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Pine-Richland School District Settles Case with Transgender Students

Back in late February 2017, United States Western District Court Judge Mark Hornak issued an Injunction prohibiting the District from enforcing a policy that was adopted in September 2016 that restricted transgender student to using unisex bathrooms or ones matching their biological gender.

The School Board's actions in September 2016 passing the new policy reversed a longstanding practice and/or policy in the District that allowed students to use restrooms matching their gender identity.

On July 17, 2017, the Board of School Directors of Pine-Richland School District voted to rescind the prior policy they had adopted in September 2016 that restricted transgender student use of unisex bathrooms or ones matching their biological gender. In that same action, the Board also agreed to update its nondiscrimination policy about sexual orientation.

All of the specific details of the settlement agreement have yet to be filed with the Court or made available to the public.

The issue in Pine-Richland is similar to the issue that was in dispute in the *Whitaker v. Kenosha Unified School District No. 1 Board of Education,* 858 F.3d 1034 (2017). On May 30, 2017, the U.S. Court of Appeals for the 7th Circuit upheld a preliminary injunction that temporarily stopped the District from enforcing a policy that required students to use the restroom of the biological sex they were assigned at birth.

Inside …

OCR Field Guidance Addresses Protection of Transgender Students Under Title IX

On June 4, 2017, the Office for Civil Rights issued "Instructions to the Field Regarding Complaints Involving Transgender Students" to all Regional OCR Directors in order to explain the effects of various developments on the enforcement of Title IX. This Guidance was issued in follow-up to a number of developments in the first half of 2017, including the February 2017 withdrawal of a Dear Colleague Letter addressing Title IX and Transgender Students originally issued under the administration of former President Obama, as well as the March 2017 Decision of the U.S. Supreme Court to vacate and remand the *Gloucester County School Board* case involving transgender students' access to restrooms for further consideration by the Fourth Circuit Court of Appeals in light of the February 2017 withdrawal.

In the June 2017 instructions Regional Directors are advised not to rely on the Policy set forth in the May 2016 Dear Colleague Letter, but further reminded that transgender students were not left without protections from discrimination, bullying or harassment under Title IX. The Guidance further advises that OCR Investigators should instead rely on Title IX Regulations and Decisions that remain in effect in order to appropriately investigate allegations of the following:

- failure to promptly and equitably resolve a transgender student's complaint of sex discrimination (34 C.F.R. § 106.8(b));
- failure to assess whether sexual harassment (i.e., unwelcome conduct of a sexual nature) or gender-based harassment (i.e., based on sex stereotyping, such as acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, such as refusing to use a transgender student's preferred name or pronouns when the school uses preferred names for gender-conforming students or when the refusal is motivated by animus toward people who do not conform to sex stereotypes) of a transgender student created a hostile environment;
- failure to take steps reasonably calculated to address sexual or gender-based harassment that creates a hostile environment;
- retaliation against a transgender student after concerns about possible sex discrimination were brought to the recipient's attention (34 C.F.R. § 106.71 (incorporating by reference 34 C.F.R. § 100.7(e); and
- different treatment based on sex stereotyping (e.g., based on a student's failure to conform to stereotyped notions of masculinity or femininity) (34 C.F.R. § 106.31(b)).

In providing this Guidance, OCR emphasized that each allegation should be evaluated separately so that complaints of harassment based on gender non-conformity/stereotyping may be permitted to go forward even where another allegation such as denial of access to restrooms based on gender identity is dismissed. This clarifies that the denial of access to restrooms on basis of gender identity may remain an isolated issue, while School Districts must be cognizant that complaints from transgender students can and will give rise to obligations to invoke Title IX Complaint Procedures and investigate allegations of unlawful harassment notwithstanding questions of restroom access that Districts may likewise be asked to address.

OCR's confirmation of the above-listed protections also underscores the degree of attention that school district officials should pay to complaints received from transgender students about bullying and/or other discriminatory treatment within the school setting. School districts should therefore continue to evaluate requests and/or complaints from transgender students on a case-by-case basis and should implement Unlawful Harassment Policies and Complaint Procedures promptly and effectively whenever faced with complaints of discrimination or harassment from transgender students that pertain to these matters.

