

## Virginia School Board Pays Big

A Virginia School Board agreed to pay \$1.3 million in attorney’s fees and costs in the settlement with Gavin Grimm, a transgender male who sued the school board after he was not allowed to use the bathroom that corresponded with his gender identity.

Seven years ago in 2014, Grimm was allegedly told by the school board that he could not use a bathroom that was designated for boys. The school board did later allow him to use his own bathroom after parents expressed their disapproval with the school board’s decision. Unsatisfied with this, Grimm decided to sue the district.

Six years after the initial filing of suit, the case made its way to the Supreme Court where, over the dissent of Justices Thomas and Alito, it was declined to be heard. After the denial, the only issue left was that of attorney’s fees and costs.

In July 2021, the ACLU filed its request for \$1.3 million arguing that although Grimm was only awarded nominal damages they were still entitled to fees as they were the prevailing party. Initially, the school board requested more time to respond to the fee request; however, on Thursday, August 26, 2021, the board filed a stipulation with the ACLU agreeing to pay the fees and costs.

In a press release from the School Board the spokesperson stated “the insurance provider for the [sic] School Board has addressed the Plaintiff’s request for attorney fees and costs resulting from the Grimm v. Gloucester County School Board litigation. The School Board has no further comment on this matter.”

After the several years of litigation

surrounding this case, one thing is clear – the Virginia policy and procedures relative to treatment of transgender students was wrong and now the District has to pay out a huge settlement as a result. Therefore, with the 2021-2022 school year just beginning, it is imperative to ensure that your district has policies and/or procedures in place regarding the treatment of transgender and gender diverse students.

**NOTE:** See our prior Education Law Reports from June 2021, August 2019, June 2018, and February 2017 for in-depth analysis of this case. All previous editions of the Education Law Report can be found at [www.beardlegallgroup.com](http://www.beardlegallgroup.com)

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## Back To School Refresher Regarding Transgender Students

Beard Legal Group has previously discussed Title IX protections as they extend to transgender students. The Department of Education has made it clear that Title IX's prohibition on discrimination "on the basis of sex" would encompass discrimination on the basis of sexual orientation as well as gender identity. This protects students from discrimination based on their sexual orientation and gender identity at school and during extracurricular activities.

As school districts aim to ensure that transgender students are safe and supported in school and have equal access to educational opportunities, they are faced with the question of the use of students' preferred name and pronouns versus their legal name and pronouns.

On June 30, 2021, the Department of Education's Office for Civil Rights published a resource, "Supporting Transgender Youth in School" as part of their more comprehensive resource "The White House Toolkit on Gender Equality." OCR's resource "Supporting Transgender Youth in School" encourages schools to adopt policies that respect all students' gender identities, such as using the name the student goes by, even if it differs from their legal name, and using the pronouns that reflect the student's gender identity.

As well as treating students according to their gender identity, school districts need to address the student with their preferred name and pronoun. The student's preferred name and gender can be reflected on the student's unofficial student records, such as school IDs, yearbooks, and classroom rosters. However, it is important to note that official records require the student's legal name and legal gender.

Students and former students may request revisions to their records through FERPA when their name and/or gender marker have been officially changed. FERPA provides current and former

students with the right to seek to amend their school records if such records are "inaccurate, misleading, or in violation of the student's rights of privacy." (34 C.F.R. § 99.7(a)(2)(ii)). A failure to correct a student or former student's record following their request and completion of the legal requirements would essentially disclose their transgender status to anyone who sees their records.

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## Remember New Act 65 Requirements Went Into Effect August 29, 2021

On June 30, 2021 Governor Wolf signed amendments to the Sunshine Act into law. This legislation amends the Sunshine Act provisions of Title 65 to establish requirements for the distribution and posting of information relating to the agenda of a public meeting. The intent of the new Act is to provide proper notice to the community of upcoming agenda items to be discussed and deliberated upon and to ensure the utmost transparency for meetings.

Effective August 29, 2021, Act 65 requires that School Districts and other public agencies covered under the Sunshine Act post the meeting agendas on their websites at least 24 hours prior to meetings. Additionally, the agenda must include a list of each matter that may be the subject of deliberation or official action. The agenda must also be physically posted at the meeting and the district's principal office and copies made available for the public at the meeting.

The new Amendment also prohibits an agency from taking official action on a matter of agency business at a public meeting if the matter is not included in the meeting agenda that was posted and distributed for the meeting in question.

This section does not apply to a conference or working session under section 707 of the School Code (relating to exceptions to open meetings) or an executive session under section 708 of the School

Code (relating to executive session).

