SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
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Eleventh Circuit Grants School Board's Request for *En Banc* Review in Transgender Student Bathroom Case

On August 23, 2021, the Eleventh Circuit Court of Appeals granted the School Board of St. Johns County, Florida's request for *en banc* review in Adams v. School Board of St. Johns County, Florida (Case No. 18-13592), thereby vacating a prior order entered in favor of Adams. At issue in Adams is whether the School Board's policy requiring students to use the bathroom matching their biological sex is permitted under the United States Constitution and Title IX. Sniffen & Spellman, P.A.'s Jeffrey D. Slanker and Terry J. Harmon continue to serve as lead counsel to the School Board in Adams.

Florida Court Invalidates Governor's Emergency Executive Order Regarding Mask Mandates

On August 31, 2021, Leon County Circuit Judge John Cooper determined that Governor DeSantis' exceeded his authority by entering an Executive Order prohibiting school boards from adopting mandated mask policies. The Court's oral ruling also invalidated emergency rules adopted by the Florida Department of Education ("FL DOE"). Governor DeSantis has already announced that he will appeal the decision.

More information is available at the following link: Florida Politics.

US DOE on Title IX: Postsecondary Institutions May Admit Statements into Evidence Even in the Absence of Cross Examination

On August 24, 2021, on the heels of the decision Victim Rights Law Center et al. v. Cardona, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), the United States Department of Education ("US DOE") released guidance clarifying that postsecondary institutions may accept written statements into evidence during Title IX hearings even if the individual who prepared the statement is not subjected to cross examination. In the guidance, US DOE advised, among other things, as follows:

> In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination.
>
> Postsecondary institutions are no longer subject to this portion of the provision. In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the

> regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

More information is available at the following link: US DOE.

Alabama Federal Court Grants Motion to Dismiss in Postsecondary Erroneous Outcome Title IX Lawsuit

To prevail in an "erroneous outcome" lawsuit under Title IX, a plaintiff must prove that he/she was innocent, found to have wrongfully committed a Title IX violation, and there was a causal connection between the flawed outcome and gender bias. Doe v. Valencia Coll., 903 F.3d 1220, 1236 (11th Cir. 2018)(internal citation omitted). In Doe v. Samford Univ., 2:21-CV-00871-ACA, 2021 WL 3617702 (N.D. Ala. Aug. 15, 2021), the University moved to dismiss Plaintiff Doe's lawsuit and argued, among other things, that he failed to state a claim under Title IX based on an erroneous outcome. The Court ultimately found that in accepting all of the allegations in the Complaint as true, Plaintiff Doe demonstrated that he was innocent and the University reached a flawed outcome. To support his claim that there was a causal connection between the flawed outcome and anti-male bias, Plaintiff Doe argued, in pertinent part, as follows (quoted from opinion):

> (1) the investigation and hearing were flawed;
> (2) the investigative report found Jane Roe credible despite inconsistencies in her statements;
> (3) the investigative report contained prejudicial hearsay statements;
> (4) Ms. Kruntorad said, while interviewing Jane Roe, that "I still think, regardless, you couldn't give consent";
> (5) the school refused to give him copies of some of Jane Roe's medical records;
> (6) the Title IX Hearing Panel excluded some of his evidence; and
> (7) Samford participated in sexual misconduct public awareness campaigns.

Ultimately, the Court dismissed Plaintiff Doe's Title IX erroneous outcome claim, because he was unable to allege "facts supporting an inference that anti-male bias caused that outcome."

A copy of the opinion is available at the following link: Doe v. Samford Univ.

US DOE Reaffirms Requirement to Provide FAPE During Pandemic

On August 24, 2021, US DOE's Office of Special Education and Rehabilitative Services issued guidance reaffirming the requirement that school districts provide a free appropriate public education ("FAPE") in accordance with the Individuals with Disabilities Education Act ("IDEA") during the pandemic. The guidance is a Q&A-styled document that addresses a number of issues regarding the provision of FAPE during the pandemic, including Child Find obligations, timelines, evaluations, special education and related services, and compensatory services.

US DOE's press release, which includes a link to the guidance document, are available at the following link: US DOE.

