Ratwik, Roszak & Maloney, P.A.

730 Second Avenue South, Suite 300
Minneapolis, Minnesota 55402

(612) 339-0060
Fax (612) 339-0038
www.ratwiklaw.com

MSBA WORKSHOP SERIES: SCHOOL LAW UPDATE

April 15, 2021

Timothy A. Sullivan
tas@ratwiklaw.com

I. TRANSGENDER STUDENT ACCOMMODATIONS

A. *N.H. v. Anoka-Hennepin Sch. Dist. No. 11*, 950 N.W.2d 553 (Minn. App. 2020).

Plaintiff N.H., a high school freshman ("N.H.") who was born female but identified as male, joined the boys swim team and was initially permitted to use the boys locker room. Toward the end of his freshman year, however, the school district told N.H. that he had to use the girls locker room. That same day, the school district reversed its determination, allowing him to continue to use the boys locker room. N.H. was admitted to the hospital for mental health concerns that he reported arose from the original determination that he must use the girls locker room. In N.H.'s sophomore year, Anoka-Hennepin also told him that he had to use the enhanced-privacy changing area, and that he would be punished if he continued to use the main boys locker room.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2021 Ratwik, Roszak & Maloney, P.A.

Shortly after the decisions in his sophomore year related to his use of the locker room, N.H. transferred out of the school district and filed a charge of discrimination with the Minnesota Department of Human Rights ("MDHR") in 2017. In 2019, N.H. withdrew the pending MDHR charge and filed a lawsuit against the school district in the Anoka County District Court. On April 15, 2019, the MDHR joined the lawsuit on N.H.'s behalf.

In his lawsuit, N.H. contended that requiring him to use a facility other than the main boys locker room violated his rights under the Minnesota Human Rights Act ("MRHA"), cited above, and the Equal Protection Clause of the Minnesota Constitution. The school district moved to dismiss N.H.'s suit for failure to state a claim. The motion was denied by the district court. The school district appealed to the Minnesota Court of Appeals.

On appeal, the Minnesota Court of Appeals concluded that N.H. had stated a viable claim under the MHRA, and that transgender students who were denied the use of the locker room that corresponds to their gender identity could bring a lawsuit under the MHRA. The Court of Appeals specifically noted that Section 363A.23 did not create an exemption for locker rooms. The Court also held that a student could sue under the Equal Protection Clause of the Minnesota Constitution, and that the school's policy would have to satisfy intermediate scrutiny. This standard of review requires that any school policy prohibiting transgender students from using the locker room that corresponds to their gender identities would have to be "substantially related to an important governmental objective." Although not ruling on this point, the Court of Appeals opinion also suggests that, based on the majority of recent federal decisions, a policy requiring a transgender student to use a separate locker room would not meet this standard.

Ultimately, no decision was reached as to whether the Anoka-Hennepin School District's policy with respect to transgender students was or was not discriminatory. Although ruling that the facts raised a viable claim under the law, the Court of Appeals remanded, or sent the case back, to the trial court for further proceedings. Pending continuing litigation, on March 23, 2021, the Anoka-Hennepin School District settled the lawsuit with the student for $300,000.

B. *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (U.S. 2020).

Bostock is a consolidated appeal of three employment-discrimination cases, involving employees who were terminated because of their sexual orientation or gender identity. In each of these cases, the employer admitted that the employee's sexual orientation or intent to transition to present as a transgender woman was the reason for the termination.

The U.S. Supreme Court granted certiorari, consolidated the cases, and addressed the question of whether Title VII's prohibition against employment discrimination "because of sex" encompasses discrimination based on an individual's sexual orientation, and whether Title VII prohibits discrimination against transgender employees based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins*.

In a 6-3 opinion authored by Justice Neil Gorsuch, the Supreme Court began from the parties' assumption that "sex," as used in Title VII, refers to biological male or femaleness. The Court noted, however, that Title VII prohibits discrimination "because of sex," but not "solely because of sex." Rather, the Court held, "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger [Title VII]." Accordingly, the Court held that it does not matter if factors besides the plaintiff's sex were part of the termination decision. Rather, if changing the employee's sex would have produced a different result, the employer has committed sex discrimination.

As an example, the Court proposed the hypothetical of two employees, both of whom are attracted to men, and both of whom are identical in all respects, except that one employee is a woman and the other is man. If the employer fires the male employee solely for being attracted to men, then that employee has been treated worse than a female employee who is attracted to men, and so the decision is based on sex, and is discrimination.

