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LATEST LEGAL DEVELOPMENTS ON TRANSGENDER STUDENT ISSUES

Gloucester County School Board v. G.G., 136 S. Ct. 2442 (U.S. 2016): Supreme Court Stays Fourth Circuit Order allowing transgender student to use boys' restroom; *State of Texas, et al. v. United States of Amercia, et al.*, Case 7:16-cv-00054-O (N.D. Texas August 23, 2016): District Court for the Northern District of Texas blocks federal government's transgender rules.

DISCUSSION

GLOUCESTER COUNTY SCHOOL BOARD V. G.G.

The case *G. G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. Va. Apr. 19, 2016) involved a high school student, G.G., who was born a biological female but identifies as a male. The school administration initially allowed G.G. to use the boys' bathroom, but the local school board adopted a policy that required students to use the bathrooms and locker rooms for their "corresponding biological genders." The board added that "students with gender identity issues" would be allowed to use private bathrooms.

As discussed in the *Education Law Report* released June 2016 (Volume XXVII Number 2), on April 19, 2016, in the *G.G.* case, a three-judge panel of the Fourth Circuit reversed the lower court's dismissal of G.G.'s Title IX claim and held that, with respect to bathrooms, the Department of Education's Office for Civil Rights' interpretation of Title IX regulations that school districts must treat transgender students consistent with their gender identity must be given controlling weight. The school board filed a petition asking the U.S. Court of Appeals for the Fourth Circuit to order a rehearing by all 15 judges on the Fourth Circuit, which automatically stayed the order.

Since the June 2016 *Education Law Report*, there have been significant developments in the *G.G.* case. On May 31, 2016, the Fourth Circuit denied the petition for a rehearing. As a result, the lower court, on June 23, 2016, entered a preliminary injunction order that required the school district to permit G.G. to use the boys' bathroom at the high school. The lower court and the Fourth Circuit both refused to stay the injunction until the issue could be resolved on appeal. However, on August 3, 2016, the Supreme Court of the United States stayed the June 23, 2016 preliminary injunction order pending the Court's decision to hear the case. Accordingly, G.G. is not permitted to use the boys' bathroom until the Court rules on the merits or decides to not hear the case.

STATE OF TEXAS, ET AL. V. UNITED STATES OF AMERICA, ET AL.

As discussed in the June 2016 *Education Law Report*, in response to the Fourth

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Circuit's decision in the *G.G.* case, the Department of Justice and Department of Education issued a jointly authored Dear Colleague Letter on Transgender Students dated May 13, 2016 (the "Letter") to all of the school districts in the country and told the districts they must allow students to use the bathrooms, locker rooms and showers of the student's choosing and cannot force transgender students to use single-person facilities. The Letter also warned that failure to comply with this directive could result in the loss of Title IX-linked funding.

This Letter and related guidelines (collectively "Guidelines") issued by the Department of Justice, Department of Education and other federal agencies (collectively "government"), was then challenged by several states and agencies in the District Court for the Northern District of Texas in *State of Texas, et al. v. United States of America, et al*, Case No. 7:16-cv-00054-O.

On August 21, 2016, the court issued a preliminary injunction that enjoined the government from enforcing the Guidelines against plaintiffs and their respective schools, school boards, and other public, educationally-based institutions.

In reaching this decision, the court rejected the Fourth Circuit's holding in *G.G.* that the Title IX regulation, 34 C.F.R. §106.33, is ambiguous and that, therefore, the government's interpretation of the regulation should be given controlling weight. The regulation provides: "A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex." In the *Texas* case, the court found that regulation unambiguously protected against discrimination on the basis of biological sex, but not gender identity. Accordingly, because it found that the regulation was unambiguous, the court concluded that it should not defer to the governmental interpretations set forth in the Guidelines.

