44th FIAAA State Conference

John C. Palmerini, B.C.S.
Deputy General Counsel

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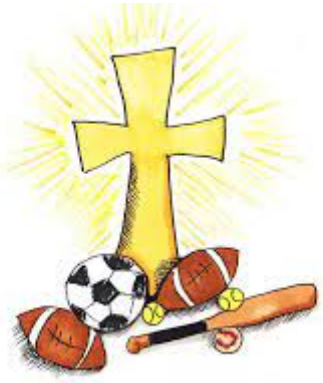
Orange County Public Schools

Topics for Today

- ✓ Religion in Sports
- ✓ Transgender Athlete Updates

Religion in Sports



Religion in Sports

- First Amendment to Constitution:
  - "Congress shall make no law **respecting an establishment of religion, or prohibiting the free exercise thereof**; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Religion in Sports

- School prayer was addressed by the United States Supreme Court in 1962.
- In Engel v. Vitale, 370 U.S. 421, 422 (1962), the School District required the principal to recite the following prayer at the beginning of each school day:
  - ‘Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.’

Religion in Schools

- The Supreme Court started by discussing the purpose of the Establishment Clause in the First Amendment and discussed the history behind the creation of the Establishment Clause:
  - “It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America.” Id. at 425.

Religion in Schools

- After a discussion of the History, the Supreme Court wrote as follows:
  - “By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. …The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, **government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity**.” Id. at 429-430

Religion in Schools

- One of the concerns about state endorsement of religion was its coercive effects on non-believers and the adverse affects on religion itself:
    - "When the power, prestige and financial support of government is placed behind a particular religious belief, **the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain**. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government **and to degrade religion**. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs." Id. at 431.

Religion in Schools

- The court stated that prohibition of official state prayer before a school day is not a violation of the Free Exercise clause.
- “It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong.” Id. at 433–34 (1962).

Religion in Schools

- In 1971, the Supreme Court ruled upon the provision of state financial support to religious schools. Lemon v. Kurtzman, 403 U.S. 602, 606–07 (1971), the Court analyzed the practices of Pennsylvania, which adopted a statutory program that provided financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions.
- The Court held both practices were unconstitutional.

Religion in Schools

- The Supreme Court observed as follows with respect to the First Amendment:
  - “Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process.” Id. at 622.

Religion in Schools

- The Court established a three part test: “Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, finally, the statute must not foster ‘an excessive government entanglement with religion.’” Id. at 612–13.
- The Court ruled that the practices by Pennsylvania and Rhode Island advanced religion and was therefore unconstitutional.

Religion in Schools

- In the case of Wallace v. Jaffree, 472 U.S. 38 (1985), the United States Supreme Court analyzed Alabama Code Section 16-1-20.1, which is almost identical to Section 1003.45, Fl. Stat. The Alabama Statute read:

> "At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that **a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer**, and during any such period no other activities shall be engaged in." (Emphasis added)

Religion in Schools

- The United States Supreme Court held that the statute was unconstitutional:
  - "The legislature enacted § 16–1–20.1, despite the existence of § 16–1–20 for the sole purpose of expressing the State's endorsement of prayer activities for one minute at the beginning of each school day. **The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice. Such an endorsement is not consistent with the established principle that the government must pursue a course of complete neutrality toward religion**." The Court then invalidated the Alabama statute as unconstitutional: "Keeping in mind, as we must, 'both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded,' **we conclude that § 16–1–20.1 violates the First Amendment**." (Emphasis added)

Religion in Schools

- Invocations at graduation ceremonies was addressed in the case of Lee v. Weisman, 505 U.S. 557(1992). The School District had a policy of allowing invocation at middle and high school graduation ceremonies. The following was recited at a middle school graduation:
  - “O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement. Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them. The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly. We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion. AMEN”

Religion in Schools

- The Court ruled as follows:
  - “The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us. The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so. The State's involvement in the school prayers challenged today violates these central principles.’” Id. at 587.

Religion in Schools

- The Supreme Court addressed a School Board policy allowing student-initiated, student-led prayer over the loudspeaker at football games.
- The court held in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309–10 (2000) that such practice violated the Establishment clause:
  - “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’ The delivery of such a message—over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as ‘private’ speech.

Religion in Schools

- The court further held as follows:
  - “To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is ‘formalistic in the extreme.’ *Ibid.* We stressed in *Lee* the obvious observation that ‘adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.’ High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for ‘[i]t is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.’ Id. at 311-12.

