CASES AND CONTROVERIES: a review of the national school landscape

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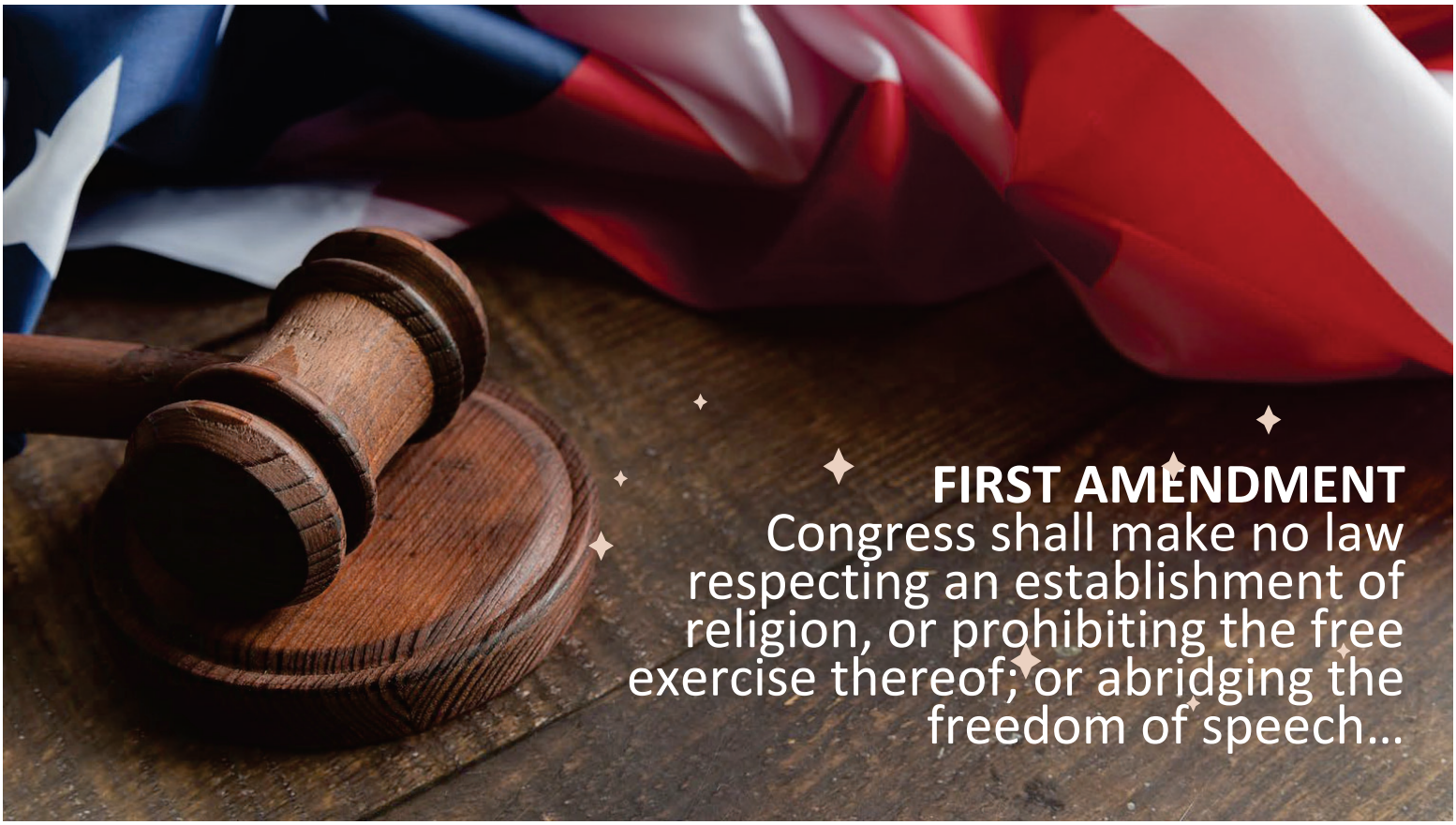
Religion: Establishment Clause v. Free Exercise Clause

Kennedy v. Bremerton Sch. Dist.

597 U.S. ___, 142 S.Ct. 2407 (2022).

- Coach Kennedy established a post-game ritual of praying aloud while kneeling at the 50-yard line of the school football field.
- District asked Kennedy to stop engaging in "any overt actions" that could "appear to a reasonable observer" to endorse prayer while he was on duty as a district-paid coach.
- **Issues**:
  - Whether a public employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection
  - Whether, assuming that such religious expression is protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.



