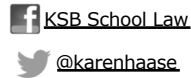


## Legal Update for NSIAAA

Karen Haase  
Mandy Gruhlkey  
KSB School Law  
(402) 804-8000  
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## The Plan for Today

- This is not a drill: a lot has happened in the areas we talked about last year...
  - Taunts, chants, "racist" expression, "Statement of Principle," and "Crowd Control Protocols"
  - *Kennedy* coach prayer case appeal to SCOTUS
  - Trump Title IX moves versus court decisions
- Juuling
- "Selling" ad space

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## Taunts and Chants




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## America Night in the Student Section



October 25, 2017

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### RE: Racist Events and Incidents at School-Sponsored Athletic Events

Dear Superintendent:

During the last few weeks, the ACLU of Nebraska has received reports regarding racist events and incidents occurring at school-sponsored athletic events in which students are present. We are writing to you today to express our concern and to request your assistance in ensuring that all students are treated with dignity and respect.

The ACLU of Nebraska is a non-profit, non-partisan organization that works to defend and uphold the individual rights and liberties guaranteed in the United States and Nebraska Constitutions through public advocacy, litigation and education. For over fifty years, the ACLU of Nebraska has been a constant partner for students and their families in the fight for equal rights and freedom of expression. The ACLU of Nebraska works to ensure that all students are treated with dignity and respect, regardless of their race, ethnicity, religion, sexual orientation, gender identity, or social status.

The State Department of Education provides help in model policies prohibiting harassment, discrimination, and bullying. The model policy on our website encourages and requires prompt investigation of any allegations of harassment, discrimination, or bullying. Model policies, along with related resources, are available at: <http://www.education.ne.gov/sites/default/files/2016/06/2016-2017-Model-Policies.pdf>.

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## NSAA



500 Charleston St., Suite 1, Lincoln, NE 68508  
www.nsaaonline.org 402-489-0386

### INSIDE THIS ISSUE

- 1 & 3 Executive Director's Notebook
- 2 NSAA Board of Directors & NSAA Staff
- 4 2017-18 U.S. Bank Believers & Achievers
- 5 September U.S. Cellular "Gems of the Week"

### Executive Director's Notebook Dr. Jim Tenopir, NSAA Executive Director



#### School Spirit: Administrative Leadership Necessary!

We're back into the fall school routines: homework, class projects, school pictures, marching band, pep rallies and baggins. The climate within schools is often enhanced when students, teachers and the

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## Statewide Education Efforts

- Education support groups approved "Statement of Principle"
  - Want to give ADs and others support from board and admins to enforce sportsmanship rules
  - Education of students and communities
- Each organization will develop "action plan" to address these issues
- Rex Schultze working on policy/guidelines for planning prior to events between ADs, admins, etc.

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### Legal Considerations

- These are difficult legal issues...
- 1st Amendment
  - Must balance duty of school officials to maintain order and teach appropriate social values with student expression rights
  - *Bethel* compared to *Tinker*
  - History of disruption based on race will be a significant factor in applying *Tinker*
  - Must train staff who will be making these decisions

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### From the Statement of Principles

It is the responsibility of our organizations to promote and respect the liberty interests of all persons who may participate in or attend any educational endeavor sponsored by our organizations which includes ensuring that common courtesy is shown for all persons, insuring tranquility for all, and being responsible that no one person abuses his or her liberties to the detriment of other persons.

Conduct by any person that does not show respect for and courtesy to other persons in Nebraska schools and any school activity is prohibited and shall not be tolerated – period.

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### Legal Analysis

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### **Bethel Sch. Dist. v. Fraser (1986)**

- Student nomination speech for class president
- Speech was "an elaborate, graphic, and explicit sexual metaphor"
- Circuit court ruled First Amendment was violated; attendance at nominating assembly voluntary; no material or substantial disruption

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### **Bethel Sch. Dist. v. Fraser (1986)**

- Supreme Court:
  - The First Amendment does not prevent schools from encouraging the "fundamental values of habits and manners of civility by insisting that certain modes of expression are inappropriate and subject to sanctions."
  - "The determination of what manner of speech in the classroom or in the school assembly is inappropriate properly rests with the school board."

