

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT April 2016

Fourth Circuit Issues Key School Transgender Bathroom Decision

In early 2015, the American Civil Liberties Union (“ACLU”) filed a federal complaint on behalf of Gavin Grimm against Gloucester County Public Schools (“GCPS”) (*G.G. v. Gloucester County School Board*, Case No. 4:15cv54). Grimm is a transgender student at Gloucester High School who is now recognized as a male. The complaint alleged GCPS’s policy limiting restroom facilities available to transgender students was discriminatory and in violation of Title IX. The policy also required transgender students to only use single-stall bathrooms or facilities assigned to their biological gender. In late June of 2015, the federal government took the position that it is discrimination under Title IX to prohibit students from accessing restrooms that match their gender identity.

On July 27, 2015, U.S. District Judge Robert G. Doumar dismissed the Title IX portion of the student’s lawsuit and found that schools may have separate restrooms based on sex. On October 21, 2015, the ACLU filed an appeal seeking to overturn Judge Doumar’s ruling. In a decision of significant importance, the Fourth Circuit on April 19, 2016, overturned Judge Doumar’s decision. In sum, the Court held that it was error for the lower court to not accept the U.S. Department of Education’s (“DOE”) interpretation of the definition of “sex.” The lower court held “sex” meant birth or biological gender. The Fourth Circuit sided with the DOE and concluded that “sex” means both biological sex and gender identity, thus G.G. was protected under Title IX. The Court reasoned that DOE’s interpretation was entitled to deference under the law. The case was ultimately remanded back to Judge Doumar for further proceedings based on this interpretation.

A copy of the opinion is available at the following link: [G.G. v. Gloucester.](#)

ACLU Files Baseless Lawsuit against NC Law Protecting Bathroom Privacy

The American Civil Liberties Union (“ACLU”) recently initiated a lawsuit styled *Carcano v. McCrory* against a North Carolina law that seeks to protect citizens’ privacy in bathrooms and locker rooms.

Kellie Fiedorek, legal counsel for the group Alliance Defending Freedom, a non-profit legal organization that advocates for the rights of individuals to freely live out their faith, spoke at a citizens’ rally in Raleigh, North Carolina about the lawsuit. Fiedorek criticized the invalidation of the “bathroom” ordinance, stating that it “protects everyone’s privacy by ensuring that bathrooms, showers, locker rooms, and other intimate settings remain private and based on one’s biological sex while also offering accommodations to those with special circumstances.” Fiedorek also spoke to a common misunderstanding about the application of Title IX to such

laws, explaining that “[t]he threat that schools will lose funding in implementing this sensible standard is simply false. Title IX specifically allows schools to ‘provide separate toiled, locker room, and shower facilities on the basis of sex.’”

More information is available at: [Alliance Defending Freedom](#)

NSBA Publishes “Transgender Students in Schools” Guide

Just two weeks prior to the *G.G.* decision referenced above, the National School Boards Association (“NSBA”), clearly recognizing the growing challenges transgender students pose in K-12 public schools, published a “Transgender Students in Schools” guide. The guide was subsequently updated on April 27, 2016, following the *G.G.* decision. Importantly, the guide provides information on more than just transgender student bathroom issues.

The 24-page guide is available at the following link: [“Transgender Students in Schools.”](#)

Parents Contend Disabled Student Needs Religious Instruction to Receive FAPE

The Individuals with Disabilities Education Act (“IDEA”) mandates that all public schools provide a free appropriate public education (“FAPE”) to students with disabilities. What constitutes FAPE is often the source of intense litigation. In *M.L. v. Starr* (Case No.: PWG-14-1679), a Maryland federal court case, parents of a student with an intellectual disability argued that in order to receive FAPE, their child needed an education program that took into account his religious and cultural needs. The school district prevailed, with the judge holding, among other things, as follows:

Plaintiffs have pointed to no authority, nor have I found any, that expands the requirement of the IDEA that an IEP be “individualized” to the extent that it affords a qualified student with an educational program specifically tailored to the religious and cultural enclave in which the student lives.

The case is currently on appeal in the Fourth Circuit.

FL DOE: Submit New Anti-Bullying Policies by September 30, 2016

Following the most recent Florida legislative session, [HB 229](#), which revised Florida’s school anti-bullying statute (F.S. 1006.147), became law. The statutory changes are fairly minor, but there is a new requirement that school boards adopt and review their anti-bullying policies every 3 years.

