

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT

January 2016

Illinois School District Settles Transgender Title IX Investigation (Locker rooms)

On December 3, 2015, the U.S. Department of Education (“US DOE”) announced that it settled a pending investigation with Township High School District 211 involving allegations that the District violated Title IX by denying a transgender female student access to the girls’ locker room. Although the transgender student was denied access to the locker room, she was identified by the District by her female pronoun, permitted to use girls’ restrooms, and participated in girls’ athletics. US DOE took the position that the District violated Title IX by refusing to allow the student to use the locker room of her identified gender.

Ultimately, the District resolved the investigation with OCR, in part because the student agreed to change in private changing stations in the girls’ locker rooms. Other elements of the agreement included the following (quoted):

- Provide the student with access to the girls' locker rooms at her high school based on the student's request to change in private changing stations in the girls' locker rooms.
- Protect the privacy of its students by installing sufficient privacy curtains within the girls' locker rooms at the high school to accommodate the transgender student and any students who wish to be assured of privacy.
- Provide a reasonable alternative for any student requesting additional privacy—beyond the privacy afforded by the privacy curtains—in the girls' locker rooms. Examples could include use of another private area or assignment of a locker in near proximity to the office of a teacher or coach.
- Coordinate with hosts of off-campus, district-sponsored activities to arrange for the transgender student to be provided access to facilities for female students.
- Engage a consultant (who may be a district employee) with expertise in child and adolescent gender identity, including transgender and gender nonconforming youth, to support and assist the district in implementing the resolution agreement.
- Establish a support team, if requested by the transgender student and her parents, to ensure that she has access and the opportunity to participate in all district programs and activities, and is otherwise protected from gender-based discrimination at school.
- Adopt and publish a revised notice of nondiscrimination on the basis of sex. And,
- Provide OCR with a copy or detailed description of all gender-based discrimination or harassment complaints or incidents.

The investigation makes it clear that US DOE is of the position that students should be permitted to use the bathroom of their identified gender. It will be interesting to see how this issue is resolved through the courts, particularly in G.G. v. Gloucester County School Board. Grimm is a transgender student at Gloucester High School who is now recognized as a male. On July 27,

2015, U.S. District Judge Robert G. Doumar dismissed the Title IX portion of G.G.'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.

More information regarding the Illinois School District investigation is available at the following link: [US DOE](#).

Federal Court Finds No Deliberate Indifference in Handling Employee's Alleged Sexual Harassment of Student

In Doe v. Georgetown County Sch. Dist., the United States District Court for the District of South Carolina examined whether the Georgetown County School District violated Title IX by acting with deliberate indifference regarding a student's complaint of sexual harassment. In DOE, there were two primary incidents that formed the basis of the student's claim against the District. They were as follows:

- First Incident: "...the squad was sitting in a circle going over cheers and McCray asked the squad where they should put their arms during the cheer. Doe responded 'below your collar bone,' and McCray responded that the placement would not be the same for the other girls because not everyone has 'saggy boobs' like Doe. "
- First Incident (cont'd): "Doe then turned her chair so that her back was facing McCray, but McCray turned Doe's chair back around and continued to 'pick on' Doe. Doe stated: 'Ms. McCray, you're bullying me.' McCray responded: 'Honey, you don't know what a bully is.' Doe alleges that McCray continued to make jokes, causing the other girls to laugh at her. "
- Second Incident: The next day, Friday, November 1, McCray addressed the squad while they were gathering prior to the football game. Doe alleges that McCray stated that "it has been brought to my attention that I have offended someone in here—or I made an offense to someone in there; if I have ever offended anyone, could you raise your hand."

Ultimately, the Court ruled in favor of the District, holding that McCray's (cheerleading coach) comments were inappropriate but not sexual harassment. Moreover, the Court found that the District placed her on administrative leave, investigated the incident, reprimanded her, and suspended her for two weeks. The Court also concluded that the District did not act with deliberate indifference to the student's complaint.

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

Department of Justice and Kent State Settle a Case Concerning Emotional Support Dogs and Student Housing

In 2010, a Kent State University student with a psychological disability sought permission to keep an emotional support dog in her university-operated apartment. After Kent State University denied the student's request, she filed a complaint with the Department of Housing and Urban

Development (“HUD”) alleging violations of the Fair Housing Act. HUD investigated the complaint, found violations, and forwarded the matter to the Department of Justice (“DOJ”), which in turn filed a lawsuit against the university in federal court. This January, the DOJ and Kent State reached a settlement agreement, and the university agreed to pay \$145,000 to settle the lawsuit, as well as adopt a policy allowing persons with psychological disabilities to keep emotional support animals.

More information available at: [Press Release](#).

