

SNIFFEN & SPELLMAN, P.A.



Education Law Alert September 2017

Supreme Court Asked to Weigh In on Key Education Law Issues

The United States Supreme Court has been asked to review several impactful issues in the upcoming 2017-2018 term. Here is a summary of a few cases in which petitions requesting certiorari review have been filed:

Kenosha Unified School District v. Whitaker

This case involves a decision of the 7th Circuit Court of Appeals that upheld an injunction requiring a school district to allow a transgender student to use the bathroom that corresponds with the student's gender identity rather than biological sex. The Supreme Court punted the issue last term in the case of *Gloucester County School Board v. G.G.* If the Court accepts the *Whitaker* case, school districts may finally receive guidance on whether Title IX and the Equal Protection Clause of the U.S. Constitution require schools to assent to the wishes of transgender students when it comes to bathroom use.

American Humanist Association v. Birdville Independent School District

This case involves the question of whether a school board violates the Establishment Clause of the First Amendment when it allows sectarian prayers to be said during school board meetings at which students are present. The 5th Circuit Court of Appeals held that under the specific facts of the case, there was no Establishment Clause violation.

Easterling v. Tensas Parish School Board

This is a Title IX case in which the Court has been asked to determine whether the practice of combining into a single position a school's head football coach and athletic director excludes certain females from being considered for both positions individually. The 5th Circuit Court of Appeals held that it did not.

Read the case opinions at the following links:

[Kenosha Unified School District v. Whitaker](#)

[American Humanist Association v. Birdville Independent School District](#)

[Easterling v. Tensas Parish School Board](#)

DOE Issues New Interim Guidance on Campus Sexual Misconduct

On September 22, Secretary of Education Betsy DeVos announced the release of a new interim Q&A for schools on how to investigate and adjudicate allegations of sexual misconduct on school campuses. In addition, the Department of Education is withdrawing its April 4, 2004 Dear Colleague Letter on Sexual Violence and its April 29, 2014 Questions and Answers on Title IX Sexual Violence.

In its press release regarding the Q&A, the Department of Education stated it intends to engage in rulemaking on Title IX responsibilities related to sexual misconduct complaints. Meanwhile, the new Q&A addresses the Department's expectations of schools with respect to Title IX.

Read the DOE release [here](#).

Read the Q&A [here](#).

Eleventh Circuit Ruling – School Superintendent Entitled to Quality Immunity in First Amendment Case

The Eleventh Circuit recently reversed a district court ruling for failing to apply the appropriate qualified immunity protections to a school superintendent. The case at issue, *Gaines v. Wardynski*, involved a teacher who claimed her school's superintendent denied her a promotion because of statements her father made in the local newspaper that were critical of the school board and superintendent. The District Court disagreed with the superintendent's argument that he was entitled to qualified immunity because terminating a public employee because her family member engaged in protected speech was not a "clearly established" violation of the First Amendment.

The Eleventh Circuit disagreed with the District Court, reversing their ruling and finding that the superintendent did not have a fair warning that denying plaintiff a promotion because of her father's comments would violate her constitutional rights.

Read the case [here](#).

How President Trump's Position on DACA Will Impact Higher Education

On September 5, the Trump administration announced it will provide Congress with six months to institute legislation restoring the Deferred Action for Childhood Arrivals ("DACA") program. At the end of six months, the administration will begin phasing out the program. This will not terminate existing DACA permits; renewal permit requests will be adjudicated on a case-by-case basis.

As many DACA recipients are college students, both the American Council on Education and the Association of Public and Land-grant Universities released statements in response to the administration's position. Education organizations are concerned that the end of DACA could mean college students and college graduates would lose their permits to stay in the United States.

Read more [here](#).

Ruling: Title IX Protections Do Not Extend to Students Taking Online Courses Abroad

On September 1, a Federal Judge dismissed six claims, including a Title IX claim, lodged by a student enrolled in an online education class against Massachusetts Institute of Technology. Plaintiff was a citizen and resident of France during the alleged harassment, a factor which Judge F. Dennis Saylor found to be instrumental to the application of Title IX.

In his ruling, Judge Saylor opined that Title IX "may well be outdated" because the geographical reach of online learning was not contemplated when the statute was enacted in 1972.

We likely have not seen the end of this issue. Schools with online learning options, especially globally, should be aware of the ongoing discussions regarding how to protect students who fall outside the scope of those covered by Title IX.

Read more [here](#).

Impact of President Trump's New Travel Bans on Higher Education Students

On September 24, President Trump issued new restrictions on travel to the United States. The new restrictions replaced the 90-day ban on travel for citizens from six Muslim-majority countries, which expired on Sunday.

The new restrictions limit travel in certain targeted ways for nationals of eight specific countries. Some restrictions target tourism or business travel for certain government officials; others are more sweeping, and restrict nonimmigrant travelers, including students and scholars.

For example, the restrictions bar entry of Iranian immigrants and most nonimmigrants, but allow entry for holders of student and exchange visas (F, M, and J). Immigrant travel is suspended for Somalians, but nonimmigrant travel is not subject to restrictions. For Chad, Libya, and Yemen, suspensions include nonimmigrant business or tourism travel, but do not include student or exchange visitor travel.

Higher education programs should assess how the new restrictions will impact their students from each of the covered nations.

Read more [here](#).

From the lighter side: Employee Attends Beyonce Concert Courtesy of Company Sky Box While Out on FMLA Leave

Immediately after receiving a performance improvement plan, a Dallas-area marketing director left work and called in to advise that she would be filing for short-term disability benefits. Just a week later, however, the employee was seen attending a Beyonce concert in her employer's corporate sky box. Her boss then reached out to the employee via email and requested to discuss her leave requests and attendance at the concert. The employee responded that she was not medically cleared to meet with her employer. After the employee failed to meet a deadline to respond via email, the company terminated her employment.

Apparently, she was not, in fact, irreplaceable.

Read the story [here](#).