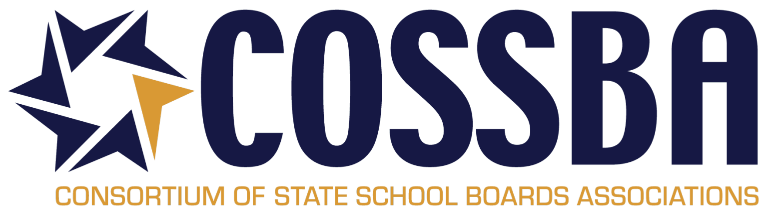


# Court Report

Education Law News You Can Use

## Ninth Circuit (AK, AZ, CA, HI, ID, MT, NV, OR, WA) Affirms Narrow Injunction to Arizona's Save Women's Sports Act

Arizona's Save Women's Sports Act requires schools to classify sports and students by biological sex and bans students of the male sex from participating in female-designated sports—effectively banning transgender women and girls. Two transgender girls, ages 11 and 15, who both had not undergone male puberty and sought to play girls' sports at their respective schools, challenged the law as violating the Equal Protection Clause and Title IX. The district court had previously concluded that the plaintiffs were likely to succeed on those claims and issued a preliminary injunction preventing enforcement of the law against the two of them. The United States Court of Appeals for the Ninth Circuit affirmed, noting that the Act's transgender ban applies categorically, irrespective of relevant factors such as testosterone levels (or other medically accepted indicia of competitive advantage), participant age, or level of competition.

## Eighth Circuit (AR, IA, MN, MO, NE, ND, SD): District Employees Lacked Standing to Challenge Mandatory Equity Training Program

In 2020, a Springfield, MO, school district required its employee to attend an interactive in-person "equity training." Attendees were paid for their time and received professional development credit, but the presentation noted that unprofessional conduct could lead to being asked to leave with no credit given. During the training, two employees began self-censoring their comments after receiving pushback from the presenters on the viewpoints they expressed (e.g., one employee shared a personal anecdote supporting her view that Black people could be racist, to which a presenter responded with a contrary view that Black people could be prejudiced, but not racist). The two employees sued the district for violating their First Amendment rights for compelling or chilling their speech. The United States Court of Appeals for the Eighth Circuit concluded that the employees' subjective fear that dissent or silence would be considered unprofessional and grounds for denial of credit was too speculative to support a cognizable injury. The court found no evidence that expressing opposing views or refusing to speak was unprofessional, or that anyone was disciplined in any way after attending the training.

## Court Strikes Down South Carolina School Voucher Program

The South Carolina Supreme Court ruled that the use of taxpayer dollars to fund private school tuition and fees violated the state's constitution, which provides in relevant part that: "No money shall be paid from public funds … for the direct benefit of any religious or other private educational institution." A recent South Carolina law established the Education Scholarship Trust Fund (ESTF), which consisted of money appropriated to the state department of education to provide scholarships for eligible students for "qualifying education expenses." In turn, a qualifying education expense included tuition at a private school. The court rejected the argument that the funds lost public character once placed in the "trust," describing the mechanism as a "veneer" deployed "to avoid constitutional limits on the use of public funds."

## Second Circuit (CT, NY, VT) Revives Challenge to NYC High School Admissions Program Over Alleged Anti-Asian Bias

In 2018, the New York City Department of Education revised the admissions policy for its Specialized High Schools to increase diversity, including creating an admissions pathway for economically disadvantaged students. An advocacy group challenged the revisions as intentionally discriminating against Asian-American students by reducing their admissions opportunities. The district court had granted summary judgment for the city, concluding that the plaintiffs failed to show that the policy changes had a disparate impact on Asian-

American students. The United States Court of Appeals for the Second Circuit reversed, and held that an aggregate disparate impact is not the only means to demonstrate a discriminatory effect sufficient to trigger strict scrutiny review. Rather, the Second Circuit reasoned that if there is evidence of a racially motivated policy and specific harm to individual members of the targeted racial group, that can also establish the discriminatory effect.

## Second Circuit (CT, NY, VT): Title VI Covers Retaliation Claims Unrelated to Employment Practices

A principal at a Brooklyn public school with majority Black and Latino students raised complaints that her students were victims of systemic race discrimination following the New York City Department of Education's decision to move an affiliate school – allegedly predominately White – to the same campus, citing "vastly unequal opportunities" for the respective sports teams. Shortly after the complaint, the principal was investigated based on an anonymous allegation that she tried to recruit students to a communist organization. The investigation resulted in a written reprimand, but no other disciplinary action. Nonetheless, the principal alleged that the investigation had damaged her professional reputation. The principal brought a Title VI (race discrimination) retaliation claim against the NYC DOE. The district court had previously dismissed the claim based on Title VI's bar on claims "with respect to any employment practice." The United States Court of Appeals for the Second Circuit reversed. The Second Circuit concluded that an implied private right of action exists under Title VI for intentional discrimination, and thus retaliation claims are cognizable. Moreover, the court found that the claim was not barred because it allege retaliation for opposing race discrimination in the allocation of sports, not in opposing any employment practice.

## Eleventh Circuit (AL, FL, GA): Judges Doubt Title IX Allows Job Bias Claims

Two plaintiffs fired from separate Georgia universities filed separate employment discrimination cases against the universities under Title IX. Both cases were dismissed by district courts on the basis that Title VII, the primary federal employment discrimination statute, preempted the Title IX Claims for employment discrimination. At oral argument before the United States Court of Appeals for the Eleventh Circuit, the three-judge panel expressed skepticism about allowing employment discrimination claims under Title IX, suggesting that Title VII is the exclusive remedy for such claims.

