

U.S. Supreme Court Rules Student’s Snapchat Post Was Off-Campus Protected Speech

Beard Legal Group has extensively discussed the Mahanoy Area School District v. B.L. First Amendment free speech rights case as it has progressed throughout the federal courts. See Beard Legal Group’s Education Law Report in July 2018 (Volume XIII, Number 4) and July 2020 (Volume XVI, Number 3) analyzing the decisions of the Federal Middle District Court and Third Circuit Court of Appeals.

In this free speech case, the Mahanoy Area School District removed and suspended student B.L. from the District’s junior varsity cheerleading team after she posted a profane message (“*F*ck school f*ck softball f*ck cheer f*ck everything*”) to Snapchat. B.L. challenged the District’s actions as an improper regulation of her free speech, particularly as her Snapchat post occurred off school grounds and after school hours.

In the 8-1 decision issued on June 23, 2021, the United States Supreme Court ruled that the Mahanoy Area School District violated B.L.’s free speech rights, particularly as “the school’s interest in teaching good manners is not sufficient...to overcome [her] interest in free expression.” The Court reviewed pertinent student free speech cases, including Tinker v. Des Moines Independent Community School Dist. and its progeny, to hold that there was no substantial disruption in this matter to support the District’s actions in this matter.

While the Supreme Court held that a school’s authority to regulate student speech is highly limited

in off-campus settings, including on social media, it ultimately declined to rule that all speech occurring off grounds was protected from school regulation and discipline. Instead, the Court provided a non-exhaustive list of off-campus speech where school action may be permissible such as instances of “bullying and cheating.”

We do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus. The school’s regulatory interests remain significant in some off-campus circumstances...These include serious or severe bullying or harassment targeting particular individuals; threats aimed at teachers or

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Gloucester County School District Heading Back to U.S. Supreme Court

On February 19, 2021, after four years of litigation—including a trip to the Supreme Court and back—Gloucester County School District (GCSD) has once again filed a petition for certiorari asking the U.S. Supreme Court to review a U.S. Court of Appeals for the Fourth Circuit three-judge panel’s decision that schools must allow transgender students to use restrooms consistent with their gender identity.

This appeal came in the long-running case of *Gloucester County School Board v. Grimm*. This case concerns a transgender student, Gavin Grimm, who was barred by a policy of GCSD from using the boys’ restroom at his high school. Last year, a federal appeals court ruled that the district’s policy violated Title IX, which bars sex discrimination in federally funded schools, and the 14th Amendment’s equal-protection clause.

In its appeal, the district acknowledges that several federal appeals courts have joined with the one that ruled in Grimm’s case, the U.S. Court of Appeals for the Fourth Circuit, in favor of a broad reading of transgender student rights under Title IX and the equal-protection clause. The district also cited an Executive Order signed by President Biden during his first week that declared Title IX to protect students on the basis of gender identity. Together, the court rulings and the Executive Order amount to a “nationwide policy” that GCSD argues deprives districts from tailoring restroom and locker room policies that would also protect the privacy rights of cisgender students.

GCSD also argues that the Fourth Circuit’s reliance on *Bostock v. Clayton County* was misplaced. In its opinion, the Fourth Circuit held that the prohibition against sex discrimination in Title VII of the Civil Rights Act of 1964 covered sexual orientation and gender identity in the workplace. The court said that the district’s “bathroom policy

precluding Grimm from using the boys’ restrooms discriminated against him ‘on the basis of sex.’” GCSD argues that Title IX is a “vastly different statute” than Title VII and that Title IX allows for sex-separated living facilities on school campuses and its regulations allow for sex-separated restrooms.

This case was granted review by the Supreme Court in 2016, based on an earlier Fourth Circuit ruling that the district has violated Title IX and that courts should defer to the interpretation of the federal statute by the Obama administration. However, with the Trump’s administration withdrawal of the Obama Title IX guidance, the Supreme Court sent Grimm’s case back to the lower courts.

The ACLU has filed a formal response to this appeal. The Biden administration is expected to chime in as well.

The **Education Law Report** has covered the progress of the *Grimm* case in prior editions accessible on Beard Legal Group’s website including January 2017, February-March 2017, June 2018, July 2020, and October 2020.

