

# SNIFFEN & SPELLMAN, P.A.

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## EDUCATION LAW ALERT May 2022

### **Supreme Court Decision Expected in First Amendment School Employee Prayer Case**

The United States Supreme Court is expected to rule soon in a landmark case involving the First Amendment and school employee prayer. In Kennedy v. Bremerton School District (Case No. 21-418), a former high school football coach (Kennedy) sued his school district alleging he was terminated for praying at midfield at the conclusion of a football game. The questions before the Supreme Court are as follows:

- (1) Whether a public-school employee who says a brief, quiet prayer by himself while at school and visible to students is engaged in government speech that lacks any First Amendment protection.
- (2) Whether, assuming that such religious expression is private and protected by the Free Speech and Free Exercise Clauses, the Establishment Clause nevertheless compels public schools to prohibit it.

More information is available at the following link: [SupremeCourt.gov](https://www.supremecourt.gov).

### **Big Changes Coming to Section 504?**

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination on the basis of disability in all programs and activities offered by educational institutions that receive federal funding. On May 6, 2022, the U.S. Department of Education (“US DOE”) announced its “intent to strengthen and protect rights for students with disabilities by amending regulations implementing Section 504.” It will be interesting to see whether the US DOE attempts to amend the regulations to provide a more detailed process related to Section 504 plans, due process, accommodations, and the provision of “supplementary aids and services.”

More information regarding the announcement, including a link to provide comments regarding the current regulations (due at the end of June 2022), is available at the following link: [US DOE Press Release](#).

### **Federal District Court Enters Injunction Preventing School District from Prohibiting Transgender Student from Using Bathroom Matching his Gender Identity**

Another federal court is set to hear the issue of whether transgender students are permitted to use the bathroom matching their gender identity. In A. C. by M.C. v. Metro. Sch. Dist. of

Martinsville, Case No. 121CV02965TWPMPB, a 13-year-old transgender male student sued his school district alleging violations of Title IX and the Equal Protection Clause, because he was prohibited from using the bathroom matching his gender identity. Although it is early on in the litigation, it is important to note that on April 29, 2022, the federal district court entered a preliminary injunction prohibiting the school district from denying plaintiff the right to use the boys' bathrooms at school. In granting the preliminary injunction, the court held, among other things, that the student was likely to succeed on the merits. The federal district court subsequently denied the school district's expedited motion to stay the entry of the preliminary injunction pending its appeal of the Court's April 29, 2022, decision.

The Court's Order granting the preliminary injunction is available at the following link: [A.C.](#)

### **Supreme Court Holds that Emotional Distress Damages Are Not Available Under Certain Anti-Discrimination Statutes**

In a ground-breaking decision in Cummings v. Premier Rehab Keller (Case No. 21-219), the United States Supreme Court held that damages for emotional distress are not recoverable in a private action for discrimination brought pursuant to the Rehabilitation Act of 1973 (the "Rehab Act") or the Patient Protection and Affordable Care Act (the "ACA"). Federal courts had previously been split on the issue, but the Supreme Court has now definitively barred plaintiffs from recovering for emotional injuries under the Rehab Act or the ACA.

The plaintiff in Cummings, who is deaf and legally blind, sued her physical therapy provider for disability discrimination under the Rehab Act and the ACA for failing to provide an American Sign Language interpreter during her physical therapy sessions. Her only damages were for emotional distress. However, in a 6-3 decision authored by Chief Justice John Roberts, the Supreme Court dismissed the plaintiff's claims, holding that emotional distress damages are not available under either statute.

The Supreme Court's ruling was based on long-standing precedent that holds that statutes governing recipients of federal funding pursuant to the Spending Clause of the United States Constitution (such as the Rehab Act and the ACA) are contractual in nature and typically do not allow for the recovery of punitive damages (absent specific language in the statute). The Supreme Court in Cummings extended this reasoning, and held that emotional distress damages, like punitive damages, are not traditionally available in suits for breach of contract. The Court also noted that the Rehab Act and ACA are silent as to such special damages and, as a result, damages for emotional distress are no longer available to plaintiffs under the Rehab Act or the ACA.

Click [here](#) to read more.

### **Proposed Revisions to Title IX Regulations Delayed...Again**

In last month's edition of the *Education Law Alert*, we alerted you that despite not releasing proposed revisions to Title IX regulations in April, it was expected that US DOE would release the regulations in May. According to Senior Reporter Jeremy Bauer-Wolf at *Higher Ed Dive*, it

is now expected that US DOE will release the proposed revisions this month. The proposed revisions are expected further address the duties of educational institutions to respond to allegations of sexual misconduct.

Source: [HigherEdDrive.com](https://www.highereddrive.com).

### **Florida Department of Education Releases Memorandum on Implementation of Limitations on Instruction Related to Sexual Orientation and/or Gender Identity**

This month's *Education Law Alert* provides updates regarding education law issues of interest from May of 2022. However, a recent publication from the Florida Department of Education ("FL DOE") is worthy of an early mention. On June 6, 2022, FL DOE released a memorandum addressing school district responsibilities under House Bill 1557. The controversial legislation is set to take effect on July 1, 2022. Although the memorandum addresses all of HB 1557, a key paragraph of the memorandum provides new information regarding the limitations on instruction related to sexual orientation and/or gender identity. As a reminder, the provision in HB 1557 addressing such instruction states as follows:

Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.

Since many school districts are eager for guidance regarding the "age appropriate or developmentally appropriate" language in HB 1557, the memorandum notifies school districts that only the kindergarten through grade 3 provision will take effect on July 1, 2022. The memorandum further states, "[f]or other grades, it takes effect only after the Florida Department of Education (Department) develops rules or guidance on age-appropriate and developmentally appropriate instruction."

A copy of the memorandum is available at the following link: [HB 1557](#).

### **2022 Condition of Education Report is Out**

In May of 2022, the National Center for Education Statistics (NCES) released the popular *Condition of Education* report for 2022. The report summarizes education data related to a number of topics, including COVID-19 and homeschool students. The report is available at the following link: [2022 Condition of Education report](#).

### **From the Lighter Side: Cockroaches in the Courtroom!**

Courtroom drama is common. Lawyers argue, witnesses make surprise statements, and sometimes people get arrested. Well, in New York, you can now add a parade of cockroaches to the list. During an arraignment, a defendant would not stop filming the proceedings and, when

asked to stop, a woman in the courthouse released hundreds of cockroaches from plastic containers. The courthouse was subsequently closed for fumigation. Nasty.

Source: [Associated Press](#).

### **Firm News**

[Rob Sniffen](#) co-presented “Handling Employment Actions in the Public Sector” at the Defense Research Institute’s Annual employment law conference in Denver, Colorado. Mr. Sniffen’s presentation included a discussion about the unique challenges faced by public sector employers in defending federal and state employment litigation.

Sniffen and Spellman is pleased to announce that its Managing Partner, Rob Sniffen, has been ranked in the 2022 Edition of Chambers USA as one of the state’s leading labor and employment lawyers. In ranking Mr. Sniffen *Chambers USA* states:

**Robert Sniffen** of Sniffen & Spellman has a comprehensive labor and employment practice, which includes both contentious and noncontentious mandates. He is especially well regarded for his representation of local government and other public sector employers.

*"Robert Sniffen is very intelligent and practical. He is a true collaborator."*

### **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.