



# School Law Legal Update

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2021 School Law Seminar

# NDSBA Legislative Updates



**NDSBA**  
NORTH DAKOTA SCHOOL  
BOARDS ASSOCIATION

**LEGISLATIVE  
UPDATE** 2021

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## Update No. 17

The 67<sup>th</sup> Legislative Assembly came to a close just past midnight on April 30<sup>th</sup>. Lawmakers were able to complete their work in 76 days, a few days short of the 80 days allotted by the ND Constitution. This means the Legislature will be able to use the remaining 4 days later this year for the legislative redistricting process. This legislative session was one for the books, to say the least. Not only did it result in the largest state budget in state history, but lawmakers also briefly paused their work in order to expel a House member for the first time.

The following are the key education-related bills impacting school boards that passed this session and will become effective on August 1<sup>st</sup> (unless otherwise noted):

**HB 1388:** One of the final issues to get resolved in the last few days of the session was K-12 public school funding. The Conference Committee for HB 1388 finally resolved their differences mid-week and were able to come to an agreement on the final language of the bill. HB 1388 is likely the most significant piece of education-related legislation passed this session as it establishes changes to the policy for implementing the K-12 funding formula and was the "catch-all" bill for issues germane to education. The sticking point for the conference committee came down to whether there should be an increase in the per pupil payment over the next biennium. The agreement came after several days of back and forth between the Senate members (who were pushing for a 1/1 increase in the per pupil payment) and the House members (who did not support any increase in the per pupil payment). Senate members persisted and were able to convince the House members to agree to the 1/1 increase (\$10,136/\$10,237). You can watch a short clip of Senator Schaible, a former school board member from Mott-Regent and the current chair of the Senate Education Committee, explaining the need for the increase [here](#).

In addition to the increase in the per pupil payment, HB 1388 does the following:

- Adjusts the small school district size weighting factors. School districts that do not operate a high school will have their average daily membership divided by .6 to impute an average daily membership to be on the same scale as high school district. The bill also establishes a new weighting factor for districts that have reorganized that operate 2 physical plants over 19 miles apart.
- Provides the ability of a school district to meet instructional time requirements through a virtual instruction program that meets certain criteria (established through administrative rules to be adopted by DPI). It also includes provisions to account for virtual instruction in the ADM calculation. The bill also includes an emergency clause regarding the virtual instruction provisions so that districts currently providing virtual learning may continue to do so through the end of the current school year and also meet instructional time requirements.
- Adds a reading competency component to the teacher licensure requirements, as well as additional requirements to reading curriculum.
- Adjusts the timing for the phase-out of moving transition maximum school districts onto the K-12 funding formula.
- Provides for a legislative management study of K-12 funding, including transition minimum reduction impacts on reorganized and consolidated school districts.

**HB 1013:** This is the DPI appropriation bill and includes the per pupil payment appropriation provisions based on the policy provisions in HB 1388. HB 1013 also includes a provision requiring that during the 2021-23 biennium, school boards must use an amount equal to at least 70% of all new money received by the district resulting from the 1/1 increase in the base integrated formula payment rate, to increase the compensation paid to non-administrative personnel.

**HB 1027:** This bill codifies the required transportation aid payments to school districts. For the 2021-22 and 2022-23 school years, transportation state aid will be calculated based on the greater of the 2018-19 mileage and rider data or previous year mileage and rider data. In subsequent school years, DPI will use the latest available student enrollment count in each school

# Legislative Highlights

- Negotiations (SB 2015)
- Patriotic society access (HB 1356)
- Public meetings changes (HB 1349)

# SB 2015 - Negotiations

- Added deadline to complete negotiations – **July 1** unless otherwise agreed to by parties
- Notice of intent to negotiate must be provided at least 160 days prior to anniversary date
- Added filing deadlines to recognition process –
  - **February 1** for petition to recognize appropriate negotiating unit
  - **March 1** for petition to recognize representative organization
- If no agreement by July 1, then impasse exists