As another example, the Court imagined a hypothetical employer who fired every female employee who was a fan of the New York Yankees. If that employer did not fire male employees for being fans of the New York Yankees, the fact that the termination was based on sports team preference does not change the fact that the termination is also discrimination based on sex—the employer is tolerating a trait in one sex, but not the other.

The Court further noted that sexual orientation and gender identity are "inextricably bound up with sex," and wrote that "[f]or an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms—and that 'should be the end of the analysis.'"

C. *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3rd Cir. 2018), *cert. denied*, 139 S.Ct. 2636 (2019).

A group of cisgender students filed suit against their school district, alleging that the school's gender inclusion policy violated their constitutional right to privacy under the Fourteenth Amendment and created a hostile environment in violation of Title IX. The students sought an injunction preventing the school district from permitting transgender students from using locker rooms and bathrooms inconsistent with their birth sex.

The U.S. District Court for the Eastern District of Pennsylvania denied the students' motion for injunctive relief. The court held that the students were unlikely to succeed on the merits of their claims, and that they had not suffered any irreparable harm. The decision was appealed to the Third Circuit Court of Appeals, which affirmed the lower court's decision in July of 2018 substantially for the reasons set forth "[i]n an exceedingly thorough, thoughtful, and well-reasoned [district court] opinion."

The lower court held that, with respect to the constitutional right to privacy claim, the students had failed to prove that the gender inclusion policy violated their constitutionally protected interest to privacy in their partially clothed bodies.

With respect to the Title IX claim, the lower court held that the students did not establish that they have suffered discrimination "on the basis of sex," as the gender inclusion policy treats all students, male and female, similarly. The lower court further held that the students could not meet the strict legal standard for establishing a sexual harassment claim under Title IX, which requires a plaintiff to establish sexual harassment "that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim students are effectively denied equal access to [the school's] resources and opportunities."

D. Shifting Federal Guidance/Enforcement

On May 13, 2016, the U.S. Department of Education Office of Civil Rights (OCR) issued a highly publicized "Dear Colleague Letter" (2016 DCL). This 2016 DCL expressly took the position that Title IX requires schools to permit transgender students access to restroom and locker room facilities that align with their gender identity.

Following the 2016 election, the OCR under the incoming Trump Administration issued a new "Dear Colleague Letter" on February 22, 2017 (2017 DCL). The

2017 DCL formally withdrew and rescinded the 2016 DCL, including the Obama-era OCR position regarding restroom and locker room access by transgender students.

In February of 2018, it was widely reported that the OCR had announced it will no longer investigate civil rights complaints from transgender students regarding bathroom access. The OCR clarified that it will continue to scrutinize other forms of discrimination on the basis of sex.

However, on March 8, 2021, President Biden issued an Executive Order declaring that it was the policy of the Biden Administration to construe Title IX's prohibition on sex discrimination as including claims of sexual-orientation or gender-identity discrimination. The extent to which this declaration changes the U.S. Department of Education's approach remains to be seen.

II. STUDENT FREE SPEECH

A. General Background.

1. The *Tinker* Standard

In 1969, the United States Supreme Court made the now famous statement that "students do not shed their constitutional rights at the school house door." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In this case, the Court struck down a school rule that prohibited students from wearing black armbands in silent protest of the Vietnam War. The Court considered two factors:

a. Particularized Message

Courts first consider whether the student "intended to convey a particularized message" and whether there is a reasonable likelihood that those who viewed it would understand the message. If so, the speech is entitled to constitutional protection.

b. Disruption or Material Interference

Even if protected, courts next consider whether the speech is likely to, or did it actually cause a "disruption of or material interference with school activities" or "invasion of rights of others." If so, public schools may impose restrictions on the student speech.

2. Lessons Learned from *Tinker* and Subsequent Cases

a. A fear of disruption is not enough. A public school must have specific facts from which it can reasonably forecast a "substantial/material disruption."

b. The fact that speech might cause discomfort and uneasiness is an insufficient ground for regulating the speech.