Free Exercise Clause

- Did the district burden a **sincere religious practice** pursuant to a policy that was not **"neutral"** or **"generally applicable?"**
- Supreme Court concluded that the district's actions were not neutral or generally applicable.
- Kennedy's religious activity was targeted when secular activities of other coaches were not disciplined.

Free Speech

Teachers (and coaches) do not shed their Free Speech rights at the schoolhouse gate, but their speech rights are not "boundless."

Speaking pursuant to official duties	Speaking as a citizen addressing a matter of public concern
• Served as the face and voice of district during games. • Spoke from the playing field. • Football games were over, but football events were not. • Served as a role model "clothed with the mantle of one who imparts knowledge and wisdom."	• Did not speak pursuant to district policy. • Was not seeking to convey a district-created message. • Was not instructing players, discussing strategy, encouraging better on-field performance, etc. • Was allowed to attend briefly to personal matters.

Establishment Clause

- *Lemon v. Kurtzman* test – courts examined a government actions' purposes, effects, potential for entanglement with religion and whether a "reasonable observer" would consider the action an "endorsement" of religion.
- SCOTUS abandoned the *Lemon* test.
- NEW test – courts must interpret the Establishment Clause by "reference to historical practices and understandings."
- The line between permissible and impermissible must "accord with history and faithfully reflect the understanding of the Founding Fathers."

Kennedy v. Bremerton

- **Holding**:
  - The district's requirement that Kennedy discontinue his prayer practice violated his free exercise and free speech rights because the prayers constituted private—rather than government—speech.
  - Kennedy's prayers did not violate the Establishment Clause because they could not reasonably be construed as a religious endorsement and did not coerce student participation in religious activity.

"For now, it suffices to say that the Court's history-and-tradition test offers essentially no guidance for school administrators. If even judges and Justices, with full adversarial briefing and argument tailored to precise legal issues, regularly disagree (and err) in their amateur efforts at history, how are school administrators, faculty, and staff supposed to adapt? How will school administrators exercise their responsibilities to manage school curriculum and events when the Court appears to elevate individuals' rights to religious exercise above all else? Today's opinion provides little in the way of answers; the Court simply sets the stage for future legal changes that will inevitably follow the Court's choice today to upset longstanding rules."

--Justice Sotomayor (Dissenting Opinion)

