

National School Law Trends and COSA Online Resources Tour

**Presented by Sonja Trainor, Director, NSBA Council of School Attorneys
Illinois Council of School Attorneys Seminar on School Law
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- I. NSBA/COSA is your *source* on what's happening on the national school law stage, and your *voice* in the courts, Capitol Hill and federal agencies on issues that affect public schools.
 - A. Your source: COSA ties school attorneys to resources so you can stay up-to-date.
 - i. Inquiry & Analysis
 - ii. Legal Clips
 - iii. Federal Regulations & Resources
 - iv. School Law Seminar Papers
 - v. Amicus Briefs
 - vi. Weekly COSA message
 - B. Your voice: NSBA is the Washington voice for public schools.
 - i. Courts
 - ii. Capitol Hill
 - iii. Federal Agencies
 - iv. The Public

NSBA/COSA Online Resources

NSBA main page: www.nsba.org

COSA main page: www.nsba.org/COSA

COSA member benefits (I&A, FR&R, Seminar Papers, etc.):
<http://www.nsba.org/services/council-school-attorneys-cosa/member-benefits-and-resources>

Legal Clips: legalclips.nsba.org

NSBA Connect (the COSA "listserv"): community.nsba.org

II. Supreme Court Activity

A. *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015). “The right to marry is a fundamental right inherent in the liberty of the person and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.” The NSBA guide for schools discusses issues school districts will need to address as they attempt to bring their policies and practices in line with *Obergefell*.

NSBA Guide: <http://www.nsba.org/same-sex-marriage-what-obergefell-decision-means-school-districts>

B. *EEOC v. Abercrombie*, 135 S.Ct. 2028 (2015). Issue: Whether an employer may be held liable under Title VII of the Civil Rights Act for failing to provide a religious accommodation to an applicant when the employer had no actual knowledge of the applicant’s faith or the need for an accommodation. In this case, a woman wearing a head covering to an interview with Abercrombie & Fitch was not hired. The EEOC took a new position on this issue contrary to its previous guidance that placed the burden on employees to inform their employers of the need for religious accommodation. The Court held, “To prevail in a disparate-treatment claim, an applicant need show only that his need for an accommodation was a motivating factor in the employer’s decision, not that the employer had knowledge of his need.”

NSBA Amicus Brief (written by SLLC and IMLA): <http://www.nsba.org/eecoc-v-abercrombie-fitch-stores-us-sup-ct-merits-brief>

C. *Ohio v. Clark*, 135 S.Ct. 2173 (2015). Issue: Whether teachers or other school personnel who are mandatory child abuse reporters should be treated as law enforcement agents for purposes of the Confrontation Clause. The Court held that the Sixth Amendment’s Confrontation Clause does not bar every statement that satisfies its “primary purpose” test. A child’s out of court statements to his teachers, when the child was not available to be cross-examined, did not have to be excluded because they were not testimonial. They clearly were not made with the primary purpose of creating evidence for Clark’s prosecution. (The teacher’s first objective was to protect the child.) The child’s age also played a role, as “[s]tatements by very young children will rarely, if ever, implicate the Confrontation Clause.” “[T]he fact that L. P. was speaking to his teachers remains highly relevant....Statements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers.”

NSBA Amicus Brief: <http://www.nsba.org/ohio-v-clark-us-sup-ct-merits-brief>

D. *Wenk v. O’Reilly*, 783 F.3d 585, 6th Cir. (Ohio), Apr. 15, 2015, *Petition for Certiorari Docketed*, *Schott v. Wenk*, July 14, 2015. Issue: Whether teachers or other school personnel who are mandatory child abuse reporters are entitled to qualified immunity

against First Amendment retaliation claims asserted by the alleged abuser. The district court denied the administrator qualified immunity. The Sixth Circuit upheld the denial of qualified immunity and summary judgment, holding a “report of child abuse – even if it is not materially false and there is evidence in the record that could support a ‘reasonable basis’ to suspect child abuse – is actionable if the reporter actually made the report at least in part for retaliatory motives.” The Supreme Court asked for more briefing at the petition stage, but case has been settled.

NSBA Amicus Brief: <http://www.nsba.org/schott-v-wenk-us-petition-brief>

- III. *Fisher v. University of Texas at Austin*, cert. granted, 135 S.Ct. 2888 (Jun. 29, 2015). Issue: Can the Fifth Circuit’s re-endorsement of the University of Texas at Austin’s use of racial preferences in undergraduate admissions decisions be sustained under the Equal Protection Clause of the Fourteenth Amendment, including *Fisher v. Univ. of Texas at Austin*, 133 S.Ct. 2411 (2013)? On remand, a Fifth Circuit panel again rejected Fisher’s claim that UT’s race-conscious admissions policy violated the Fourteenth Amendment.

