SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
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Judge Dismisses Sarasota County School District Book Challenge

On August 22, 2022, Sarasota County Court Judge Mayann Olson Boehm dismissed a suit seeking to prevent the Sarasota County School District ("District") from using certain books as instructional materials in the classroom. The Court concluded that the Plaintiff, Robert Craft, did not have standing to bring the suit, explaining that the Plaintiff had not alleged that he was either a citizen of Sarasota County or that he was a parent or legal guardian of a student in Sarasota County public school. The Court further concluded that the Plaintiff did not establish the right to injunctive relief because the Plaintiff had an available, adequate remedy at law—the District's established procedure for challenging the adoption of a specific instructional material. Finally, the Court concluded that the judiciary cannot adjudicate challenges to the adequacy and quality of the public school system and therefore the determination as to which instructional materials should be used in a classroom was a non-justiciable political question.

A copy of the Order is not linkable. Please feel free to contact our office to obtain a copy of the Order.

Florida Department of Education Files Brief in Support of Central Florida High School in Lawsuit Challenging Right to Pray Over Loudspeaker Prior to Sporting Events

The Florida Department of Education ("DOE") filed a brief in the Eleventh Circuit Court of Appeals in support of Cambridge Christian School ("CCS"), arguing that the Florida High School Athletic Association ("FSHAA") violated CCS's First Amendment rights when it prohibited CCS from using the Public Address ("PA") system to broadcast a pregame prayer prior to the 2015 Division 2A High School Football State Championship game.

In 2016, CCS filed suit in the Federal District Court for the Middle District of Florida (Tampa Division) alleging that FSHAA's refusal to allow it to use the PA system to broadcast a prayer prior to the FHSAA Division 2A Championship Game violated CCS's First Amendment rights to freedom of speech and free exercise of religion. The district court ultimately granted summary judgment in favor of FHSAA, concluding that the First Amendment was inapplicable to this case because the speech at issue (the pregame speech broadcast over the PA system) was government speech. The Court went on to conclude that even if a portion of the speech was private speech, no constitutional violation occurred because the PA system was a nonpublic forum and FSHAA's prohibition was a reasonable, content neutral restriction. CCS appealed to the Eleventh Circuit. DOE filed a "friend of the court" brief in support of CCS, contending that the district court's decision should be reversed because FSHAA improperly: questioned the sincerity of CCS's belief in communal prayer; engaged in gamesmanship through advancing post-hac justifications of its refusal; and, failed to engage in the necessary strict scrutiny analysis to ensure

that its decision to prohibit CCS from broadcasting a prayer over the PA system was narrowly tailored to serve a compelling governmental interest. The case is currently pending on appeal.

The district court's order is available here. A copy of the DOE's brief is not linkable. Please feel free to contact our office to obtain a copy.

Federal District Court Dismisses Parents' Challenge to School District's Guidelines for Student Gender Identity

On August 18, 2022, the Federal District Court for the District of Maryland, issued an order dismissing with prejudice a challenge to Montgomery County Public School's ("MCPS") 2020-2021 *Guidelines for Student Gender Identity in Montgomery County Public Schools* ("Guidelines") filed, anonymously, by three parents of MCPS high-school students ("Plaintiff Parents"). The challenged Guidelines include, in part, guidance and instructions on how MCPS personnel can provide support and resources to transgender and gender non-conforming students, and address topics including: establishing a gender support plan; protecting student privacy; maintaining school records; dress code; participation in gender-based activities; addressing bullying and harassment; and providing safe spaces on campus for transgender and gender non-conforming students. Additionally, portions of the Guidelines explicitly contemplate parental involvement in developing a gender-support plan for students and advise MCPS personnel to avoid disclosing a student's gender identity to their parents without the student's consent.

The Plaintiff Parents challenged the Guidelines under the U.S. Constitution (14th Amendment), Federal Statutes (42 U.S.C. § 1983), and Maryland Statutes alleging that the Guidelines inappropriately instructed MCPS personnel to withhold information and records from parents regarding their children's gender identify expressed at school. As to the Parent Plaintiffs' substantive due process and 42 U.S.C. § 1983 claims, the Court concluded that the plain language of the Guidelines, which explicitly anticipate parental involvement and did not otherwise instruct MCPS staff to coerce students into withholding information from parents, did not implicate the Plaintiff Parents' Fundamental rights. The Court dismissed the Plaintiff Parents' remaining statutory claims, because the Plaintiff Parents sued under statutes which did not include a private cause of action and Maryland common law did not include an implied right of action for private citizens.

A copy of the Court's Order can be found here.

Third Circuit Court of Appeals Holds that School District Did Not Breach its Statutory Duty When It Initially Denied Services to Disabled Child

In J.M. v. Summit City Board of Education, No. 20-3391 (3d Cir. July 1, 2022), the Third Circuit Court of Appeals affirmed summary judgment in favor of the Summit City Board of Education ("Board"), holding that the Board did not breach its duty to identify, locate, and evaluate children with disabilities ("child-find duty") under either the Individuals with Disabilities Education Act ("IDEA") or Section 504 of the Rehabilitation Act when it initially determined that a student was not eligible for special education services. As is relevant to the case, the student-plaintiff was formally diagnosed with autism and ADHD in 2017. However, prior to the 2017 diagnosis, the

Board provided the student with behavioral intervention services starting in 2015, which appeared to be working. Also prior to the formal diagnosis, in 2016, after a thorough evaluation, and in light of the progress the student-plaintiff was making with the interventions in place, the Board concluded that the student-plaintiff did not qualify for special education services. The parent-plaintiffs challenged the Board's initial denial of services at both the administrative and district court level. The District Court granted summary judgment in favor of the Board.

