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Legal Clips
THE SOURCE FOR RECENT DEVELOPMENTS IN SCHOOL LAW

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BONUS EDITION

Sua Sponte: NSBA set to release new guide on student medications

The National School Boards Association (NSBA) will be releasing a new guide entitled "*Drugs, Substance Abuse and Public Schools: A Legal Guide for School Leaders Amidst Changing Social Norms."* The guide is in the form of a FAQ. It covers six areas: Medications At School; Marijuana; Tobacco and Related Products; School Authority to Discipline and Student Rights; Student Educational Performance and Drug Use; and Student Privacy and Drug Use.

As NSBA's Executive Director & CEO Thomas J. Gentzel states in the guide's introduction:

> This legal guide is intended to help schools navigate the complicated patchwork of federal, state and local laws and regulations governing the presence and use of both authorized medications and illicit drugs in school. From medication management to increasingly novel issues such as medical marijuana, to the rise of troubling trends affecting children such as the opioid addiction and e-cigarettes, to student privacy rights and discipline, this publication will guide school board members in policy making and school board officials in identifying issues and appropriate responses to help ensure student well-being and to maintain safe school environments. The National School Boards Association is especially pleased to be joined by the National Association of School Nurses in this effort, and we acknowledge their generous review. Our hope is that this guide, which will live digitally on

the NSBA web site and will be available through many of our state association members, will help school leaders proactively prepare for and meet the many challenges, new and old, in this area.

Suit alleges that Indiana district is barring Gay Straight Alliance student club from using the term "gay" in club name

A December 5, 2018 article in the *Daily Beast* by Samantha Allen reports that LGBT students at Leo Jr. Sr. High School (LJSHS), who formed a Gay Straight Alliance club, are being told they cannot call the club a "gay-straight alliance" or even a "GSA," and is instead only permitted to refer to itself as a "Pride Alliance." They also allege the GSA can't use the "Pride" in its name to refer to LGBT Pride. Instead, "Pride" is allegedly required to be used as a reference to a common school acronym: "Professionalism, Respect, Integrity, Diligence, and Excellence."

The American Civil Liberties Union of Indiana (ACLU-IN) has filed suit on behalf of the students in federal court against East Allen County Schools. The legal complaint alleges the Leo Pride Alliance is treated differently from other extracurricular clubs at the school, claiming that it is "not allowed to meet outside of a single classroom," that it is barred from participating in school fundraisers, and that it can only put up a bulletin board "if members performed community service outside of the school, a requirement not imposed on any other club." Other clubs, by contrast, are reportedly allowed to host activities outside of their regular meetings.

The Leo Pride Alliance has been in existence for two years and now boasts over 30 members. The lawsuit contends LJSHS staff have told the GSA that it can't even use terms like "gay" or "lesbian" or "queer" in its advertising—terms that would help LGBT students understand the club's purpose of providing support and community. "There have been several court cases involving schools that have tried to force GSAs to adopt 'less divisive' names or broaden the scope of the group's mission statement to include other issues," a GLBTQ Legal Advocates and Defenders resource notes. "In all those cases, the GSAs have won the right to keep their name."

According to Falk, denying a GSA its full name not only violates the First Amendment but also sends a potentially damaging message to LGBT youth, many of whom are in early and potentially vulnerable stages of coming out. "If you have to start that whole process off by not even being able to identify yourself with the name that would put you in line with the thousands of other GSAs across the country, you can see, right off the bat, you're being told that in some way, there is something that needs to be suppressed in who you are," he said. "That's the complete opposite of the message that a GSA is designed to give."

There's one more allegation in the lawsuit, that could prove harmful for LGBT students at LJSHS: The complaint alleges that the Leo Pride Alliance's faculty advisor "is required to send a list of all club members to all faculty"—and that no other clubs are required to follow this protocol. In effect, every teacher in the school would know who goes to GSA meetings. For closeted or questioning LGBT students who are concerned about being outed, Falk says, this policy could deter them from seeking the support

they need at a critical time in their life. “There is obviously a bit of a chilling factor there because there may be students who are coming to the club who do not want to be identified throughout the school’s faculty as club members,” Falk said.

ACLU-IN’s lawsuit makes three separate but intertwined legal claims: First, ACLU-IN alleges that the school is violating the Equal Access Act by not allowing the GSA to operate under the same terms as other clubs, with fundraisers and bulletin boards. Second, ACLU-In alleges that the school is violating the First Amendment by trying to control the language used in the group’s name and in its marketing. And finally, the complaint claims that the “differential treatment” of the club is a violation of the Fourteenth Amendment’s guarantee of equal protection under the law.

The ACLU has participated in a long string of successful GSA cases, stretching from 1996 when LGBT groups sued a Salt Lake City school district over an anti-GSA policy to 2014 when an Indiana high school decided to allow a GSA after an ACLU-IN lawsuit was filed. Schools have used various tactics to constrain GSAs, ranging from imposing name restrictions to, at the most extreme, shutting down all extracurricular clubs as a way to block a GSA while still remaining in compliance with the federal Equal Access Act.

[Editor’s Note: In the ACLU-IN press release announcing filing of the suit, ACLU-IN’s legal director Ken Falk states: “Students at Leo Jr. Sr. High School may participate in extracurricular clubs recognized by the school. By creating additional hurdles for the Leo Pride Alliance, and censoring the group’s name, the school is infringing on these students’ rights.”

The legal complaint asserts: The failure to allow Leo Pride Alliance to call itself “Leo GSA” and the unequal burdens imposed upon it violates the Equal Access Act, 20 U.S.C. § 4071, et seq., the First Amendment, and the Equal Protection Clause of the Fourteenth Amendment.]