Compliance with Act 84 of 2020

On October 29, 2020, Governor Tom Wolf signed into law Act 84 of 2020 to provide the public with direct accessibility to school directors. Per Act 84, all school entities, including charter schools, must create and publish school director email addresses on the school’s website in order for students, staff, and the public to communicate with school directors regarding school district matters. The email addresses for each school director must be posted to an easily found and publicly accessible area of the school’s website no later than June 26, 2021.

School entities are advised to establish email protocols for school directors to address issues concerning chain of command and confidentiality, as well as maintain compliance with the Pennsylvania Sunshine Act, 65 Pa. C.S. § 701 et. seq. and Pennsylvania School Code. School entities are encouraged to discuss email protocols with their solicitor to address these areas.

Title IX Protections Extended to Transgender Students

On June 16, 2021, the United States Department of Education (DOE) issued new interpretation guidance reversing the prior administration's position that Title IX protections did not include transgender students. In the published guidance, the DOE discussed the United States Supreme Court decision in Bostock v. Clayton County, 140 S. Ct. 1731, 590 U.S. ___ (2020) that Title VII prohibitions on employment discrimination based on sex likewise included discrimination based on sexual orientation and gender identity. As courts apply interpretations of Title VII to Title IX issues, the DOE made clear its position that Title IX's prohibition on discrimination "on the basis of sex" would likewise encompass discrimination on the basis of sexual orientation and gender identity.

Students are once again protected from discrimination based on their sexual orientation and gender identity at school and during extracurricular activities. School entities are strongly advised to review their policies and handbooks to ensure that adequate protections are in place for all students as the U.S. Department of Education Office for Civil Rights will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity.

All individuals involved in the Title IX grievance process—particularly Title IX coordinators, investigators, and decisionmakers—should ensure that they are analyzing and processing complaints alleging discrimination based on sexual orientation or gender identity correctly.

On June 23, 2021, the Acting OCR chief announces a Dear Educator Letter and resources on anti-LGBTQI+ Harassment. In the letter, OCR reiterates its position, consistent with the recent notice of interpretation, that it "will fully enforce Title IX to prohibit discrimination based on sexual orientation and gender identity in education programs and activities that receive Federal financial assistance

from the Department. For more information, please see our accompanying fact sheet in which OCR and the U.S. Department of Justice's Civil Rights Division provide examples of the kinds of incidents we can investigate." In the letter, OCR also states that it is reviewing the Title IX comments recently submitted and anticipates issuing a Notice of Proposed Rule Making to amend the 2020 regulations.

Resources:

Dear Educator Letter, <https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/educator-202106-tix.pdf>

The Office of Civil Rights in conjunction with the U.S. Department of Justice's Civil Rights Division, also issued a new Fact Sheet: Confronting Anti-LGBTQI+ Harassment in Schools <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-tix-202106.pdf>

The Dear Colleague Educator letter and fact sheet continue OCR's efforts to promote safe and inclusive schools for LGBTQI+ students, as underscored by President Biden's Executive Orders on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity [<https://www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05200.pdf>] and Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation [<https://www.govinfo.gov/content/pkg/FR-2021-01-25/pdf/2021-01761.pdf>].

Practice Note: School entities should consider a refresher training on Title IX issues.

Save the Date

*The Pennsylvania School Study Council, Penn
State Law,
Penn State College of Education, and the
Partners of Beard Legal Group ask you to save
the date for:
Education Law Day October 26, 2021 in
State College Pennsylvania*

Title IX Update – Nine Months Later

On August 14, 2020, the new Title IX Regulations went into effect.

Even nine (9) months later school entities and administrators are still deciphering all the nuances of the new regulations that were issued as part of the 2,033 page document.

We previously reported the new law will significantly alter the way public school entities address issues and/or complaints under Title IX. Such changes include, but are not limited to:

1. Modification to existing Policies and Administrative Regulations to address and incorporate the Final Rule, which we anticipate as an effort to be undertaken by the Pennsylvania School Boards Association.
2. School Districts will need to ensure these policy changes are timely adopted and disseminated to students, parents, faculty, administrators and Title IX Coordinators.
3. Students and staff will need to be provided in-service training and/or professional development on these changes.
4. Faculty and student handbooks will need to be updated in accordance with applicable policy changes.
5. Title IX Coordinators, Administrators and other staff tasked with the responsibility of investigating complaints will need to receive updated training regarding the new changes in the law, meeting timelines, the requirements for conducting effective and legally compliant investigations and documenting the information that is uncovered as a result of such investigations.