Religion in Schools

- Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004) is the instructive case which binds all schools in Florida as Florida is in the 11th Circuit's jurisdiction.

- The teacher in the case opened every school day by asking if any of the students had prayer requests. She would begin the moment of silence with "Let us pray" and end it with "Amen."

- The teacher never told students they were free to leave during silent prayer. The teacher also let students read aloud out of the Bible to the whole class.

Religion in Schools

- The 11th Circuit ruled that a teacher taking prayer requests from students was unconstitutional and subjected the teacher to individual liability:
  - "*Praying goes sufficiently beyond the range of activities normally performed by high school teachers and commonly accepted as part of their job as to fall outside the scope of Allred's official duties, even if she were using prayer as a means of achieving a job-related goal*." Holloman v. Harland, 370 F.3d 1272 (11th Cir. 2004).

Religion in Schools

- In 2017, the Supreme Court started to switch focus from the Establishment Clause to the Free Exercise Clause with respect to religion in schools.
- In Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2019 (2017) a private school applied for a state grant for playground rubber surfacing. The state denied the private school the grant based upon the establishment clause. The court ruled as follows:
  - "The Free Exercise Clause 'protect[s] religious observers against unequal treatment' and subjects to the strictest scrutiny laws that target the religious for 'special disabilities' based on their 'religious status.' Applying that basic principle, this Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion that can be justified only by a state interest 'of the highest order.'"

Religion in Schools

- Continuing with the move towards the superiority of the Free Exercise Clause, the Supreme Court ruled on a case involving the state of Montana not providing scholarships for students to attend private schools because of a “No aid” provision in its state constitution not allowing the state “make any direct or indirect appropriation or payment from any public fund or monies, or any grant of lands or other property for any sectarian purpose or to aid any church, school, academy, seminary, college, university, or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.”

- The Supreme Court in Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2261 (2020) ruled: “A State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious.”

Religion in Schools

- Kennedy v. Bremerton School District, 869 F.3d 813 (9th Cir. 2017):
  - An assistant coach for a high school football team was employed. His job description said he assisted the head coach with supervisory responsibilities. He was tasked in his employment contract with creating good athletes and good human beings.
  - From 2008-2015, the coach led his coaching staff and players in prayer. He would also do religiously motivational speeches at midfield with players and coaches from both teams. He originally prayed alone at midfield, but when players asked to join him, he said “This is a free country. You can do what you want.”

