

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT July 2021

US DOE Releases Title IX Q&A

From June 7 through June 11, 2021, the United States Department of Education (“US DOE”) held a series of public hearings regarding the agency’s current Title IX regulations. Following the public hearings, US DOE issued another Q&A. The intent of the Q&A document is to provide schools with guidance regarding compliance with the current Title IX regulations. The new Q&A, as well as a transcript of the public hearings, are available at the following link: [US DOE](#).

“Long COVID” Covered Under Section 504/ADA?

The breadth of COVID-19’s impact on schools continues to grow. This month, the U.S. Department of Health and Human Services and the U.S. Department of Justice issued a joint guidance document opining that “Long COVID” can be considered a disability under Titles II and III of the Americans with Disabilities Act, Section 504 of the Rehabilitation Act of 1973, and other laws. Fairly summarized, “long COVID” is a condition that describes an individual who experiences new or reoccurring symptoms of COVID-19 for months after the date of initial infection. The guidance document identifies symptoms of “long COVID,” circumstances under which “long COVID” may be a disability under federal laws, and the rights of individuals with “long COVID.”

The joint guidance document is available at the following link: [“Long COVID.”](#)

Can Florida Use COVID-Relief for Teacher Bonuses?

Last month, US DOE notified the Florida Department of Education (“FL DOE”) that its plan to provide \$1,000.00 bonuses to teachers utilizing federal COVID-19 monies may not be in compliance with federal requirements regarding how the funds are to be used. Whether the bonuses will be taxed is also an issue currently being reviewed by FL DOE. For more information, please visit the following links: [Florida Politics](#); [Newsweek](#).

Federal Court in Oregon Recognizes Claim for Hostile Learning Environment under Section 504 and the ADA

On July 26, 2021, the United States District Court for the District of Oregon denied the Eugene School District 4J’s motion for summary judgment in a disability discrimination case (hostile learning environment). In [RILEY DUNCAN, Plaintiff, v. EUGENE SCHOOL DISTRICT 4J Defendant.](#), 6:19-CV-00065-MK, 2021 WL 3145966 (D. Or. July 26, 2021), a student appealed an administrative law judge’s dismissal of his due process claims brought under the Individuals

with Disabilities Education Act, Section 504, the ADA, and Oregon law. Plaintiff contended, among other things, that he was subjected to a hostile learning environment because of his disability. The school district moved for summary judgment, arguing that the Ninth Circuit does not recognize hostile learning environment claims. After an analysis of Ninth Circuit case law and other authority, the Court found as follows (emphasis added):

Applying the Department of Education's choice language in enforcing Section 504 and the ADA with the Ninth Circuit's prior findings that statutes with substantially similar language be read to require the same levels of protection and equality, **this Court concludes that the ADA and Section 504 require the same protection provided by analogous statutes such as Titles VII and IX, and the Plaintiff may proceed with a hostile learning environment claim under the ADA and Section 504.**

After concluding Plaintiff may proceed with his hostile learning environment claim, the Court denied the school district's motion for summary judgment and held, "[v]iewing the record in the light most favorable to the non-moving party, a reasonable jury could conclude from the evidence in the record that Plaintiff was subject to sufficiently severe or pervasive harassment."

A free copy of the opinion is currently not available online.

Federal Court in West Virginia Grants Preliminary Injunction Permitting Female Transgender Middle School Student to Participate in Girls' Athletics

On July 216, 2021, the United States District Court for the District, Southern District of West Virginia, granted a female transgender middle school student's motion for a preliminary injunction requesting that she be permitted to participate in girls' school athletics during the pendency of the lawsuit challenging a new West Virginia law requiring students to participate on athletics teams based on their biological sex at birth. B.P.J., et. al. v. West Virginia State Board of Education, et. al., Case No. 2:21-cv-00316. Applying intermediate scrutiny to Plaintiff's constitutional claims, the Court found that Plaintiff demonstrated a clear likelihood of success. In its reasoning, the Court stated, among other things, as follows:

Finally, as applied to B.P.J., this law cannot possibly protect the physical safety of other girl athletes. Cross country and track are not contact sports. The physical ability of one athlete does not put another in danger in the way it might in another sport like football or hockey.