Fourth Circuit panel hears oral argument in case alleging Maryland high school’s world history lesson on Islam violates Establishment Clause

A December 11, 2018 article by Brad Kutner of *Courthouse News Service* reports that during argument before the U.S. Court of Appeals for the Fourth Circuit panel in *Wood v. Board of Education of Charles County*, a case challenging the constitutionality of a high school world history class’s lesson plan on Islam, the panel members appeared to cast doubt on the validity of the student’s religious claims. All three judges on the panel appeared unpersuaded by the Thomas Moore Law Center attorney Kate Oliveri’s argument that even the subtle promotion of faith could violate the right to freedom from religion.

The case stems from the 2014-15 school year at La Plata High School in Maryland’s Charles County School District. Caleigh Wood, a junior, claimed that her rights were violated during a world-history class where the teacher focused on how Islam influences Middle Eastern politics. Wood took offense specifically with two PowerPoint slides that read, “Most Muslim’s faith is stronger than the average Christian,” and “Islam, at heart, is a peaceful religion.” A third assignment that Wood found

objectionable required students to write the Islamic shahada, which states, “There is no god but Allah and Muhammad is the messenger of Allah.”

Arguing for the school district, attorney Andrew Scott said that the decontextualized lesson materials have no business being debated in court. “Context is crucial,” he said. “If this court were to rule in appellants favor it would open the floodgates.”

Judge Harris appeared receptive to Scott’s warning, chiming in that she read the slides as an invitation for students to tackle the public conceptions of Islam. As for the “strength of faith” slide, she said she could see how the required fasting, daily prayers and other requirements of the faith might show a strength of faith many Christians lack, or at least lead to discussion among students.

Scott agreed. “This was taught to show the rise of Islam in politics from then to today … and that’s what it does,” he said. “Students parroting the tenets of Islam to learn about them.”

Sua Sponte: U.S. Department of Education has issued proposed regulations regarding sexual harassment under Title IX

On November 29, 2018, the U.S. Department of Education’s (ED) Office for Civil Rights (OCR) issued proposed regulations “addressing sexual harassment under Title IX to better align the Department's regulations with the text and purpose of Title IX and Supreme Court precedent and other case law.” The press release announcing the proposed regulations spells out the following key provisions in the new rules:

- The proposed rule would require schools to respond meaningfully to every known report of sexual harassment and to investigate every formal complaint.
- The proposed rule highlights the importance of supportive measures designed to preserve or restore a student's access to the school's education program or activity, with or without a formal complaint. Supportive measures may include the following:
    - Academic course adjustments
    - Counseling
    - No-contact orders
    - Dorm room reassignments
    - Leaves of absence
    - Class schedule changes
- Where there has been a finding of responsibility, the proposed rule would require remedies for the survivor to restore or preserve access to the school's education program or activity.
- The proposed rule would require schools to apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to "rape shield" protections.

- Colleges and universities would be required to hold a live hearing where cross-examination would be conducted through the parties' advisors. Personal confrontation between the complainant and respondent would not be permitted. K-12 institutions would not be required to hold a live hearing with cross examination, but would be required to permit written questions.
- To promote impartial decisions, schools would not be allowed to use a "single investigator" or "investigator-only" model.
- Under the proposed rule, if a school chooses to offer an appeal, both parties can appeal.
- Consistent with U.S. Supreme Court Title IX cases, the proposed rule defines sexual harassment as unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity.
- The proposed rule adopts the Clery Act definition of sexual assault and includes it in the definition of sexual harassment under Title IX.

According to ED's fact sheet, the regulations' guiding principles are: Rulemaking Process; Greater Clarity; Increased Control for Complainants; and Fair Process. ED has also issued the "Background & Summary of the Education Department's Proposed Title IX Regulation," which summarizes each provision of the regulation.

Religious Advocacy group files petition with U.S. Supreme Court challenging Pennsylvania district's policy accommodating transgender students' use of sex-segregated facilities at school

According to a November 20, 2018 report by Peter Hall of *The Morning Call*, Alliance Defending Freedom (ADF) filed a petition with the U.S. Supreme Court challenging of Boyertown Area High School's (BAHS) policy that allows transgender students to use the bathrooms and locker rooms matching their gender identity. ADF is asking the Supreme Court to review the U.S. Court of Appeals for the Third Circuit's panel decision upholding the policy accommodating transgender students.

The petition argues that the Third Circuit inappropriately made students' bodily privacy contingent on what others believe about their own gender, and that the school district could have found ways to accommodate transgender students without infringing on the rights of others. "Schools should not expect students to accept that the differences between females and males don't matter in the very places set apart for privacy from the opposite sex," said Randall Wenger, chief counsel with the Independence Law Center, a nonprofit legal organization whose attorneys also worked on the case. Boyertown Area School District's (BASD) attorney lawyer Michael Levin said the district will file an appropriate response. "The school district believes the lower court decisions were well-reasoned and will be able to be defended," Levin said.
An attorney for the American Civil Liberties Union of Pennsylvania, which joined the case on behalf of the Pennsylvania Youth Congress, characterized the Supreme Court petition as a request by "anti-LBGTQ extremists" for a ruling that school districts like Boyertown are "prohibited by the Constitution from

doing the right thing." "Their claim that transgender students are a threat to others is offensive and not supported by the evidence in Boyertown or schools around the country," attorney Ria Tabacco Mar said. The Third Circuit upheld the decision of U.S. District Judge Edward G. Smith, who refused to issue an injunction suspending the policy last year. Smith wrote that the privacy provisions at Boyertown Area High School, including private shower and toilet stalls and single-user bathrooms, as well as the willingness of school officials to work with students to ensure they are comfortable, were suitable to address any privacy concerns related to transgender students sharing locker rooms and bathrooms.