NSBA Amicus Brief: <http://www.nsba.org/fisher-v-university-texas-austin-us-sup-ct-merits-brief-2015>

NSBA U.S. Supreme Court Charts – full, abbreviated and amicus:
<http://www.nsba.org/amicusbriefs>

IV. Federal Courts of Appeals – recent amicus cases

- A. *Salazar v. South San Antonio Independent School District* (5th Cir.). Issue: Whether a school district may be held liable under Title IX of the Education Amendments of 1972 for the sexual assault of a student by a school principal when the abuser was the only school official with actual knowledge of the wrongdoing. Not yet decided.

NSBA Amicus Brief: <http://www.nsba.org/salazar-v-south-san-antonio-independent-school-district-5th-cir>

- B. *S.B. v. Board of Education of Harford County* (4th Cir.). Issue: Whether Section 504 claims seeking monetary damages for alleged peer harassment based on disability are subject to Title IX standard set forth in the U.S. Supreme Court in *Davis v. Monroe County*.

NSBA Amicus Brief: <http://www.nsba.org/sb-v-board-education-harford-county-4th-cir>

- C. *Seth B. v. Orleans Parish School Board* (5th Cir.). Whether IDEA requires publicly-funded independent educational evaluations (IEEs) to meet state and local school district evaluation criteria.

NSBA Amicus Brief: <http://www.nsba.org/seth-b-v-orleans-parish-school-board-5th-cir>

V. OCR/DOJ activity

A. Investigations

B. Guidance making waves

- i. Racial Disparity
- ii. Equity in School Resources and Opportunities
- iii. Effective Communication Regulation
- iv. ADA/Section 504 and Special Education
- v. Transgender student use of restrooms/locker rooms....?

NSBA summary of recent guidance: <http://www.nsba.org/key-federal-agency-guidance-2008-2015>

Reported resolution agreements and settlements:
<http://www2.ed.gov/about/offices/list/ocr/index.html> (bottom of page)

Seminar papers:

The OCR Special Report by Boyce, Reaves and Silverman, October, 2015

<http://www.nsba.org/ocr-special-report-cosa-slps-presentation>

Anatomy of an OCR Complaint by Dolphin, Littlefield, and Long, March, 2015

<http://www.nsba.org/anatomy-ocr-complaint-or-what-ocr-when-my-clients-are-sweating-bullets-over-complaint>

Tustin and the Increasing Involvement of the Justice Department in Special Education Cases by Weatherly and Wenkart, March, 2015

<http://www.nsba.org/tustin-and-increasing-involvement-justice-department-special-education-cases>

VI. First Amendment

A. Religion – trending issues

- i. Schools promoting religion through traditions and assemblies, baptisms before football games

Legal Clips coverage: <http://legalclips.nsba.org/2015/09/14/georgia-district-investigating-video-purporting-to-show-a-group-of-players-and-a-coach-being-baptized-on-field-before-football-practice/>

- ii. Employment claims – retaliation, failure to accommodate

EEOC v. Abercrombie & Fitch (above)

Heffernan v. City of Paterson, NJ, 777 F.3d 147 (3d Cir. 2015), *cert. granted*, ___ S.Ct. ___, U.S., Oct. 01, 2015. Jeffrey Heffernan, a police officer in Paterson, New Jersey, was demoted after being observed obtaining a local mayoral candidate's campaign sign at the request of his mother. He disavowed any intent to convey a particular message or to affiliate himself with the campaign. He sued under 42 U.S.C. § 1983 against Appellees, including the City of Paterson, and city officials, for unconstitutional retaliation (expression and association) under the First Amendment. The district court granted summary judgment in favor of the defendants. The Third Circuit affirmed, as Heffernan failed to come forward with evidence that he actually exercised his First Amendment rights, and because claims of retaliation based only on the *perceived* exercise of those rights are foreclosed by *Fogarty v. Boles*, 121 F.3d 886, 888 (3d Cir.1997). “[I]t is not “a violation of the Constitution for a government employer to [discipline] an employee based upon substantively incorrect information,” ... [citations omitted], even where the government employer erroneously believes that the employee had engaged in protected activity under the First Amendment.”

- iii. Gay Straight Alliance clubs
ACLU has appealed district court’s dismissal of its suit against a Florida district for refusing to allow GSA at middle school.