Training:

The new Title IX regulations specifically mandate training. Specific training requirements are outlined in §106.45(b)(1)(iii):

A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance

of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section."

In response to meeting this specific "Training" need, Beard Legal Group PC and Levin Legal Group PC collaborated to develop a comprehensive five (5) plus hour training module for school entities.

During the months of August, September and October 2020, our firms provided required training to almost 100 school entities.

Since then, we have received a significant number of inquiries and requests to provide a shorter and much more targeted training module for Title IX Investigators.

We are pleased to announce we have developed and are releasing a focused training module targeted specifically for Title IX Investigators.

The new module is approximately 1.5 hours in length and covers virtually every aspect a Title IX Investigator will encounter in the course of an investigation.

The module contains over fifty (50) PowerPoint slides accompanied by a completely narrated format explaining every PowerPoint and providing insight regarding the application of PowerPoint to each aspect of the investigatory process.

Special narratives are included by each of the presenting attorneys.

The training module features:

- Approximately 1.5 hours of training.
- Comprehensive PowerPoint of over 50 slides.
- Narrative and explanation of the specific PowerPoint slide.
- Supplemental outline containing Postulates and detailed Cliff Notes of each phase of the Title IX process.
- Overview and Checklist of all PSBA required policies to include new Dating Violence and Discipline of Students Convicted/Adjudicated of Sexual Assault to comply with Act 110 of 2020 and new School Code Section 1318.1.
- Title IX Claims and Liability Outline. This comprehensive PowerPoint outline will examine no less than ten (10) federal lawsuits filed against Pennsylvania School Districts outlining who was sued, reasons therefore

and outlining practical tips to avoid or minimize liability.

- “Protection from Abuse Orders: A School’s Newest Challenge” outline. This outline contains case studies and rulings. The outline also contains an actual template of a “Pre-Investigation Student Safety Plan” as well as Targeted Student Safety Plan.
- Additional template letters
 - o Close out letter for an Initial Report not falling under Title IX.
 - o Close out letter as a result of supportive measures resolving Complaint.
 - o Resolution Agreement as an outgrowth of Mediation.

Costs

- The cost of the new investigator on-line training module and accompanying tool kit materials outlined above is \$600. NOTE: Each school entity shall be given an annual license to utilize the training module as many times as necessary.

Training Options:

- On-line/Webinar format.
- Live in-person can be arranged by contacting either Beard Legal Group or Levin Legal Group. See contact information below.

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NOTE: For a detailed overview of new Title IX regulations requirements, please see the Beard Legal Group Education Law Report Editions: July 2020, Volume XVI Number 2 and Volume XVI Number 3 available on our website at www.BeardLegalGroup.com.

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other students; the failure to follow rules concerning lessons, the writing of papers, the use of computers, or participation in other online school activities; and breaches of school security devices, including material maintained within school computers.

We do not now set forth a broad, highly general First Amendment rule stating just what counts as ‘off campus’ speech and whether or how ordinary First Amendment standards must give way off campus to a school’s special need to prevent... substantial disruption of learning-related activities or the protection of those who make up a school community.”

The Court further advised that the following three features of off-campus speech “diminish[ed] the strength of the unique educational characteristics that might call for special First Amendment leeway”: 1) rare instances of in loco parentis; 2) regulation of both on and off-campus speech could result in situations where students could not engage in that kind of speech in its entirety; and 3) schools have an interest in protecting a “student’s unpopular expression.”

School entities are encouraged to consult with their counsel to discuss issues concerning regulation of student speech, both on and off-campus, to prevent overreaching policies and discipline. Schools are also encouraged to conduct in-service training for building administrators regarding the handling of potential free speech issues relative to potential student discipline issues surrounding same.

Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Peggy Schooling mxs284@psu.edu.

Subsequent Issues

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