

# SNIFFEN & SPELLMAN, P.A.

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## EDUCATION LAW ALERT June 2021

### **Supreme Court Rules in Favor of High School Student Disciplined for Snapchat Message**

In an 8-1 decision, on June 23, 2021, the U.S. Supreme Court ruled in favor of a high school student disciplined for a Snapchat social media message in *Mahanoy Area School District v. B.L.*, 20-255, 2021 WL 2557069 (U.S. June 23, 2021). In the case, a public high school student brought action against her school district, alleging that her suspension from the junior varsity cheerleading squad based on her use of profanity in a social media post, made off-campus and on a Saturday, violated the First Amendment. The Court of Appeals for the Third Circuit affirmed the United States District Court for the Middle District of Pennsylvania granting the student's motion for summary judgment. The Supreme Court affirmed.

Justice Stephen Breyer writing the opinion for the Supreme Court, held that the special characteristics that give schools additional license to regulate student speech do not always disappear when a school regulates speech that takes place off-campus. However, in the present case, the school violated the student's First Amendment rights when it suspended her from the junior varsity cheerleading squad. The Supreme Court's opinion acknowledged that schools might have a substantial interest in regulating a variety of different kinds of off-campus conduct – for example, severe bullying, threats aimed at teachers or students, participation in online school activities, or hacking into school computers. Nevertheless, the opinion observed that there are three features of off-campus speech that will make it less likely that schools will have an interest in regulating it: First, a student's off-campus speech will generally be the responsibility of the parents of the student. Second, regulation of off-campus speech could be overboard, covering virtually everything that a student says or does outside of school. And third, schools have an interest in protecting unpopular speech and ideas by students, especially when the expression is off-campus. Breyer explained the Court left “for future cases to decide where, when, and how these features mean the speaker's off-campus location will make the critical difference.”

In ruling in favor of the student, the Court opined that her speech was the type that would normally be protected by the First Amendment if she were an adult. Further, the Court reasoned that she created the social media message off school grounds on a weekend, and there is no evidence it caused a substantial disruption at school that would justify her suspension.

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

### **Important Decisions and Laws Enacted Concerning Student Athletes at Higher Education Institutions**

On June 21, the Supreme Court issued its opinion in *NCAA v. Alston*. In its unanimous opinion, the Court found that the NCAA's prohibition on member institutions providing student athletes with additional benefits (on top of their scholarships) such as computers or paid post-grad internships violated antitrust laws.

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

Additionally, Florida has implemented a Name, Image, and Likeness ("NIL") Rule that takes effect July 1, 2021. The rule allows student athletes who attend Florida colleges and universities to profit off their NIL without terminating their eligibility to compete in intercollegiate athletics. Athletes may now sign their own endorsement deals; however, such contracts cannot be at odds with their school's team contract. Importantly, these contracts and subsequent representation agreements to assist in procuring these deals cannot extend past their participation at their postsecondary institution.

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

### **U.S. Supreme Court Declines to Review Transgender Student Bathroom Case**

On June 28, 2021, the U.S. Supreme Court issued an Order declining to review an appeal filed by the Gloucester County School Board in *Gloucester County School Board v. Grimm* (Case No. 20-1163). *Gloucester* involved the issue of whether the school board's policy separating bathrooms on the basis of biological sex violated Title IX and the Equal Protection Clause in the U.S. Constitution. In light of the U.S. Supreme Court's decision, the Fourth Circuit's ruling in favor of Grimm stands. It also means the highest court in the land has still not provided any insight as to how it will rule on this landmark issue.

On a related issue, the United States Department of Education's Office for Civil Rights ("OCR") recently issued a press release advising that OCR is of the position that Title IX protects students from discrimination based on sexual orientation and gender identity. OCR's press release is available at the following link: [OCR Press Release](#).

### **Governor DeSantis Signs Fairness in Women's Sports Act**

On June 1, 2021, Florida Governor Ron DeSantis signed the Fairness in Women's Sports Act (SB 1028). The legislative intent behind the Act is "to maintain opportunities for female athletes to demonstrate their strength, skills, and athletic abilities and to provide them with opportunities to obtain recognition and accolades, college scholarships, and the numerous other long-term benefits that result from participating and competing in athletic endeavors." The Act provides, among other things, that athletic teams or sports designed for females, women, or girls may not be open to students of the male sex. The Act further states that a "student's biological sex on the student's official birth certificate is considered to have correctly stated the student's biological sex at birth if the statement was filed at or near the time of the student's birth." The Act also includes the following causes of action:

- (a) Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this section shall have a private cause of action

for injunctive relief, damages, and any other relief available under law against the school or public postsecondary institution.

(b) Any student who is subject to retaliation or other adverse action by a school, public postsecondary institution, or athletic association or organization as a result of reporting a violation of this section to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or public postsecondary institutions in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under the law against the school, institution, or athletic association or organization.

(c) Any school or public postsecondary institution that suffers any direct or indirect harm as a result of a violation of this section shall have a private cause of action for injunctive relief, damages, and any other relief available under the law against the governmental entity, licensing or accrediting organization, or athletic association or organization.

(d) All civil actions brought under this section must be initiated within two years after the alleged harm occurred. Persons or organizations who prevail on a claim brought under this section shall be entitled to monetary damages, including for any psychological, emotional, or physical harm suffered reasonable attorney fees and costs, and any other appropriate relief.

More information is available at the following link: [SB 1028](#).

