

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT January 2021

President Biden Issues Executive Order Regarding Gender Identity and Sexual Orientation

On January 20, 2021, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation. As it relates to schools, the Executive Order specifies that “[c]hildren should be able to learn without worrying about whether they will be denied access to the restroom, the locker room, or school sports.” President Biden further directed the heads of each federal agency to review all existing orders, regulations, guidance documents, policies, programs, and other agency actions to ensure they fully implement federal statutes that prohibit sex discrimination. It is certainly possible the United States Department of Education will proceed with promulgating new rules or issuing guidance as it pertains to gender identity issues in public schools.

Interestingly, President Biden’s Executive Order was issued less than two weeks after the United States Department of Education’s Office of the General Counsel issued a [memorandum](#) opining that the term “sex” under Title IX “should be construed to mean biological sex, male or female.”

Source: [Executive Order](#).

Florida School District Requests Prioritization of School Personnel for Vaccinations

The School Board Sarasota County, Florida, is urging Governor DeSantis to include school personnel on the priority list for the COVID-19 vaccination. School Board Member Bridget Ziegler sent a letter to the Governor with unanimous consent of the School Board, asking that school district personnel be prioritized for vaccine distribution as more doses become available. Ziegler cited the desire to “ensure we can continue to provide quality instruction and services to all of our students and families with minimal disruption from the pandemic.”

As of now, only seniors, medical workers, and nursing home workers are given priority.

Source: [Sarasota Herald-Tribune](#).

Parent ADA Claim Not Subject to IDEA Exhaustion

The Ninth Circuit Court of Appeals vacated a district court’s dismissal of an action brought by a student under Title II of the Americans with Disabilities Act (ADA) and remanded for further proceedings. The guardian of an elementary school student with attention deficit hyperactivity disorder (ADHD) and severe disability-related behavioral issues filed suit against the Los Angeles Unified School District claiming it denied the student equal access to a public education because of his disability, in violation of the ADA.

The district court dismissed his complaint on the ground that he failed to exhaust his claim through the administrative procedures prescribed by the Individuals with Disabilities Education Act (“IDEA”), as required when a plaintiff seeks relief under other federal statutes for the denial of a free appropriate public education (“FAPE”). The panel held that the student’s ADA claim was for discrimination separate from his right to a FAPE under the IDEA. Hence, his ADA claim was not subject to IDEA exhaustion. The panel closely examined the complaint and determined that its allegations concerned the denial of access to public facilities rather than the denial of a FAPE.

The opinion is available at the following link: [D.D. v. Los Angeles Unified School District \(Case No. 19-55810\)](#).

Executive Order on Supporting the Reopening and Continuing Operation of Schools and Early Childhood Education Providers

On January 21, 2021, President Biden issued an Executive Order requiring the Secretary Education and Secretary of Health and Human Services to begin providing guidance and collecting data to assist school districts, institutions of higher education, child care providers, and Head Start programs in the safe reopening of their buildings and in-person classes.

Among other things, the Order requires the Secretary of Education to provide evidence-based guidance on how to reopen and stay open for in-person learning. The Secretary of Education shall also consult and guide appropriate institutions on distance and online learning, with the promotion of mental health and social-emotional well-being.

The Secretary of Health and Human Services shall be in charge of facilitating the collection of data needed to continue the reopening of schools, supporting the development and operation of contract tracing programs, and providing technical assistance to appropriate institutions to support the accelerated distribution of federal COVID-19 relief funds to child care providers, and to assist such providers on how to remain open.

Source: [Executive Order](#).

United States Department of Education Announces Agency Appointments

On January 21, 2021, the United States Department of Education issued a Press Release announcing President Biden’s appointments to the agency. These appointments to the agency are in addition to Miguel Cardona who was previously selected as the Secretary of Education. Our Firm addressed Dr. Cardona’s background and credentials in the December 2020 edition of the Education Law Alert.

For a full list of the recent appointments, please visit the following link: [Department of Education Appointments](#).

Teacher's Speech Used to Address Students Not Protected Under First Amendment

In Kluge v. Brownsburg Community School Corp., Case No. 1:19-cv-24672-JMS-DLP (S.D. Ind.), a music and orchestra teacher brought an action alleging violations of Title VII, the First Amendment, the Fourteenth Amendment, and the Indiana State Constitution. Among other things, the teacher contended that he was subjected to discrimination and retaliation based on his sincerely-held religious beliefs. The teacher also claimed that he was forced to resign because his beliefs prevented him from following a school policy that required transgender students to be addressed by their preferred names and pronouns.

Ultimately, the district court found mostly in favor of the school district concluding, *in part*, as follows:

- (1) the way in which the teacher addressed his students was pursuant to the teacher's official duties as a public employee, and thus was not protected under the First Amendment;
- (2) the teacher's choice as to how to address students did not involve a matter of public concern, and thus was not protected by the First Amendment;
- (3) the school district's policy was neutral and generally applicable, and thus any burden on the public school teacher's religious beliefs in requiring him to address transgender students by their preferred name and pronoun did not violate the Free Exercise Clause;
- (4) the policy requiring teachers to address students by their preferred first name, as listed in school directory, was not void for vagueness under the Due Process Clause;
- (5) the allegation that the teacher was forced to retire for noncompliance with school policy **adequately alleged** a claim for failure to accommodate under Title VII; and
- (6) allegations that the school district agreed to an accommodation for addressing students, subsequently withdrew the accommodation, and forced the teacher's resignation under threat of termination **stated a claim** for retaliation under Title VII.

The opinion is available at the following link: [Kluge](#).

U.S. Department of Education's Investigation into Indiana Department of Education's Handling of COVID-19

Federal law requires schools to provide students with disabilities a free appropriate public education. Since the onset of the COVID-19 pandemic, some states have had a harder time adjusting than others.

The Indiana Department of Education (IDOE) is currently under investigation by the United States Department of Education's Office for Civil Rights (OCR) for allegedly denying students with disabilities equal access to education during the COVID-19 pandemic. OCR stated its concern with Indiana's lack of accessibility and individuality in its learning programs, and parents have expressed dissatisfaction with how schools have been adapting via complaints filed with IDOE. Parents have also complained about IDOE's education of their children during the COVID-19 pandemic.

The purpose of OCR's investigation is to determine whether IDOE failed to fulfill its duty to provide students with disabilities a free appropriate public education and subjected these students to discrimination and exclusion.

Source: [Indianapolis Star](#).

From the Lighter Side: Tiger Woods and His Caddie Sued for Shove

In ridiculous lawsuit news, a spectator has sued Tiger Woods and his caddie after the caddie allegedly "unnecessarily" and "harmfully" shoved him to make room for Tiger to play his next shot. The spectator was trying to take a selfie with Tiger. The fan alleges that the shove caused him injury, including "pain and suffering." Here's hoping that Tiger and his caddie draw Judge Elihu Smails and that he rules that the spectator will "get nothing and like it."

Source: [U.S. Chamber Institute for Legal Reform](#).

Firm News

On January 29, 2021, **Terry J. Harmon** served as a panelist for The Florida Bar's Education Law Certification Exam Review. Mr. Harmon presented "Florida's Administrative Procedures Act."

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