[Editor's Note: In August 2018, Legal Clips published a Sua Sponte item reporting that the Third Circuit with all active circuit judges available voted to deny the plaintiffs' petition for rehearing en banc *(all active circuit judges participating). However, the three-judge panel that participated in the June 18, 2018 decision granted the plaintiffs' request for a rehearing by the panel. The panel vacated its June 18, 2018 decision and issued a revised opinion. The Third Circuit panel's revised opinion deviates from the June 18, 2018 vacated opinion only in regard to the detailed discussion of* Whitaker's *applicability to Third Circuit Title VII caselaw applying the theory of sex stereotyping. Although the vacated opinion concluded Title IX prohibits discrimination against transgender students in school facilities "just as Title VII prohibited discrimination against* Prowel*[*Prowel v. Wise Business Forms, Inc*, 579 F.3d 285 (3d Cir. 2009)] in the workplace," the revised opinion merely states BASD "can hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX."]*

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Virginia district terminates teacher who refused to refer to transgender student using male pronouns

According to a December 10, 2018 report by Associated Press on *NBC News*, West Point School Board has voted unanimously to terminate a middle school French teacher who refused to use male pronouns when referring to a female-to-male transgender student. Peter Vlaming, the teacher in question, was fired for insubordination.

Witnesses said that when the student was about to run into a wall, Vlaming told others to stop "her." When discussing the incident with administrators, Vlaming made it clear he would not use male pronouns, a stance that led to his suspension referral for disciplinary action. "I can't think of a worse way to treat a child than what was happening," said West Point High Principal Jonathan Hochman, who testified that he told Vlaming to use male pronouns in accordance with the student's wishes.

Vlaming told superiors that his Christian faith prevented him from using male pronouns for the student. Vlaming said he had the student in class the year before when the student identified as female. Vlaming's attorney, Shawn Voyles, says his client offered to use the student's name and to avoid feminine pronouns, but Voyles says the school was unwilling to accept the compromise. "That discrimination then leads to creating a hostile learning environment. And the student had expressed that. The parent had expressed that," said West Point schools Superintendent Laura Abel. "They felt disrespected."

Nondiscrimination policies were updated a year ago to include protections for gender identity, but didn't include guidance on gender pronoun use, according to Vlaming's lawyer, Voyles, who notes Vlaming has constitutional rights. "One of those rights that is not curtailed is to be free from being compelled to speak something that violates your conscience," Voyles said.

Vlaming said he loves and respects all his students but when a solution he tried to reach based on "mutual tolerance" was rejected, he was at risk of losing his job for having views held by "most of the world for most of human history." "That is not tolerance," Vlaming said. "That is coercion." Vlaming is considering a legal appeal, but said he wants to consult with his attorney before announcing further steps.

[Editor's Note: A December 6. 2018 article in the Richmond Times-Dispatch by Graham Moomaw reported that the school system had released a brief statement after the vote. "As detailed during the course of the public hearing, Mr. Vlaming was recommended for termination due to his insubordination and repeated refusal to comply with directives made to him by multiple WPPS administrators," said Abel,

the superintendent. The statement said the school system would not be commenting further due to "the potential for future litigation."]

Fourth Circuit panel hears oral argument in case alleging Maryland high school's world history lesson on Islam violated Establishment Clause

A December 11, 2018 article by Brad Kutner of *Courthouse News Service* reports that the U.S. Court of Appeals for the Fourth Circuit panel hearing argument in *Wood v. Board of Education of Charles County*, a case challenging the constitutionality of a high school world history class's lesson plan on Islam, appeared to cast doubt on the validity of the student's religious claims. All three judges on the panel appeared unpersuaded by the Thomas Moore Law Center attorney Kate Oliveri's argument that even the subtle promotion of faith could violate the right to freedom from religion.

The case stems from the 2014-15 school year at La Plata High School in Maryland's Charles County School District. Caleigh Wood, a junior, claimed that her rights were violated during a world-history class where the teacher focused on how Islam influences the Middle East politics. Wood took offense specifically with two PowerPoint slides that read, "Most Muslim's faith is stronger than the average Christian," and "Islam, at heart, is a peaceful religion." A third assignment that Wood found objectionable required students to write the Islamic shahada, which states, "There is no god but Allah and Muhammad is the messenger of Allah."

Arguing for the school district, attorney Andrew Scott said that the decontextualized lesson materials have no business being debated in court. "Context is crucial," he said. "If this court were to rule in appellants favor it would open the floodgates."

Judge Harris appeared receptive to Scott's warning, chiming in that she read the slides as an invitation for students to tackle the public conceptions of Islam.
As for the "strength of faith" slide, she said she could see how the required fasting, daily prayers and other requirements of the faith might show a strength of faith many Christians lack, or at least lead to discussion among students.

Scott agreed. "This was taught to show the rise of Islam in politics from then to today … and that's what it does," he said. "Students parroting the tenets of Islam to learn about them."