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### **Morse v. Frederick (2007)**

- During Olympic torch ceremony, a student unfurled a banner that read: BONG HITS FOR JESUS.
- Attendance at the ceremony was school-sponsored and school-supervised
- Circuit court ruled First Amendment violated, school did NOT demonstrate risk of substantial disruption

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### Morse v. Frederick (2007)

▪Supreme Court:

- "The special characteristics of the school environment, and the governmental interest in stopping student drug abuse allow schools to restrict student expression that they reasonably regard as promoting such abuse."
- "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use."

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### Morse v. Frederick (2007)

▪Supreme Court:

- "Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment."

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### Morse v. Frederick (2007)

▪Supreme Court:

- "Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. **We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive."** After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use."

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## Legal Considerations

### **79-725. Character education; principles of instruction; duty of teachers.**

Each teacher employed to give instruction in any public, private, parochial, or denominational school in the State of Nebraska shall arrange and present his or her instruction to give special emphasis to common honesty, morality, courtesy, obedience to law, respect for the national flag, the United States Constitution, and the Constitution of Nebraska, respect for parents and the home, the dignity and necessity of honest labor, and other lessons of a steadying influence which tend to promote and develop an upright and desirable citizenry.

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### Legal Considerations

**79-726. Character education; outline of instruction; duty of Commissioner of Education.**

The Commissioner of Education shall prepare an outline with suggestions such as in his or her judgment will best accomplish the purpose set forth in section 79-725 and shall incorporate the same in the regular course of study for the first twelve grades of all schools of the State of Nebraska.

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### Legal Considerations

#### 79-255. Act; purpose.

The purpose of the Student Discipline Act is to assure the protection of all elementary and secondary school students' constitutional right to due process and fundamental fairness within the context of an orderly and effective educational process. The sanctions defined in the act shall be interpreted at all times in the light of the principles of free speech and assembly protected under the Constitution of Nebraska and the United States Constitution and in recognition of the right of every student to public education.

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### Legal Considerations

- Anti-bullying and harassment laws apply to school activities
  - Title VI prohibits subjecting students to discrimination on the basis of race, among others
  - Title IX prohibits discrimination based on sex
  - 79-2,137 prohibits "bullying" as an "ongoing pattern of...verbal...abuse" on school grounds, in a school vehicle, or at a school activity

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### Barnes v. Hillsboro School Dist.

- Barnes wore "Donald Trump Border Wall Construction Company" t-shirt
- Shirt says, "The wall just got 10 feet taller."
- Removed from "People and Politics" class and given suspension for refusing to cover the shirt
- AP: one other student was offended by it
- No noted disruption
- Court: injunction for student

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### ACLU in NE: Stop those kids! ACLU in OR: Let the kids speak!

*"The school clearly crossed the line when it required a student to remove a T-shirt that voiced support for Donald Trump's border wall or face a suspension. This shirt is mean-spirited, but it isn't a 'disturbance' under First Amendment case law.*

*"It is disappointing that Liberty High School decided to censor the student instead of inviting the student body to discuss immigration, the freedom of speech, and the impacts of xenophobic rhetoric. Schools have a responsibility to teach our youth how to engage in thoughtful conversations about difficult and potentially offensive subject matters. Censorship doesn't work and often just elevates the subject the government is trying to silence."*

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## Statement of Principle

- **Link to Statement of Principle if you want to include screenshots:**

<https://cdn.education.ne.gov/wp-content/uploads/2018/08/Statement-of-Principle.pdf>

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## Crowd Control Protocol

- police are present, have them in the parking lot reviewing the contest.
- Prepare a supervision chart and inform, in writing, the assigned personnel of their duties before the game. (Persons on duty from both schools should have some type of identification—arm bands, badges, etc.)
  - Evaluate the location of spectator seating and team locker rooms. Teams should not enter/leave in front of the opponent's seating area. Arrange appropriate accommodations for the handicapped.