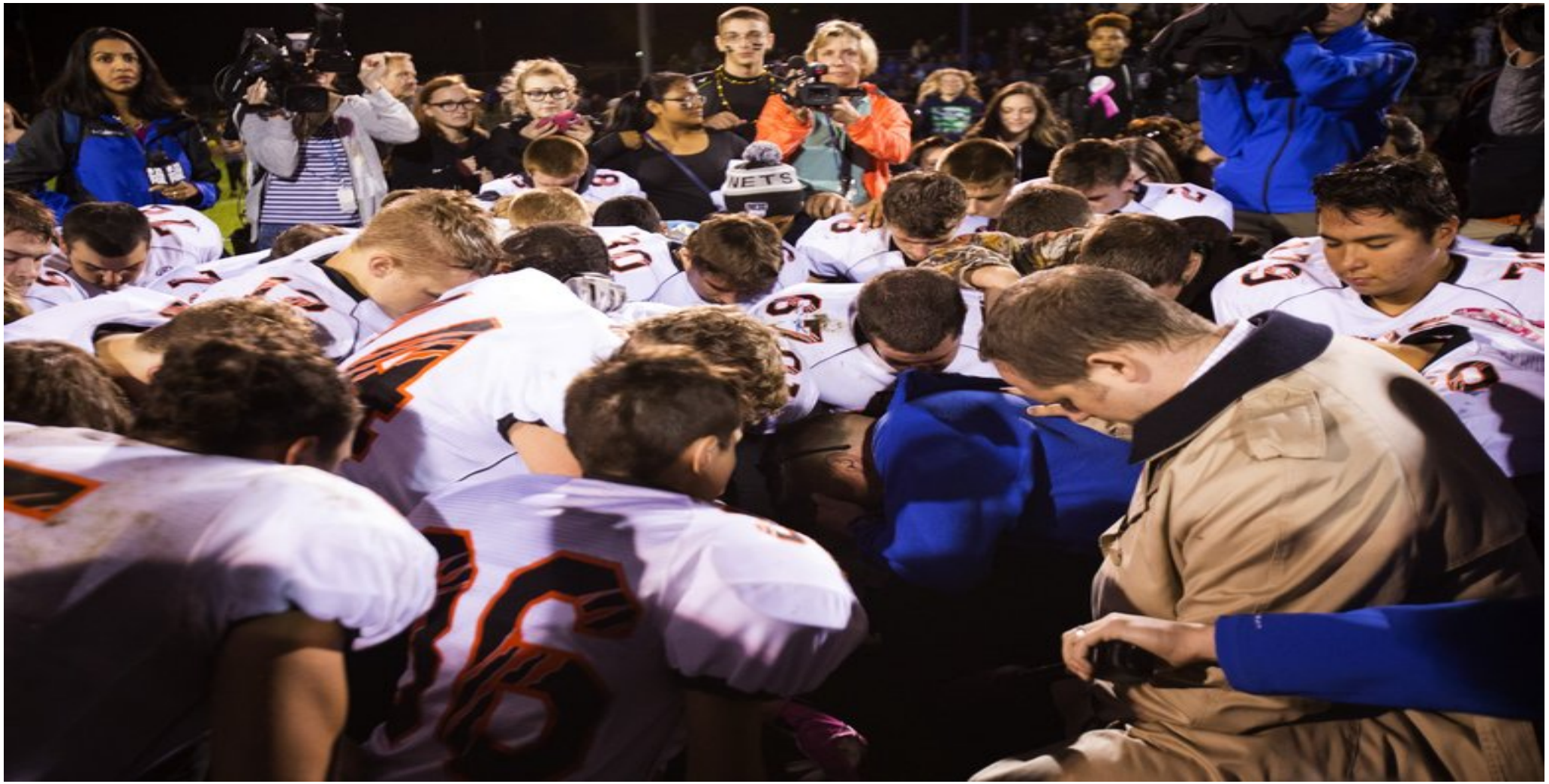
Religion in Schools

- In September 2015, he was sent a letter from his school district. The School District in the letter stated it had a policy which states that “school staff shall neither encourage or discourage a student from engaging in non-disruptive oral or silent prayer.”
- The letter said that his inspirational talks at the 50-yard line had to be entirely secular in nature so as to avoid alienation of any team member.
- The letter also said while the coach was entitled to engage in prayer, he had to physically separate from students and that the prayer be non-demonstrative (i.e. not noticeable as prayer)

Religion in Schools

- The coach, through a lawyer, wrote a letter to the School District stating that he was requesting a religious accommodation under Title VII of the Civil Rights Act to allow him to continue to say a private post game prayer.
- The lawyer told the school district he would resume praying at the fifty yard line at the October 16, 2015 game.
- The coach also made media appearances announcing he would be praying at the 50 yard line that night.

Religion in Schools



Religion in Schools

- While the coach was praying, other students were jumping the fence and running among the cheerleaders and the players.
- After the Coach participated in his public prayer, the Satanists asked if they could have a ceremony at the fifty yard line after the games.
- The School District had to make arrangements with local police to cordon off the field for the next game so spectators could not come out of the stands onto the field.

Religion in Schools

- The District sent another letter to the coach and his lawyer saying he was violating his obligation to supervise students after the game as well.
- The District suggested it would allow prayer in a private location, such as a school building, or press box while students are still on campus. It also offered to allow prayer at the 50-yard line after the stadium completely emptied.

- This case returned to the Supreme Court for Oral Argument on April 25, 2022.

Religion in Schools

- Oral Argument has some interesting exchanges:
  - "JUSTICE KAGAN: I -- **I take it from your earlier answers that you're not contesting the right of the school district to discipline Coach Kennedy if he had been praying during the official, if you will, post-game talk**?
  - MR. CLEMENT: **I think that's right**. We don't -- I mean -- JUSTICE KAGAN: Correct?
  - MR. CLEMENT: -- we don't take an issue that –
  - JUSTICE KAGAN: So -- so that's like –
  - MR. CLEMENT: -- he discontinued that practice." (Transcript of Oral Argument, page 25)

Religion in Schools

- JUSTICE KAGAN: -- if he were praying -- if he were a math teacher and he prayed in math class, same? If he's a coach and he prays during the post-game talk, that the school can discipline him for?
- MR. CLEMENT: That's right because –
- JUSTICE KAGAN: And -- and –
- MR. CLEMENT: -- it would be government speech.
- JUSTICE KAGAN: -- just briefly, why?
- MR. CLEMENT: Because it would be government speech.” (Transcript of Oral Argument, page 26)
- JUSTICE KAVANAUGH: What about the player who thinks, if I don't participate in this, I won't start next week, or the player who thinks, if I do participate in this, I will start next week, and the player, like, wants start?