Montana Supreme Court rules that state's tuition tax credit program violates state constitution's provision prohibiting any state aid, direct or indirect, to religious institutions and that state department of revenue rule barring religious schools from participating in state's scholarship program exceeded the state legislature's grant of rulemaking authority

Espinoza v. Montana Dep't of Revenue, DA 17-0492 (Mont. Dec. 12, 2018)

Abstract: The Montana Supreme Court, in 5-2 split, ruled that the state' s private school tuition tax credit scholarship program violates Article X, Section 6 of the Montana State Constitution, which prohibits the state legislature from making "any direct or indirect appropriation or payment from any public fund or monies" to aid religious schools. The court's majority also held that because the provision was unconstitutional, the Montana Department of Revenue's (MDR) Rule 1, which prohibits religious schools from participating in the private school scholarship program, is superfluous and MDOR had exceeded the rulemaking authority the state legislature had granted to it. The decision features two concurring opinions and two dissenting opinions

Facts/Issues: The mothers of three students attending private religious schools in Montana have filed suit against the state, challenging the fact that the Montana Department of Revenue (MDR) adopted a rule that bars religious schools from participating in the state's private school scholarship - tuition tax credit program. The MDR cites the Montana Constitution's prohibition on appropriations to religious institutions as the basis for the rule.

Earlier in 2015, Montana enacted a law allowing tax credits for individual donations of up to $150 to private school scholarships or to innovative public school programs. The tax-credit program is capped at $3 million for the first year. The mothers' lawsuit contends the tax credits are not state appropriations, and MDR did not have the authority to adopt the rule because it contradicts the state legislature's intention of benefiting all school children.

The Eleventh Judicial District Court, Flathead County, determined the tax credit program was constitutional without Rule 1 and granted the plaintiffs summary judgment. MDR appealed, arguing that the tax credit program is unconstitutional absent Rule 1.

Ruling/Rationale: The Montana Supreme Court, in a 5-2 decision, reversed the district court. The majority addressed first the issue of whether the state's tax credit program ran afoul of Art. X, § 6 of the Montana Constitution, which prohibits state aid to sectarian schools. After concluding that the plain language of the provision clearly "prohibit 'any' type of state aid being used to benefit sectarian education," it explored whether delegates to the 1972 Montana Constitutional Convention demonstrated an intent to bar public aid either direct or indirect to religious institutions.

The majority stated: "The Delegates' strong commitment to maintaining public education and ensuring that public education remained free from religious entanglement is evident from the Constitutional

Convention Transcripts; the Delegates wanted the public school system to receive 'unequivocal support.'" It also pointed out:

> The Delegates ultimately maintained the indirect language and instead added a separate subsection specifically addressing federal aid: "[Article X, Section 6] shall not apply to funds from federal sources provided to the state for the express purpose of distribution to non-public education." Mont. Const. art. X, § 6(2). Notably, the Delegates understood that Montana could prohibit forms of state aid that were otherwise permissible as federal aid.

The majority concluded that Art. X, § 6 "more broadly prohibits aid to sectarian schools than the federal Establishment Clause is consistent with the Delegates' intent of the provision. " It also noted that "Montana's no-aid provision is unique from other states' no-aid provisions."

As a result, the majority held: "The plain language of Article X, Section 6, and the Constitutional Convention Transcripts demonstrating the Delegates' clear objective to firmly prohibit aid to sectarian schools lead us to the conclusion that the Delegates intended Article X, Section 6, to broadly and strictly prohibit aid to sectarian schools."

The majority then examined the tax credit program to determine whether providing aid to sectarian school violates Art. X, § 6. It said, "It is clear the Department's contention is a facial challenge to the Tax Credit Program, as it asserts the Tax Credit Program unconstitutionally aids sectarian schools and promulgated Rule 1 to cure the constitutional defect." It, thus, concluded that "the Tax Credit Program aids sectarian schools in violation of Article X, Section 6, and that it is unconstitutional in all of its applications."

The majority explained that when the state legislature enacted the tax credit program it "involved itself in donations to religiously-affiliated private schools." It stated: "The Legislature, by enacting a statute that provides a dollar-for-dollar credit against taxes owed to the state, is the entity providing aid to sectarian schools via tax credits in violation of Article X, Section 6."

The majority concluded that the tax credit program allows the state legislature to indirectly pay tuition to private religious schools. According to the majority, an "indirect payment still exists … when a student whose parents claimed the tax credit receives a scholarship from an SSO. The simple fact that parents who donate to SSOs cannot directly designate the scholarship funds to their own child or to their child's school does not defeat the fact that the Legislature indirectly pays tuition to the QEP [Qualified Education Provide]."

The majority determined:

> When the Legislature indirectly pays general tuition payments at sectarian schools, the Legislature effectively subsidizes the sectarian school's educational program. That type of

> government subsidy in aid of sectarian schools is precisely what the Delegates intended Article X, Section 6, to prohibit.

It, therefore, concluded: "The Legislature violates Article X, Section 6's prohibition on aid to sectarian schools when it provides any aid, no matter how small." It added, "There is simply no mechanism within the Tax Credit Program itself that operates to ensure that an indirect payment of $150 is not used to fund religious education in contravention of Article X, Section 6."

The majority held: "Because the Tax Credit Program does not distinguish between an indirect payment to fund a secular education and an indirect payment to fund a sectarian education, it cannot, under any circumstance, be construed as consistent with Article X, Section 6."

Having found the state legislature provides the tax credits to aid schools controlled in whole or part by churches, the majority said that the tax credit program "aids schools controlled by churches, in violation of Article X, Section 6."

