



5 HOT SCHOOL LAW ISSUES IN 50 MINUTES

#5 SOCIAL MEDIA

- Students have always done stupid things, they just have different tools now.
- Impacts School Safety
 - Sexting
 - Threats
 - Bullying and Harassment
 - Inciting violence or disruption

Teens Suspended Over Airsoft Homecoming Photo On Facebook

(Captioned “Homecoming 2014”)



#5 SOCIAL MEDIA

- A new impact on some student relationships has emerged due to 24 hour texting and following on social media
- Stalking, controlling, isolating and other unhealthy behavior:
 - “Where are you?” and “Who are you with?”
 - “I don't want you to hang out with your friends.”
 - “I don't like the way you dress.”
- What may seem like harmless teen jealousy can spiral into a dangerous unhealthy relationship.

#5 SOCIAL MEDIA

1. Freedom of speech (1st Amendment)
2. Freedom from unreasonable search and seizure (4th Amendment)
3. Potential criminal acts and legal reporting obligations
 1. Child abuse
 2. Dissemination of child pornography
4. Bullying & harassment

OFF CAMPUS SPEECH

- Most speech arising out of new technologies occurs off campus
- Much more difficult to restrict or punish student expression that takes place away from school or school-sponsored events
- Student Internet speech issues are not settled; U.S. Supreme Court has not yet addressed

STUDENT SPEECH

1. *Tinker v. Des Moines Ind. Sch. Dist.* (1969)

- ✓ Students wearing armbands to school in protest of the Vietnam War
- ✓ **Holding:** School officials cannot censor student expression unless they reasonably forecast the student expression will create a substantial disruption of school activities or invade the rights of others.

STUDENT SPEECH

- *Bethel School Dist. v. Fraser* (1986)
 - ✓ Student gave a speech at a school assembly nominating a friend for student office; speech used graphic sexual metaphors
 - ✓ **Holding:** School officials may regulate on-campus student speech that is vulgar, lewd or plainly offensive.

STUDENT SPEECH

- *Hazelwood School Dist. v. Kuhlmeier* (1988)
 - ✓ Students wrote articles in school paper relating to teen pregnancy and divorce
 - ✓ **Holding:** School officials may regulate school-sponsored student speech if they have a legitimate educational reason for doing so.

STUDENT SPEECH

- Morse v. Frederick (2007)
 - ✓ “Bong Hits 4 Jesus” case
 - ✓ Student displayed a banner on a public street across from the school during a Winter Olympics torch relay
 - ✓ **Holding:** School officials may punish students for expression that promotes illegal drug use or other illegal actions.

What about threats?

- True threats are never protected speech and students may be punished for such expression.
 - ✓ *DJM v. Hannibal Public School Dist.* (8th Circuit Court of Appeals, 2011)
 - ✓ High school student vented his anger over a breakup to a friend over IM and made several comments about shooting classmates, using racially and sexually charged language.
 - ✓ He later claimed to be joking, but the friend he made the comments to eventually became concerned enough to show them to an adult, and later their principal.
 - ✓ Even though the conversation happened outside of school, the court found that the district was “reasonably concerned” about the student carrying out his threats, and upheld his expulsion.

STUDENT SPEECH

- *O.Z. v. Long Beach Unified School Dist.* (2008)
- California seventh grader created a cartoon slide show depicting herself murdering her English teacher with a knife and posted it, along with colorful commentary, to YouTube.
- The teacher discovered the video while randomly Googling herself. She became physically ill and lost several nights' sleep.
- The student was immediately transferred to another school.
- The court had no problem upholding this punishment, or in determining that the student's speech "disrupted" her school environment.

Off Campus Speech Cases (Lower Courts)

- **Three Pennsylvania Decisions**

1. *Layshock v. Hermitage School District*

- Student created a parody of his principal on MySpace on his grandmother's computer away from school
- School suspended him for 10 days
- **Court applied the Tinker standard, finding no nexus between the speech and the school environment; no substantial disruption**
- Ruled that the Frazier standard (lewd, vulgar, etc.) **does not apply to off campus speech**

Off Campus Speech Cases (Lower Courts)

- **Three Pennsylvania Decisions**

- 2. *J.S. v. Bethlehem Area School District*

- Student created a website at home that contained derogatory comments about an algebra teacher; comparing her to Hitler, making fun of her appearance, and requesting \$20 to help pay for a hitman
- Site also contained a drawing showing the teacher with her head cut off and dripping with blood
- Student was expelled
- Court held that “where speech that is aimed at a specific school and/or its personnel is brought onto the school campus or accessed at school by its originator, the speech will be considered on-campus speech”

Off Campus Speech Cases (Lower Courts)

- **Three Pennsylvania Decisions**

- 2. J.S. v. Bethlehem Area School District (cont.)