In a fact-driven analysis, the Third Circuit held that the Board did not breach its child-find duty when the Board concluded that the student-plaintiff did not qualify for special education services in 2016. Specifically, the Third Circuit concluded that the Board's 2016 determination under the "Response to Intervention Approach," which relied on the progress the student had made with the interventions in place, did not violate the Board's child-find duty. The Third Circuit further held that though the Board could have relied on the student-plaintiff's test scores to establish that he had a specific learning disability through the "Severe-Discrepancy Approach" the Board was not required to do so. Finally, the Third Circuit held that there is no bright-line rule that the presence of a rule-out diagnosis from a psychologist (i.e. indicating that a particular disability could not be diagnosed but could also not be ruled out) requires a school district to conduct further testing and evaluation on a student under the IDEA.

A copy of the opinion is available here.

Eleventh Circuit Court of Appeals Holds that it Lacks Jurisdiction to Review District Court's Order Remanding IDEA Case for Due Process Hearing

The Eleventh Circuit Court of Appeals in S.S. v. Cobb County School District, No. 21-11048 (Aug. 5, 2022) held that it lacked jurisdiction to review a district court order remanding an IDEA claim back to a state administrative agency for a due process hearing, because the order was a non-final order.

S.S. filed an administrative complaint alleging that the Cobb County School District ("School District") violated the IDEA when it failed to provide her a free appropriate public education. The administrative law judge granted the School District's motion for a summary determination and denied S.S.'s request for a due process hearing, concluding that the administrative petition presented no genuine issue of material fact. S.S. appealed the determination to the Federal District Court in the Northern District of Georgia. The District Court reversed the administrative court's decision and remanded the case back to the administrative court for a due process hearing, finding that there were two readily apparent issues of material fact on the face of the petition. The School District appealed. The Eleventh Circuit dismissed the appeal holding that the District Court's order remanding the case for a due process hearing and further development of evidence was a non-final order and therefore it lacked jurisdiction to consider the appeal.

A copy of the full opinion is available here.

U.S. Department of Education's Office for Civil Rights Reaches Settlement with California School District Over Discriminatory Disciplinary Policy

On August 16, 2022, the U.S. Department of Education's Office for Civil Rights ("OCR"), entered into a voluntary resolution agreement ("Resolution Agreement") with the Victor Valley Union High School District ("District") in California. Following a compliance review, initially opened on August 12, 2014, which included a four-day site visit to the District and extensive interviews and document review, OCR found by a preponderance of the evidence that the District engaged in disparate treatment based on race in violation of Title VI by disciplining African American students more frequently and more harshly than similarly situated white students. More specifically, OCR concluded that the District was discriminating against African American students in multiple areas such as suspensions, expulsions, truancy, and law enforcement citations.

OCR additionally interviewed students who reported to the District that African American students were disciplined more often and more harshly for dress code violations and for being loud than their white peers. Moreover, OCR relied on substantial circumstantial evidence of racial discrimination including statistical evidence that African American students were substantially overrepresented compared to their white peers at every level of discipline: referrals, out-of-school suspensions, expulsions, and citations.

To resolve the violations found by OCR, the District made the following commitments in the Resolution Agreement in addition to other compliance and monitoring provisions:

- Examining the causes of racial disparities in the District's discipline and implementing a corresponding corrective action plan;
- Employing a director with expertise in nondiscriminatory discipline practices to help the District implement the corrective action plan and the agreement;
- Establishing a stakeholder equity committee to inform implementation of the plan;
- Revising its discipline policies and procedures, including regarding law enforcement involvement in school discipline;
- Regularly analyzing its student discipline data to identify and, as needed, address possible areas of discrimination;
- Providing training to staff on the revised discipline policies and practices;
- Publicly reporting disaggregated discipline data;
- Conducting school climate surveys to assess perceptions of fairness and safety; and
- Providing compensatory education to students subjected to discriminatory practices.

The letter to the District is available here and the resolution agreement is available here.

Affirmative Action is the First Target in the Supreme Court's November Docket

The Supreme Court will begin its full November slate with Students for Fair Admissions v. University of North Carolina and Students for Fair Admissions v. President and Fellows of Harvard College (See, Supreme Court's November Docket - Original Text). These are two affirmative action cases analyzing the appropriateness of universities considering race in their admission processes. Newly-confirmed Supreme Court Justice Ketanji Brown Jackson will only be able to participate in the UNC case. Justice Jackson will not hear the Harvard case after her recusal because of the potential conflict stemming from her recent service on the Harvard Board of Overseers.

From the Lighter Side: Chief Candy Officer is a Job. And there's a Vacancy.

Yes, Chief Candy Officer is a thing and Canada's Candy Funhouse has an opening for one. The job can be done remotely or based in the Canada or New Jersey Offices of the Ontario-based candy company. What does a Chief Candy Officer do? The Chief Candy Officer serves as the head candy taste tester trying over 3,500 products a month. Extensive palate training is required. The CCO also leads the company's FUN house candy strategy, runs candy board meetings, and has a say in the products that company will carry. Best of all, no golden ticket needed to get into this C-Sweet (had to). The job does come with an extensive dental plan. Good thing.

More here.

Firm News

Sniffen & Spellman is pleased to announce that four of the Firm's attorneys have been recognized in the 29th Edition of The Best Lawyers in America® for their work in the following areas:

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

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.