The majority stated:

> We conclude, following consideration of both the plain language of the provision and the Delegates' intent as discerned from their discussion when drafting Montana's 1972 Constitution, that such attenuation remains inconsistent with Article X, Section 6's strict and broad prohibition on aid to sectarian schools. The Tax Credit Program constitutes the precise type of indirect payment the Delegates sought to prohibit in their formulation of Article X, Section 6. Based on the Legislature's definition of QEP, the Department cannot constitutionally implement or administer the Tax Credit Program. Because Senate Bill 410 contained a severability clause, we conclude the Tax Credit Program, § 15-30-3111, MCA, must be severed from the remainder of Part 31, §§ 15-30-3101 to -3114, MCA.

The concurring opinions both agreed with the majority that the tax credit program ran afoul of Montana Constitution Art X, § 6 and that the constitutional deficiency could not be cured by resort to administrative rule, i.e. Rule 1. The opinions also concluded that the tax credit program violated the U.S. Constitution's First Amendment Establishment Clause.

Regarding the First Amendment's Free Exercise of Religion Clause, the First concurrence found a violation because "taxpayers wishing to donate to a QEP and claim a tax credit for that donation are forced to choose between their religious beliefs and a government benefit because they cannot control whether the donation is used to fund a religious education." The second concurrence stated its agreement with the first concurrence that Art. X, § 6 does not violate the First Amendment's Free Exercise Clause.

The dissenting opinions took issue with the majority on its failure to follow the plain language in the Montana Constitution, and the majority's failure to program taxpayers' rights to free exercise of religion under both the state and federal constitutions.

[Editor's Note: A December 12, 2018 article in the Missoulian on the decision reported that an attorney for MDR said 90% of the private schools that signed up for scholarship funds under the program were religious, meaning the Legislature's tax credit program almost exclusively benefited religious schools.

The case drew input from a host of education and legal groups who submitted briefs arguing for and against the tax credit. Alex Rate, legal director for the American Civil Liberties Union of Montana, called the opinion a victory for the state's public schools and taxpayers.
"Montana's students and parents have the right to choose a religious education, but it is unconstitutional for taxpayers to foot the bill for private, religious schools," Rate said in an emailed statement.

"Tuition-tax credit programs like Montana's are a transparent attempt to circumvent state constitutions that prohibit public funding of religious education," Alex J. Luchenitser, associate legal director for Americans United for Separation of Church and State, said in a release Wednesday. "The Montana Supreme Court correctly saw through this money-laundering scheme. Other state courts should follow suit."]

Group of parents file lawsuit against Pennsylvania district over its policy to arm teachers and other school employees

On January 4, 2019, Michael Rubinkam of Associated Press reported in *PoliceOne.com* that three parents and a grandparent have filed suit against Tamaqua School District,, alleging its school board's adoption of a policy allowing teachers and other school employees to carry firearms in school "endangered their community" when board members approved a "manifestly illegal" policy. The teachers union had already filed suit to overturn the policy.

Teachers are allowed to carry weapons in several states, including Texas, Missouri and Ohio, and a number of other states are considering similar measures in the wake of the Parkland, Florida, school massacre in February 2018. The National Education Association, the nation's largest teachers union, says its members "overwhelmingly reject" proposals to have them carry guns in school.

In Florida, the panel investigating the massacre at Marjory Stoneman Douglas High School recommended that teachers who volunteer and undergo extensive background checks and training be allowed to carry concealed guns on campus. The state teachers union and PTA oppose it.

In Lee County, Virginia, a school district is trying to persuade skeptical state officials to allow it to become the state's first county to arm teachers and staff. The district says it cannot afford to hire more than a few resource officers to protect 11 schools.

Mo Canady, executive director of the National Association of School Resource Officers, said law enforcement officers are likely to be better trained for situations in which they might have to shoot a student or look for a shooter. But he said districts that do not have the money for a school resource officer face a difficult choice. "I realize there are poor rural districts throughout this country," Canady said, citing schools that cannot afford a resource officer without federal or state help. "I don't know that I'm in a position to say, well, you shouldn't have anyone armed."

The TSD firearms policy approved in September 2018 states that teachers and other employees can volunteer to carry concealed, district-issued guns after training. The policy also establishes guidelines for the use of force. "The rationale for the policy is to prevent the apocalypse," school board member Nicholas Boyle said. "When we have a shooter in the building, how are we going to stop that shooter from killing more and more and more people? We have to have an armed presence there."

Citing operational security, the district will not say whether an armed force is already present in the schools. But Boyle said that "the litigation is not stopping the policy." He said the number of volunteers who signed up for gun training has exceeded his goal of at least a dozen.

Pennsylvania education officials said they are not aware of any other district with a policy of arming teachers. Gov. Tom Wolf, a Democrat, is opposed to the idea. "The Wolf administration has maintained that school districts may only authorize trained school police officers and school resource officers to carry firearms around students in our schools, should the school professionals feel they need it," education department spokeswoman Nicole Reigelman said.

Federal court rejects Los Angeles district's request that court bar teachers' strike

A January 5, 2019 article by Valerie Strauss of *The Washington Post* reported that U.S. District Court Judge Ronald S.W. Lew rejected a bid by Los Angeles Unified School District (LAUSD) Superintendent Austin Beutner to limit or stop a teachers' strike. The judge rejected LAUSD's argument that students with special needs would be denied education services that are guaranteed to them under U.S. law if the teachers were allowed to strike.

Judge Lew concluded the school district was attempting to bring an unrelated issue into the contract dispute and that it had failed to show how the union, United Teachers Los Angeles (UTLA), would be liable if special education laws were not followed. More than 30,000 teachers are preparing to strike on June 10 after more than 1½ years of unsuccessful contract talks with the district, with strike leaders meeting Saturday to make plans.

