SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
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Federal Government Takes Position that it is Discrimination Under Title IX to Prohibit Students from Accessing Restrooms Matching their Gender Identity (Court Disagrees)

In late June, the federal government filed a "Statement of Interest of the United States" in a federal case in Virginia involving a 16-year-old transgender boy who had been required by the school district to use gender neutral bathrooms (G.G. v. Gloucester County School Board, Case No. 4:15cv54). In G.G., the federal government took the position that it is discrimination under Title IX to prohibit students from accessing restrooms that match their gender identity.

As many education professionals are aware, transgender student issues are a rapidly growing concern. The following excerpts from the Statement of Interest are a sample of the position taken by the federal government:

> Granting transgender students access to restrooms consistent with their gender identity will serve the public interest by ensuring that the District treats all students within its bounds with respect and dignity.
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> …
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> Allowing transgender students to use the restrooms consistent with their gender identity will help prevent the stigma that results in bullying and harassment and will ensure that the District fosters a safe and supportive learning environment for all students, a result that is unquestionably in the public interest

One of the common arguments against allowing transgender students to use bathrooms with those of the opposite anatomical sex is the harm that may result to other students. The Statement of Interest addresses this argument as follows:

> Although certain parents and community members may object to students sharing a common use restroom with transgender students, any recognition of this discomfort as a basis for discriminating would undermine the public interest. It is axiomatic that a school district cannot justify sex discrimination by asserting that it acted upon a "desire to accommodate other people's prejudices or discomfort."

Source: National School Board Association

UPDATE: 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.

Source: 13NewsNow.

New Clery Act Regulations Effective July 1, 2015

Educational institutions should be aware that the new regulations under the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (20 USC §1092)("Clery Act"), as amended by the 2013 Violence Against Women Reauthorization Act ("VAWA"), were effective as of July 1, 2015. The new regulations contain, among other things, updated requirements pertaining to the annual security report that must be filed by institutions each October.

The new regulations are available at the following link: Final Regulations.

Congress Attempts to Leave Behind "No Child Left Behind" Law

In rare Washingtonian cooperation among the House of Representatives, Senate, Democrats and Republicans, legislation is being created that will drastically change the No Child Left Behind ("NCLB") Act and offer states more flexibility. The legislation attempts to keep testing and reporting requirements, but would provide more flexibility for states and school districts to develop innovative ways of conducting that testing. The changes in the law would not affect data reporting requirements for subgroups of students, which provides notice of achievement gaps. The bill would also continue to require identification of low-performing schools, but would allow states to determine which schools should be targeted and how to intervene and fix those schools. There are differences between the House and Senate versions that may derail a final bill such as school choice, individual opt-out for testing, and special provisions for disadvantaged districts. Experts state, if the legislation passes, the focus for schooling would shift away from testing and measuring toward an emphasis on flexibility for teaching and learning.

Source: Education Week

US DOE Settles Another School District Title IX Investigation (Athletic Opportunities)

Chicago Public Schools recently reached a settlement agreement with the U.S. Department of Education's ("US DOE") Office for Civil Rights ("OCR") in relation to an investigation initiated by OCR under Title IX. According to OCR, the "investigation revealed significant disparities between the enrollment of female students and their participation in high school interscholastic athletics at the majority of district high schools. OCR determined that 6,200 additional athletic participation opportunities would be available if girls' enrollment and participation were proportionate."

Chicago Public Schools agreed to add participation opportunities for females at 12 high schools, add new sports, and add levels of competition (varsity, junior varsity, etc.) or squads to meet its Title IX responsibilities. Athletic Directors at each school are also required to receive annual Title IX training and certify that data regarding school athletic programs is accurate.

A press release issued by OCR is available at the following link (also contains links to the settlement agreement): Press Release.

Tennessee School District Allowed to Outsource Alternative School Program to Private Christian School

The Sixth Circuit Court of Appeals recently ruled in Smith v. Jefferson Cnty. Bd. Of Comm'rs (Case No. 13-5957), that the Jefferson County Board of School Commissioners ("JCBSC") acted within the confines of the First Amendment's Establishment Clause when it outsourced its alternative school services to Kingswood School ("Kingswood") before the 2003 – 2004 school year. The decision raised eyebrows, because Kingswood is a private Christian school and many thought the change was unconstitutional. Two teachers who lost their jobs when the JCBSC voted to eliminate the alternative school and outsource it to Kingswood filed suit in federal district court against JCBSC and the commissioners. The teachers claimed the actions violated their rights under the First Amendment's Establishment Clause, the Fourteenth Amendment's Due Process Clause, and the state establishment clause. However, the Sixth Circuit disagreed with the teachers.

