free speech and free association rights;
- Neither the school district's anti-bullying policy nor Massachusetts anti-bullying statute were facially overbroad; and
- Neither the school district's anti-bullying policy nor Massachusetts anti-bullying statute were impermissibly vague in violation of due process.

Students appealed to the Court of Appeals for the 1st Circuit.

NSBA amicus brief supporting the school district

- *Tinker*'s second prong authorizes schools to enforce rules barring speech that "impinges upon the rights of other students."
- Anti-bullying laws require schools to address cyberbullying, and many including Massachusetts', incorporate *Tinker*'s second prong. The 1st Circuit upheld this framework recently in Norris v. Cape Elizabeth Sch. Dist., 969 F.3d 12 (1st Cir. 2020) (sticky note on the bathroom mirror).
- The level of active involvement by students in cyber bullying does not immunize their speech but is a consideration for the discretion of school officials in deciding the proper discipline.

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Case to watch…
C1.G. v. Siegfried, 2020 WL 4582715 (D. Colo. Aug. 10, 2020)

- Student's social media post taken at a thrift shop captioned, "Me and the boys bout to exterminate the Jews," with picture of his three classmates wearing hats, one of which resembled foreign military hat from World War II.
- C.G. was expelled after a hearing, the Superintendent's decision, and the school board's upholding of that decision.
- C.G. sued the district claiming First Amendment Free Speech and Fourteenth Amendment Due Process violations.

C1.G. v. Siegfried, 477 F.Supp.3d 1194 (D. Colo. Aug. 10, 2020)

[BEFORE *MAHANOY*] The district court adopted the majority view of appellate courts that *Tinker* applied to off-campus speech:

- Under *Tinker*, high school had authority to discipline student for the post and thus, school did not violate student's right to free speech by suspending and expelling him for his post.
- Student should reasonably have known, that the post would be published beyond his home and could reasonably be expected to reach school.

"*It was foreseeable that an anti-Semitic attempt at humor might cause substantial disruption to the learning environment*. "

- Post was materially and substantially disruptive as it interfered with school's work and collided with rights of other students to be secure and to be let alone

Student appealed to the 10th Circuit.

Thoughts on Student Free Speech Cases

- The court almost always starts by saying something like,

"This is not a case about whether a school's decision to discipline two students tangentially involved in an environment of group bullying was proportional or fair, but only whether the school violated those students' First Amendment rights."

- Facts, facts, facts – no two cases are alike.
- The nature of the deprivation – extra curricular suspension v. school suspension – is becoming less important in the 1st Am student free speech context.

Case to watch…
Carson v. Makin, 979 F.3d 21 (1st Cir. 2020)

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 Free Exercise, Free Speech, or Establishment Clauses of the 1st Am, or Equal Protection Clause of the 14th Am.

Plaintiffs are parents who live in towns served by school administrative units that do not operate a secondary school. Maine's tuition statute requires LEA to pay tuition to a private *nonsectarian* school for public secondary education. The parents would prefer to send their children to sectarian schools.

They challenged the program, arguing that it violates the Free Exercise Clause under *Trinity Lutheran*.

The district court decided that it was bound by *Eulitt v. Maine Dep't of Educ*., 386 F.3d 344 (1st Cir. 2004), and upheld the state's program. Plaintiffs appealed.

NSBA amicus brief to the 1st Circuit

- NSBA urged 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.

First Circuit Decision October 29, 2020:

- The state's use of the "nonsectarian" requirement in the Maine statute does not discriminate against the plaintiffs based on their religious status and does not violate the Free Exercise Clause.
- The Supreme Court's rulings in *Trinity Lutheran* (2017) and *Espinoza* (2020) do not dictate the resolution of this challenge. In *Eulitt*, the First Circuit did not focus on whether the determination that a school qualifies as "nonsectarian" under the Maine statute is based solely on its religious "status" or instead on the religious use that it would make of the tuition assistance payments. In both *Trinity Lutheran* and *Espinoza*, however, it was of central importance whether the restriction at issue was based solely on the aid recipient's religious status.
- Even considering this challenge afresh in the light of those two new precedents, the plaintiffs' free exercise challenge lacks merit. The "nonsectarian" requirement does not discriminate based solely on religious status or punish the plaintiffs' religious exercise nonetheless. It is a use-based restriction.

The Supreme Court agreed to hear the case on July 2, 2021.

Transgender Student Restroom/Locker Room Use – Federal Courts of Appeals

But, before we get into transgender student rights, let's "head down the Atlanta Highway…" (With apologies to the B-52's)

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

“The Title VII” Cases

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

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

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

Bostock v. Clayton County, Georgia, 140 S.Ct. 1731 (June 15, 2020); (6-3)

- "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."

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

- Four U.S. Court of Appeals have decided that Title IX's anti-discrimination provisions apply to transgender students. Two in 2020.
- Eleventh Circuit specifically applied Bostock to the student context, and ruled that a school district's bathroom policy that did not permit a transgender student to use the bathroom of his gender identity, violated Title IX. (Panel ruling 2-1).
- "With Bostock's guidance, we conclude that Title IX, like Title VII, prohibits discrimination against a person because he is transgender, because this constitutes discrimination based on sex."
- Adams v. School Bd. of St. Johns County, 968 F.3d 1286 (11th Cir. 2020), petition for rehearing *en banc* filed August 28, 2020.
- August 2021, 11th Circuit granted rehearing *en banc,* and vacating the panel decision.

