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Student Expression: Off-Campus Speech

On June 23, 2021, in the case of *Mahanoy Area School District v. B.L.*, the United States Supreme Court issued a decision which will have implications on how school districts around the country regulate and discipline off-campus student speech moving forward. In this case, a student, B.L., was suspended from the junior varsity cheerleading squad for one school year after she posted two Snapchats from a convenience store on a Saturday which contained inappropriate remarks. Specifically, when B.L. did not make the school's varsity cheerleading squad, she posted a Snapchat where she and a friend had their middle fingers raised and stated "F*** school f*** softball f*** cheer f*** everything." While in the

specific facts of this case, the Court held that the school's disciplinary action violated the student's First Amendment rights, the Court made it clear that public schools have the ability to regulate off-campus student speech when the circumstances warrant it. Please see our Firm's legal alert memorandum which was emailed on July 26, 2021 for further detail and guidance related to this matter.

United States Supreme Court Denies Certiorari for Transgender School Bathroom Case

On June 28, 2021, the United States Supreme Court denied certiorari in the case of *Grimm v. Gloucester Co. School District*. Thus, the Fourth Circuit's August 2020 decision stands as it relates to transgender students' rights. By way of background, Grimm, a transgender male student, at the end of 9th grade, changed his name to Gavin and began to express his male identity. He entered 10th grade living fully as a boy. He and his mother met with the school and they agreed that he could use the boy's bathroom. After weeks without incident, word got out and parents began to voice their opposition, and the School Board faced backlash. In response, the Board adopted a quickly drafted policy under which students could only use bathrooms that matched their "biological gender." Also, in a further effort to resolve the issue, the school allowed the use of the nurse's bathroom and built single-stall restrooms as an alternative for students dealing with "gender identity issues." The single stall restrooms were at the far end of the school and the use of the nurse's bathroom became stigmatizing. Specifically, the stigma caused by separation from his peers resulted in Grimm refusing to use the restroom at times, suffering urinary tract infections and eventually he was hospitalized for suicidal thoughts as a result.

In addition to the bathroom issue, Grimm also requested the District amend his school



records to reflect his male identity. Among other things, Grimm received a Virginia Driver's License listing his sex as male, received an amended birth certificate listing his sex as male, and obtained a court order legally changing his sex to male; however, the Board refused to amend Grimm's school records to reflect his sex as male. At the time of the appeal, Grimm was applying to college and wanted his high school transcript to reflect his expressed gender. Grimm sued in 2015 arguing that the school board policy excluding him from the male bathroom and the District's refusal to amend his records violated both the 14th Amendment Equal Protection Clause and Title IX. After five years of litigation, the District Court found in Grimm's favor and determined that he was discriminated against on the basis of sex. The Fourth Circuit agreed with the District Court and held that the Board's policy constituted sex-based discrimination, thus violating the Fourteenth Amendment's Equal Protection Clause and Title IX.

Based upon the Fourth Circuit's decision and the United States Supreme Court's decision to deny certiorari, as it currently stands, school districts in South Carolina must allow transgender students to use bathrooms that align with their gender identities and must allow records to be amended if the student presents a legally recognized amended birth certificate or court order.

Student Identification Card Suicide Prevention Act

On May 17, 2021, the South Carolina legislature enacted the "Student Identification Card Suicide Prevention Act" requiring all public schools, including charter schools, that serve any student in the seventh through twelfth grades that issue student identification cards, to print on either side of the cards the telephone number for the National Suicide Prevention Lifeline. The school must also print on either

side of the cards the social media platform, telephone number, or text number for at least one additional crisis resource selected by the school district or charter school sponsor pursuant to the available data regarding local school or community needs, including, but not limited to the Crisis Text Line, a local suicide prevention hotline, or the National Teen Dating Abuse Helpline. Prior to the start of each school year, schools are also required to certify to their respective governing bodies that the contact information being printed on student identification cards is up to date and reflects current contact information for crisis resources posted on the South Carolina Department of Mental Health's website. If a public school has a supply of unissued student identification cards that do not comply with the requirements of this act, then the school may issue those student identification cards until the supply is depleted. This Act takes effect on July 1, 2022.

Waiver of Limitations on Homeschool Student Eligibility to Participate in Public School Interscholastic Activities

On April 16, 2021, Act No. 101 went into effect which provides that for the 2020-2021 and 2021-2022 school years, the requirements of S.C. Code § 59-63-100(A)(3), which state "a home school student is a child taught in accordance with Section 59-65-40, 59-65-45, or 59-65-47 and has been taught in accordance with one of these sections for a full academic year prior to participating in an interscholastic activity..." are waived for homeschool students. For the purposes of this Act, eligible students must have been enrolled in a public school for the beginning of either the 2019-2020 or 2020-2021 school year.