UTLA officials said they have taken steps to keep schools open, including hiring hundreds of nonunion substitute teachers to fill in for educators walking picket lines. UTLA has demanded, among other things,

a 6.5 percent pay raise; more money for schools; a boost in the number of counselors, nurses, social workers and librarians; a reduction in standardized testing; and an expansion of community schools.

The union has accused the district of claiming to have fewer resources than it really has, but Beutner says the district cannot afford many of the concessions and warns that the district could be insolvent in a few years. A fact-finding panel tasked with trying to find a resolution to the contract impasse agreed with both sides on some points, saying that teachers deserve a raise but that the district can afford only the 6 percent being offered. A report written by the one neutral member of the panel said the district should dip into its reserves to cut class sizes and hire more nurses, counselors and other needed staff.

UTLA is also calling for a cap on charter schools, which are publicly funded but privately operated, but that was not part of its bargaining demands.

Lew's order details a 1993 lawsuit against LAUSD alleging that special education services to some students were being denied in violation of federal law, as well as a 1996 consent decree that settled the suit and a 1996 modified consent decree (MCD) entered into by all parties for the district to improve its special ed services.

LAUSD's attorneys asked the court to make the UTLA a third party in the consent decree, but Lew denied the request. The judge stated: "Defendant is attempting, prematurely, to bring an unrelated party into a long-settled dispute without any explanation as to how UTLA would be legally liable to Defendant under the MCD or special education laws."

Group of parents files lawsuit against Pennsylvania district over its policy to arm teachers and other school employees

On January 4, 2019, Michael Rubinkam of Associated Press reported in *PoliceOne.com* that three parents and a grandparent have filed suit against Tamaqua School District, alleging its school board's adoption of a policy allowing teachers and other school employees to carry firearms in school "endangered their community." The teachers union had already filed suit to overturn the policy.

Teachers are allowed to carry weapons in several states, including Texas, Missouri and Ohio, and a number of other states are considering similar measures in the wake of the Parkland, Florida, school massacre in February 2018. The National Education Association, the nation's largest teachers union, says its members "overwhelmingly reject" proposals to have them carry guns in school.

In Florida, the panel investigating the massacre at Marjory Stoneman Douglas High School recommended that teachers who volunteer and undergo extensive background checks and training be allowed to carry concealed guns on campus. The state teachers union and PTA oppose it.

In Lee County, Virginia, a school district is trying to persuade skeptical state officials to allow it to become the state's first county to arm teachers and staff. The district says it cannot afford to hire more than a few resource officers to protect 11 schools.

Mo Canady, executive director of the National Association of School Resource Officers, said law enforcement officers are likely to be better trained for situations in which they might have to shoot a student or look for a shooter. But he said districts that do not have the money for a school resource officer face a difficult choice. "I realize there are poor rural districts throughout this country," Canady said, citing schools that cannot afford a resource officer without federal or state help. "I don't know that I'm in a position to say, well, you shouldn't have anyone armed."

The TSD firearms policy approved in September 2018 states that teachers and other employees can volunteer to carry concealed, district-issued guns after training. The policy also establishes guidelines for the use of force. "The rationale for the policy is to prevent the apocalypse," school board member Nicholas Boyle said. "When we have a shooter in the building, how are we going to stop that shooter from killing more and more and more people? We have to have an armed presence there."

Citing operational security, the district will not say whether an armed force is already present in the schools. But Boyle said that "the litigation is not stopping the policy." He said the number of volunteers who signed up for gun training has exceeded his goal of at least a dozen.

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Sua Sponte: U.S. Department of Education has issued proposed regulations regarding sexual harassment under Title IX

On November 29, 2018, the U.S. Department of Education's (ED) Office for Civil Rights (OCR) issued proposed regulations "addressing sexual harassment under Title IX to better align the Department's regulations with the text and purpose of Title IX and Supreme Court precedent and other case law." The press release announcing the proposed regulations spells out the following key provisions in the new rules:

- The proposed rule would require schools to respond meaningfully to every known report of sexual harassment and to investigate every formal complaint.

- The proposed rule highlights the importance of supportive measures designed to preserve or restore a student's access to the school's education program or activity, with or without a formal complaint. Supportive measures may include the following:
    - Academic course adjustments
    - Counseling
    - No-contact orders
    - Dorm room reassignments
    - Leaves of absence
    - Class schedule changes
- Where there has been a finding of responsibility, the proposed rule would require remedies for the survivor to restore or preserve access to the school's education program or activity.
- The proposed rule would require schools to apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to "rape shield" protections.
- Colleges and universities would be required to hold a live hearing where cross-examination would be conducted through the parties' advisors. Personal confrontation between the complainant and respondent would not be permitted. K-12 institutions would not be required to hold a live hearing with cross examination, but would be required to permit written questions.
- To promote impartial decisions, schools would not be allowed to use a "single investigator" or "investigator-only" model.
- Under the proposed rule, if a school chooses to offer an appeal, both parties can appeal.
- Consistent with U.S. Supreme Court Title IX cases, the proposed rule defines sexual harassment as unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity.
- The proposed rule adopts the Clery Act definition of sexual assault and includes it in the definition of sexual harassment under Title IX.

According to ED's fact sheet, the regulations' guiding principles are: Rulemaking Process; Greater Clarity; Increased Control for Complainants; and Fair Process. ED has also issued the "Background & Summary of the Education Department's Proposed Title IX Regulation," which summarizes each provision of the regulation.

