

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT April 2021

In Surprise Move, Florida Surgeon General Rolls Back Guidance on Masks, Social Gatherings – Orders Government Offices Open for “In-Person Operations”

In a surprise move, on April 29, 2021, Florida’s Surgeon General, Dr. Scott Rivkees, rescinded all prior COVID-19 Public Health Advisories regarding protective measures, including face masks, gatherings of private citizens, and workforce densities. The new [Public Health Advisory](#) states that COVID-19 vaccines should be provided to every eligible (as prescribed by the Federal Food and Drug Administration) Florida resident. The Advisory goes on to state that because COVID-19 vaccines are readily available throughout Florida, all Government offices should be conducting in-person operations and services. The Advisory notes that due to the “risk of adverse and unintended consequences” from the “long-term use of face coverings and withdrawal from social and recreational gatherings,” face coverings should no longer be required or social recreational gatherings avoided “except in limited circumstances.” The Public Health Advisory is at odds with current [CDC guidance](#) for fully vaccinated individuals issued on April 27, 2021.

The Advisory was issued just two weeks after Florida Commissioner of Education Richard Corcoran issued a [memorandum](#) to all School District Superintendents requesting that all school districts revise their policies to make face coverings voluntary for the 2021-2022 school year.

U.S. Supreme Court Hears Oral Argument in B.L. v. Mahanoy Area School District on Student Freedom of Speech

On April 28, 2021, the U.S. Supreme Court heard oral arguments in *Mahanoy Area School District v. B.L.*, an important case about whether school officials may discipline students for off-campus speech. The case is the first the Supreme Court has taken that tackles students’ free-speech rights in the era of social media.

B.L., a student at Mahanoy Area High School, failed tryouts for the school’s varsity cheerleading team and then cursed about school on social media over the weekend off campus. Several students who saw the social media post thought it was inappropriate and brought it to the attention of the team coach, and the coach decided to suspend B.L. from junior varsity for a year. B.L. then sued the school district alleging that her suspension from the junior varsity team for exercising her free speech violated the First Amendment. The District Court granted summary judgment in B.L.’s favor, ruling the school district violated her First Amendment rights. The Third Circuit Court of Appeals affirmed the District’s Court’s decision.

During oral argument on April 28, 2021, the Supreme Court seemed to wrestle with whether a single test could be formulated on such a complex topic. The Supreme Court decision in the case will have major implications for public school students across the country.

Florida Legislation Addresses School Closures and COVID-19 Passports

[Senate Bill 2006](#) appears on its way to approval. The 49-page bill amends a number of statutes addressing pandemic and COVID-related issues. Specific to schools, the bill creates “a presumption that schools should remain open during extended public health emergencies so long as the health and safety of students and school personnel can be maintained by specific public health mitigation strategies recommended by federal or state health agencies for educational settings.”

The bill also creates F.S. 381.00316 (COVID-19 vaccine documentation) that provides, *in pertinent part*, as follows:

- An educational institution as defined in s. 768.38 may not require students or residents to provide any documentation certifying COVID-19 vaccination or post-infection recovery for attendance or enrollment, or to gain access to, entry upon, or service from such educational institution in this state. This subsection does not otherwise restrict educational institutions from instituting screening protocols in accordance with state or federal law to protect public health.

The bill is expected to be signed by the Governor.

Second Circuit Concludes that IDEA Prohibits Unilateral Amendments During 30-day Resolution Period

On March 3, 2021, the Second Circuit Court of Appeals affirmed the judgment of the District Court that the Individuals with Disabilities Education Act (“IDEA”) does not permit a school district to amend a student’s individualized education program (“IEP”) unilaterally during the 30-day resolution period that follows a parent’s filing of a due process complaint. See, Board of Education of Yorktown Central School District v. C.S., Case No. 19-270 (2d Cir. 2021).

The District Court found that the school district did not effectively amend the student’s IEP and denied the student a free appropriate public education (“FAPE”), because it promised but did not provide a 12-student class. The school district sought to cure the deficiency in the student’s IEP by unilaterally amending the original IEP during the resolution period from a 12-student class to a 15-student class, because that was what was actually provided to the student. In finding against the school district, the Second Circuit reasoned that the IDEA envisions the 30-day resolution period as a time for mediation and agreement - not one-sided action.