Pennsylvania Federal Court Rules that Gender Dysphoria May Be Asserted as an ADA-Protected Disability

The U.S. District Court for the Eastern District of Pennsylvania has issued an important ruling, the first of its kind, addressing transgender status as a protected disability under Federal Anti-Discrimination Law. In *Blatt v. Cabela's Retail, Inc.,* the Eastern District Court addressed the case of a Plaintiff who was diagnosed with Gender Dysphoria, also known as Gender Identity Disorder, which is characterized by clinically significant stress and other impairments that may be disabling. After her employer refused her requests to use the bathroom of her preferred gender, to wear a female uniform, and to wear a nametag with a female name, Blatt was ultimately terminated. She then filed a Federal Complaint alleging that the Employer failed to accommodate her disability of Gender Dysphoria under the ADA, and further asserting retaliation based on requested accommodations.

In response the Employer filed a Motion to Dismiss the Complaint, asserting that the Plaintiff could not make any such claims because Section 12211 of the ADA expressly excludes "Gender Identity Disorders" from coverage under the Act, along with sexual orientation and other specified categories arising out of illegal current drug use and other illegal activity. Despite the fact that Section 12211 specifically exclude, "Gender Identity Disorders" from the definition of a disability under the ADA, the Court held that it was possible to interpret that exclusion narrowly, and as only referring to conditions in which individuals merely identify with a different gender, do not suffer an actual disabling condition such as Gender Dysphoria. Noting that the Gender Dysphoria impacted major life activities such as reproduction and socialization, the Court then relied on this interpretation to hold that the Plaintiff stated an ADA claim based on her disability of Gender Dysphoria and has allowed the case to proceed.

This decision has significant ramifications for school districts, to the extent that it recognizes the use of the bathroom of one's preferred gender and one's preferred pronouns as potential requests for accommodation triggering interactive process obligations under the ADA. To the extent these interpretations of Gender Dysphoria as a disability and bathroom access and pronoun usage as potential accommodations could also translate to Section 504 of the Rehabilitation Act. Pennsylvania school districts should be aware that similar claims could begin to arise not only among employees but also among students, thereby further complicating the question of access to student restrooms and posing significant questions as to whether a school district is not only obligated to prohibit discrimination and harassment of transgender students but also to proactively accommodate them within the school setting when a diagnosis of Gender Dysphoria is present.

As noted elsewhere in this newsletter, school officials should be cognizant of the need to address transgender students' requests and complaints on a case-by-case basis as the legal landscape on these issues continues to evolve, and this decision rendered by the Eastern District Court further emphasizes that need, in the context of potential interactive process obligations under the ADA and Section 504.

Third Circuit Court Holds That a Single Racial Slur Can Support an Unlawful Harassment Claim While Clarifying Standard for Hostile Work Environment

The United States Third Circuit Court of Appeals has issued a ruling in mid-July 2017 that has significant ramifications for hostile work environment and harassment claims alleged against Pennsylvania employers. In the case of *Castleberry v. STI Group*, the Third Circuit reversed a lower Court decision holding that African-American Employees' assertion that a Supervisor's onetime use of the "N word" was insufficient to establish a racially hostile work environment. In doing so, the Third Circuit first identified a line of cases providing varying and inconsistent standards for determining whether certain conduct constitutes a hostile work environment, and held, as a final matter, that the official standard for identifying a hostile work environment requires Plaintiffs to show that the harassment or other discrimination suffered was "severe or pervasive," as opposed to both "severe and pervasive," **or** "pervasive and regular." This essentially confirms a lighter standard in which Plaintiffs need to only prove one of the two characteristics included, as opposed to both.

Having clarified this standard, the Third Circuit went on to determine that the isolated discriminatory remark uttered by the Supervisor in that case, which was also coupled with a threat of termination, was sufficient to state a claim for a hostile work environment and can amount to unlawful activity under Federal Anti-Discrimination Laws.

In light of the decision in *Castleberry,* all school districts should review their Anti-Discrimination and Unlawful Harassment Policies to ensure that they are in compliance with the now-clarified standard of "severe or pervasive" harassment. School Districts should further ensure that all responsible Administrators and other school officials understand the significance of even a single incident in which a racial slur or other derogatory term connected with the Protected Class is utilized, as such behavior can, on its own, trigger obligations to take prompt remedial action to address the matter under Federal Anti-Discrimination Laws.