Religious Advocacy group files petition with U.S. Supreme Court challenging Pennsylvania district's policy accommodating transgender students' use of sex-segregated facilities at school

According to a November 20, 2018 report by Peter Hall of *The Morning Call*, Alliance Defending Freedom (ADF) filed a petition with the U.S. Supreme Court challenging Boyertown Area High School's (BAHS) policy that allows transgender students to use the bathrooms and locker rooms matching their gender

identity. ADF is asking the Supreme Court to review the U.S. Court of Appeals for the Third Circuit's panel decision upholding the policy accommodating transgender students.

The petition argues that the Third Circuit inappropriately made students' bodily privacy contingent on what others believe about their own gender, and that the school district could have found ways to accommodate transgender students without infringing on the rights of others. "Schools should not expect students to accept that the differences between females and males don't matter in the very places set apart for privacy from the opposite sex," said Randall Wenger, chief counsel with the Independence Law Center, a nonprofit legal organization whose attorneys also worked on the case. Boyertown Area School District's (BASD) attorney Michael Levin said the district will file an appropriate response. "The school district believes the lower court decisions were well-reasoned and will be able to be defended," Levin said.

An attorney for the American Civil Liberties Union of Pennsylvania, which joined the case on behalf of the Pennsylvania Youth Congress, characterized the Supreme Court petition as a request by "anti-LBGTQ extremists" for a ruling that school districts like Boyertown are "prohibited by the Constitution from doing the right thing." "Their claim that transgender students are a threat to others is offensive and not supported by the evidence in Boyertown or schools around the country," attorney Ria Tabacco Mar said. The Third Circuit upheld the decision of U.S. District Judge Edward G. Smith, who refused to issue an injunction suspending the policy last year. Smith wrote that the privacy provisions at Boyertown Area High School, including private shower and toilet stalls and single-user bathrooms, as well as the willingness of school officials to work with students to ensure they are comfortable, were suitable to address any privacy concerns related to transgender students sharing locker rooms and bathrooms.

[Editor's Note: In August 2018, Legal Clips published a Sua Sponte item reporting that the Third Circuit with all active circuit judges available voted to deny the plaintiffs' petition for rehearing en banc (all active circuit judges participating). However, the three-judge panel that participated in the June 18, 2018 decision granted the plaintiffs' request for a rehearing by the panel. The panel vacated its June 18, 2018 decision and issued a revised opinion. The Third Circuit panel's revised opinion deviates from the June 18, 2018 vacated opinion only in regard to the detailed discussion of Whitaker's applicability to Third Circuit Title VII caselaw applying the theory of sex stereotyping. Although the vacated opinion concluded Title IX prohibits discrimination against transgender students in school facilities "just as Title VII prohibited discrimination against Prowel[Prowel v. Wise Business Forms, Inc, 579 F.3d 285 (3d Cir. 2009)] in the workplace," the revised opinion merely states BASD "can hardly be faulted for being proactive in adopting a policy that avoids the issues that may otherwise have occurred under Title IX."]

Teacher of Afro-Caribbean descent files suit against New York state alleging racial discrimination

According to a December 31, 2018 report by Aristos Georgiou of *Newsweek*, teacher Andrea Bryan has filed suit against Commack School District (CSD), seeking unspecified damages, after claiming that she suffered years of racial discrimination and harassment from some of her colleagues and students. The federal court suit alleges that the school district fostered "an atmosphere of racial harassment and intimidation."

Bryan also alleges CSD, which she says has not had a single other black teacher in the past 17 years, continuously dismissed her grievances when she tried to make them aware of the situation. The suit highlighted a number of incidents where she was subjected to racially derogatory comments. For example, she says she once asked a senior white colleague whether food in the English teacher's staff lounge was for sharing, to which he responded it was "for whites only."

Bryan complained about the teacher's comment—which she said made her feel "humiliated, degraded and embarrassed"—and he was subsequently demoted. However, she says that afterwards she was "ostracized" by her colleagues in the department, NBC News reported.

Bryan also noted that she was not afforded the privilege of having her own regular classroom as a senior teacher, despite the fact that many junior white teachers were given one. She described how she was completely ignored by her colleagues after being in a serious car accident in 2017. And in another racially charged incident, she alleges in the court documents that she was given only a bottle of hand sanitizer as a secret Santa present—for which the spending limit was $50—because her co-workers thought she was "dirty."

Virginia district terminates teacher who refused to refer to transgender student using male pronouns

According to a December 10, 2018 report by Associated Press on *NBC News*, West Point School Board has voted unanimously to terminate a middle school French teacher who refused to use male pronouns when referring to a female-to-male transgender student. Peter Vlaming, the teacher in question, was fired for insubordination.

Witnesses said that when the student was about to run into a wall, Vlaming told others to stop "her." When discussing the incident with administrators, Vlaming made it clear he would not use male pronouns, a stance that led to his suspension referral for disciplinary action. "I can't think of a worse way to treat a child than what was happening," said West Point High Principal Jonathan Hochman, who testified that he told Vlaming to use male pronouns in accordance with the student's wishes.

Vlaming told superiors that his Christian faith prevented him from using male pronouns for the student. Vlaming said he had the student in class the year before when the student identified as female.

Vlaming's attorney, Shawn Voyles, says his client offered to use the student's name and to avoid feminine pronouns, but Voyles says the school was unwilling to accept the compromise. "That discrimination then leads to creating a hostile learning environment. And the student had expressed that. The parent had expressed that," said West Point schools Superintendent Laura Abel. "They felt disrespected."