A copy of the opinion is available [here](#).

US DOE Provides Update on Possible Title IX Changes

On April 20, 2021, the U.S. Department of Education published information on its website indicating that it will “conduct a comprehensive review of ED’s Title IX regulations.” As part of the review, US DOE’s Office for Civil Rights (“OCR”) advised that it will:

- Host an upcoming public hearing (dates TBD) and invite those interested in sharing their views on the issue of sexual harassment at schools.
- Issue a Q&A document to clarify how OCR interprets schools’ existing obligations under the 2020 amendments to the Title IX regulations.
- Post a notice of proposed rulemaking, which gives the public an opportunity to submit feedback.

US DOE’s proposed actions are in response to President Biden’s March 8, 2021, [Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#).

More information is available at the following link: [US DOE Title IX](#).

Florida Legislation Awaiting Governor’s Signature Impacts FCS and SUS Institutions in Florida

House Bill 233 passed both the Florida House and Senate and is headed to the Governor’s desk. The “Intellectual Freedom and Viewpoint Diversity Act” requires Florida College System Institutions and State University System members to conduct an annual assessment that shall consider the extent to which competing ideas and perspectives are presented and whether or not students, faculty, and staff feel free to express their beliefs and viewpoints on campus and in the classroom. The Act requires that the State Board of Education and the Florida Board of Governors compile and publish the assessments by September of each year beginning on September 1, 2022.

The Act also allows students to record and film class lectures for their own personal educational use as well as to provide evidence in, or in preparation of, a complaint to the college or university, as well as a civil or criminal proceeding. The Act does not allow a recorded lecture to be published without the consent of the lecturer. The Act also gives a cause of action to those who have had their viewpoints discriminated against, allowing them damages plus court costs and reasonable attorney fees. These damages may only be paid from non-state funds.

In addition to the assessment and classroom recording provisions, the Act also requires state college and university student governments to adopt internal procedures providing an elected or appointed officer the right to appeal a suspension, removal, or other discipline directly to the vice president of student affairs. This right will not be conditioned on the decision of any student panel.

The Act further addresses colleges' and universities' student codes of conduct. The Act requires that every code of conduct adhere to due process protections to students and student organizations, such as: written notice (at least 7 days prior to a disciplinary hearing) of the allegations against them, a list of all witnesses that will provide testimony at least 5 days before such hearing, all known information relating to the allegation, the right to a presumption of innocence that needs to be overcome by a preponderance of the evidence, the right to an internal hearing officer, notice that they have the right to remain silent, the right to present witnesses in their favor, the right to an advisor or advocate provided by the school, the right to have an advocate or legal representative hired at the defendant's own expense, the right to appeal the final decision directly to the VP of student affairs, the right to a complete record of the hearing, and a provision setting a time limit for bringing a charge for a violation.

A copy of the legislation is available at the following link: [HB 233](#).

From the Lighter Side: Newly-Freed Man Lands Himself Back in Jail After Stealing a Police Vehicle

Just moments after his release from the Pulaski County jail in Arkansas, a man allegedly stole a marked police vehicle and drove away from the jail. The man, age 33, was released originally following a charge for public intoxication. The stolen vehicle was a 2018 Ford Explorer that had been left unlocked near a jail sally port. The officer who operated the patrol vehicle said he had been assisting with the booking of a prisoner when he returned to discover his vehicle had been stolen.

The alleged thief ended up 10 miles down the road at an apartment complex where he was found inside the vehicle, arrested, and taken back to the jail. When asked about his reasoning for committing the crime, his mumbled response was unintelligible. He was ultimately charged with a felony and booked on \$25,000 bond.

You can read more about it [here](#).

Firm News

[Mitchell Herring](#) and [Jeff Slanker](#) were recently published in the April 2021 edition of The Checkoff, a publication of the Florida Bar Labor and Employment Law Section for their Article New Tipping Regulations Delayed, which explored the delay of the new rules eliminating the 80/20 rule for classification of tipped employees and the regulations regarding tip pooling. This article is available online [here](#).

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