Circuit Court of Appeals Tells District It Cannot Enforce Its Restroom Policy

On May 30, 2017, the U.S. Court of Appeals for the 7th Circuit upheld a preliminary injunction in the case of *Whitaker v. Kenosha Unified School District No. 1 Board of Education* that temporarily stopped the District from enforcing a policy requiring students to use the restroom of the biological sex they were assigned at birth. Judge Ann Claire Williams wrote that Kenosha Unified School District No. 1's privacy argument is "based upon sheer conjecture and abstraction" after the District was unable to provide any incidents of harm or complaints from students while Ashton "Ash" Whitaker used the boys' bathroom. Since the policy was designed to protect students' privacy, the solitary complaint from a teacher and multiple complaints from parents at a school board meeting were not enough to convince the panel to overturn the injunction. "[The] policy [did] nothing to protect the privacy rights of each individual student vis-à-vis students who share

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OCR Targeting School District Websites

Many public school websites are in essence an archive of information; most contain pictures, videos, and documents such as old School Board agendas, minutes, and financial reports. While having a wealth of information available is certainly convenient, school districts must ensure that this content satisfies current Web Content Accessibility Guidelines 2.0 (WCAG) Level AA international accessibility standards.

All across the nation, public schools and universities have become the subject of investigation by the Department of Education's Office of Civil Rights (OCR) for inaccessible web content which fails to satisfy current WCAG standards. Web accessibility means that people with disabilities can perceive, understand, navigate, and interact with the website to the same extent as persons without disabilities; this includes making web content accessible on assistive devices like screen readers and on limited devices such as mobile phones.

OCR's power to monitor and enforce website accessibility stems from Section 504 of the Rehabilitation Act of 1973 and Title II of the Americans with Disabilities Act. Both of these anti-discrimination laws require public entities, including public schools, to remove barriers that may prevent individuals with disabilities from accessing its public web content and services. OCR continues to enter into settlement agreements with educational organizations to correct outstanding accessibility errors, develop policies and procedures relative to new web content, and training of appropriate personnel.

The most common website accessibility errors are the lack of alternative text (alt tags) to describe the associated images to blind and low vision users, inaccessible PDF files and documents, lack of closed-captioning on videos, website features or structures that are not navigable by keyboard, and poor color contrast for text. See *OCR v. Downingtown* where some important contents of the website could only be accessed by a computer mouse, parts of the website used color combinations that made text difficult or impossible for people with low vision to see, and videos were not accurately captioned. The majority of these errors prevent assistive technologies or keyboard users from reading the content in a logical fashion or even at all.

One of the most time consuming corrections school districts may face is making PDF files accessible. In this context, tagging elements must be included in **each** PDF file to ensure that assistive technologies can logically and accurately read the document. While many web accessible PDF converters are available, the process to convert all necessary PDF files can quickly become overwhelming.

Free applications like the WAVE tool are particularly helpful in identifying initial web accessibility errors; however, school districts should complete a thorough audit of existing online content and website functionality. Our office can assist school districts in addressing web accessibility issues related to third-party content, video-captioning and livestreams, negotiating consent agreements, and developing website accessibility policies for new web content.

Restroom Policy *Continued*

similar anatomy and it ignores the practical reality of how Ash, as a transgender boy, uses the bathroom: by entering a stall and closing the door." School administrators from 21 states and the District of Columbia wrote *amici* briefs in support of Ash, all noting that "the frequently-raised and hypothetical concerns about a policy that permits a student to utilize a bathroom consistent with his or her gender identity have simply not materialized." Importantly, this case was decided without reliance or mention of the Obama-era guidance that the Trump administration rolled back shortly after taking office. The District is still considering whether to file an appeal to have the case heard *en banc,* an appeal to the U.S. Supreme Court, or to proceed with the case in district court.

Students Bring Suit to Stop Transgender Student from Undressing in Boys' Locker Room

Four students brought a federal lawsuit against Boyertown Area School District. The suit was filed in March 2017 by the parents of an anonymous 11th Grade boy who objected after seeing a transgender boy undressing in the high school boys' locker room. (*Doe v. Boyertown Area School District,* U.S. District Court for the Eastern District of PA; Case No. 17-1249-EGS (4/18/2017)). The ACLU intervened on behalf of a transgender boy, while applauding Boyertown for "[doing] the right thing in affirming and respecting their students' gender identity." The ACLU has argued that "because they can't possibly use the girls' facilities any more than other boys could be expected to do so, if Plaintiff were to prevail, transgender students would be excluded from the facilities used by all other students and forced to use separate facilities that other students may choose to use, but no other student is required to use." The Boyertown Area School Board has already voted 6-3 to reject a proposal that would see transgender students' rights trampled in exchange for dismissal of the lawsuit. The Court has held a hearing on the Plaintiff Doe's Motion for Preliminary Injunction, which would exclude transgender students from using the bathroom of their choice. The evidentiary hearing on the Motion for Preliminary Injunction was scheduled to resume on July 31, with additional oral argument on the Motion for Preliminary Injunction scheduled for August 11. Boyertown's defense may be bolstered by the U.S. Court of Appeals for the 7th Circuit when they unanimously upheld an injunction requiring the school in question to allow a transgender student to use the boys' bathroom.