Nondiscrimination policies were updated a year ago to include protections for gender identity, but didn't include guidance on gender pronoun use, according to Vlaming's lawyer, Voyles, who notes Vlaming has constitutional rights. "One of those rights that is not curtailed is to be free from being compelled to speak something that violates your conscience," Voyles said.

Vlaming said he loves and respects all his students but when a solution he tried to reach based on "mutual tolerance" was rejected, he was at risk of losing his job for having views held by "most of the world for most of human history." "That is not tolerance," Vlaming said. "That is coercion." Vlaming is considering a legal appeal, but said he wants to consult with his attorney before announcing further steps.

[Editor's Note: A December 6. 2018 article in the Richmond Times-Dispatch by Graham Moomaw reported that the school system had released a brief statement after the vote. "As detailed during the course of the public hearing, Mr. Vlaming was recommended for termination due to his insubordination and repeated refusal to comply with directives made to him by multiple WPPS administrators," said Abel, the superintendent. The statement said the school system would not be commenting further due to "the potential for future litigation."]

Florida Supreme Court rules state's system of funding public education is not unconstitutional

On January 7, 2019, Autumn Callan of *Jurist* reported that the Florida Supreme Court rejected a suit claiming the state was failing to provide constitutionally mandated "high quality" education for all. The suit, which was filed almost a decade ago by parents, students and advocacy groups, alleged that the State of Florida wasn't properly funding schools as outlined in a 1998 amendment approved by voters, which makes it the state's "paramount duty to make adequate provisions for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education."

In a 4-3 split, the court's majority concluded the plaintiffs failed to show what level and manner the schools should be funded. It declined to settle a matter it felt should fall under those of the state's legislature. According to the dissent, "The majority of this Court eviscerates article IX, section 1, of the Florida Constitution, contrary to the clear intent of the voters, and abdicates its responsibility to interpret this critical provision and construe the terms 'uniform,' 'efficient,' and 'high quality,' enshrined in that provision."

[Editor's Note: The majority's opinion in Citizens for Strong Schools, Inc. v. Florida State Board of Education relied on Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles (Coalition), 680 So. 2d 400 (Fla. 1996), in which the Florida Supreme Court upheld the trial court's dismissal with prejudice of a complaint that "asked the trial court to declare that an adequate education is a fundamental right . . . and that the State has failed to provide its students that fundamental right by failing to allocate adequate resources for a uniform system of free public - 3 - schools." It concluded that "Coalition defeats Petitioners' claim because Petitioners— like the appellants in Coalition—fail to present any manageable standard by which to avoid judicial intrusion into the powers of the other branches of government."]

Advocacy group joins with parents opposing Florida district's practice of accommodating transgender students' use of sex-segregated school facilities on the basis of gender identity

According to a January 9, 2019 report by Jeffrey S. Solochek of the *Tampa Bay Times*, Liberty Counsel (LC), a conservative Christian advocacy group, has joined a group Pasco County school district residents who are opposed to the school district's practice of allowing transgender students to use school facilities based on gender identity. During several recent meetings, a group of residents has asked the board to restrict restroom and locker room use to a student's birth certificate gender. They also have demanded the district not penalize employees who refuse to monitor areas where transgender students are changing or showering, among other concerns.

A second group has pressured the district to hold its ground in protecting the rights of all students, regardless of how they identify themselves. LC has joined the side of those pushing for the rights of non-transgender students and teachers who might have privacy concerns relating to the rules and school experiences.

Just prior to the winter break, LC made a renewed set of demands on the district. It set a Jan. 18, 2019 deadline by which it wants the district to take several steps, including:

- Written confirmation it will not retaliate against any teachers who are "standing for the dignity and privacy of all students and the rights of their parents."
- Written guarantee that no teachers will be required to use "false gender pronouns" for any students, or to supervise single-sex restrooms or locker rooms where students of the opposite gender are permitted to shower or change.
- School Board rejection of its gender-support plan, replacing it with a policy "recognizing biological sex as the standard for district single-sex facilities and programs."
- Adoption of a new policy requiring parental permission for all club participation.

- Written confirmation that the district "prohibits all classroom LGBT political activism, specifically the drag queen coloring books."

- Requirement that school psychologist Jackie Jackson-Dean make publicly available her library of LGBTQ materials. The district has taken the position that the materials are not public record, as Jackson-Dean purchased and maintains them privately, and not with district funds or on district grounds.

School Board members have shown limited interest in changing the district's approach, which superintendent Kurt Browning has repeatedly stated is designed to respect every student's rights.

Board attorney Dennis Alfonso meanwhile has reminded the board that it already has several anti-harassment policies in place that relate to gender, as well as race, religion, national origin, disability, age and marital status. He added in a memo that while it is true the board does not have a policy specific to transgender issues, neither does it have separate rules for other protected groups. Alfonso also noted that it has been up to the administration and staff to develop procedures consistent with existing policy, as well as state and federal law.

[Editor's Note: LC rolled out a petition aimed at the Pasco County school board that states:

To: The Pasco District School Board

We, the undersigned, urge you to restore bathroom privacy based on the realities of biological sex for your teachers and students. We believe that students in intimate spaces are best protected when they are with their own biological gender. The safety and privacy of your students must be your top priority. Students cannot learn to their full potential in an unsafe environment.

Especially for students who already have been sexually abused, opening up bathrooms, locker rooms, and changing rooms to both biological genders can unnecessarily turn your schools into a high stress environment. The victims under your care deserve to be, and to feel, safe.

We demand that you stop subjecting the students and teachers under your authority to your political whims and experimentation. Restore bathroom privacy in Pasco Schools!]