3. Other Forms of Student Speech Not Entitled to Protection

a. Plainly offensive, obscene or vulgar speech. *See Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986) (holding that a student's speech, filled with sexually explicit metaphors and delivered at a school assembly, did not relate to political, religious, or other areas of speech that usually receive First Amendment protection and could be restricted).

b. Promotion of drug use. *See Morse v. Frederick*, 551 U.S. 393 (2007) (a student displaying a banner "BONG HiTS 4 JESUS on school property just as the Winter Olympic Games torch relay passed by the school could be required to remove the sign and disciplined if he did not, as the speech is reasonably viewed as promoting illegal drug use and can be prohibited without a showing of a "substantial disruption").

B. ***B.L. by and through Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d. Cir. 2020)**. B.L., a sophomore, was placed on the junior varsity cheer team for the second year in a row. She was frustrated by this placement, particularly because a first-year student had made the varsity cheer team. She was also stressed about upcoming exams, and frustrated with her assigned position on the softball team. So, she took to Snapchat to vent, and posted a photo of herself and a friend with their middle fingers raised on her Snapchat story, which she captioned "F*** school f*** softball f*** cheer f*** everything" and added a message referring to how she had been told she needed a year of junior varsity experience before she could make the varsity cheer team, but apparently that requirement did not matter to anyone else. Several students approached the cheerleading coaches about B.L.'s Snapchat story, and she was suspended from the cheer team for one year, on the grounds that she had violated the team's rules regarding respect for coaches and appropriate online behavior. Additionally, the coaches felt that B.L. had violated a school rule requiring student athletes to "conduct themselves in such a way that the image of the Mahanoy School District would not be tarnished in any manner." The District Court and the Third Circuit Court of Appeals both

ruled in B.L.'s favor, finding that her Snapchat was off-campus speech, and therefore not subject to *Fraser*. Disagreeing with other Circuits, including the Eighth Circuit, the Third Circuit also concluded that *Tinker* did not apply to B.L.'s off-campus speech.

The U.S. Supreme Court is reviewing the Third Circuit's decision, and oral argument will take place on April 28, 2021.

Note: The Third Circuit is the only Circuit that has concluded that *Tinker* does not apply to off-campus speech. Five other Circuits, including the Eighth, have all held that *Tinker* does apply off-campus, and the remaining six have not addressed the issue. *See C1.G, on behalf of his minor son, C.G. v. Siegfried,* 477 F.Supp.3d 1194, 1205 (D. Colo. 2020) (collecting cases).

B. ***Norris on behalf of A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12 (1st Cir. 2020).** A high school student, A.M., anonymously posted a sticky note on the mirror of a girls' bathroom saying "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS." The sticky note contained no details as to who it was referring to as a "rapist," or where any alleged sexual assault occurred. The high school conducted a ten-day investigation, that included 47 student interviews as well as a review of security camera footage.

The investigation determined that the alleged "rapist" had not actually engaged in any sexual assault, and the sticky note was based entirely on rumors. The student who was rumored to have engaged in sexual assault was nevertheless ostracized by the revival of these rumors, and stayed home for almost a week while the investigation was ongoing. The school district determined that A.M. had posted the sticky note, and suspended her for three days for bullying.

A.M. sued the school district, and sought an injunction to prevent the three-day suspension from taking effect. The U.S. District Court for the District of Maine found that A.M. was entitled to an injunction, because she was substantially likely to succeed on the merits of her First Amendment claim. Specifically, the District Court found that A.M. had suffered an adverse action (suspension), that her speech was a substantial or motivating factor in the adverse action, and that her speech was constitutionally protected, and that A.M.'s speech was likely political speech on a significant issue of public consequence, namely, sexual assault. The District Court further noted that, under the Supreme Court's decision in *Elrod v. Burns*, the loss of First Amendment freedoms for even a minimal period of time constitutes an irreparable injury sufficient to warrant an injunction.

The First Circuit Court of Appeals affirmed the District Court. Furthermore, the First Circuit Court of Appeals noted that the school district's justification for regulating or restricting A.M.'s speech via sticky note was limited to bullying, as that was the only reason A.M. had been provided. The District Court noted, and the First Circuit Court of Appeals agreed, that the school district had not identified a causal connection between A.M.'s sticky note and the rumors relating to the Snapchat video of Student 1, which were the primary cause of his ostracization by his peers.

This case was settled on October 2, 2020.