The board decided to close the alternative school and outsource the programs because of budget cuts facing the upcoming 2003 - 2004 school year. The decision caused the two teachers to lose their jobs. Kingswood offered treatment programs to students with emotional and behavioral problems, all while maintaining its religious foundation. Therefore, JCBSC determined outsourcing to Kingswood would be a great fit. Procedurally, the district court denied the teachers' motion for summary judgment and granted the defendants' motion for the same. The teachers appealed and the Sixth Circuit rejected the due process claims and remanded the case to the district court for further consideration of the Establishment Clause claims. The district court denied the board's motion for summary judgment and a bench trial was held in May 2013. At the conclusion of the bench trial, the district court ruled that JCBSC had violated the Establishment Clause and it enjoined the board from contracting with Kingswood or "another religious entity for the operation of its alternative school." In so ruling, the district court also awarded damages for lost wages missed during the 2003 – 2004 school year.

The board appealed and the Sixth Circuit overturned the district court's finding. In deciding the issue of whether the board's outsourcing to a private religious school is a violation of the First Amendment's Establishment Clause, the court applied the Lemon test established in Lemon v. Kurtzman, 403 U.S. 602 (1971). In order for its actions to be constitutional, JCBSC had to meet three requirements under the Lemon test: (1) there is a secular purpose for the district's action; (2) the relationship between the school district and the Christian school did not amount to government endorsement of religion; and (3) the relationship did not foster excessive entanglement between church and state. The court ruled prong one was met because JCBSC had a secular purpose in that it contracted out the alternative school services to meet budget

restraints. The second prong was met when the court ruled a reasonable observer would not interpret JCBSC's relationship with Kingswood as a governmental endorsement of religion. Students in the program were not exposed to any religious instruction, prayer, or other similar activities. Lastly, the court held there was no excessive entanglement between church and state under the third prong because JCBSC was paying Kingswood under a contract and was not rendering government aid.

Source: National School Board Association

Student Expelled for Calling Ex-Girlfriend "Pyscho" on Twitter

Navid Yeasin, a former student at the University of Kansas, was dismissed from the school after calling his ex-girlfriend a "psycho b[****]" on a recent Twitter post. Attorneys for the school claim he created a hostile environment on campus for the ex-girlfriend in direct violation of Title IX. Yeasin's Twitter account was set to private, he never used his ex-girlfriend's name, and he posted the Tweet while off campus during the summer when fewer students are on campus.

University attorney Sara Trower argued his actions warranted expulsion because he was "seeking to alienate her." Groups from both the American Civil Liberties Union ("ACLU") and the Foundation for Individual Rights in Education ("FIRE") have filed supporting briefs on behalf of Yeasin. In its brief, FIRE submitted, "the widespread abuse of harassment policies under the banner of Title IX enforcement signals to students and faculty that colleges and universities are no longer safe for free speech." The case is currently under appellate review before the Kansas Court of Appeal.

Source: National Review

Miami-Dade Schools Face $233,000 Legal Tab in Charter Case

An administrative law judge ruled that the Miami-Dade County School Board should pay $233,000 in attorneys' fees in a case filed by employees who said they faced retaliation for trying to open a charter school. The legal-fees recommendation, which now goes to the state Department of Education, stems from an underlying case in which three school employees alleged they suffered retaliation after seeking to convert Neva King Cooper Educational Center to a charter school. The judge's recommended order said the Miami-Dade County school system "quickly squelched the conversion efforts and, beginning in late April of 2012, reassigned all three petitioners to undesirable work locations." Last year the judge ruled that the Miami-Dade school system had violated part of state law, a finding that was upheld by the Department of Education. That led to further legal arguments about the amount of attorneys' fees. In addition to $233,000 in fees, the judge recommended the district pay about $17,900 in costs.

Source: CBS Miami

From the Lighter Side: Student Sues After Being Disciplined for Sharing Hot Pepper

In a spicy situation, Nick Lien was disciplined after he shared a ghost pepper with his fellow classmates during lunch at Centereach High School. The school informed Lien he could either serve one day of in-school suspension or two days of after-school detention after his classmates suffered adverse effects from eating bites of the pepper. Two of his classmates suffered red faces, stomach pains, and burning tongues. School officials compared the spicy pepper to psychedelic drugs, such as LSD, in their attempt to justify the discipline. Lien's parents disagree and have filed suit against the Middle Country School District, claiming their son's rights have been violated.

Source: National School Board Association

Firm News

On July 10, 2015, **Terry J. Harmon** presented "Legal Issues Related to Bullying, Cyberbullying, and Social Media" at the Florida Association of School Administrators Professional Development Day in Niceville, Florida, for school administrators in Walton County, Florida, and Okaloosa County, Florida.

Michael P. Spellman spoke at the annual conference of the Florida Society of Association Executives (www.fsae.org) in St. Petersburg, Florida about Human Resources and Personnel issues affecting the workplace. The FSAE is the state-wide resource for information, best practices and innovations in the association community, and currently boasts over 1,000 members.

Michael P. Spellman also spoke at the annual conference of the Florida Association of Self Insureds (www.fasi-fl.org) in Naples, Florida. Mr. Spellman updated the membership and attendees on developments in employment law, especially in the wake of the recent United States Supreme Court decisions and proposed rules by the Department of Labor.

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