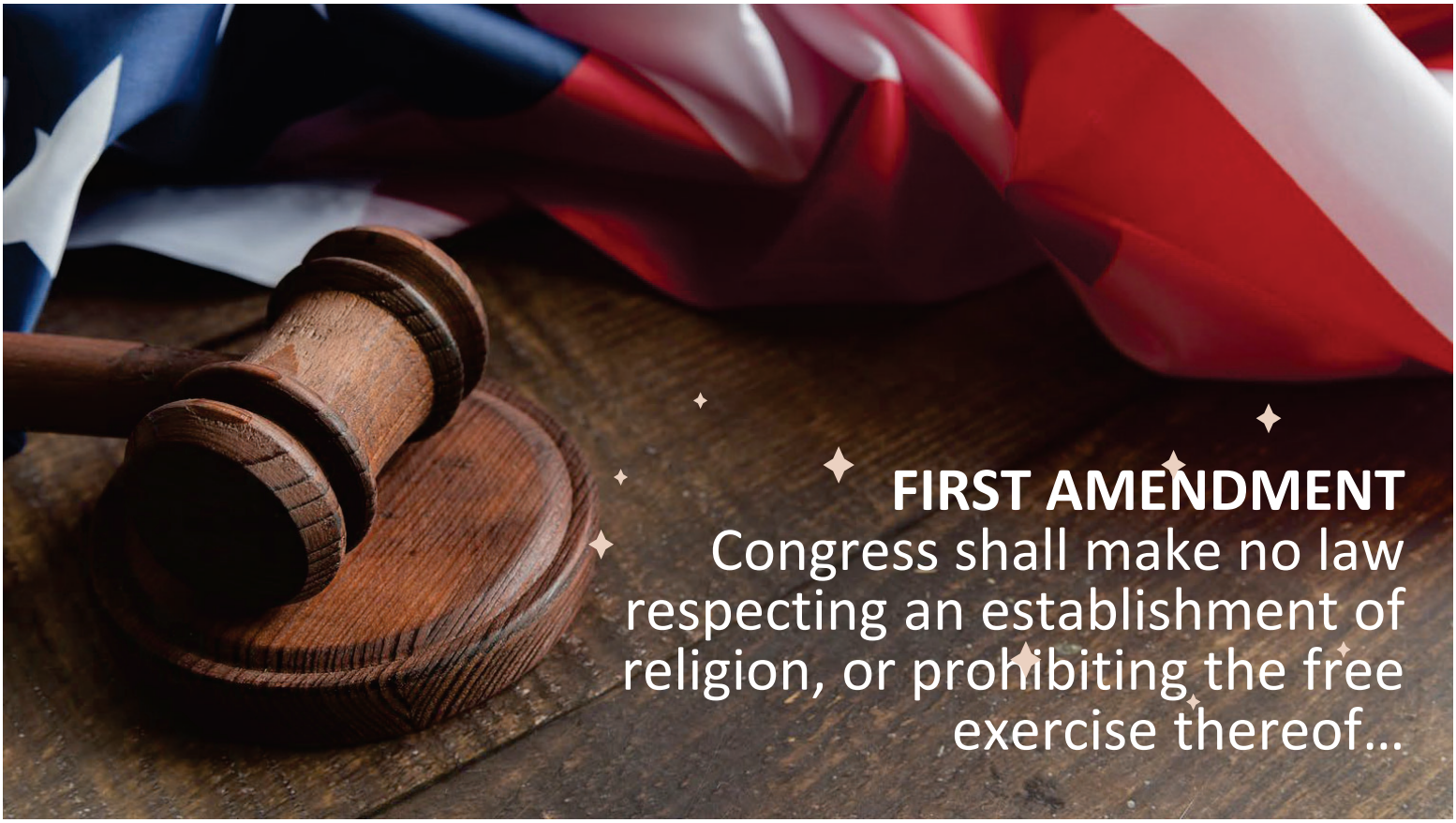
Key takeaways

- What religious activities are allowed in public schools?
  - "Private" religious expression that is:
    - Not mandatory for students
    - Conducted outside the scope of the employee's job functions
  - Be cautious about restricting employees from engaging in "private" religious expression at school, especially while outside the classroom, during non-working time, and/or in non-student-facing settings.
- Review current policies and internal practices and procedures.

Carson v. Makin

142 S. Ct. 1987 (2022).

- Maine has enacted a program of tuition assistance for parents who live in school districts that do not operate a secondary school of their own.
- Most private schools are eligible to receive the payments, so long as they are "nonsectarian."
- **Issue**: whether the "nonsectarian" requirement of Maine's tuition assistance program violates the Free Exercise Clause of the First Amendment.



Carson v. Makin

- ***Trinity Lutheran Church of Columbia v. Comer (2017)*** – Missouri Dept. of Natural Resources violated Free Exercise Clause when it denied playground grants to applicants owned or controlled by a church.
- ***Espinoza v. Montana Dept. of Revenue (2020)*** - a provision of the Montana Constitution barring government aid to any school "controlled in whole or in part by any church, sect, or denomination" violates the Free Exercise Clause.

Carson v. Makin

- **Holding**: Maine's "nonsectarian" requirement for otherwise generally available tuition assistance payments violates the Free Exercise Clause.
- SCOTUS rejects Maine's argument that the "public benefit" is a free public education.
- "The prohibition on status-based discrimination under the Free Exercise Clause is not a permission to engage in use-based discrimination."

"The First Amendment begins by forbidding the government from "mak[ing] [any] law respecting an establishment of religion." It next forbids them to make any law "prohibiting the free exercise thereof." The Court today pays almost no attention to the words in the first Clause while giving almost exclusive attention to the words in the second. The majority also fails to recognize the " 'play in the joints' " between the two Clauses."

--Justice Breyer (Dissenting Opinion)

"What a difference five years makes. In 2017, I feared that the Court was "lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment." Today, the Court leads us to a place where separation of church and state becomes a constitutional violation. If a State cannot offer subsidies to its citizens without being required to fund religious exercise, any State that values its historic antiestablishment interests more than this Court does will have to curtail the support it offers to its citizens."