### **The Eleventh Circuit Rules that Circumstances of Teacher's Condition Allowed School District to Discharge a Mentally Ill Teacher**

On May 27, 2021, the Eleventh Circuit Court of Appeals ruled, in *Todd v. Fayette County School District*, No. 19-13821 (11th Cir. 2021), that a school district's firing of an art teacher who allegedly threatened to kill herself and her son was lawful because it was based on her conduct and not her major depressive disorder as she had claimed. After being fired, the teacher sued the school district, claiming discrimination under the Americans with Disabilities Act, 42 U.S.C. §§ 12101 et seq., and the Rehabilitation Act, 29 U.S.C. §§ 701 et seq.; interference with her Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq., rights; and retaliation in violation of all three statutes. In chief, the teacher alleged that, in ending her employment, the school district discriminated against her because she suffers from major depressive disorder and retaliated against her for asserting her statutory rights. The District Court granted the school district's motion for summary judgment, and the Court of Appeals affirmed.

The teacher had been diagnosed with major depressive disorder which, she had confided in her school's principal prior to being terminated. In reaching a conclusion on the discrimination counts, the Eleventh Circuit assumed that the plaintiff could establish a *prima facie* case of discrimination but found the school district could meet its burden of articulating a legitimate, nondiscriminatory reason for ending the plaintiff's employment and that the plaintiff could not establish that such reason was a mere pretext for discrimination. The Court found that,

even if her mental health issues did contribute to her behavior, the school district had an obligation to keep students and staff safe from violence. The Court found that the teacher's violent threats were sufficient cause for the school district to terminate her employment, especially since her position put her in charge of the welfare of children. The opinion reinforces the principle that, while disabled employees may not be treated less favorably than non-disabled employees because of their disabilities, an employer is entitled to eliminate from the workplace an employee who exhibits misconduct, in the same manner, it would if the employee were not disabled.

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

### **Fourth Circuit Grants New Trial in Title IX Case and Clarifies its Actual Notice Standard**

The United States Fourth Circuit Court of Appeals recently approved of a new trial in a Title IX case after the jury found for the School Board due to lack of knowledge of alleged sexual harassment forming the basis of the case. Title IX, of course, prohibits sexual harassment in schools, but plaintiffs can only prevail on claims of such harassment if the defendant's school had actual notice or knowledge of the alleged sexual harassment. The instant case on review by the Fourth Circuit Court of Appeals involved allegations of sexual harassment and hinged on whether the plaintiff presented enough evidence to establish that her school had actual notice of the alleged harassment. The Fourth Circuit held and clarified that under Title IX, "when a school official with authority to address complaints of sexual harassment and to institute corrective measures receives a report that can objectively be construed as alleging sexual harassment, that receipt establishes actual notice of such harassment for Title IX purposes." The appellate court found this standard was met and ordered a new trial in the trial court.

A link to the case can be found [here](#).

### **New FL Department of Education Rule Effectively Prohibits Critical Race Theory in Schools**

The Florida Department of Education has enacted a rule that effectively prohibits the teaching of Critical Race Theory in Florida schools. The rule concerns the teaching of history topics in Florida schools. The rule indicates that instruction "may not suppress or distort significant historical events" and notes examples of such instruction include Critical Race Theory.

A link to the rule can be found [here](#).

### **From the Lighter Side: Florida Gator Found Inside United States Post Office**

A seven-foot alligator made its way into a United States Postal Service in Spring Hill, Florida earlier, this month. In the early morning hours of June 9<sup>th</sup>, a patron stopped by the post office to drop off a package. A seemingly simple errand led to the discovery of an alligator roaming around the lobby of the post office. Officials believe this was a result of the post office's automatic double doors that allow after-hour entry into the building. Thankfully, the alligator could be safely removed by a trapper and presumably returned to its natural habitat, which is not inside a government building.

More can be read about this incident [here](#).

### **Firm News**

This month, [Terry J. Harmon](#) was appointed as a member of the 22-member Board of Directors of the Council of School Attorneys (“COSA”). COSA is a national organization and “supports 3,000 attorneys representing K-12 public school districts and state school boards associations. The work of the Council is widely respected and a resource for school board attorneys and state association counsel across the country.” For more information, please visit the following link: [COSA](#).

Congratulations to our Firm's Super Lawyers! [Robert Sniffen](#), [Michael Spellman](#), and **Terry Harmon** for being selected as 2021 Florida Super Lawyers. Each year, no more than five percent of the lawyers in the state are selected to receive this honor. [Jeffrey Slanker](#) has been selected as a 2021 Rising Star. Each year, no more than 2.5 percent of the lawyers in the state are named Rising Stars. Super Lawyers, a Thomson Reuters business, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement.

[Lisa Fountain](#) has been recognized by Martindale-Hubbell with an AV preeminent rating. AV Preeminent is the highest possible rating given by Martindale Hubbell and is based on peer and judicial review of a lawyer’s competence and ethics.

**Rob Sniffen** co-presented “The Latest in the Rise of Whistleblower Claims: Defenses, Pitfalls, Strategies and COVID Trends” at the 2021 EPLI ExecuSummit Conference in Naples, Florida.

The Firm sponsored the Florida Society of Association Executive, Inc.’s (“FSAE”) 2021 Annual Conference in Orlando, Florida.

### **Past Issues of the Education Law Alert Available on Website**

You may view past issues of the Education Law Alert on the Firm’s website: [www.sniffenlaw.com](http://www.sniffenlaw.com). After entering the Firm’s website, click on the “Publications” page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.