The court also found that the Guidelines were likely be found to constitute "legislative rulemaking" and therefore had to go through the most formal regulatory process required by the federal Administrative Procedure Act ("APA"). The APA requires agency rules to be published in the Federal Register and that the public be given an opportunity to comment on them if they are legislative in nature. 5 U.S.C. §§ 553(b)–(c).

The court found that the Guidelines were legislative because they created new standards and that violations would be punished. In other words, because the government had taken the position that schools not acting in conformity with the Guidelines are in violation of Title IX, the government was required to go through the notice and comment process.

The court concluded that the plaintiffs met the requirements for a preliminary injunction and enjoined the government from enforcing the Guidelines. In addition, the court ordered that the injunction apply nationwide. However, the court acknowledged that since 34 C.F.R. §106.33 is permissive, the injunction only applies to any state that requires separate facilities based on biological sex. The court also acknowledged that the injunction would not impact any pending litigation in the federal courts.

PRACTICAL ADVICE

The law surrounding the rights of transgender students in schools is, to say the least, unsettled. The stay issued by the Supreme Court in the *G.G.* case does not necessarily mean that the Supreme Court will reverse the decision of the lower courts or even decide to hear the case. Moreover, the stay does not restrict how the federal government will interpret and apply its regulations.

The *Texas* case certainly appears to limit how the federal government can interpret and apply its regulations and Guidelines to school districts. However, Pennsylvania law does not require separate facilities based on biological sex, so it is uncertain whether the injunction in the *Texas* case even applies to Pennsylvania school districts. Moreover, even if it does apply, it is impossible to know whether the preliminary injunction

will be appealed and, if so, whether the preliminary injunction blocking the Guidelines will be stayed or remain in force.

Accordingly, because the issues involving transgender students are complex, controversial, novel and unsettled, school districts should consult with their solicitor prior to implementing any policies concerning transgender students or acting on individual requests for accommodations from transgender students.

BAD TEACHER REINSTATED BECAUSE DISTRICT DID NOT FOLLOW PROPER TERMINATION PROCEDURES

School Dist. of Philadelphia v. Jones, 139 A.3d 358 (Pa. Commw. Ct. 2016). In order to terminate a teacher, a school district must strictly follow procedural requirements under the Pennsylvania School Code. In *Jones*, a teacher was terminated for cursing and discussing sexual topics with his students. But he was subsequently reinstated because the school district committed several procedural errors, including terminating the employee before holding a hearing on the charges against him.

SUMMARY AND FACTUAL BACKGROUND

Ellis Jones was a teacher at Mastbaum Area Vocational Technical School ("Mastbaum") within the Philadelphia School District. Mastbaum's principal, Mary Dean, received reports that Jones was acting unprofessionally with his students, using foul language and discussing inappropriate topics, such as sex. Principal Dean conducted an investigation that confirmed these reports. Jones admitted to some of the inappropriate language and remarks, but explained that he was "trying to build trust and rapport with the students."

The District sent a letter to Jones on August 10, 2009 advising him that it would recommend that Jones be terminated, "effective immediately." The letter also advised Jones that he had a right to a hearing before Philadelphia's School Reform Commission (analogous to a school board), but that "salary adjustments" would be made. Jones stopped receiving pay on August 14, 2009. Jones requested a hearing on the charges against him, but this was not held until April 16, 2010 eight months after the notice letter. The School Reform Commission ("SRC") did not pass a resolution terminating Jones until December 15, 2010 after another eight months had passed. The resolution was retroactive, stating that the effective date of termination was August 14, 2009. Jones then appealed the termination to the Pennsylvania Secretary of Education, who ultimately revised the termination date to December 15, 2010, and awarded back pay to that date.

On appeal, the Commonwealth Court held that the SRC met its burden to prove that "Jones' conduct offended the moral standards of the community," and therefore termination was warranted. However, the Commonwealth Court directed that Jones be reinstated due to several procedural errors by the school district.