In-Person Classroom Instruction & Dual-Modality Instruction Requirements & Limitations

On April 22, 2021, the South Carolina



Legislature passed Act No. 102 which provides that for the 2021-2022 school year, every school district in the state must offer five-day, in person classroom instruction to students. Further, the Act provides that due to the need for ongoing, high-quality instruction to address learning disruptions associated with COVID-19, for the 2021-2022 school year, school districts are prohibited from assigning a teacher to deliver instruction to students simultaneously in-person and virtually (“dual-modality instruction”), unless it is reasonable and necessary due to extreme and unavoidable circumstances in order to ensure that all students have access to highly qualified instructors. In the event that a school district determines it is necessary for a teacher to deliver dual-modality instruction, the school district must provide additional compensation to the teacher. Moreover, for any teacher assigned by a school district to dual-modality instruction, the school district must provide the State Department of Education with the name of the teacher, school where the teacher is employed, and subject area in which the teacher was hired to teach. The State Department of Education will be required to report the information to the General Assembly at the completion of the school year.

Increase of the Limited Earnings Cap to the South Carolina Retirement System

On April 22, 2021, the South Carolina Legislature increased the earnings limitation imposed pursuant to S.C. Code Ann. § 9-1-1790, South Carolina Retirement System from \$10,000 to \$50,000 for retired educators. Specifically, the \$10,000 limited earnings cap does not apply to a retired member of the South Carolina Retirement System if the retired member (a) retired on or before April 1, 2019; and (b) returns to otherwise covered employment in the K-12 public education system. The Act provides that a retired member

who meets the above-referenced qualifications “may be hired and return to employment covered by the system and earn up to fifty thousand dollars annually without affecting the monthly retirement allowance that the member is receiving from the system. No retired member participating under this section may be compensated for an employment period exceeding thirty-six consecutive months. An employer shall notify the system of the engagement of a retirement member to perform services, and if an employer fails to notify the system of the engagement of a retired member to perform services, then the employer shall reimburse the system for all benefits wrongly paid to the retired member. Nothing in this joint resolution may be construed to require an employer to hire a person after that person has retired.”

Public High School Required Instruction

On April 28, 2021, the General Assembly passed Act No. 26 amending S.C. Code Ann. § 59-29-120(A) to read “All public high schools must give instruction in the essentials of the United States Constitution, the Declaration of Independence, the Emancipation Proclamation, and the Federalist Papers. No student in a public high school may receive a certificate of graduation without previously passing a course that includes instruction in the provisions and principles of the United States Constitution, the Declaration of Independence, the Emancipation Proclamation, and the Federalist Papers.” This Act takes effect beginning with the 2021-2022 school year.

Schools of Choice Re-designated as Schools of Innovation

On April 22, 2021, the General Assembly passed Act. No. 20 re-designating schools of choice as schools of innovation and amended S.C. Code Ann. § 59-19-350(A) to read:

“(A)(1) A local school district board of



trustees of this State desirous of creating an avenue for new, innovative, and more flexible ways of educating children within their district, may create one or more schools of innovation within the district that are exempt from applicable state statutes and regulations which govern other schools in the district. To achieve the status of a school of innovation and have exemption from specific statutes and regulations, the local board of trustees, at a public meeting, shall identify specific statutes and regulations which will be considered for exemption and shall disclose the financial model to be used. The exemption may be granted by the governing board of the district only if there is a two-thirds affirmative vote of the board for each exemption and the proposed exemption is approved by the State Board of Education, provided a district may not designate all schools in the district as schools of innovation.

(2) To achieve the status of exemption:

(a) A school district must identify each state statute, regulation, and local district policy from which the school is requesting exemption and specify how this flexibility will support academic achievement for students and the Profile of the Graduate. No district is permitted to request flexibility from all state regulations and statutes for any school or schools.

(b) The district superintendent must submit a request containing the information in subitem (a) to the local board of trustees for approval, which must be considered in a public meeting and requires a two-thirds vote of the board for approval. Any change in the request must be approved by the local board by a two-thirds vote.

(c) Once approved by a local school board, the district superintendent must submit the request to the State Board of Education for approval, which requires a two-thirds vote of the State Board. Any change in a request that is pending

approval by, or has been approved by, the State Board of Education must be made in the same manner as provided in subitem (b) and this subitem for initial requests.

(3) Each school of innovation annually before July first shall:

(a) demonstrate compliance with the financial model identified in item (1);

(b) provide full financial statements detailing how it receives and expends funds; and

(c) report the academic achievement of its students as indicated by the performance of its students on the same assessments and matrices required of all other public schools, based on grade level.

(4) Nothing in this section permits a local school district board of trustees to relinquish control or oversight of the schools created pursuant to this section, and the local school district board must ensure transparent and timely reporting of fiscal and academic performance for each school of innovation.”

COVID-19 Related Budget Proviso

Proviso 1.108 (SDE: Mask Mandate Prohibition) was adopted by the General Assembly in the 2021-2022 Appropriations Bill and states “No school district, or any of its schools, may use any funds appropriated or authorized pursuant to this act to require that its students and/or employees wear a facemask at any of its education facilities. This prohibition extends to the announcement or enforcement of any such policy.”

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