--Justice Sotomayor (Dissenting Opinion)

Key takeaways

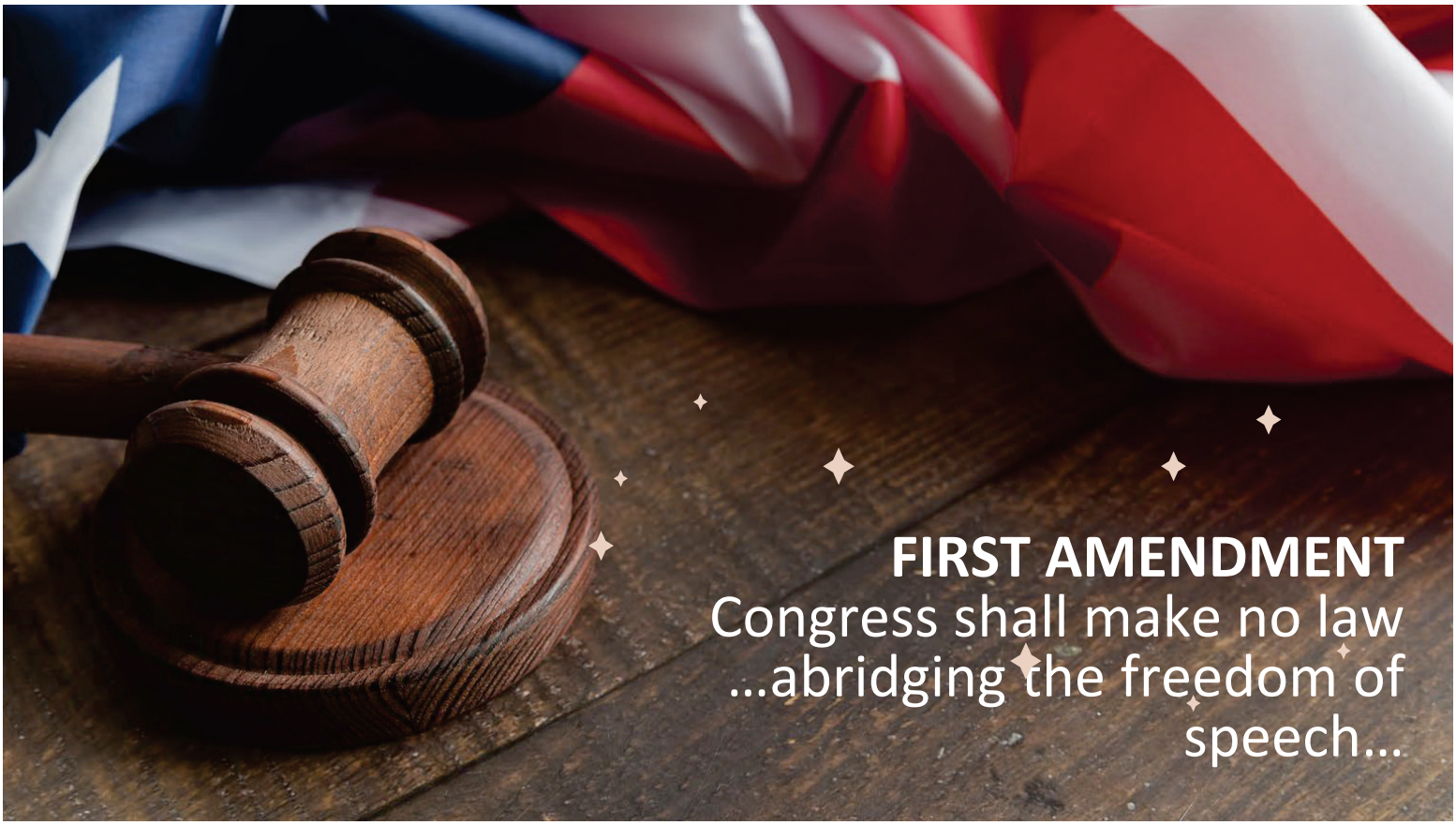
- A neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause.
- States may not deny a religious entity an otherwise available public benefit on account of its religious status.
- States need not subsidize public education, but once a state decides to do so, it cannot disqualify some private schools solely because they are religious.