- The court determined that if speech was considered on-campus, the school could punish under the Fraser (vulgar, lewd, etc.) and Tinker (substantial disruption) standards
- However, court recognized questions relative to a website created off campus and focused solely on the substantial disruption
- **Court found a substantial disruption and ruled in favor of the school district**

Off Campus Speech Cases (Lower Courts)

- **Three Pennsylvania Decisions**

- 3. *Killion v. Franklin Regional School District*

- Student created a website at home that contained a derogatory “Top 10” list about the school’s athletic director
- Student e-mailed the list to his fellow students
- List found its way to campus and the student was suspended
- **The court applied the Tinker standard and ruled in favor of the student finding, while offensive, the speech did not create a substantial disruption**

6th Circuit Cases

- *Coy v. Bd. Of Educ. of North Canton City Schools* (N.D. Ohio 2002)
 - Coy was suspended for creating and accessing at school website that labeled pics of students as “losers”
 - **Court implied it was “on-campus” and found no disruption.**
 - Court also stated punishing pursuant to policy for “inappropriate” conduct is too vague.

6th Circuit Cases

- **Mahaffery v. Aldrich (E.D. Mich. 2002)**
 - Mahaffey suspended for contributing to website that discussed hating and killing fellow students
 - Website was written in joking manner
 - Off-campus speech
 - No true threat - reasonable person would not think he wanted to kill students
 - **Court applied substantial disruption test but found no disruption and student prevailed on 1st Amendment claims**

6th Circuit Cases

- ***Barnett v. Tipton County Bd. Of Education* (W.D. Tenn. 2009)**
 - Barnett made fake MySpace page for assistant principal containing his pic, bio, and suggestive comments about female students
 - Court did not discuss off-campus nature of speech
 - **Barnett argued protected speech as parody but court dismissed claim because visitors believed it was authentic.**

Interesting 2011 7th Circuit District Court Case

- **Federal judge in Indiana ruled school can't punish students for posting provocative images of themselves online at slumber parties**

- *T.V. v. Smith-Green Community School Corporation and Austin Couch*

- **“Not much good takes place at slumber parties for high school kids, and this case proves the point.”**

- **“Raunchy” pics featuring girls posing provocatively with lollipops and wearing lingerie with money stuck in “stripper style.”**

Interesting 2011 7th Circuit District Court Case

- **Girls suspended for volleyball & other extra-curricular activities for violating code of conduct for activities (honor code)**
- **District judge found school exceeded authority and violated students' 1st Amendment rights**
- **Judge also found policy that disciplines for bringing dishonor or discredit upon school or student is vague and overbroad.**

WHAT WE KNOW?

- There is a solid legal argument that off-campus expression can, and in certain cases, should be punished by school officials if the Tinker test is met
- Before you punish off-campus speech, make sure there is a logical nexus between the off-campus expression and a substantial disruption to the educational environment
- Remember, Tinker also stands for the premise that speech (presumably on or off campus) can be regulated if it “invades the rights of others”

TENNESSEE LAW

- **Mandatory reporting of suspected child abuse** (T.C.A. § 37-1-403)
 - Contact Department of Children's Services or Law enforcement
 - Contact parents, unless they are suspected to be the perpetrator
- **Child pornography statutes** (T.C.A. § 39-17-1001 et seq.)
 - Prohibits possession and distribution of material that includes a minor engaged in sexual activity or simulated sexual activity that is patently offensive
 - Definition of "sexual activity" is fairly broad and not easily understood

RECOMMENDATIONS WHEN FACED WITH SEXTING

- Err on side of caution and notify proper authorities of suspected abuse or child pornography so a proper investigation can be conducted
- Turn over evidence immediately and don't share images with others
- Notify parents of all involved students immediately
- Make sure policies address sexting issues
- Contact your local board attorney to help sort out legal obligations

#4 CELL PHONE SEARCHES



4TH AMENDMENT



Right to be secure ...
against unreasonable
searches and seizures

Tennessee Constitution Article I §7

...the people shall be secure in their persons, houses, papers and possessions...unreasonable searches and seizures are “dangerous to liberty”...