Florida DOE Releases Technical Assistance Paper Regarding ESE (Least Restrictive Environment)

The Florida Department of Education (“FL DOE”) occasionally releases technical assistance papers (TAPs) to school districts providing guidance on various school-related issues. The most recent TAP was released on January 15, 2016, and addresses exceptional student education. In particular, the TAP addresses “Least Restrictive Environment Considerations Related to Individual Education Plans.” The following is a summary of the TAP (quoted, see link below for source):

This technical assistance paper (TAP) updates previous technical assistance provided to school districts regarding the provision of services for students with disabilities in the least restrictive environment (LRE). Individual educational plan (IEP) teams must adhere to all legal requirements related to placement in the LRE. This TAP will in addition address other considerations that must be addressed when determining the most appropriate placement for a student with a disability. It will also address issues related to service delivery and scheduling methods for students with disabilities.

The TAP is available at the following link: [DPS 2016-13](#).

Florida DOE Publishes Revised Rule Regarding Gifted Students/Extended School Year

On January 7, 2016, FL DOE released revised Rule 6A-6.03028 which addresses, among other topics, gifted student education and extended school year (ESY). Whether a student needs ESY is frequently a hot topic of discussion during IEP Team meetings. Fortunately, the new rule provides more information regarding what the IEP team must consider when determining if a student needs ESY. The revised rule provides as follows (quoted from rule):

12. At least annually, whether extended school year (ESY) services are necessary for the provision of a FAPE to the student consistent with the following:

a. ESY services must be provided if a student’s IEP Team determines, on an individual basis, that the services are necessary for the provision of FAPE to the student.

b. When determining whether ESY services are necessary, the IEP Team must consider all of the following factors:

(I) Whether there is a likelihood that significant regression will occur in critical life skills related to the following areas:

- (A) Academics or for prekindergarten children with disabilities, developmentally appropriate pre-academic skills;
- (B) Communication;
- (C) Independent functioning and self-sufficiency; and,
- (D) Social or emotional development or behavior.

(II) Whether the student is at a crucial stage in the development of a critical life skill or an emerging skill and a lapse in services would substantially jeopardize the student's chances of learning that skill;

(III) Whether the nature or severity of the student's disability is such that the student would be unlikely to benefit from their education without the provision of ESY services; and,

(IV) Extenuating circumstances pertinent to the student's current situation that indicate the likelihood that FAPE would not be provided without ESY services. Examples include the following: a student who had recently obtained paid supported employment and requires the services of a job coach in order to be successful; a student who requires ESY services in order to remain in his or her existing least restrictive environment (LRE) and prevent movement to a more restrictive setting; and a student whose frequent health-related absences have significantly impeded progress on goals related to critical life skills.

The revised rule is available at the following link: [Rule 6A-6.03028](#).

Florida Senate Passes Legislation to Expand Education Options for Students with Unique Abilities

On January, 13, 2016, the Florida Senate passed new legislation codifying the expansion of the Personal Learning Scholarship Account Program ("PLSA"), renamed the "Gardiner Scholarship" in honor of Senate President Andy Gardiner and his family, and the statewide coordination of Florida Postsecondary Comprehensive Transition Programs for students with intellectual disabilities funded by the Florida Legislature in the 2015-16 General Appropriates Act. The bill, Senate Bill (SB) 672, was proposed by Senator Don Gaetz.

"The bill is a pillar of our cradle to career pathway to economic independence for people with unique abilities," said President Gardiner. The PLSA Program was created by the Florida legislature in 2014, and provided K-12 Florida resident students with disabilities to option to

apply for scholarship funds to be used for specialized services, tuition, instructional materials, assessment fees, and more. In 2015, the GAA expanded the program, for one year only, to include students with muscular dystrophy and students on the autism spectrum, as well as qualifying three and four year old students. With the passing of SB 672, this expansion to the program has been permanently codified in state law.

SB 672 further establishes a process for Florida postsecondary institutions to voluntarily seek approval to offer a transition program for students with intellectual disabilities.

Finally, SB 672 provides incentive payments of \$10 per student to school districts and charter school that implement standard student attire policies for students in grades K-8. The attire policies are to establish clothing prohibitions and requirements and allow for accommodations based on religion, disability, and medical conditions. The legislation further provides immunity from civil liability to school boards who choose to implement such an attire policy.

More information available at: [Press Release](#).

Firm News

On January 13, 2016, **Terry J. Harmon** presented “Title IX Update” at the Florida School Boards Insurance Trusts’ Winter Meeting in Celebration, Florida. The presentation addressed current case law and Office for Civil Rights investigations in the area of Title IX as applied to K-12 school districts, including transgender student-related issues.

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