In the 6th and 7th Circuits…

- *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016) School district failed to demonstrate likelihood of success on appeal from district court's order granting preliminary injunction requiring school district to permit student, a transgender girl, to use girls' restroom and otherwise treat her as a girl.
- *Whitaker v. Kenosha Unified Sch. Dist.*, 858 F.3d 1034 (7th Cir. 2017), *cert. dismissed*, 138 S.Ct. 1260 (2018). Transgender student sufficiently demonstrated that he was likely to suffer irreparable harm in absence of preliminary injunction, sought on Title IX and equal protection grounds, barring school district from denying or preventing his use of boys' restroom while on school property or attending school-sponsored events.

And, in the 4th Circuit…

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

Is an accommodation a valid operational fix?

- The school district appealed to the Supreme Court.
- School district raised the issue of whether Title IX/Equal Protection Clause requires schools to let transgender students use multiuser restrooms designated for the opposite biological sex, even when single-user restrooms are available for all students regardless of gender identity?
- Supreme Court has denied certiorari.
- ACLU has filed for $1.3 Million in attorneys' fees and costs.

But, lawsuits involving gender identity are not only brought by transgender students.

Parents for Privacy v. Barr, 949 F.3d 1210 (9th Cir. 2020), *cert. denied*, 141 S.Ct. 894 (2020).

- 14th Amend. Right to privacy did not extend to high school students who wished to avoid all risk of intimate exposure to or by a transgender person,
- Mere presence of transgender student in locker and bathroom facilities does not severe, pervasive, and objectively offensive harassment that it could be said to deprive alleged victims of access to educational opportunities or benefits provided by the school under Title IX.

Doe v Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019).

- Cisgender high school students were not likely to succeed on merits of their claim that school district's policy of allowing transgender students to access bathrooms and locker rooms consistent with their gender identity violated their due process right to bodily privacy.
- School district's policy allowing all students to use bathrooms and locker rooms that aligned with their gender identity did not discriminate based on sex.

Bostock and other federal cases: 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.

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

What are some of questions addressed in the NSBA guide?

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

Transgender Student Participation in Athletics

Soule v. Connecticut Interscholastic Athletic Conference et al., No. 3:20-cv-00201, 2021 WL 1617206 (D. Conn. April 25, 2021)

- Cisgender students claim the state's athletic association's rule requiring participation school districts to allow student athletes to participation in sports based on their gender identity violates their rights to participate under Title IX.
- April 24, 2021 -- District court dismissed the case based on mootness and monetary relief not available as insufficient notice of Title IX liability.
- Plaintiffs have appealed to the Second Circuit.

Parallel OCR complaint

- May 15, 2020 -- OCR issued Letter of Impending Enforcement Action WITHDRAWN BY THE BIDEN ADMINISTRATION.
- August 31, 2020 -- OCR updated its letter after the Supreme Court's ruling in Bostock, saying that ruling did not alter its previous determination in this matter. WITHDRAWN BY THE BIDEN ADMINISTRATION.

Hecox et al. v. Little et al. , No. 1:20-CV-00184-DCN, (D. Idaho Aug. 17, 2020)

- Transgender college athlete challenged new Idaho law banning transgender women from competing in women's sports (the first such law in the nation). The extensive factual allegations include history of sex testing in sport, transgender status, importance of participation, science of sex, history and purpose of the bill.
- Federal court granted a preliminary injunction, prohibiting Idaho from enforcing law until a decision on the merits.
- The court also granted the cisgender student-athletes' motion to intervene in support of the Idaho law.
- The decision was appealed to the Ninth Circuit, which ruled in May 2021 that Hecox has standing despite her temporary leave of absence from Boise State University.
- DOJ filed a Statement of Interest in the Idaho case in 2020; BIDEN ADMINISTRATION WITHDREW U.S. BRIEF AS AMICUS CURIAE IN THE NINTH CIRCUIT.

States restricting transgender girls from girls athletics. (Legislation passed or in progress as of May 2021.).

- Alabama
- Arkansas
- Florida
- Georgia
- Idaho
- Iowa
- Kansas
- Louisiana (Veto expected from governoir (D).
- Mississippi
- Mississippi.
- Missouri
- Montana
- North Carolina
- North Dakota
- Oklahoma
- South Dakota
- Tennessee
- Texas
- West Virginia
- Note: Other states including Kentucky, Connecticut, Michigan, Pennsylvania have had bills proposed but they are not expected to advance.
- Bills in New Mexico and News Hampshire failed before they could be debated.

The “New” Department of Education

U.S. Department of Education

Transgender Student Rights Guidance – To be Reinstated?

- May 13, 2016 ED guidance stating that Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations prohibit discrimination in educational programs and activities operated by recipients of Federal financial assistance based on a student's gender identity, including discrimination based on a student's transgender status. This would encompass school policies regarding bathroom and locker room use, school records, and athletics.

Title IX Regulations – To Be Rolled Back?

- Revocation would require Notice & Comment.
- Title IX guidance updated June 2021 (not listed on Title IX webpage):

A recipient institution that receives Department funds must operate its education program or activity in a nondiscriminatory manner free of discrimination based on sex, including sexual orientation and gender identity….

- No mention of Title IX regulations roll-back in ED's unified agenda issued spring 2021

FERPA and PPRA proposed regulations coming?

- Both are listed in the ED's unified agenda!

Victory in South Carolina in *Adams v. McMaster!*

Great collaboration between SCSBA & NSBA to defeat misuse of federal stimulus dollars intended for students in poverty.

Supreme Court of South Carolina ruled against the governor's attempt to create a voucher program based on SC Constitution.

NSBA provided federal framework, leading Justice Hearn to reference NSBA's brief in oral argument.

Questions & Discussion.

"People's Choice"

Thank You.

fnegron@nsba.org