New Jersey v. T.L.O. (1985)

- Students do have an expectation of privacy
- Schools may not argue the 4th Amendment does not apply to searches of students based on the doctrine of in loco parentis

New Jersey v. T.L.O. (1985)

- Standard of student search is not probable cause
- Reasonableness, under all circumstances
- Under the circumstances, is this search reasonable?

Reasonableness

- **Justified at inception**

- Grounds for suspecting search will produce evidence

- **Permissible in scope**

- Measures reasonably related to objective of search and not excessively intrusive in light of:
 - age and sex of student
 - seriousness of issue
 - exigency

Individualized Suspicion

- Most courts have required
- Searches must be based on facts that support a reasonable belief that the **individual** student is engaged in a prohibited activity or possesses drugs or weapons.

How to determine reasonableness?

- Balancing Test
- Legitimate expectations of privacy
- It is possible to limit or eliminate that expectation
- School has a legitimate need to maintain an environment in which learning can take place

Types of Searches

- Pat downs
- Body searches
- Strip searches
- Canine searches
- Metal detectors
- Urinalysis
- Video surveillance
- **Electronic devices**

Purses, Book Bags, Wallets & Cell Phones

- Greater expectation of privacy than in locker
- Still only need reasonable suspicion before search may be conducted
- Individualized suspicion may be required to justify these searches
- What about electronic devices?



G.C. v. Owensboro Pub. Schs. (2013)

- The Sixth Circuit became the first United States Court of Appeals to consider whether, and under what conditions, school officials may search the cell phones of students.
- This decision is especially illustrative because two different cell phone searches were in dispute.
- The Court contrasted those two searches and ruled that, while the first search may have been justified, the second search was not.

G.C. v. Owensboro Pub. Schs. (2013)

- **Freshman year:**
- Told assistant principals that he was very upset after a spat with his girlfriend and that he “didn’t want to be here anymore”
- Parents were informed and it was recommended that he be evaluated at a mental health facility.
- Student was evaluated, the facility recommended that he be admitted but parents refused
- Student began receiving counseling from the school’s drug and alcohol prevention counselor and indicated he was using marijuana on a weekly basis.

G.C. v. Owensboro Pub. Schs. (2013)

- **Sophomore year:**
- Student continued counseling
- Counselor sent parents a list of drug treatment facilities, but the parents did not seek help for their son.
- Student committed his first cell phone infraction by having his phone out during class.
- Teacher confiscated his phone and returned it to his parents

G.C. v. Owensboro Pub. Schs. (2013)

- **Sophomore year continued:**

- Student came to see counselor and told her he wanted to go home

- Counselor told him that she did not have the authority to permit him to go home, he left her office and then walked out of school.

- Counselor contacted assistant principal and told her what had happened and student was eventually located in school parking lot, in his car, talking on his phone.

- After the assistant principal escorted student back into her office he told her that he was thinking about suicide again.

- Assistant principal then confiscated his cell phone and searched it. She found a text message from the student to his girlfriend from that day which said, "I need to smoke."

G.C. v. Owensboro Pub. Schs. (2013)

- **Sophomore year continued:**
- Student was taken to another mental health facility where it was recommended that the student be admitted but his parents again did not to admit him.
- He was placed in ISS for four days as a consequence for leaving the building without permission.
- Approximately one month later, school officials responded to a disturbance where the student was throwing a loud fit, yelling, and punching a locker.
- He was placed in ISS for twenty days—essentially the remainder of his sophomore year.

G.C. v. Owensboro Pub. Schs. (2013)

- **Junior year:**
- In the first month, he was caught texting during class and given a warning.
- When same teacher caught him texting again, he confiscated his phone and student became very upset and began throwing a loud fit.
- Assistant principal was alerted and came and retrieved both the student and his cell phone.
- She then searched his cell phone for text messages from that day because she knew of his previous expressions of suicidal thoughts, his regular drug use, and his extreme reaction when his phone was taken away.

G.C. v. Owensboro Pub. Schs. (2013)

- **Lawsuit filed:**
- On October 21, 2009, the student and his parents filed a complaint in federal district court, alleging that the school district had violated his Fourth Amendment rights by searching his cell phone on these two occasions.
- The district court concluded that both searches were justified at their inception and reasonable in scope.
- The Court found for the school district on both counts and the student/parents appealed.