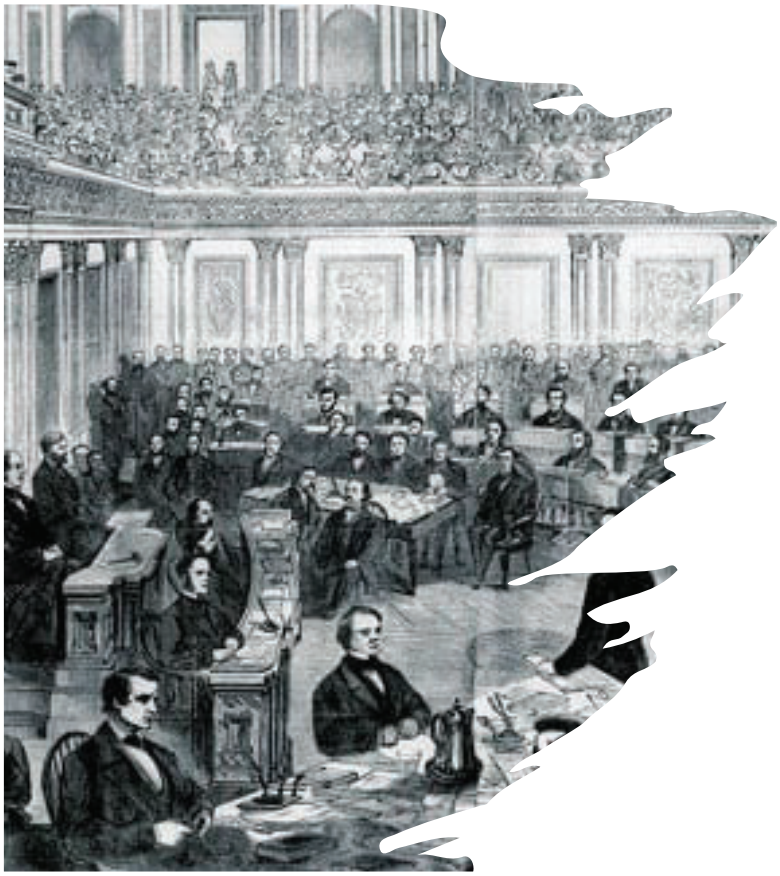
Freedom of Speech

Houston Comm. College Sys. v. Wilson

142 S. Ct. 1253 (2022).

- David Wilson was elected to a 6-year term as a member of the Board of Trustees of the Houston Community College System.
- Wilson's tenure on the board was a "stormy one."
- Board of Trustee's 2018 Resolution
  - Wilson's conduct was "not consistent with the best interests of the College" and "not only inappropriate, but reprehensible."
  - Censure
  - Penalties
- **Issue:** did the board's censure offend Wilson's First Amendment right to free speech?





Houston Comm. College Sys. v. Wilson

- When faced with a dispute about the Constitution's meaning or application, "long settled and established practice is a consideration of great weight."
- Elected bodies in this country have long exercised the power to censure their members.
- There is "no evidence suggesting prior generations thought an elected representative's speech might be 'abridged' by that kind of countervailing speech from his colleagues."

Houston Comm. College Sys. v. Wilson

- Was this a "material adverse action?"
- Elected representatives must shoulder a degree of criticism about their public service from their constituents and their peers. We expect elected officials to continue exercising their free speech rights when the criticism comes.
- The First Amendment cannot be used by one member of a public body as a weapon to silence other members of the board who attempt to freely express themselves.
- **Holding:** Board's censure was not a material adverse action and did not offend Wilson's First Amendment right to free speech.
  - Censure was a form of speech by elected representatives.
  - Concerned the public conduct of another elected representative.
  - Censure did not prevent Wilson from doing his job, did not deny him any privilege of office, and it was not defamatory.

Key takeaways

- A ”purely verbal censure” issued by elected representatives concerning the public conduct of another elected representative does not violate the First Amendment.
- Be mindful of censures that are:
  - Targeted at students, employees, licensees, private individuals, or government officials who do not serve as members of the school board.
  - Accompanied by punishments.