District's Tax Assessment on Commercial Property Struck Down

The Supreme Court of Pennsylvania in the case of V*alley Forge Towers Apartments v. Upper Merion Area School District* has struck down the tax assessment practices by Upper Merion Area School District of targeting commercial properties when initiating tax assessment appeals. After the Montgomery County court dismissed the case, the Commonwealth Court concurred, saying a school district does not violate the state constitution's Uniformity Clause, which states "all taxes shall be uniform, upon the same class of subjects, within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." However, the Supreme Court unanimously disagreed with the lower courts' rulings. By singling out under-assessed commercial properties while ignoring other classes of under-assessed properties, the school district violated the Uniformity Clause. The Supreme Court did leave room for what they believed would be a fair way to appeal tax assessments by allowing a school district to establish a uniform threshold that would apply to all classes of properties. This uniform threshold could be monetary in nature, where a tax assessment appeal would be brought if a property is sold for a certain dollar amount over the value based upon the tax assessment. The key for the Supreme Court was that whatever threshold was established, it must be applied uniformly and not designed to target certain classes of properties. The case was remanded back to the Montgomery County Court of Common Pleas for a determination of the actual facts regarding Upper Merion Area School District's assessment practices.

Commonwealth Court Hands Public School Districts a Victory With Clearance Issue

On or about April of 2017, the Commonwealth Court reversed the decision in the matter of *United Union of Roofers, Waterproofers, and Allied Workers v. North Allegheny, Fox Chapel, and Montour School Districts*. The Court of Common Pleas of Allegheny County granted a preliminary injunction to United Union of Roofers, Waterproofers, and Allied Workers and by that decision the trial court essentially disturbed the status quo which was being performed by the school districts as a standard background check in school construction issues. By way of background, the preliminary injunction enjoined School Districts from conducting background checks mandated by the Public School Code of 1949 and Child Protective Service Law on Union members assigned to roofing projects on School District property because School Districts did not show that the workers will have "direct contact with children." In summary, by Memorandum of Opinion, it stated that the trial court further ordered School Districts to take corrective action to permit Union's members who had been excluded by the unauthorized background checks to have access to the work sites. During the initial case, the School Districts argued the trial court erred in granting the preliminary injunction because the Union failed to establish any of the legal prerequisites for injunctive relief. By Order of Court granted by President Judge Leavitt on April of 2017, the Commonwealth Court agreed with the District's argument and reversed the trial court's order.

Specifically, the arguments surrounded Section 111 of the School Code which requires certain listed individuals to submit to state and federal criminal background checks prior to commencing employment. Section 111(a.1) specifically states that:

> "This section shall apply to all current and prospective employees of public and private schools, intermediate units and area vocational-technical schools, including, but not limited to, teachers, substitutes, janitors, cafeteria workers, independent contractors and their employees, except those employees and independent contractor and their employees who have no direct contact with children."

As a general matter the School Districts' practice and procedures and specifically their project manuals require that each employee of the Pennsylvania roofing company was required to obtain criminal background checks as required by Section 111 of the School Code and Section 6344 of the Child Protective Service Law. As a result of those background checks, eight (8) Union members were denied clearance to work on school projects. Likewise in all of the Districts who filed the appeal, the same issues were raised as Union members were denied clearance to work on school construction projects. Essentially, the Union argued that they were exempt from background checks under Section 111(a.1) of the School Code because they do not have "direct contact with children."

Following trial court hearings on October 12, 2015, and October 23, 2015, the trial court granted the Union's motion for preliminary injunction and ordered School Districts to provide previously disqualified Union members access to school district's worksites and to cease performing background checks on Union members unless the position involved direct contact with children.