## Fourth Circuit (MD, NC, SC, VA, WV) Reverses Class Certification in IDEA Class Action

Two students with disabilities filed a class action against a West Virginia school board, claiming that the district lacks a system for identifying students with disabilities who need behavior supports, in turn leading to unjustified disciplinary removals, thus violating their rights under the Individuals with Disabilities Education Act (IDEA). The district court certified a class of all school district students with disabilities who needed behavioral supports and experienced disciplinary removals. The United States Court of Appeals for the Fourth Circuit reversed, holding that the class did not meet the commonality requirement under the procedural rules. The court reasoned that commonality requires more than shared claim of a rights violation; rather, all class members must suffer the same injury capable of classwide resolution, but the plaintiffs' claims involved individualized experiences and alleged harms at different stages in the special education process.

## California Federal Judge Finds Student's Black Face Paint Not Protected Speech

A San Diego middle schooler attended a high school football game against a district rival. Among two other friends, during the game, the student had black paint cover half of his face (in a way which some may perceive as "blackface"). School officials later received reports of students with black face paint uttering racial slurs at students on the opposing team from the opposing team's side of the field. After an investigation, and in light of prior race-related misconduct, school officials suspended the student for two days and banned him from attending extracurricular activities for the remaining school year. Through his parents, the student sued school officials and sought injunctive relief, claiming a First Amendment violation for allegedly constitutionally protected speech. The United States District Court for the Southern District of California denied the student's motion for preliminary injunction. The court first reasoned that wearing black face paint is conduct that merely contains an expressive component because it can be done for various non-expressive reasons (e.g., glare reduction, camouflage). In that nature, the student had to show that the face paint intended to convey a particularized message that would likely be understood by a viewing audience, but the court concluded he failed to meet this standard: the student contended that his face paint was for "spirit" and "support" but the court explained that the student did not specify which team was supported with that message or why that would be understood by the audience on the opposite side of the field.

**Pending U.S. Supreme Court Petitions to Watch:**

- **Hile v. Michigan** – Whether Michigan's constitutional amended barring direct and indirect public financial support for parochial (or other nonpublic) schools violates the Equal Protection Clause. ***Petition denied.***
- **Parents Protecting Our Children, UA v. Eau Claire Area School District** – Whether parents subject to a school district's policy regarding parental decision-making authority over a major health-related decision have standing to challenge the policy.
- **West Virginia Secondary School Activities Commission v. B.P.J, by next friend and mother, Heather Jackson** – Whether Title IX or the Equal Protection Clause prevents a state from designating school sports teams based on biological sex determined at birth.
- **Boston Parent Coalition v. School Committee for Boston** – Whether an Equal Protection challenge to a facially race-neutral admission criteria is barred because members of the racial groups targeted for decline still receive a balance share of admissions offers.
- **Mahmoud v. Taylor** – Whether public schools burden parents' religious exercise by compelling elementary school children to participate in instruction on gender and sexuality against their parents' religious convictions without notice or opportunity to opt out.
- **FDA v. R.J. Reynolds Vapor Co.** – Whether a tobacco product manufacturer may file a judicial review petition in a circuit outside of the District of Columbia if the manufacturer is not located in that circuit but is joined by a seller of their products located in that circuit.

**U.S. Supreme Court Cases to Watch:**

- **Free Speech Coalition, Inc. v. Paxton**– Whether strict scrutiny or rational basis review applies to a Texas law that restrict minors' access to sexual material but significantly burdens adults' access to protected speech
- **U.S. v. Skrmetti** – Whether Tennessee's Senate Bill 1, which prohibits medical treatments intended to allow a minor to identify with a purported identity inconsistent with the minor's sex, violates the Equal Protection Clause (a related petition in L.W. v. Skrmetti asks whether this same bill violates the fundamental right of parents to make decisions concerning the medical care of their children)
- **Williams v. Washington** – Whether a plaintiff must first exhaust state administrative remedies before bringing a claim under Section 1983 claim in state court. (Oral argument presented today.)
- **Lackey v. Stinnie** – (1) Whether a party must obtain a ruling that conclusively decides the merits in its favor, as opposed to merely predicting a likelihood of later success, to prevail on the merits under 42 U.S.C. § 1988; and (2) whether a party must obtain an enduring change in the parties' legal relationship from a judicial act, as opposed to a non-judicial event that moots the case, to prevail under Section 1988. (Set for argument tomorrow.)
- **FDA v. Wages and White Lion Investments, LLC** – Whether the FDA's denial of an application for authorization to market new e-cigarette products (including candy and fruit flavors) was arbitrary and capricious.
- **E.M.D. Sales, Inc. v. Carrera** – Whether the burden of proof that employers must satisfy to demonstrate the applicability of a Fair Labor Standards Act exemption is a mere preponderance of the evidence or clear and convincing evidence.
- **Stanley v. City of Sanford** – Whether, under the Americans with Disabilities Act, a former employee — who was qualified to perform her job and who earned post-employment benefits while employed — loses her right to sue over discrimination with respect to those benefits solely because she no longer holds her job.
- **Wisconsin Bell, Inc. v. US ex rel. Heath** – Whether reimbursement requests submitted to the Federal Communications Commission's E-rate program are "claims" under the False Claims Act.

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