G.C. v. Owensboro Pub. Schs. (2013)

- Assistant principal testified that she believed that a search of his phone could reveal evidence of thoughts or plans of suicide, drug use at school, or both.

- The texts she discovered said:

- *“Baby, I do care! The only thing I do is smoke weed and that doesn’t mean I don’t care about you! Actually, that’s when I think about you the most Baby cus it slows everything down and I understand us. Baby I love you so much and I’ve....”*
- *“Why didn’t you just say that? I don’t have to act that way. I can act like I’m going to school being high lol. Nobody knew then. You barely knew that 1 day.”*
- *“Smoking interferes with football so I’ll have to smoke Friday night.”*
- *“I want you to blow with me so we can do it all night long.”*

G.C. v. Owensboro Pub. Schs. (2013)

- At oral argument, the student's attorney conceded that the search of the student's cell phone on the first occasion was reasonable, but continued to contend that the second search was not.
- The Sixth Circuit accepted this argument and, using the two-part inquiry set forth in *T.L.O.*, went to great lengths to distinguish the circumstances which led to the first search from the circumstances which led to the second.

G.C. v. Owensboro Pub. Schs. (2013)

- The Court concentrated on distinguishing between the two different sets of circumstances which led school officials to search the student's phone
- First incident
 - ✓ The distinction the court made between the two searches was that, although school officials had the same knowledge of the student's mental health and drug use history prior to both searches, on the day of the first search, the student had left the school counselor's office without permission, admitted to "making a call" on his cell phone in the parking lot, and, upon his return, told the counselor that he was again having suicidal thoughts.
- Second incident
 - ✓ They contrasted this to the events of the day of the second search, in which he "was sitting in class when his teacher caught him sending two text messages on his phone." The court stated, "There was no indication in the hours, weeks, or months leading up to [the second search]...." which would have indicated to school officials that "a search of the phone would reveal evidence of criminal activity, impending contravention of school rules, or potential harm to anyone in the school."

G.C. v. Owensboro Pub. Schs. (2013)

- Needless to say, the school administrators who were involved in the case were very disappointed at the decision.
- They have repeatedly stated that, from their perspective as school administrators, they do not understand the distinction the Sixth Circuit made between the two searches.
- Their knowledge of the student's history combined with his specific behavior on those two days which led to both searches.

G.C. v. Owensboro Pub. Schs. (2013)

- Ultimately, the court's distinction between the two searches in this case suggests that in the Sixth Circuit at least, a search of student's cell phone will be justified at its inception when school officials:
 1. have a credible, **specific, and timely** reason to believe that they will find evidence of wrongdoing or potential harm to self or others; and
 2. can reasonably and specifically articulate what that specific wrongdoing or potential harm is.

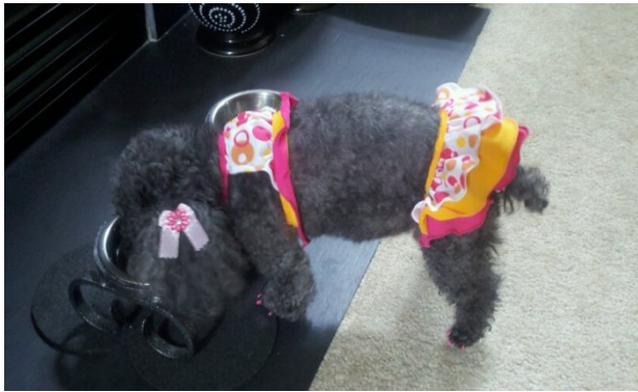
G.C. v. Owensboro Pub. Schs. (2013)

- This case still leaves many unknowns.
- It now seems clear that school officials may search cell phones in accordance *T.L.O.*
- It also seems likely, however, that personal cell phone searches are going to be more closely scrutinized
- Future searches of cell phones may be analyzed in a manner similar to that which the Supreme Court recently applied to a strip search; with an added factor which requires school officials to weigh the “content of the suspicion” against the “degree of intrusion.”