In reviewing the trial court's decision, Commonwealth Court noted, in reviewing the fact pattern presented, the trial court largely focused on the level of interaction between the Union members and children at School Districts' project sites and determined that the Union was likely to succeed on the merits of its declaratory judgment action because its members do not in fact have direct contact with children. Commonwealth Court declined to address either of these matters as it relates to the preliminary injunction and simply focused on the fact that the injunction did not restore the parties to the status quo

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— IMPORTANT REMINDER —

Act 138 of 2016 was signed into Law on November 3, 2016, and has come into effect for the 2017-2018 school year. School districts that have not already done so should be reviewing and updating School District Attendance Policies to ensure that they are compliant with the Act's Provisions, which implements changes to compulsory school attendance requirements and the process for addressing truancy, including changes in practices for addressing excused and unexcused absences, parental notification, and the types of discipline that can be implemented for truant behavior. Those school districts that have already adjusted their Board Policy should ensure that any overlapping policies, student handbooks, and any introductory information and notifications referencing the Attendance Policy are reviewed and are consistent with the changes imposed by Act 138 as they prepare for the start of the upcoming school year.

Did You Know?

True/False — Terminated employees have no right to access their personnel files?

Answer is now "True." However, up until a few months ago, a former Commonwealth decision (*Beitman v. Dep't of Labor)* held that an employee could request their personnel file within a reasonable time after termination. In a more recent decision, June 20, 2017, the Pennsylvania Supreme Court ruled that former employees who are not laid off with reemployment rights or on a leave of absence, have no right to access their personnel files pursuant to the Personnel Files Act, regardless of how quickly after their termination they request access to same. *Thomas Jefferson Univ. Hosp., Inc. v. Penn. Dep't of Labor & Indus.,* ___ 3d ___, 2017 (WL 2651980).

Clearance Issue *Continued from page 7*

during the pendency of the underlying complaint. This decision was made as a result of testimony taken at trial which showed the standard practice in implementing background checks on prospective employees. The School Districts presented that when the 2011 legislature made an amendment to Section 111 of the School Code to change the disqualification periods for current or prospective employees based on convictions; the School District began to use a checklist to determine whether a prospective employee satisfied the background check requirements for all employees. The School District testified that they received names from the project manager, completed a background check on all employees, and flagged any individuals who failed to meet the requirements of Section 111 of the Code. Furthermore, it was stated that the School Districts used the same background check process since the legislature amended Section 111 from 2011 until the present.

Commonwealth Court noted that since school districts have been doing background checks on employees of independent contractors as required by Section 111 of the School Code since 2011 without ascertaining whether those employees would have direct contact with children provided a basis to reverse the trial court.

As such, school districts need to ensure that bid documents always contain the necessary clearance language regarding background checks.

The Pennsylvania School Study Council, Penn State Law,
Penn State College of Education, and the Partners of Beard Legal Group
invite you to join us for

Education Law Day:
A Cafeteria of Legal Experts and Topics

Wednesday, October 11, 2017
8:30 a.m. – 4:00 p.m.
at Penn Stater Conference Center
University Park, Pennsylvania

Introduction by Dr. Lawrence Wess
Executive Director of the Pennsylvania School Study Council
and
Dr. Gregory Kelly, Associate Dean, College of Education

Ronald Cowell, Executive Director of Education Policy and Leadership Center
- Mr. Cowell will speak about the current education finance situation and the challenges to schools.

Dr. David Bateman, Author and Professor of Special Education at Shippensburg University
- Session will address special education and highlight updates from the recent Supreme Court Decision in *Endrew*; what to learn, what to pay attention to, and word choice tips.

Coordinated by Beard Legal Group — Speakers and topics include:
Carl P. Beard, Managing Partner
- "Special Education Update & Things Districts Can Do to Minimize Claims"

Elizabeth Benjamin, Partner
- "Sexual Orientation & Gender Identity as a Protected Class in Pennsylvania Schools"

Ronald N. Repak, Partner
- "Dismissals, Demotions and the New Statement of Charges"

"Ask the Solicitors" session to allow discussion on topics as requested by participants.

For further information or to register, contact Danielle Nattermann at dns5077@psu.edu or 814-865-0321. Directions and information will be sent to all registrants. Open parking is available at the Penn Stater Conference Center.

Beard Legal Group Education Law Focus

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carrier.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, www.ed.psu.edu/pssc/ or contact the Executive Director Dr. Lawrence Wess at ljw11@psu.edu.

Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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