DISCUSSION

The Commonwealth Court explained that Section 1127 of the Pennsylvania School Code, and cases interpreting the statute, require the following, in chronological order, before a school district may terminate a teacher:

1) A resolution by the school board stating that it has sufficient evidence to support discipline of the teacher. The resolution should also direct the board president and secretary to provide written notice of charges to the teacher and advise the teacher of his or her right to a hearing on the charges.

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2) A detailed written statement of charges, signed by the board president and attested by the board secretary, sent registered mail to the employee, setting forth the time and date of a hearing before the school board.

3) A hearing before the school board on the charges, between 10 and 15 days after the written notice. The hearing, including testimony of all witnesses, must be recorded by a competent, disinterested public stenographer, at district expense.

Sections 1129 and 1130 of the Pennsylvania School Code contain additional requirements following the hearing:

4) A 2/3 roll call vote of all school board members, recorded in the school board minutes, upholding the charges and terminating the teacher.

5) Notice of the school board's decision via registered mail to the teacher within 10 days of the hearing. If the decision is in favor of the teacher, the charges shall be expunged from school board records and the official transcript and records of the hearing shall be delivered to the teacher.

The Commonwealth Court noted several defects with the procedure to terminate Mr. Jones. First, the SRC never adopted a resolution as described in paragraph 1) above. Consequently there was no evidence that the SRC was aware of the charges and evidence against Jones, in order to direct the school district to send notice of charges. Second, the notice of charges sent to Jones was not attested by the board secretary. Finally, the SRC held its hearing on the charges against Jones on April 16, 2010, but then passed a resolution terminating Jones, effective August 14, 2009. Holding the hearing subsequent to the date of dismissal violated Jones' right to due process according to the Court. The Secretary of Education's decision to revise the termination date to December 15, 2010 did not cure this due process violation. Because the school district did not comply with the procedural requirements under the Pennsylvania School Code, the Court held the teacher was entitled to reinstatement with the district.

PRACTICAL ADVICE

School districts must carefully follow procedural requirements when terminating a professional employee. Any violation of the requirements of § 1127, or other procedural sections of the Pennsylvania School Code, may lead to reinstatement of the employee in question.

ARBITRATION AWARD REINSTATING TEACHER CHARGED WITH "GROOMING" OF STUDENT REVERSED BY COURT

Cornwall - Lebanon School District v. Cornwall - Lebanon Education Association, Court of Common Pleas of Lebanon County, Pennsylvania No. 2015-01556 (April 21, 2016). Common Pleas Court vacates Arbitrator's award reinstating teacher who had been terminated by school district for sexual encounter with a student on the evening of her graduation from high school.

SUMMARY AND FACTUAL BACKGROUND

Todd Scipioni ("Scipioni") was a teacher at Cornwall-Lebanon High School and coached the school's girl's basketball team during the 2003-2004 school year. Late in the season, a senior member of the team, A.H., related to the coaching staff, including Scipioni, that she was experiencing problems at home. Scipioni had significant communications and interactions with A.H., which included a sexual encounter with A.H. on the

night of her high school graduation. The two continued their affair throughout the summer until A.H. left for college. Rumors of an inappropriate relationship between A.H. and Scipioni began circulating around the District and Scipioni ceased coaching basketball, citing "family pressures."

In May 2010, Scipioni met with the high school principal to complain that the school board had declined his application to be the boy's basketball coach. The principal told Scipioni that the board was concerned about rumors of his sexual relationship with a former player from several years earlier when he was the coach of the girls basketball team. The principal asked Scipioni if he was sure that he had never done anything inappropriate with A.H. Scipioni insisted that he had not done anything inappropriate with A.H. but admitted that he had been "too close" with A.H. due to her family problems and that the situation had caused him marital strife.