#3 EXPULSION FOR VIOLENT FELONIES

- **PC 501:**
- Students charged with offense that would be classified as violent felony if student was charged as an adult or charged with a violent felony may be expelled or remanded at determination of director if...
 - Continued presence in school would have substantial detrimental effect on general welfare of school
- Students adjudicated delinquent for offense that would be classified as violent felony if student was an adult or convicted of a violent felony shall be expelled if...
 - Continued presence in school would have substantial detrimental effect on general welfare of school
- Parents must be provided notice of appeal rights

#2 SERVICE ANIMALS



#2 SERVICE ANIMALS

- Service animal: A dog that is individually trained to do work or perform tasks for a person with a disability.
- Generally, Title II and Title III (of ADA) entities must permit service animals to accompany people with disabilities in all areas where members of the public are allowed to go.
- Service animals must:
 - Be under the handler's control through voice commands, hand signals, or other effective means
 - Be house broken
 - Be trained to perform work or tasks directly related to the person's disability.

Dogs whose sole function is to provide comfort or emotional support do not qualify as service animals under the ADA.

#2 SERVICE ANIMALS

- In the past, only dogs were recognized as service animals under titles II and III of the ADA.
- However, now miniature horses are also permitted.
 - Private business must allow a person with a disability to bring a miniature horse on the premises as long as
 - it has been individually trained to do work or perform tasks for the benefit of the individual with a disability,
 - as long as the facility can accommodate the miniature horse's type, size, and weight.
 - The rules that apply to service dogs, also apply to miniature horses.

#2 SERVICE ANIMALS

- Examples of work or tasks performed by a service animal include:
- assisting individuals who are blind or have low vision with navigation and other tasks
- alerting individuals who are deaf or hard of hearing to the presence of people or sounds
- providing non-violent protection or rescue work
- pulling a wheelchair
- assisting an individual during a seizure
- alerting individuals to the presence of allergens
- retrieving items such as medicine or the telephone
- providing physical support and assistance with balance and stability to individuals with mobility disabilities
- helping individuals with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors

#2 SERVICE ANIMALS - What questions can be asked?

- When it is not obvious what service an animal provides, only limited inquiries are allowed:
 - (1) is the dog a service animal required because of a disability, and (2) what work or task has the dog been trained to perform.
- Staff cannot ask about the person's disability, require medical documentation, require a special identification card or training documentation for the dog, or ask that the dog demonstrate its ability to perform the work or task.
- Allergies and fear of dogs are not valid reasons for denying access or refusing service to people using service animals.
 - When a student who is allergic to dog dander and a student who uses a service animal must spend time in the same classroom, they both should be accommodated.

#2 SERVICE ANIMALS – When may they be removed?

- A person with a disability cannot be asked to remove his service animal from the premises unless: (1) the dog is out of control and the handler does not take effective action to control it or (2) the dog is not housebroken.
- Establishments that sell or prepare food must allow service animals in public areas even if state or local health codes prohibit animals on the premises.
- Students with disabilities who use service animals cannot be isolated from other students, treated less favorably than other students, or charged fees that are not charged to other students without animals.
- Staff are not required to provide care or food for a service animal.

#2 SERVICE ANIMALS

Fry v. Napoleon Community Schools, 788 F.3d 622 (2015)

- Student suffers from cerebral palsy and was prescribed a service dog to assist her with everyday tasks. Her school, which provided her with a human aide as part of her Individualized Education Program (IEP) under the IDEA, refused to permit her to bring her service dog to school.
- Parents sued the school, its principal, and the school district, alleging violations of the ADA and the Rehabilitation Act and state disability law.

#2 SERVICE ANIMALS

Fry v. Napoleon Community Schools, 788 F.3d 622 (2015)

- Parents argued:
 - Dog's presence allowed the student to be more independent so that she would not have to rely on a one-to-one aide for tasks such as using the toilet and retrieving dropped items.
 - Student needed the dog in school to form a stronger bond with the animal and feel more confident.
- Court affirmed district court and ruled –
 - parents could not pursue Section 504 or Title II claims against a former school district until they exhausted their administrative remedies under IDEA.
 - Exhaustion requirement applies if the IDEA's Administrative procedures can provide some form of relief or if the claims relate to the provision of FAPE.
- The court reasoned that the parents' allegations brought the claim squarely within the IDEA's scope. "Developing a bond with the dog that allows the student to function more independently outside the classroom is an educational goal just as learning to read Braille or learning to operate an automated wheelchair would be.
- **Should you include in 504 plan or IEP?**

#1 TRANSGENDER STUDENTS

Missouri Teenagers Protest a Transgender Student's Use of the Girls' Bathroom
SEPT. 1, 2015



#1 TRANSGENDER STUDENTS

- Still an emerging area of the law
- School boards are in a position of balancing the rights of transgender students and concerns of others
- Confusing to many parents, students, and school officials

#1 TRANSGENDER STUDENTS

DEFINITIONS

- **Gender identity** -a person's inner sense of being male, female or something on a continuum
- **Gender expression** -the way in which a person communicates gender identity through clothing, hairstyle, grooming or voice.
- **Transgender** -people whose gender identity is different from the sex assigned to them at birth
- Common question –What is the difference between gender identity and sexual preference?
 - Gender identity does not equate to sexual preference or orientation.