C1.G v. Siegfried

38 F.4th 1270 (10th Cir. 2022)

- Student posted a picture in Snapchat with caption “Me and the boys bout to exterminate the Jews.”
- Student was expelled for one year.
- **Issue:** whether the district had the authority to regulate C.G.’s off-campus speech

Remember the Cocoa Hut (*Mahanoy)*

- Schools may restrict student speech if it "would substantially interfere with the work of the school or impinge upon the rights of other students."
- A school can also regulate student speech where it reasonably forecasts such disruption.
- Court directed schools to consider three features of off-campus speech:
  - The extent a school stands in loco parentis
  - The effect on students' ability to engage in political or religious speech that occurs outside a school program or activity
  - The school's interest in protecting a student's unpopular expression

Comparing C.G. to Mahanoy

- Speech:
  - Occurred outside of school hours
  - Occurred from a location outside the school
  - Did not identify the school
  - Was transmitted using a personal cellphone
  - Was transmitted to an audience consisting of a private circle of friends
- **Did the speech "target and invade the rights of an individual student?"**
- **Holding**: district did not have the authority to regulate C.G.'s off-campus speech

Key takeaways

- Offensive, controversial speech can still be protected under the First Amendment.
- Does the speech:
  - Cause a substantial disruption?
  - Include weapons?
  - Include specific threats or comments directed at students or officials?
  - Directly or indirectly identify the school?
- Expect more off-campus student speech cases!

Title IX:
Sexual harassment
Transgender students/staff

Doe v. Fairfax Cty. Sch. Bd.

1 F.4th 257 (4th Cir. 2021).

- High school student was inappropriately touched by a fellow student during a band trip bus ride.
- School officials investigated the complaint but did not impose any discipline.
- Jury found that student had been sexually harassed, but that school board did not have actual knowledge.
- Plaintiff requested new trial.
- **Issue:** 1) whether a district may be liable in cases alleging student-on-student sexual harassment when the district's response to such allegations didn't itself cause any harassment actionable under Title IX; 2) whether a district lacks "actual knowledge" when it lacks a subjective belief that any harassment actionable under Title IX occurred.

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.

Doe v. Fairfax Cty. Sch. Bd.

- To establish a Title IX claim based on student-on-student sexual harassment, a plaintiff must show that:
  - they were a student at an educational institution receiving federal funds;
  - they suffered sexual harassment that was so severe, pervasive, and objectively offensive that it deprived them of equal access to the educational opportunities or benefits provided by their school;
  - **the school, through an official who has authority to address the alleged harassment and to institute corrective measures, had actual notice or knowledge of the alleged harassment; and**
  - the school acted with deliberate indifference to the alleged harassment.

Doe v. Fairfax Cty. Sch. Bd.

- What establishes a school's "actual notice" in Title IX cases?
  - **Holding:** School district's receipt of a report that can objectively be taken to allege sexual harassment is sufficient to establish actual notice under Title IX.
  - It doesn't matter whether the district:
    - *Subjectively* understood that the plaintiff was making an allegation of sexual harassment.
    - Believed that the alleged harassment occurred.
- **Holding:** To state a claim under Title IX, a student who reports sexual harassment does not need to experience further harassment after the school's deliberately indifferent response.
- Petition for writ of certiorari filed.
- Solicitor General was invited to file a brief in the case expressing the views of the United States.

Tennessee v. United States Dept. of Edn.

No. 3:21-cv-308, 2022 U.S. Dist. LEXIS 125684 (E.D. Tenn. July 15, 2022)

- TIX Guidance
  - Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (1/20/21)
  - DOE's TIX Notice of Interpretation (6/22/21)
  - DOE's Dear Educator Letter (6/23/21)
  - EEOC Technical Assistance Document (6/15/21)
- 20 states file a complaint challenging the legality of the guidance documents issued by DOE and EEOC
- **Issue:** whether the guidance documents were procedurally and substantively unlawful under the Administrative Procedure Act and U.S. Constitution

Tennessee v. United States Dept. of Edn.

- According to the court, the guidance documents:
  - Went "beyond putting the public on notice of pre-existing legal obligations and reminding affected parties of their existing duties."
  - Required states to choose between the threat of legal consequences or altering their state laws to ensure compliance with the guidance and avoid such state action.
  - Constituted legislative rules that required notice and comment procedures under the APA.
- **Holding**: the court granted the plaintiff states' motion for a preliminary injunction and enjoyed the federal agencies from implementing the interpretation.

Transgender Student and Staff Cases

- ***Meriwether v. Hartop,*** 999 F.3d 492 (6th Cir. 2021) – university professor's refusal to use a student's preferred pronouns was speech on a matter of public interest and his free speech rights outweighed the state's stated interest in "promoting the efficiency of the public services it performs through its employees."
- ***Kluge v. Brownsburg Comm. Sch. Corp.,*** 548 F.Supp.3d 814 (S.D. Ind. July 2021) – court found no Title VII violation in the forced resignation of teacher who refused to refer to transgender students by the names selected by the students.
- ***Eller v. Prince George's Cnty. Pub. Sch.,*** No. CV TDC-18-3649 (D.Md. Jan. 14, 2022) – pervasive harassment of transgender teacher constituted sexual harassment under Title VII.