Religion in Schools

- MR. CLEMENT: So that's -- that's where I think making a clear message that that's inappropriate, that this doesn't matter for those purposes, that's -- that's how you deal with those problems. And if there is a coach or a teacher –
- JUSTICE KAVANAUGH: But how -- how will you -- how will you ferret that out? Because every player's trying to get on the good side of the coach, and every parent is worried about the coach exercising favoritism in terms of the starting lineup, playing time, recommendations for colleges, et cetera.
- MR. CLEMENT: I -- I -- I think the school district, if it has that concern, and I'm not saying it's not a legitimate concern, just makes it as clear that it's school policy that nothing turns on that. But that concern, although legitimate, isn't even specific to religion. I mean, if -- if – (Transcript of Oral Argument, Pages 47-48)

Religion in Schools

- The Court will rule on this matter by the end of its term at the end of June.
- This will have wide-ranging implications if the Court rules for the Coach.
- If the Coach prevails, this will apply to all coaches of all faiths or no faith at all. Imagine a Muslim or Atheist Coach doing the same thing as Kennedy – the decision would apply with equal force.

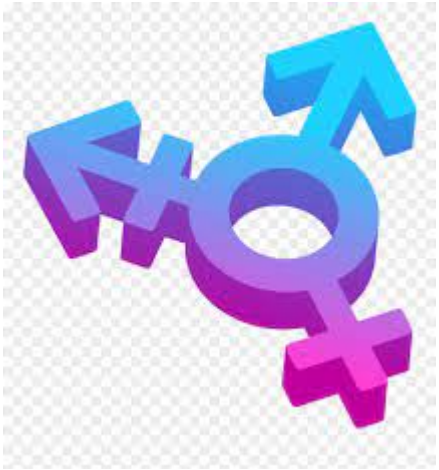
Religion in Schools

- Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc., 8:16-CV-2753-CEH-AAS, 2022 WL 971778, at *3 (M.D. Fla. Mar. 31, 2022):
  - Before the 2015 FHSAA Football final, Cambridge Christian School and University Christian School asked for a prayer to be read over the loudspeaker prior to the FHSAA final at the Citrus Bowl. FHSAA refused to allow this prayer citing its status as a state actor had an establishment clause concern in not allowing the prayer.
  - UCS and CCS student athletes and coaches prayed together at the middle of the field before the 2015 Final. The prayer was not broadcast over the PA system. Both schools also prayed on the field in the minutes following the 2015 Final. The prayer was not broadcast over the PA system.

Religion in Schools

- “As pointed out by the appellate court, this was a State-organized game classified as the ‘State’ championship final. The PA system was part of the government-owned stadium. Unlike the playoff games, there is no ‘host school’ in the State Championship Final football game. Rather, the FHSAA—a state actor—is the host of the event. Significantly, the PA system was not used by anyone other than the PA announcer, except for the music played during the half time performance. Critically, the prayer requested by CCS would have come at the beginning of the game at the same time as the pre-game rituals of presentation of the color guard, singing of the national anthem, and recitation of the Pledge of Allegiance. The Eleventh Circuit found the pivotal question on the endorsement factor to be whether the speech would be ‘closely identified in the public mind with the government.’ The Court finds particularly persuasive, as did the appellate court, the fact that CCS sought to deliver the prayer over the PA during the same time as these pregame rituals that are ‘inseparably associated with ideas of government.’” Cambridge Christian Sch., Inc. v. Florida High Sch. Athletic Ass'n, Inc., 8:16-CV-2753-CEH-AAS, 2022 WL 971778, at *8–9 (M.D. Fla. Mar. 31, 2022)

Transgender Student Update



Transgender Student Update

- In 2021, the Legislature created s. 1006.205, the “Fairness in Women’s Sports Act.”
- The law states as follows:
  - Athletic teams or sports designated for males, men, or boys may not be open to students of the female sex.
  - Athletic teams or sports designated for females, women, or girls may not be open to students of the male sex.
  - For purposes of this section, a statement of a student's biological sex on the student's official birth certificate is considered to have correctly stated the student’s sex.
  - Biological sex at birth if the statement was filed at or near the time of the student's birth.