The new Act contains the following exceptions which permit additions to the previously-published agenda: (1) to address a real or potential “emergency” that involves a clear and present danger to life or property; (2) to address a matter of agency business that only arose or was brought the school district’s attention within 24 hours of the meeting; (3) to address a “*de minimis*” matter that does not involve expenditures of funds or entering into a contract or agreement; and (4) to direct the administration to research a matter raised during the meeting by a resident or taxpayer (if said matter is *de minimus*, the board may take action on the matter at that meeting). Any amended agenda must be posted at the principal office location or the agency’s website no later than the first business day following the meeting in which the agenda was amended. If action is taken on a matter of agency business added to the agenda, the minutes of the meeting must reflect the substance of the matter added, the vote on the addition, and the announced reasons for the addition.

Agendas should be prepared in a manner which includes all items that will or may be the subject of deliberation or official action at the meeting. Preparations of agendas in such a manner is key to avoid making additions to the published agenda.

School Districts should keep in mind that Section (e) of the amendments does provide an option for Boards facing a need for agenda changes that arises during a meeting and does not appear to fall within the other limited exceptions identified. Section (e) provides that upon a majority vote of the individuals present and voting during the conduct of a meeting, an agency may add a matter of agency business to the agenda, and vote on the added item so long as the following conditions are met: 1) the reasons for the changes to the agenda shall be announced at the meeting before any vote is conducted to make the changes to the agenda; 2) The agency shall post the amended agenda on the agency’s publicly accessible Internet website, if available, and at the agency’s principal office location no later than the first business day following the meeting at which the agenda was changed; and 3) the meeting

minutes must reflect the added agenda item, the vote to modify the agenda, and the announced reason for the addition.

Boards should also take care to pause and allow an opportunity for public comment, in the event the addition to the agenda is made after any relevant period for public comment on agenda items has already passed.

While Section (e) appears to present a “catchall” exception and/or loophole which allows for the addition of items to the agenda without the limitations outlined in the narrower exceptions listed above, Section (e) should be used cautiously, and only when there is a clearly articulable reason for making the addition, rather than relied upon for minor items that could be addressed in subsequent meetings.

## Registration is Open

*The Pennsylvania School Study Council,  
Penn State Law,  
Penn State College of Education, and the  
Partners of Beard Legal Group ask you to  
join us*

**October 26, 2021**

*Education Law Conference 2021*

8:30 AM – 4:30 PM EDT

Central Intermediate Unit #10  
60 Decibel Road  
State College, PA 16801

See links to the Education Law Conference 2021 website and Eventbrite registration page!

<https://www.psscclawconference.org/home>

<https://www.eventbrite.com/e/166987868209>

## Student Corner: Long COVID

The challenges schools face as they meet the needs of students during the COVID-19 pandemic continue to expand. Schools are faced with students who are suffering from the extreme long term health effects of COVID-19, commonly referred to as long COVID.

Recently, the Department of Education's Office for Civil Rights and the Office of Special Education and Rehabilitative Services have addressed long COVID as a disability which is capable of giving rise to Individuals with Disabilities Act (IDEA) eligibility and which may also be considered a disability under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act.

According to the CDC, long COVID (sometimes referred to as "post COVID condition") is "a wide range of new, returning, or ongoing health problems people can experience more than four weeks after first being infected with the COVID-19 virus". Long COVID affects both adults and children, and can appear in people who were asymptomatic when infected. The most common symptoms of long COVID include, cognitive dysfunction, often referred to as brain fog, and fatigue. The severity and duration of long COVID symptoms vary.

Children experiencing long COVID may be entitled to special education, related services, and protections under the IDEA, because of long COVID's adverse impact on the child's educational achievement and functioning, or under Section 504 of the Rehabilitation Act and the Americans with Disabilities Act if the impact substantially limits a major life activity.

Additionally, children who already qualify under the IDEA or Section 504 for services may experience new or worsening symptoms of their previous disability. It is important to note that these new or worsening symptoms may require new or different aids, services, specialized instruction, or modifications.

Due to the variety of symptoms, long COVID

can impact children in a multitude of ways and determinations of IDEA and Section 504 eligibility must be made on an individual basis.

The Department of Education's Office for Civil Rights and Office of Special Education and Rehabilitative Services have issued a new resource: Long COVID under Section 504 and the IDEA: A Resource to Support Children, Students, Educators, schools, Service Providers, and Families. This resource is available at <https://www2.ed.gov/about/offices/list/ocr/docs/ocr-factsheet-504-20210726.pdf>

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## Federal Court Says District Did Not Deny Student FAPE

In the case of A.C. & D.C., Parents on behalf of Minor Plaintiff C.C. vs. Owen J. Roberts School District (E.D. 2021), the Eastern Federal District Court for Pennsylvania granted the district's summary judgment, finding the Parents failed to show the district denied FAPE to their child.