Curriculum and Book Challenges

Curriculum and Books Challenges

- ***Ervins v. SunPrairie Area Sch. Dist.,*** No. 21-366 (W.D. Wis. July 1, 2022) – summary judgment granted to district following unapproved, racially insensitive lesson
- ***Jones v. Boulder Valley School Dist. Re-2,*** No. 20-cv-03399-RM-NRN (D.Colo. Oct. 4, 2021) – district's motion to dismiss granted following parental objections to district's "transgender tolerance programming"
- ***C.K.-W v. Wentzville R-IV Sch. Dist.,*** No. 4:22-cv-00191-MTS (E.D. Mo. Aug. 5, 2022) – court denies parent's request for preliminary injunction after board removes controversial books from school libraries

Cases to Watch

- ***Perez v. Sturgis Public Schools*** – whether the IDEA's exhaustion requirement applies to non-IDEA claims that only seek money damages as a remedy
- ***Fairfax Cty. School Bd. v. DOE*** – 1) whether a recipient of federal funding may be liable in damages in a private action under Davis v. Monroe Cty. Bd. of Edn. in cases alleging student-on-student sexual harassment actionable under TIX; 2) whether the requirement of "actual knowledge" in a private action under Davis is met when a funding recipient lacks a subjective belief that any harassment actionable under TIX occurred.
- ***Parents Defending Education v. Linn-Mar Comm. School Dist.*** -- whether a school district may withhold or conceal from the parents of minor children information about a student's gender identity or the contents of a gender support plan
- ***A.B. v. Brownsburg Comm. School Corp.***– whether parents can be considered "prevailing" and recoup the full amount of their attorneys' fees from the district when the district agreed to all of the educational relief requested and no hearing was ever held.

Federal Regulations & Guidance Documents

Letter to Educators (March 2022)

- *Letter to Educators and Parents Regarding New CDC Recommendations and Their Impact on Children with Disabilities*
- Reminds districts to mitigate the spread of COVID-19 in schools and ensure all students can safely learn in person to the maximum extent possible
- Urges schools to ensure that all students including students with disabilities have access to in-person learning alongside their peers
- Emphasizes the obligation to includes students with disabilities, including those experiencing long COVID, in compliance with the IDEA, Section 504, and the ADA
- Stresses the importance of extra precautions dependent on the COVID-19 community levels

Proposed Title IX Regulations (June 2022)

- US DOE issued notice that it was proposing changes to the Title IX regulations that were just updated in 2020.
- Changes include:
  - Broader application to “sex discrimination”
  - Expanded jurisdiction
  - Change in definitions
  - More streamlined grievance procedures
  - Use of a single investigator/decisionmaker
  - Expanded training requirements

Discipline & Students with Disabilities (July 2022)