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## Crowd Control Protocol

- Provide for adequate police supervision before, during, and after the game.
- Be sure that there is both inside and outside police supervision at games including off-site parking areas and streets.
  - Make arrangements with local police departments at the highest level possible in order that adequate police protection will be available to control the spectators at the conclusion of the contest. Develop a plan of action in cooperation with the police for measures to be taken in the event of trouble. Review prior and existing school/community control problems, along with gang activity. Crisis prevention should be part of the review.
  - Develop in consultation with police, emergency evacuation plans relating to activated fire alarms, bomb threats, and other inappropriate acts of violence.
  - Arrange for diverting traffic away from the athletic field or gym so that spectators leaving the game can do so quickly.
  - Work with local police to provide "no parking" signs around the stadium or gym, blocking off streets if needed, and arranging for one-way traffic where necessary.

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- Make use of video technology whenever possible. You may wish to video your student section.
- Arrange for supervision to continue until all visitors have left the area, including the team bus.
- Depending on local conditions, you may wish to advise ticket sellers to screen for troublemakers and group agitators. In some communities, it may be necessary to consider the advisability of not admitting elementary and junior high students unless accompanied by adults. Representatives from the visiting school should screen for known troublemakers from their school/community. Such individuals should be turned away prior to admission.
- Implement a board of education approved "Objectionable Persons" policy (Non-admittance to known troublemakers and group agitators – possible issue "stay away" letters).
- Instruct the operator of the video-taping equipment to record all incidents of inappropriate behavior.

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- Seat students from opposing schools in separate sections. Seating for home and visiting spectators should be adequate. Seats and tickets should be numbered. Spectators should remain on their side of the field or gymnasium throughout the contest. Do not oversell the facility. Keep general admission spectators separate from student sections if possible.
- Arrange for interested parents and patrons to assist with the supervision of the general admission section.
- Check fire code for seating capacity and other recommendations.
- Keep in mind the number of security and other personnel in addition to ticket purchases.
- The home athletic administrator should meet the visiting team members when they arrive and direct them to their dressing quarters. A good-sized room, a blackboard and chalk, a training table, benches, chairs, and drinking water should be provided. It may be necessary to ask opponents to come dressed for the game if the visiting team's quarters are not adequate.
- Provide security measures to protect visitors' clothing and valuables while the visitors are on the field or court. All valuables for home and visiting athletes should be kept in a gym bag monitored by an assigned individual during the contest. The playing field or court and the area immediately adjacent to it at all athletic contests shall be restricted to team members, coaches, managers,

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- Consider having a physician or athletic trainer present at all heavy contact athletic contests. The home team physician or trainer may be made available to the visiting team if the visiting team does not bring its own physician to the contest.
- Have properly trained adult scorers and timers for officials at games. The same individuals should be used the entire season. Have a backup for each position fully trained.
- Assign an official or competent person to take charge of the scoreboard.
- The announcer is a key person and carries a great deal of responsibility. What is said and how it is said may have serious effects on crowd behavior. The game should be reported without showing favoritism to teams or players. Proper language should be used at all times.

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7. Employ a walkie-talkie system, tied into the police.

8. Make sure the emergency location system is fully functional before the game.

7. Buses loaded with fans, band, and team should depart, with police escort, immediately after the game.

8. Administrators of both schools should confer before leaving to be sure that all details

7. The pre-game atmosphere is improved if spectator participation is encouraged. Standing and singing "The Star-Spangled Banner" is one opportunity for such participation. Hats/caps should be removed.

9. Use of books or resolutions dealing with crowd conduct are helpful.

## Other Considerations

- You can always apply generally-applicable rules
- Practical considerations to preserve legal arguments
  - Take more control of student section
    - Closer to government speech
    - Protects "closed forum" argument
    - Lesser right (if any) to "participate in extracurricular activities"
    - Document redirections for mundane issues
  - Enforce theme night "rules" evenly
  - Make it an educational issue
  - Clear the gym or forfeit the game?!

## Coaches Praying

### When 15 feet makes all the difference...




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### **Kennedy v. Bremerton Sch. Dist., No. 16-35801, 2017 U.S. App. LEXIS 16106 (9th Cir. Aug. 23, 2017),**

- Bremerton HS(WA) assistant coach Joe Kennedy
- Post-game prayers with players at 50 yard line for 7 years
- Told to stop engaging in overt, public religious displays on the football field while on duty Followed directive for a few games, then prayed again
- Fired
- Court: No first amendment violation
- SCOTUS considered granting certiorari on November 2, 2018
- **[RBT NOTE: PETITIONS GRANTED FRIDAY WILL BE RELEASED TOMORROW MORNING AT 9:30 AM]**
- **SCOTUSblog case summary with briefs:**  
<http://www.scotusblog.com/case-files/cases/kennedy-v-bremerton-school-district/>

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#### Tweet

**CBS This Morning** @CBSThisMorning

Photos of Idaho school teachers dressed as a border wall and Mexican stereotypes are going viral online.