During the summer of 2014, the Superintendent received an anonymous call from a female who offered to provide information about the relationship between A.H. and Scipioni. The Superintendent conducted an investigation of the rumors surrounding Scipioni's conduct, which investigation included interviews of A.H., Scipioni, A.H.'s stepfather and Scipioni's estranged wife, Jennifer Hartman ("Hartman"). Hartman informed the Superintendent that she suspected A.H. and Scipioni were having an affair during the last half of the 2003-2004 school year and that she found messages on Scipioni's computer during the summer of 2004 discussing their sexual liaisons. She further informed the Superintendent that when she confronted Scipioni, he admitted to the sexual affair with A.H., including the sexual encounter on the night of her graduation. The Superintendent interviewed A.H., who told him that she had a sexual affair with Scipioni some time in 2004, after her 18th birthday in May of that year. When the Superintendent interviewed Scipioni, he answered that he had been "friends" with A.H. and refused to answer whether he had a sexual relationship with A.H. Scipioni was suspended without pay based on his refusal to cooperate with the District's investigation. A search of Scipioni's District-owned computer revealed numerous inappropriate emails and sixty-one downloaded songs with no evidence of licensure. The District determined that the evidence of a sexual relationship with A.H., Scipioni's deceit and refusal to cooperate during the investigation, together with the information found on his computer constituted immorality and justified termination.

The Association filed a grievance asserting that the suspension and subsequent termination were without just cause. At the arbitration hearing, Scipioni continued to deny the relationship and A.H. recanted her prior admissions regarding the affair. The arbitrator, however, accepted as true testimony of several witnesses that a sexual relationship between Scipioni and A.H. did in fact occur, including the testimony from Hartman who recounted Scipioni's admission that he first became intimate with A.H. on the evening of her graduation, and A.H.'s sister who testified that A.H. told her that she and Scipioni were planning to have a sexual encounter on the evening of her graduation, and that they in fact had such an encounter.

The arbitrator found that, although there is a well defined public policy that a school district must ensure the safety of its students against inappropriate sexual or romantic behavior by its teachers, he opined that a post-graduation relationship was beyond the reach of the District's authority to regulate the conduct of its teachers and that, although Scipioni failed to fulfill his duty to respond to the District's questions with honesty and candor, his "falsehoods" were "somewhat excusable and understandable." The arbitrator mitigated Scipioni's termination to a one year suspension without pay and ordered that he be reinstated. The District filed a petition to vacate the arbitrator's award with the Lebanon County Court of Common Pleas which granted the District's petition.

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DISCUSSION

The standard of review for a Common Pleas Court reviewing an arbitrator's award is the familiar "essence test" which provides that an arbitrator's award must be upheld if

(i) the issue as properly defined is within the terms of the collective bargaining agreement, and

(ii) the arbitration award can be rationally derived from the terms of the collective bargaining agreement.

However, even if the arbitrator's award meets the essence test, an award may be vacated if it contravenes a well-defined, dominant public policy, as ascertained by reference to laws and legal precedents, and the award poses an unreasonable risk that the public policy will be undermined if it is implemented. While a Common Pleas Court is bound by an arbitrator's findings of fact, the application of the public policy exception to the essence test is purely a question of law where the standard of review is *de novo* and the scope of review is plenary. Thus, although the court must accept the findings of fact determined by the arbitrator, the court conducts a *de novo* review of the application of those findings of fact to the public policies advanced by the District.

The arbitrator found as credible testimony that A.H. and Scipioni planned, prior to A.H.'s graduation, to have a sexual encounter immediately after her graduation and that "this sexual/romantic relationship had its roots firmly planted during the time that A.H. was a District student." The court further stated "we do not believe that public policy condones such conduct" which conduct conflicted with the District's interest and obligation to protect its students from being "groomed" and prepared for future sexual conduct with District personnel. The court also noted that Scipioni's conduct constituted "sexual misconduct" within the meaning of the Professional Educator Discipline Act as the agreement to engage in sexual conduct immediately after graduation was a "sexual or romantic invitation" which occurred while A.H. was a student at the District.