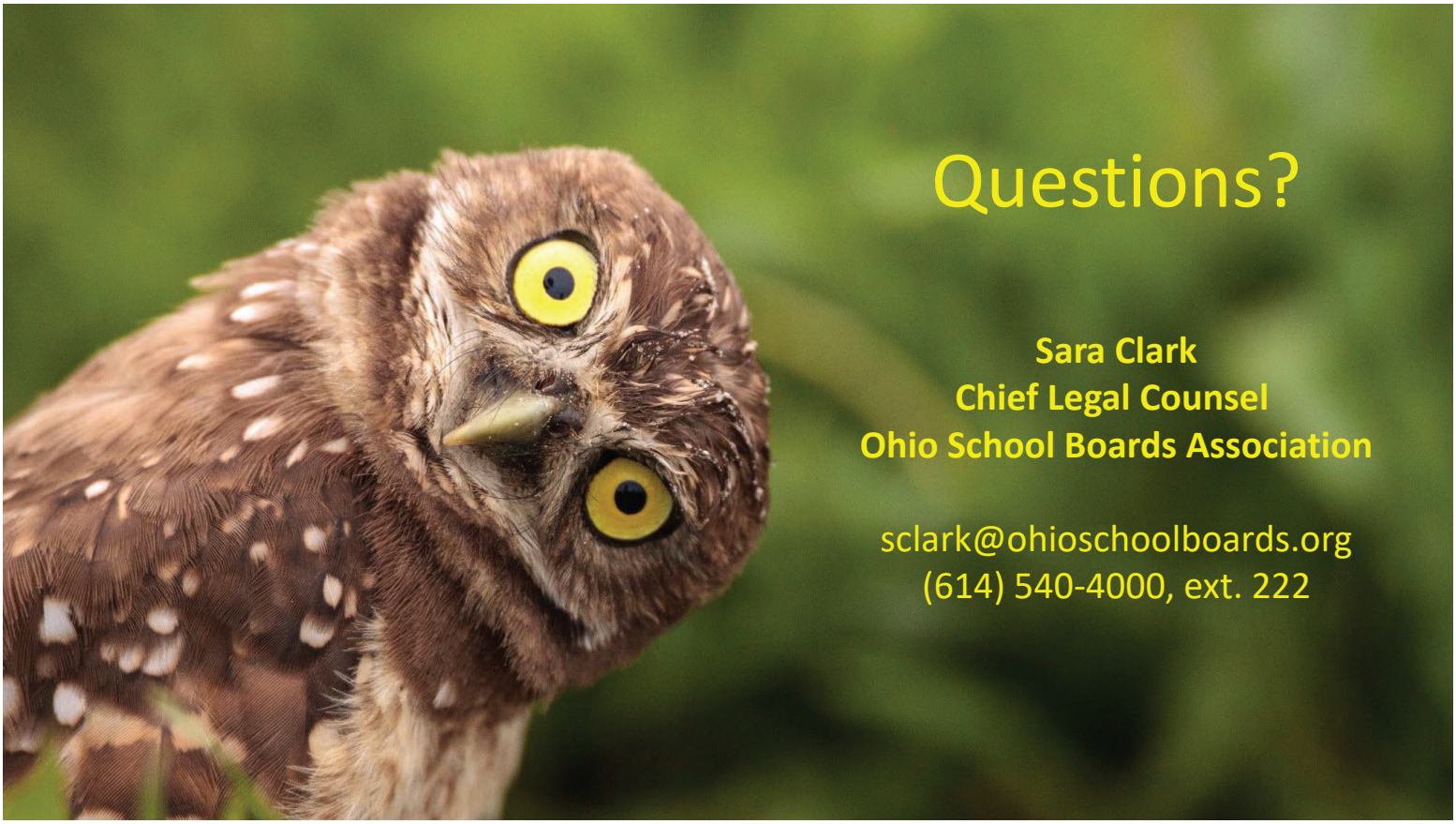
- Outlines how schools can support and respond to behavior that is based on a student’s disability and could lead to student discipline.
- Explains school’s civil rights responsibilities related to disability when administering student discipline.
- Discusses how certain school actions, such as informal removals and the use of threat assessments, may result in the denial of FAPE to children with disabilities.
- Offers strategies for schools to use in place of exclusionary discipline, restraint or seclusion.

Expected FERPA Changes

- DOE plans to amend the FERPA regulations to "update, clarify and improve the current regulations."
- Address outstanding issues, such as:
  - Clarifying the definition of "education records"
  - Clarifying provisions regarding disclosures to comply with a judicial order or subpoena
  - Implementing statutory amendments to FERPA contained in the Uninterrupted Scholars Act of 2013 and the Healthy, Hunger-Free Kids Act of 2010
  - Updating the name of the office designated to administer FERPA
  - Making changes related to the enforcement responsibilities of the office concerning FERPA
- Notice of Proposed Rulemaking: Aug 2022

American Data Privacy and Protection Act

- H.R. 8152 introduced in June 2022
- Creates a comprehensive federal consumer privacy framework.
- Does not directly amend or alter the federal frameworks set forth under COPPA or FERPA.
- Preserves state laws that govern privacy rights for students and protections for student information.
- Covered entities cannot collect, process, or transfer sensitive covered data without "the affirmative express consent of an individual." The definition of sensitive covered data includes, among other things, "information of an individual under the age of 17" and any other covered data collected, processed, or transferred for the purpose of identifying sensitive data.
- The bill prohibits targeted advertising where the covered entity has actual knowledge that an individual is under 17.
- Creates the FTC Youth Privacy & Marketing Division.


Questions?
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