III. FREE EXPRESSION IN THE WORKPLACE

A. ***Amalgamated Transit Union Local 85 v. Port Auth. of Allegheny Cty., --- F.Supp.3d ----, 2021 WL 164315 (W.D. Pa. Jan. 19, 2021).*** The Allegheny County Port Authority, which provided public transportation to the County, had a long-standing policy that prohibited its employees from wearing buttons or stickers that reflected political or social-protest messages, which was intended to avoid disruption in the workplace. Following the killing of George Floyd, many bus drivers and other employees began to wear "Black Lives Matter" facemasks at work, and did so for months without incident. Eventually however, one employee complained to Port Authority management, and asked how the Port Authority would respond if he wore a "White Lives Matter" mask. Out of concern for potential disruption, the Port Authority first attempted to extend its policy on masks and buttons to facemasks, and subsequently enacted a new policy that limited employees to a few facemask options. The Port Authority also disciplined, and threatened to further discipline, employees who continued to wear Black Lives Matter facemasks after these policies were put in place.

A group of employees and their union sued the Port Authority, asserting that the Port Authority's policies violated their free speech and equal protection rights under the United States and Pennsylvania Constitutions. The Union also sought an injunction to prohibit the Port Authority from enforcing its facemask policy. The U.S. District Court for the Western District of Pennsylvania found that the Union and employees were likely to succeed on the merits of their First Amendment claim, noting that, because the Port Authority was imposing a prior restraint on speech, the government was required to show "that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's necessary impact on the operation of the government."

Note: This is not the standard in Minnesota. This language is drawn from the U.S. Supreme Court's Opinion in *United States v. National Treasury Employees Union*, 513 U.S. 454 (1995). Neither the Eighth Circuit nor any Minnesota Court has adopted this standard. The standard in Minnesota requires that the employee's speech be on a matter of public concern, and then evaluates whether the employee's First Amendment interest in that speech outweighs any potential disruption of the work environment. Under the standard used in Minnesota, the employer must either show actual disruption or prove that disruption is likely to occur if the employee's speech is not restrained.

In this case, the Court found that the Port Authority had not shown any evidence of actual or likely disruption from employees wearing Black Lives Matter facemasks. All the Port Authority had shown was some debate amongst employees on social media and via text message. There was no evidence that any customer had complained, or that there had been any negative impact in workplace operations. By contrast, the employees would be irreparably harmed by having their free speech rights curtailed.

The Port Authority has appealed this order to the Third Circuit Court of Appeals.

B. ***Frith v. Whole Foods Market, Inc.*, --- F.Supp.3d ----, 2021 WL 413606 (D. Mass. Feb. 5, 2021).** In a non-school case, a group of Whole Foods employees sued their employer alleging they have been discriminated against, in violation of Title VII, for wearing Black Lives Matter facemasks and apparel at work. The Plaintiffs alleged that numerous races were subjected to disparate treatment, including discipline for wearing, or attempting to wear, Black Lives Matter masks at work. They asserted that this treatment constituted both race discrimination and retaliation under Title VII. Whole Foods moved for dismissal.

The U.S. District Court for the District of Massachusetts dismissed the race discrimination claims. The Court noted that Title VII prohibits differential treatment of an employee because of the *employee*'s race. Here, however, the Whole Foods employees did not make any assertions relating to their own race. Rather, they asserted that Whole Foods disciplined employees regardless of their race. The Court, relying on *Bostock*, noted that the test for race discrimination is whether changing the employee's race would have changed the outcome, and that the employees had admitted it would not change the outcome.

The employees also sought to bring an "associational discrimination claim," which the Court noted had not been widely recognized. *Note: the Eighth Circuit has not recognized associational discrimination outside the context of disability discrimination.* The Court, however, noted that associational discrimination claims are based on the employee's relationship with or advocacy for a specific person or people, not for espousing support for a race as a whole.

With respect to the retaliation claim, there was one employee whose claims were not dismissed, because she alleged that she was fired within an hour of notifying management that she had filed a complaint with the EEOC. With respect to the remaining plaintiffs, however, the Court held that protesting nation-wide racism and police brutality is not protected conduct under Title VII, and is not done to oppose an unlawful *employment* practice.

In sum, the Court wrote: "[N]ot all conduct that touches on race is actionable under Title VII. Here, even assuming the truth of the allegations in the complaint, Defendants did not discriminate on the basis of race. Rather, at worst, they were selectively enforcing a dress code to suppress certain speech in the workplace. However unappealing that might be, it is not conduct made unlawful by Title VII."

The *Frith* Court also specifically distinguished the *Port Authority* case. Unlike the employees in *Port Authority*, who worked for a public-sector employer, Whole Foods is a private employer, and is therefore not subject to the First Amendment. The judge acknowledged that, "[a]t heart, this is a First Amendment claim that Plaintiffs are trying to shoehorn into Title VII in recognition of the fact that there is no right to free speech in a private workplace."