"Insensitive and inappropriate": Teachers dress up like border wall, Mexican stereotype...  
cbsnews.com

**Leah McElrath** @leahmcElrath

Staff dressed up as "Mexicans" and others as a "wall" on which it said "Make America Great Again" at an ELEMENTARY SCHOOL in Idaho. Superintendent said there was not "malicious intent."

h/t @aurabogado  
idahostatesman.com/news/local/edu...



11/2/18, 12:21 PM

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## Title IX Update: Transgender




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## Transgender Students

### ■ Courts

- Transgender students are winning in court
  - Not just Title IX
  - Equal Protection Clause in each winning case
  - Remember this is what happened in *Obergefell* (legalizing gay marriage)
- Students and parents filing lawsuits seeking protections from sharing facilities with transgender students are losing

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## Transgender Students

- The Trump Administration is redefining "sex" under Title IX
  - "a person's status as male or female based on immutable biological traits identifiable by or before birth"
  - "The sex listed on a person's birth certificate, as originally issued, shall constitute definitive proof of a person's sex unless rebutted by reliable genetic evidence."
- The Trump DOJ argued to SCOTUS that protections on the basis of "sex" do not include an individual's "gender identity"
- There will be new Title IX regulations soon, maybe including redefining "sex."

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## So now what?

- So what should you do differently?
  - **NOTHING!**
- Title IX is an "individualized" assessment of the needs of anyone protected
  - Imagine enacting a policy treating all sex assault victims the same
- If Trump definitions/regs go through, it will impact NSAA participation policy and schools' accommodation obligations

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## Juuling




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### Juuling

- What is a Juul?
  - Brand-name of a e-cig that looks like a USB flash drive
  - Charges in a USB port
  - Small enough to be concealed in a closed fist, backpack, sock, or undergarment
  - Hard to detect for teachers that do not know what they are looking for!

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### Juuling

- Hard to detect because the vapor a Juul emits does not smell like cigarette smoke
- Students can blow vapor into a backpack or sweater and teacher is none the wiser
- One pack of oil for a Juul contains the nicotine equivalent to 1-pack of cigarettes

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### Juuling

- Law enforcement and DREs report Juuls are used to inhale controlled substances
- Juul controls 72% of e-cig market
- FDA has stepped in to determine whether Juul is deliberately targeting minors as consumers
- FDA commission says Juuling has reached "epidemic proportions" in high schools and middle schools

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## Juuling

- The Law
  - Nebraska law: 28-1418 – Unlawful for minor under 18 to use tobacco or “alternative nicotine products”
  - Use of other controlled substances in Juul also illegal under Nebraska law
  - City ordinances: Some cities outlaw minors from using any vaping products

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## Juuling

- Student Discipline Act
  - Allows schools to impose consequences for violations of Nebraska criminal code – not city ordinances
- Sticking point for schools
  - No way to know for sure what substance is in the device
  - SDA does not list tobacco or nicotine use in the grounds for long-term suspension or expulsion

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## Juuling

- What are schools to do?
  - School policy
    - Board’s student discipline policy should contain a school rule prohibiting any vape product or cartridge from campus, no matter what is in it
    - Repeat violation of school rules can them be used to impose a more serious consequence

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## Juuling

- Education
  - Students and parents
    - Inform them about the law, policies and health concerns of vaping
  - Teachers
    - Educate staff on the same
  - Collaborate with SROs
    - Everyone needs to be on the same page

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**For a “donation” of \$500, you get your business ad around the scoreboard!**



"According to your LinkedIn profile you're a focused, disciplined achiever. According to your Facebook photos you love Jack Daniels and are pretty comfortable with your body."

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## **Mech v. Sch. Bd. Of Palm Beach Cty., Fl. No. 15-10778 (Nov. 23, 2015)**

- “David Mech has a unique résumé.”
- Mech called himself the “The Happy/Fun Math Tutor.”