# HB 1356 – Patriotic Society Access

- Requires school districts to allow youth patriotic societies access to students during the first quarter of each academic year to inform students about the society and to explain how students may participate in or join the society.
- “Youth patriotic society” means a youth group that promotes patriotism, civic education, and civic involvement, listed under title 36, United States Code, subtitle II, part b, as of January 1, 2021.
- By that definition, organizations such as the Boy Scouts, Girls Scouts, National FFA, Little League Baseball and Big Brothers/Big Sisters would qualify as a "youth patriotic society."

# HB 1356 – Patriotic Society Access

- To help school districts navigate through these issues and comply with the new requirements, NDSBA created template policy FFL (Youth Patriotic Society Access).
- The policy provides the following list of time, place and manner criteria that youth patriotic societies must meet in order to present information to students during school hours.
- Confirms that student participation in such presentations is voluntary and written consent by a parent/guardian is required before a student is permitted to attend any youth patriotic society presentation.

# HB 1349 – Open Meetings

- Made some important changes to the open meetings requirements set forth in NDCC chapter 44-04, namely the ability of a public entity to hold meetings by electronic means and to provide public access by electronic means.
- To hold meetings by electronic means under the new law, the electronic capacity must accommodate the number of persons reasonably expected to attend the meeting remotely.
- In addition, the information necessary to join or view the meeting electronically must be included in the notice issued pursuant to NDCC 44-04-20.
- School boards may still hold meetings in person at a physical location as they have always done.

# Case Law Update

## ***Mahanoy Area School District v. B.L. (U.S.S.C. No. 20-255)***

- Addressed the extent to which public school officials may discipline students for their speech that occurs online and off campus.
- A high school student posted a vulgar message on Snapchat after she was placed on the junior varsity cheerleading team instead of the varsity squad. Once the school became aware of the post, the student was removed from the cheerleading team.
- Student sued the district arguing her First Amendment rights were violated when she was disciplined for her social media post.

# ***Mahanoy v. B.L.***

- For the last several decades, the standard announced by the Supreme Court in *Tinker v. Des Moines Independent Community School District* has been the law of the land and used to determine when schools may regulate student speech.
- In *Tinker*, the Court upheld the right of students to wear black armbands to protest the Vietnam War, but allowed some ability for school administrators to regulate speech that would materially disrupt the work and discipline of the school.
- The USSC has narrowed student speech rights in a series of cases since *Tinker*.

# *Mahanoy v. B.L.*

- The student won at the district court level and again in front of the Third Circuit Court of Appeals.
- In its decision, the Third Circuit said that Tinker categorically did not apply to off-campus speech, and thus schools could not discipline “speech that is outside school-owned, -operated, or -supervised channels and that is not reasonably interpreted as bearing the school’s imprimatur.”
- This is a clear departure from other federal circuit courts that addressed similar issues of off-campus speech and the school’s ability to regulate under the Tinker analysis.

# *Mahanoy v. B.L.*

- In an 8-1 majority opinion delivered by Justice Breyer, the Supreme Court held that “**although public schools may have a special interest in regulating some off-campus speech, the special interests offered by [Mahanoy Area School District] are not sufficient to overcome B.L.’s interest in free expression in this case.**”
- The Court declined to announce a new or different unifying rule that would regulate free speech cases involving off-campus speech by students.
- Opted instead to clarify Tinker’s applicability beyond school bounds based on impact or effect rather than geographic location.

# *Mahanoy v. B.L.*

## Takeaways:

- *Tinker* remains in tact – speech causing substantial disruption or a reasonable chance thereof, may still be regulated.
- BUT, mere criticism of school policy or practice or vulgar language without substantial harm or targeting a specific individual is likely protected speech.
- Bullying and harassment may still be addressed if impact school community.
- Staff training is important!



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