The employees have appealed the dismissal of their case to the First Circuit Court of Appeals.

***Note:* These issues remain an open legal question in the State of Minnesota. However, these cases illustrate some of the arguments that employees may seek to make regarding restrictions to their clothing or facemasks.**

IV. PULLING IT ALL TOGETHER: STAFF SPEECH REGARDING TRANSGENDER STUDENTS' ACCOMMODATIONS

A. *Vlaming v. West Point Sch. Bd.*, (Cir. Ct. King William Cty., VA, Filed Sept. 30, 2019).

Lawsuit filed against the West Point School Board by Alliance Defending Freedom on behalf of Peter Vlaming, a former French teacher at the school. Vlaming was suspended and subsequently terminated after refusing to refer to a transgender male student by male pronouns. The suit alleges school district officials violated Vlaming's right to speak freely and exercise his religion.

This case was removed to the U.S. District Court for the Eastern District of Virginia, which remanded the case to state court on August 19, 2020. An appeal is currently pending with the Fourth Circuit Court of Appeals.

B. *Kluge v. Brownsburg Cmty. Sch. Corp.*, 432 F.Supp.3d 823 (S.D. Ind. 2020).

John Kluge, a former orchestra teacher at Brownsburg High School, alleges he was forced to resign after he refused to comply with the school policy of addressing transgender students by their preferred names. Kluge argues that the policy goes against his religious beliefs and violates the First Amendment. After the policy was put into effect, Kluge claims he reached a compromise with the school where he was permitted, as an accommodation, to refer to all students using their last name. When students complained about the use of last names, the school rescinded the accommodation. Kluge sued under Title VII, the First Amendment, the Fourth Amendment, and the Indiana State Constitution.

The U.S. District Court for the Southern District of Indiana dismissed Kluge's lawsuit on all constitutional counts, but allowed the Title VII claims to proceed. With respect to the First Amendment, the Court first held that the manner in which a public school teacher addresses his or her students is part of the teacher's official duties, and therefore not protected under the First Amendment. Second, the Court held that, while issues relating to the treatment of individuals based on their gender identity are a matter of public importance, Kluge's choice of how to address students was not. Third, the school's policy was neutral and generally applicable, and therefore any incidental burden to Kluge's religious beliefs did not violate the Free Exercise Clause.

With respect to the Fourteenth Amendment claims, Kluge argued that the policy was void for vagueness. The Court disagreed, noting that the policy required teachers to address students by their preferred first name as listed in the school

directory, which was not vague and did not create any need to guess the policy's meaning.

However, the Court held that Kluge's allegations that he was forced to retire due to his non-compliance stated a claim for religious discrimination, and his allegations that the school district had previously agreed to and then withdrawn his accommodation and forced him to retire under threat of termination stated a claim for retaliation under Title VII.

C. ***Meriwether v. Hartop*, --- F.3d ----, 2021 WL 1149377 (6th Cir. Mar. 26, 2021).**

Nicholas Meriwether, a philosophy professor at a public university in Ohio, had a practice of referring to his students as "Mr." and "Ms.," or as "sir" or "ma'am" in conversation. At the beginning of the 2016-2017 school year, the university allegedly reminded faculty members that they were required to refer to students by their preferred pronouns, regardless of the professor's views on the subject, and regardless of any religious objections.

In 2018, Meriwether referred to a student who he perceived to be male on the first day of class as "sir." The student approached Meriwether after class and demanded to be treated as a woman, and referred to as "Ms." or "ma'am" in class. Meriwether expressed concern that his religious beliefs, which included prohibiting him from communicating messages about gender identity that he believed to be false, might prevent him from accommodating the student. The student complained, and, despite various proposals or efforts from Meriwether, including referring to the student by last name only, and adding language to his syllabus that indicated he was using preferred pronouns because of university policy and in contradiction to his own beliefs, the college ultimately reprimanded him for not using the student's preferred pronouns. Meriwether sued, and the Sixth Circuit concluded that Meriwether's description of events stated a claim for First Amendment retaliation and failure to accommodate his religious beliefs.

D. Notwithstanding the foregoing, failure to address the issue of staff refusing to respect the wishes of a transgender student exposes the school to a possible discrimination claim from the student in light of *N.H.*