Legal Clips coverage: <http://legalclips.nsba.org/2015/11/05/aclu-appeals-federal-district-courts-dismissal-of-suit-over-florida-districts-refusal-to-allow-gay-student-club-at-middle-school/>

- B. Student online speech. In *Bell v. Itawamba Cnty. Sch. Bd.*, No. 12-60264 (5th Cir. Aug. 20, 2015) (*en banc*), the 5th Circuit upheld a school district’s discipline of two students who posted an offensive rap song directed at school coaches on a social networking site. The opinion provides notes how the scope of *Tinker* has changed since the advent of the internet and its wide-spread use by students. The 5th Circuit says clearly that *Tinker* does not just apply inside the schoolhouse gate anymore: five of the six circuits that have addressed off-campus speech have found that *Tinker* applies. The court acknowledged the need for school officials to react before harm comes to the school community: “Our holding concerns the paramount need for school officials to be able to react quickly and efficiently to protect students and faculty from threats, intimidation, and harassment intentionally directed at the school community.”

Seminar paper:

Tweet Others As You Would Have Them Tweet You by Walsh, October, 2015

<http://www.nsba.org/tweet-others-you-would-have-them-tweet-you-cosa-slps-paper>

Legal Clips coverage: <http://legalclips.nsba.org/2015/08/24/fifth-circuit-sitting-en-banc-rules-mississippi-district-did-not-violate-students-first-amendment-rights-by-disciplining-him-for-off-campus-online-posting-of-rap-video-containing-threatening-langu/>

VII. Data Privacy

A. Themes of the national conversation

- i. Fears/Evils: “permanent record” following child, breach of personal info, government having big data on child, ed tech companies using data to market/advertise to the child/family
- ii. Benefits of increased access to more data: to support, improve and individualize student learning; to close achievement gaps; to create digital citizens
- iii. Efforts of national organizations: awareness, online resources, training, seals of approval for ed tech products and school learning environments, lobbying

B. Federal bills

- i. FERPA overhaul (introduced by Reps Kline and Scott, July 2015);
- ii. Partial FERPA re-write to focus on increased access for parents and more restrictions on ed tech companies (Sen Markey and Hatch, May 2015);
- iii. Partial FERPA re-write to significantly restrict collection, use and sharing of student records (Sen Vitter, May 2015);
- iv. Amendment to ESEA finding student PII should be protected and directing Congress to review student privacy laws (Rep Hurd, July 2015);
- v. Bill to regulate online service providers to protect student privacy (Rep Polis and Messer, April 2015)
- vi. Another bill to regulate online service providers to protect student privacy (Sen Blumenthal and Daines, July 2015)
- vii. COPPA update - Do Not Track Kids Act (Sen Markey and Rep Barton, June 2015)
- viii. ESEA amendment to establish Student Privacy Policy Commission to study and make recommendations (Sen Markey and Hatch, July 2015)

Summary by NASBE of federal data privacy bills: <http://www.nasbe.org/wp-content/uploads/2015-Federal-Education-Data-Privacy-Bills-Comparison-2015.07.22-Public.pdf>

C. State legislative activity: 46 states introduced 184 bills addressing student data privacy

- i. 15 states passed 28 new student data privacy laws.

- ii. States introduced legislation to govern the data use and privacy activities of online service providers (differs from the 2014 trend of legislation governing the data use/collection of states).
- iii. 25 states introduced legislation modeled on CA's SOPIPA, though many states made alterations to fit their own needs.
- iv. 31 states introduced legislation that included contract requirements for service providers.
- v. States introduced legislation to address the capacity and resource needs of districts, especially given the increased data privacy and security responsibilities many districts were charged with last year.

Summary by Data Quality Campaign on 2014-15 state legislative activity:
<http://dataqualitycampaign.org/wp-content/uploads/2015/09/DQC-Student-Data-Laws-2015-Sept23.pdf>

Summary by NASBE on state data privacy legislative trends:
<http://www.nasbe.org/wp-content/uploads/NASBE-Policy-Update-2015-Legislative-Session-Data-Privacy-June-2015.pdf>

NSBA Guide for school board members: <http://www.nsba.org/data-cloud>

COSA Guide for school attorneys: <http://www.nsba.org/cloud-computing-and-student-privacy-guide-school-attorneys>

Seminar paper:

Negotiating Contracts for Cloud Computing by Tokarz, October, 2015

<http://www.nsba.org/negotiating-contracts-cloud-computing-cosa-slps-paper>