As applied to B.P.J., Section 18-2-25d is not substantially related to protecting girls' opportunities in athletics or their physical safety when participating in athletics. I find that B.P.J. is likely to succeed on the merits of her equal protection claim.

The Court also found that Plaintiff was likely to proceed on her Title IX claims, because she "will be treated worse than girls with whom she is similarly situated because she alone cannot

join the team corresponding to her gender identity.” The Court also found Plaintiff met all other requirements required for the entry of a preliminary injunction.

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

More CDC Guidance Regarding COVID-19

On July 27, 2021, the Centers for Disease Control and Prevention (“CDC”) issued more guidance regarding COVID-19 in light of the spread of the Delta variant. The new guidance provides, among other things, as follows (quoted from US DOE website):

- To maximize protection from the Delta variant and prevent possibly spreading it to others, wear a mask indoors in public if you are in an area [of substantial or high transmission](#).
- Wearing a mask is most important if you have a weakened immune system or if, because of your age or an underlying medical condition, you are at [increased risk for severe disease](#), or if someone in your household has a weakened immune system, is at increased risk for severe disease, or is unvaccinated. If this applies to you or your household, you might choose to wear a mask regardless of the level of transmission in your area.
- You should continue to wear a mask where required by laws, rules, regulations, or local guidance.

The new guidance is available at the following link: [CDC Guidance](#).

EEOC Issues Guidance Related to Transgender Persons in the Workplace

On June 15, 2021, the Equal Employment Opportunity Commission (“EEOC”) issued new [guidance](#) to employers concerning several complicated issues involving transgender employees. Unusually, the guidance was issued by just EEOC chair Charlotte Burrows, without a full vote of the Commission. The EEOC addressed two issues in the guidance. The first concerns bathroom use, and provides that transgender persons should be permitted to use the bathroom of the gender with which they identify. The second concerns preferred pronouns for transgender persons and provides that repeated or intentional use of a pronoun or name that is not the employee’s preferred name or pronoun may create a hostile work environment in violation of the law. The guidance does not have the force and effect of law, but provides insight on how the EEOC might address these issues in the future.

From the Lighter Side: Man Returns Library Books Almost 100 Years Past their Due Date

This month, a man in Massachusetts discovered books in his basement that were checked out from the Somerville Public Library in the 1920s and 1930s. Fortunately for the man, the library discontinued charging late fees on July 1, 2021. Lucky guy.

Source: [AP News](#).

Firm News

[Rob Sniffen](#) served as Chapter Editor for the *Age Discrimination in Employment Law* treatise published by the ABA/Bloomberg. Mr. Sniffen co-edited the chapter addressing claims for age discrimination brought against public employers.

[Michael Spellman](#) presented “HR Jeopardy” to over 100 human resource professionals at the 18th Annual Greater Pensacola SHRM Conference on July 14, 2021.

[Jeff Slanker](#) spoke at the Florida Society of Self-Insured’s (“FASI”) Annual Conference in Naples, Florida earlier this month. Jeff provided the conference attendees an overview of recent legislative, executive, and judicial branch developments in the field of labor and employment law and separately lectured on addressing social media issues in the workplace. From FASI’s website: FASI is comprised of employers who self-fund some aspect of their insurance program, or are engaged in a profession or business related to self-funding. FASI was formed in 1969 by individual and group self-insurers to promote and maintain a healthy environment for self-insurance. The self-insured may be private and public companies as well as public entities such as cities and counties in Florida.

[Elmer C. Ignacio](#) presented “Return to Work in the Era of COVID” at the Florida Public Human Resources Association 2021 Annual Conference which took place in Orlando, Florida.

[Vickie Gesellschap](#) has been elected to the Board of Directors for Ballet Pensacola. She begins her three-year term in 2021.

Past Issues of the Education Law Alert Available on Website

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