Ninth Circuit Affirms Dismissal of Class Action IDEA Lawsuit for Failure to Exhaust Administrative Remedies

On August 18, 2021, the Ninth Circuit Court of Appeals affirmed a District Court's dismissal of a class action lawsuit brought by a number of students against the San Francisco Unified School District. In Student A, et al. v. San Francisco Unified School District (Case No. 20-15386), a class of five current or former students argued that the School District failed to timely identify students with disabilities and, even after identifying students as disabled, only provided "cookie-cutter" services. The District Court dismissed the lawsuit, because Plaintiffs failed to demonstrate that they exhausted their administrative remedies as required under the IDEA.

On appeal, Plaintiffs argued that they should be excused from the IDEA's administrative exhaustion requirement, because their claim arose from a policy or practice of general applicability that is contrary to law. The Court disagreed finding, among other things, as follows:

> Plaintiffs here are not challenging the integrity of the state's administrative procedures; they simply seek to bypass them. Although Plaintiffs contend they are seeking a restructuring of the education system, their complaint neither identifies the policies or practices that need to be addressed nor explains why the pursuit of administrative remedies could not correct their deficiencies. We agree with the district court that merely characterizing a school district's problems as "systemic" and the relief sought as "structural" does not provide the facts necessary to show that the allegedly needed reform is, as the court trenchantly put it, "anything other than increased funding and greater adherence to existing policies." An administrative record could shed needed light on what is going right, what is going wrong, and remedies for the latter.
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> To be sure, Plaintiffs do contend that their claims identify three specific unlawful policies or practices. But what they amount to are assertions of delay in providing services, denial of sufficiently individualized services, and arbitrary limits on services. These are allegations of bad results, not descriptions of unlawful policies or practices. Plaintiffs' claims are accompanied by general statistics documenting poor performance by students with disabilities. While these results, if true, are all unfortunate, they are not policies or practices that a court could grasp, much less change, without the benefit of any factually developed administrative record.

A copy of the opinion is available at the following link: Student A, et al. v. San Francisco Unified School District.

FL DOE Updates ESE Due Process Hearing Final Order Website

FL DOE publishes redacted copies of Final Orders entered in ESE due process hearings on its website. Importantly, the website was recently updated and includes decisions rendered through

August 2, 2021. See: FL DOE Final Orders. Of note, one of the published opinions involves a challenge to a School Board's manifestation determination related to a student's off-campus threat posted to social media. Ultimately, the School Board prevailed in the case. See: https://www.fldoe.org/core/fileparse.php/10992/urlt/20-5097.pdf

From the Lighter Side: Chalking Tires is an Unconstitutional Search?

In Taylor v. City of Saginaw, Michigan (Case Nos. 20-1538/1588), Alison Taylor argued that the City of Saginaw's practice of placing chalk marks on her tires and later ticketing her when she did not move her car after several hours amounted to an unconstitutional search under the Fourth Amendment to the Constitution. Well…she was right. On August 25, 2021, the Sixth Circuit Court of Appeals entered an order in her favor, finding that "the administrative-search exception does not justify the City's suspicionless chalking of car tires to enforce its parking regulations."

A copy of the opinion is available at the following link: Taylor v. City of Saginaw, Michigan.

Firm News

Sniffen & Spellman is pleased to announce that three of the Firm's attorneys have been recognized in the 28th Edition of The Best Lawyers in America® for their work in the following areas:

- Robert Sniffen: Employment Law – Management; Labor Law – Management; and Litigation – Labor and Employment
- Michael Spellman: Labor Law – Management, Litigation – Labor and Employment, and "Lawyer of the Year" for Employment Law - Management
- Dawn Whitehurst: Personal Injury Litigation – Defendants

Michael Spellman presented "The Latest on a City's Ability to Mandate Vaccines, Masks and Other COVID-related Issues" on August 16, 2021, as a webinar to the Florida League of Cities.

On October 14, 2021, Terry J. Harmon will be presenting "Best Practices for Alternative Dispute Resolution Under IDEA and Section 504" at webinar being conducted by LRP Publications. For more information, please visit the following link: LRP Publications.

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. 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.