He has a bachelor’s degree from Michigan State University, a master’s degree from Arizona State University, and is enrolled in a Ph.D. program at Florida Atlantic University. He has taught mathematics at Palm Beach State College and is certified to teach secondary math in Florida.

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**Mech v. Sch. Bd. Of Palm Beach Cty., Fl.  
No. 15-10778 (Nov. 23, 2015)**

- School Board instituted "business banner" program
- Principals asked to make sure signs supported educational mission, community values, appropriateness for kids
- Some school employees encouraged Mech to apply because "he apparently is a very good tutor"
- School hung the banners




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**Mech v. Sch. Bd. Of Palm Beach Cty., Fl.  
No. 15-10778 (Nov. 23, 2015)**

Mech is also a retired porn star. He has performed in hundreds of pornographic films. And he owns Dave Pounder Productions LLC, a company that formerly produced pornography. The Happy/Fun Math Tutor and Dave Pounder Productions share a mailing address in Boca Raton, Florida.

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**Mech v. Sch. Bd. Of Palm Beach Cty., Fl.  
No. 15-10778 (Nov. 23, 2015)**

- In 2013, parents "discovered the common ownership of The Happy/Fun Math Tutor and Dave Pounder Productions."
- Mech filed suit, alleging 1<sup>st</sup>/14<sup>th</sup> Amendment and breach of contract
- Court:
  - If the banners are Mech's speech, he may win; if the banners are government speech, Mech loses.
  - Test: history of government messages; observers would think government agrees with message; approval/direct control over the message

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**Mech v. Sch. Bd. Of Palm Beach Cty., Fl.  
No. 15-10778 (Nov. 23, 2015)**

- Court:
  - This is government speech (but it was a stretch, even to the attorneys who represented the school)
  - Seems to contradict other "government speech" cases
  - "His redress lies with the political process."
  - Mech then ran for the board!
- SCOTUS denied certiorari

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**Evaluation of Coaches**

- Coaching is not teaching. Neal v. York Public Schools
- NSEA litigation priority
- Negligence litigation
- Parent complaints




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**Neal v. School District of York**

- Dale Neal employed as as teacher.
- Contract included head basketball coach
- District notified in writing that it was amending coaching contract including reasons supporting the amendment
- Gave hearing before the board
- Board voted to give two separate contracts: one for teaching one for coaching
- Neal signed and returned the contract for teaching employment but refused to sign the coaching contract

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### Neal v. School District of York

"The continuing contractual provision in Nebraska School Law 79-1254 shall not apply and this provision is expressly waived. This one (1) year Contract in no way establishes any future expectations for coaching by Dale Neal at York High School. In this regard, due process procedures and just cause shall not be required to terminate this Contract prior to the filling of the head basketball coaching position for the 1977-78 school year."

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### Neal v. School District of York

- School declared position open and hired new coach
- Neal sued in federal court
- Federal judge issued injunction, ordered school to offer reworded contract
- Neal refused to sign this contract
- Sued for breach of contract

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### Neal v. School District of York

- District court ruled for school district
- Neal appealed to Nebraska Supreme Court
- Nebraska Supreme Court:
  - The threshold issue before this court is whether [the Tenure Act] applies to a coaching contract.

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### Neal v. School District of York

- "Nothing in the statutory language or legislative history indicates the Legislature intended the position of coach to be within the applicable statutory definition of teacher or administrator entitled to protection. The introductory words to the statute speak of contracts with administrators or teachers."
- "The defendant argues that if coaches were found to be entitled to the protection of [the Tenure Act] for any reassignment or termination, then all extracurricular assignments would be included. Such a construction would interfere with the right of school authorities to make reasonable assignments and reassignments of a teacher's extracurricular duties. A limitation of that magnitude is a decision for the Legislature."

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### Suggestions for Coach Evaluations

- Check your policies
  - Complaints
  - If you don't evaluate coaching, don't promise to do so
- Type your evaluations
- Identify continuing issues as such
- Explain each criticism
- Write in first person
- Include all relevant issues

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### Questions?

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**Legal Update for NSIAAA**

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Mandy Gruhlkey**



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