#1 TRANSGENDER STUDENTS –Legal history

- In *Price Waterhouse v. Hopkins*, the Supreme Court concluded that Title VII barred not just discrimination based on the biological difference between men and women, but also discrimination based on an individual's failure to conform to socially-constructed gender expectations. Following this rationale, some courts have held that transgender individuals who experience adverse employment actions have valid claims under Title VII because they fail to “act like a man” or dress in a feminine manner.
- **This case and other employment cases are being evaluated in the school context**

#1 TRANSGENDER STUDENTS

- **Transgender Teen Awarded \$75,000 in School Restroom Lawsuit**

- A court in Maine awarded the family of a transgender teenager \$75,000 in a discrimination lawsuit against a school district that forced the student to use a staff restroom rather than a facility reserved for pupils

- Nicole Maines, 17, had won her lawsuit against the Orono school district earlier this year in front of the Maine Supreme Judicial Court, which ruled that the school district had violated the state's Human Rights Act.

#1 TRANSGENDER STUDENTS – USED OCR & DOJ

- Title IX of the Education Amendments of 1972 (Title IX) is a federal law that prohibits discrimination based on sex in any educational program or activity receiving federal financial assistance.
- The U.S. Department of Education and the U.S. Department of Justice have recognized that Title IX's prohibition on sex discrimination encompasses protections against discrimination and harassment on the basis of failure to conform to sex stereotypes and gender identity.
- DOJ and OCR have concluded that discrimination or harassment because a person is transgender or gender non-conforming is illegal sex discrimination.

CASE STUDIES – What behavior violates Title IX?

- *Arcadia Unified School District (CA)* - Student was a transgender boy who had consistently and uniformly presented as a boy at school and in all other aspects of his life for several years, as supported by documentation provided to the District by his family.
- Complaint alleged that the District denied Student educational opportunities on the basis of sex when it prohibited him from accessing (1) sex-specific facilities designated for male students at school for use during school and extracurricular activities, and (2) sex-specific student cabins for male students during a school-sponsored overnight academic camp.
- Without admitting any unlawful conduct, in order to resolve the Complaint, the **District entered into a settlement agreement.**

CASE STUDIES – What behavior violates Title IX?

- The settlement agreement required a policy.
- The policy affirms that transgender students must be treated in accordance with their gender identity, even with regards to sex-separated facilities and activities.
- It also includes privacy protections and clear guidance that “[t]he responsibility for determining an individual’s gender identity rests with the individual.”

#1 TRANSGENDER STUDENTS – Ongoing litigation

- DOJ filed a Statement of Interest in *G.G. v. Gloucester County School Board*, a lawsuit filed on behalf of a transgender student seeking to enforce his right to use the boys' facilities at school. In the filing, the Department of Justice concluded that, "prohibiting a student from accessing the restrooms that match his gender identity is prohibited sex discrimination under Title IX."
- Student filed a preliminary injunction to allow him to continue using the male restroom when school started back.
- Virginia court dismissed the student's Title IX claim first and then denied the preliminary injunction
- An appeal to the 4th Circuit Court of Appeals is planned

FERPA

- One of the most common questions that arises when students transition in schools is whether others in the school community have a right to know about the student's gender transition. The simple answer is "no."
- FERPA does give school personnel discretion to discuss student information among themselves where there is a "legitimate educational purpose," but sharing a student's transgender identity will not always meet that requirement.
- A student's transgender status, legal name or sex assigned at birth is confidential information and protected personally identifiable information, and disclosure of that information may violate the school's obligations under the Family Educational Rights and Privacy Act (FERPA).

WHAT TO REMEMBER

- Think proactively
 - discuss with administrators
 - seek guidance from experts
 - have a plan
- Communicate and work with the family to make sure the child feels safe, included and supported.
 - Take action to prevent harassment or bullying
 - Protect privacy of students by not giving information that may reveal that a student is transgender to others unless the school has been given permission to do so.
- **Always work with your local school board attorney!!!**