The student was a gifted child with complex medical conditions, manifesting in both physical and behavioral symptoms. In the student's 6th grade year the parents and district agreed on a plan under Section 504 which set out accommodations to be provided by the school. In 2017, the parents disagreed with the results of an evaluation, and on a new Section 504 plan. In October of 2017, the district unilaterally discontinued the previous Section 504 plan.

In response to the district's discontinuance of the Student's 504 plan, the parents filed a complaint with the U.S. Department of Education and the Office of Civil Rights. The district agreed to a resolution agreement which included reinstating the students most recent agreed upon Section 504 plan. Additionally, the district agreed to meet and review whether the Student "suffered an educational loss due to the district's failure to provide appropriate regular

and/or special education related aids and services”.

During the student’s eight grade year, the parents and district remained unable to reach an agreement in regards to a new 54 plan and the student’s IEP. Ultimately the parents files due process complaint which stated that the Student had been denied a FAPE during the time that there was no Section 504 Plan in place. A Hearing Officer determined that the Student had not been denied FAPE. The Parents challenged the Hearing Officer’s decision. The Court reconsidered whether the student was denied a FAPE because of the removal of the Section 504 plan; and whether the Student was denied FAPE for a failure to provide homebound service.

The Hearing Officer determined that while the district’s unilateral discontinuance of the Section 504 Plan constituted a procedural violation, the parents’ failure to establish a loss, exclusion, or denial or benefit meant the Student was not denied a FAPE. The record indicates that the student mastered GIEP goals, earned high grades, and was promoted to the next grade. Additionally, as part of the OCR resolution, the Section 504 Plan was reinstated.

The fact that the Section 504 plan was not fully followed is not dispositive in determining a denial of FAPE. A procedural violation constitutes a denial of FAPE “only if it results in loss of educational opportunity for the student, seriously deprives parents of their participation rights, or causes a deprivation of education benefits”. The parents argue that regardless of academic success, the Student had social, emotional, and behavioral development issues that the district failed to address.

The District Court upheld the Hearing Officer’s decision that found the district did not deny FAPE by unilaterally discontinuing the student’s 504 Plan because the parents had not established that there was a loss, exclusion or denial of benefits. The District Court also did not find the district discriminated against the student in violation of Section 504 with regard to homebound instruction.

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## Title IX Update – One Year Later

On August 14, 2020, the new Title IX went into effect. This new law significantly altered the way in which public school districts address issues and complaints brought under Title IX. Now, one year later, school entities and administrators are still deciphering the nuances of the new regulation.

Until all distinctions are ironed out, it is imperative that **Title IX Investigators** and other key people are up to date on relevant Title IX information and how cases are being decided. To help keep you up to date, Title IX training is still available through Beard Legal Group and Levin Legal Group. The new regulations mandate training. See our August 2020 Client Alert with information on this initial training module.

Also see our website to access our Client Alert of June 2021 setting out the details of the new **Train the Investigator** module. This training module is approximately 1.5 hours in length and covers virtually every aspect a Title IX Investigator will encounter in the course of an investigation. The module contains over 50 slides with narration explaining each slide and providing insight regarding each aspect of the investigatory process. This training is provided in an online/webinar format or arrangements can be made for in-person trainings.

If your school entity has not invested in a refresher training on Title IX issues since the new regulations went into effect in August 2020, you are strongly encouraged to consider these training modules as a small investment now which may save your school entity thousands later.

**NOTE:** For prior Client Alerts and Education Law Reports on Title IX regulation requirements visit our website at [www.BeardLegalGroup.com](http://www.BeardLegalGroup.com).

## Beard Legal Group Education Law Report

As solicitors, labor counsel and special counsel, Beard Legal Group represents more than 80 School Districts in Pennsylvania. The Firm has successfully negotiated hundreds of teacher and support staff contracts.

The Firm also represents a large area of the State for coverage of school board directors through their insurance carriers.

Our legal expertise includes: Solicitorship Services, Collective Bargaining – Teacher and Support Contracts, Employment Matters, Labor Arbitrations, Special Education Issues and Proceedings, Defense of Tax Assessment Appeals, PHRC/EEOC Complaints, Student Expulsion Hearings and Constitutional Issues.

### About the Pennsylvania School Study Council

The Pennsylvania School Study Council (PSSC), a partnership between the Pennsylvania State University and member educational organizations, is dedicated to improving education by providing research information, professional development activities, and technical assistance to enable its members to meet current and future challenges. The PSSC offers professional development to the membership through colloquiums, workshops, study trips, consultation, publications, and customized services. For more information, visit the PSSC website, [www.ed.psu.edu/pssc/](http://www.ed.psu.edu/pssc/) or contact the Executive Director Dr. Peggy Schooling [mxs284@psu.edu](mailto:mxs284@psu.edu).

## Subsequent Issues

If you have a school law question or topic you would like to have addressed in subsequent issues of the newsletter, please send an email to:

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