The Common Pleas Court also noted that the arbitrator found that Scipioni had "outright lied" on numerous occasions, both during the investigation and the arbitration hearing, and that such conduct violates and undermines the clear public policy that an employee owes an undivided duty of loyalty to his employer, including the duties of honesty, frankness and candor. The Court found that the arbitrator could not simply dismiss and disregard Scipioni's violations of his duties of honesty and candor by characterizing his failure to be truthful during the District's investigation of his conduct as "human nature."

PRACTICAL ADVICE

The Association has appealed the decision of the Lebanon County Common Pleas Court to the Commonwealth Court where it is currently pending. However, as the Common Pleas Court noted, where an employee engages in a romantic or sexual relationship with a recent graduate, the school district should investigate whether there is any indication that there were any inappropriate interactions or communication between the student and the employee prior to graduation, as such conduct potentially violates public policy and the Professional Educator Discipline Act. Further, an employee's failure to be honest during an investigation of alleged misconduct by the employee constitutes a violation of public policy and is an independent grounds for discipline.

FCC RULES THAT INFORMATIONAL AUTOMATED MESSAGES SENT BY SCHOOLS TO PARENT CELL PHONES DO NOT VIOLATE THE FEDERAL TELEPHONE CONSUMER PROTECTION ACT

In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991 (Petition of Blackboard, Inc.), CG Docket No. 02-278 (August 2016). The FCC confirms that schools may send informational messages "closely related to the school's mission" via automated calls and text messages to parent cell phones absent instructions to the contrary from the parent.

SUMMARY AND DISCUSSION

The federal Telecommunications Consumer Protection Act (TPCA), 47 U.S.C § 227, regulates telemarketing calls, auto-dialed calls, prerecorded calls and text messages to non-commercial wireless phones. Generally, the TPCA prohibits solicitations using prerecorded messages or "robocalls" absent prior express consent and establishes a private cause of action for violations. The act applies to communications from schools to parents, but provides exceptions to the general prohibition.

In particular, the TPCA allows prerecorded calls and text messages to be placed by schools to cell phones for "emergency" calls which regulations define as "calls made necessary in any situation affecting the health and safety of consumers." While the act also allows informational calls to land lines from public schools, it is increasingly common that families rely only on cell phones and do not maintain a land line home phone.

Consequently, informational calls or messages, such as announcements of school activities, delivered by schools to cell phones could be construed as violating the TPCA. Thus, in guidance, the Federal Communications Communication Commission had opined that informational calls from school to parent cell phones require prior express consent.

Seeking clarification of the FCC's position on the use by schools of informational robocalls, in 2015, Blackboard, Inc., a company that provides notification services to schools, filed a petition with the FCC. In that matter, the FCC recently issued a declaratory ruling confirming that

1) schools can lawfully place certain types of robocalls to members of their school communities pursuant to the "emergency purpose" exception in the TCPA; and
2) schools are deemed to have the requisite "prior express consent" to place other types of robocalls that are not emergencies, but are "closely related to the school's mission" to numbers that recipients have provided to the schools.

The FCC determined that the "emergency purpose" exception in the TCPA allows schools to place robocalls concerning weather closures, incidents of threats and/or imminent danger due to fires, dangerous persons, or health risks, and unexcused absences of students.

Further, the FCC ruled that informational calls that are not emergencies but are "closely related to the school's mission," such as notifications of upcoming teacher conferences and general school activities, are considered to be made with "prior express consent" when the parents have provided their cell phone numbers to the school. The FCC reasoned that persons who knowingly release their telephone numbers have in effect given their invitation or permission to be called at the number which they have given, absent instructions to the contrary.

PRACTICAL ADVICE

This FCC ruling effectively eliminates the risk of claims of violations of the TPCA for most types of prerecorded messages delivered by schools. To ensure compliance with the "prior express consent" requirement for receipt of informational calls, school districts should consider including a statement on registration forms indicating that, absent contrary instructions, emergency and informational messages will be placed to cell phone numbers provided by parents.