Transgender Student Update

- Bill creates a cause of action:
  - “Any student who is deprived of an athletic opportunity or suffers any direct or indirect harm as a result of a violation of this section shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school or public postsecondary institution.”
  - Any student who is subject to retaliation or other adverse action by a school, public postsecondary institution, or athletic association or organization as a result of reporting a violation of this section to an employee or representative of the school, institution, or athletic association or organization, or to any state or federal agency with oversight of schools or public postsecondary institutions in the state, shall have a private cause of action for injunctive relief, damages, and any other relief available under law against the school, institution, or athletic association or organization.”

Transgender Student Update

- Title IX considerations:

  “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

Transgender Student Update

- U.S. DOE: “Although Title IX has long been understood to encompass discrimination based on a student’s not conforming to sex-based stereotypes, neither Title IX itself nor its implementing regulations mention discrimination on the basis of a student’s sexual orientation or gender identity. On June 15, 2020 the U.S. Supreme Court held that discrimination on the basis of an individual’s status as gay or transgender constitutes sex discrimination within the meaning of Title VII of the Civil Rights Act of 1964. *See Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1741 (2020) (“[I]t is impossible to discrimination against a person for being homosexual or transgender without discriminating against that individual based on sex.”). OCR does not enforce Title VII. Nevertheless, in cases where a complaint alleges that a school’s action or policy excludes a person from participation in, denies a person the benefits of, or subjects a person to discrimination under an education program or activity, on the basis of sex, the *Bostock* opinion guides OCR’s understanding that discrimination against a person based on their sexual orientation or gender identity generally involves discrimination on the basis of sex.”

  https://www2.ed.gov/about/offices/list/ocr/lgbt.html (February 24, 2021)

Transgender Student Update

- On June 29, 2021, the lawsuit of D.N. v. DeSantis, Commissioner of Education, FHSAA, Broward County School Board, et al., 0:21-cv-61344 (S.D. Fla. 2021) was filed.
- Student D.N. was a rising eight-grade student at a Broward County middle school. D.N. was a transgender girl who plays soccer. She is on hormone blockers to stop testosterone. She is receiving estrogen.
- Under the new Fairness in Women's Sports Act, D.N. cannot play sports on the girls teams when she enters high school
- D.N. sued under three theories:

Transgender Student Update

- Title IX: The lawsuit alleges “Under Title IX, excluding transgender individuals from school programs or athletic opportunities within schools is discrimination on the basis of sex.” This is under the theory that D.N. does not conform to gender stereotypes because she was born a biological male, but she presents as a girl.
- Equal Protection under the 14th Amendment: The lawsuit alleges “SB 1028 treats transgender girls and transgender women differently from both cisgender girls and women and transgender boys and men by precluding them from engaging in school-sponsored athletics based on their sex and transgender status.”

Transgender Student Update

- Violation of the right to privacy under the 14th Amendment. The lawsuit alleges: “The right to liberty under the Due Process Clause provides individuals with the right to be free from unnecessary government intrusion into their private affairs and from unnecessary interference with their private conduct. Defendants’ enforcement of the law would require Plaintiff to disclose sensitive medical information that would otherwise not be available, including to third parties, parents and other students who might file claims under this law.”
- The Governor, Commissioner, FHSAA and School Board have all moved to dismiss.

Transgender Student Update

- They argue as follows: “Men’s and women’s athletic teams, separated by sex, are more than a long-standing social custom; they protect and foster the equal opportunities of girls and women to participate in athletics. Courts have long accepted that boys and men are physiologically different from girls and women, and that male athletes, if permitted to compete, would displace and exclude female athletes.”
- This case is on hold pending the outcome of Adams v. School Board of St. Johns County, Florida, a case which challenges St. Johns County prohibiting Drew Adams, a transgender male, from using the male bathroom. He was required to use a single stall bathroom or the female bathroom, which corresponds to his sex at birth.
- The full 11th Circuit heard his case on February 22, 2022 and a decision is outstanding at this time.

Transgender Student Update

- Lia Thomas, a transgender female, won the national championship in 500-yard freestyle event. Her time of 4 minutes, 33:24 seconds, was nine seconds off the world record by Katie Ladecky.
- Governor DeSantis issued a proclamation declaring the runner-up the winner:
  - “Florida rejects the NCAA's efforts to destroy women's athletics, disapproves of the NCAA elevating ideology over biology, and takes offense at the NCAA trying to make others complicit in a lie," DeSantis said in Tuesday's proclamation.
- The proclamation has no effect on the actual results of the event.

Questions?

John C. Palmerini, B.C.S.
Deputy General Counsel
Office of Legal Services
Orange County Public Schools
445 West Amelia Street
Orlando, Florida 32801
Telephone: (407) 317-3411
Email: john.palmerini@ocps.net