On April 22, 2016, the Florida Department of Education (“FL DOE”) issued a memorandum advising school boards that FL DOE has published a new Model Anti-Bullying and Harassment Policy which takes into account the new statutory requirements. Additionally, although not

required by HB 229, FL DOE is requiring school boards to submit their revised anti-bullying policies to FL DOE on or before September 30, 2016.

FL DOE's memorandum is available at the following link: [DPS 2016-56](#).

NYC Department of Education Accused of Depriving Students' Right to Education Based on Violence and Bullying

A group called Families for Excellent Schools ("FES") has filed the first class-action lawsuit regarding school violence in New York. FES – on behalf of parents and students – has alleged that the New York City Department of Education has ignored pervasive violence in the school system, which in turn has robbed students of their right to an education and deprived them of their right to equal protection under the 14th Amendment. FES's complaint states that there is "a custom and practice of deliberate indifference to in-school violence, creating a culture of indifference to continued, violent assaults against [the Plaintiffs] and others similarly situated."

Despite New York City Mayor Bill de Blasio's claims in his recent State of the City address that crime in city schools has fallen by 29%, a report released by FES in February instead purports that violent incidents in city schools has increased by 23% from 2013-2014 to 2014-2015, with the number of violent incidents totaling about 16,000. Indeed, FES contends that the numbers used by de Blasio for his calculations were "at best an incomplete picture."

Plaintiffs are seeking remedies including a court-appointed independent monitor with the authority to issue binding recommendations related to violence and bullying to the New York City Department of Education.

For further reading, visit: [National School Board Association](#)

Obama Takes Action Regarding Student Testing

In October 2015, President Obama announced a "Testing Action Plan" which included a set of principles to promote a smarter approach to student assessment. The program is aimed at reducing the time students spend on standardized testing and provide support to states and school districts in developing better assessment. Specifically, the Plan outlines that the assessments must be high quality and worthwhile, enhance teaching and learning, and give a well-rounded picture of how students and schools are doing.

The U.S. Department of Education ("DOE" or "Department") is acting in Congress with the Plan and working to provide guidance about promising practices to reduce and improve school testing. In particular, the Department has outlined the proposed priorities for applicants of the Enhanced Assessment Grant – a program developed to improve state academic assessments. The priorities include developing innovative assessment item types and design approaches, improving assessment scoring and score reporting, and conducting an inventory of state and local assessment systems to eliminate unnecessary, redundant, or low-quality tests. Grants will be awarded to states later this year and total \$9 million.

The Department previously released guidance on how federal dollars could be used by states and districts to eliminate tests which do not meet the Plan priorities and how to revise assessments to improve quality. The Department plans to release regulations to clarify the authority in the Every Student Succeeds Act, a recently enacted law for states to pilot innovative assessments.

For more information, visit: [U.S. Department of Education](#)

From the Lighter Side: Judge Rules No Anonymity for Plaintiffs in Ashley Madison Hacker Case

Judge John A. Ross of the United States District Court in the Eastern District of Missouri ruled the Plaintiffs in the infamous hacker case against online dating service Ashley Madison will have to be publically identified to proceed with the case. The ruling is unfortunate to say the least for the Plaintiffs suing the website that markets itself to people seeking sexual affairs outside of their committed relationships. The 42 Plaintiffs sought to pursue the litigation anonymously for obvious reasons. Judge Ross, in his ruling, stated, “. . . the personal and financial information Plaintiffs seek to protect has already been released on the Internet and made available to the public.”

Source: [New York Times](#)

Firm News

Terry J. Harmon presented “ESE Liability Issues, Current Trends, and Best Practices” at the Florida School Boards Insurance Trusts’ Spring Meeting in Celebration, Florida, on April 20, 2016.

Robert J. Sniffen served as Program Co-Chair for a seminar sponsored by the Florida Bar’s Labor and Employment Law Section entitled: “Practicing Before State Labor and Employment Agencies.” Mr. Sniffen also served as the Panel Moderator for a presentation on the investigative process for discrimination and retaliation claims filed with the Florida Commission on Human Relations.

Robert J. Sniffen served as a panel speaker for the presentation entitled “Where Are They Now? – College of Liberal Arts and Sciences Alumni Career Paths,” at the University of Florida Career Resource Center.

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