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US Supreme Court Clarifies How to Evaluate Title VII Religious Accommodation Requests

On June 29, 2023, the United States Supreme Court issued its opinion in *Groff v Dejoy,*[1] a case involving a USPS postal worker, Groff, an Evangelical Christian who requested Sundays off due to his religious belief prohibiting work on the Sabbath. The decision is expected to affect how employers evaluate religious accommodation requests under Title VII of the Civil Rights Act of 1964 ("Title VII"). Title VII states, in part, that employers must make accommodations for an employee's religious observance and practice unless they are unable to reasonably accommodate "an employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business." 42 USC 2000e(j).

In *Groff*, USPS initially made other arrangements to provide coverage for Groff's Sunday shifts. However, over time, Groff received progressive discipline for missing his Sunday shifts, and he resigned because his personal religious beliefs were not being accommodated. After Groff filed suit, the Postmaster at Groff's office testified that Groff's requests caused a burden on coworker morale and workload. The United States Court of Appeals for the Third Circuit upheld the employer's claim of undue hardship to accommodate Groff's religious beliefs, citing the Supreme Court's precedent in *Trans World Airlines, Inc v Hardison*, 432 US 63 (1977).[2]

The Supreme Court in *Hardison* briefly stated that an undue hardship can be found when the cost on the business is a *de minimis* cost or a minimal cost. On the basis of this brief mention, the Third Circuit ultimately concluded that the impact on the morale of other employees was a factor that could be considered as undue hardship and meets the *de minimis* cost test.

In a unanimous decision, the *Groff* Court rejected the Third Circuit's interpretation of the *Hardison* case along with the *de minimis* cost test. According to the Court, *Hardison* did not announce a *de minimis* cost test to be generally applied in examining whether an accommodation imposes an undue hardship on the employer. The Court found that the test was taken out of context and read in a vacuum, which gave lower courts the impression that *de minimis* costs created an undue hardship. The Court stated that *Hardison*'s one-sentence reference to the *de minimis* test should not compel courts to read the *de minimis* test so literally or in a manner that undermines *Hardison*'s references to "substantial cost."

The Court stated that an undue hardship exists "when a burden is substantial in the overall context of an employer's business." *Groff*, 600 US at *10. According to the Court, this definition accurately reflects the plain language of "undue hardship" under Title VII.

[1] 600 US ____; 143 S Ct. 2279 (2023).

[2] *Groff v DeJoy*, 35 F4th 162, 167 (CA 3, 2022).

Courts must look at the specific facts and context of each case and determine whether the business would bear a substantial increase in cost in accommodating an employee's practice of religion as compared to the conduct of its business. Relevant factors include the accommodation(s) requested; the practical impact in light of the nature, size, and operating cost of the employer; and an impact on coworker morale that affects the conduct of the business. However, the Court noted that not all impacts on morale are relevant. For example, if the morale decrease is merely centered around a dislike of religious practices or expression in the workplace, such dislike is not a cognizable factor to the undue hardship inquiry. In short, undue hardship cannot be based on "bias or hostility to a religious practice or religious accommodation."

The Court did not rule on whether Groff's accommodations in fact created undue hardship. The Court remanded the case to the Third Circuit for further review under the context-specific standard and to decide whether additional factual inquiry is needed.

The Sixth Circuit Court of Appeals (which encompasses Michigan in its jurisdiction) will change how it analyzes religious accommodation cases in accordance with the Court's decision in *Groff*. In a case prior to *Groff*, the Sixth Circuit found an undue hardship present in *Cooper v Oak Rubber Co*, 15 F3d 1375 (CA 6, 1994), on the basis of the *de minimis* test. The employee, Cooper, objected to working on Saturdays because of her religious beliefs. The Court concluded that her employer would have to hire an additional worker to work the entire week to accommodate Cooper's religious beliefs. Under the *de minimis* test, the Court ruled that hiring another employee caused an undue hardship for the employer. *Oak Rubber Co.* demonstrates a time when the Sixth Circuit relied exclusively on the *de minimis* cost test in adjudicating Title VII claims, which is what the Supreme Court expressed concern about in the *Groff* opinion. Accordingly, the holding of *Groff* will ultimately require a shift in how courts review Title VII religious accommodation claims.

Please contact us at Collins & Blaha, P.C. if you have any questions regarding Title VII or religious accommodations following this ruling.

AFTER *MAHANOY*, SIXTH CIRCUIT RULES ON OFF-CAMPUS STUDENT SPEECH

The Sixth Circuit Court of Appeals, which governs Michigan, recently considered the landmark United States Supreme Court case *Mahanoy Area School District v BL*, 141 S Ct 2038 (2021), for the first time, marking a development in off-campus student speech jurisprudence for Michigan schools. In *Kutchinski v Freeland Community School District*, the Sixth Circuit held that a Michigan school district acted properly when it suspended a student for inappropriate off-campus speech. 69 F4th 350 (CA 6, 2023). Based on *Mahanoy*,

the Court stated that the student's off-campus speech was directly responsible for causing a substantial disruption to the school environment. Thus, discipline for the speech was proper.

Factual Background

H.K. was a high school student in the Freeland Community School District ("FCSD"), located in Saginaw County, Michigan. While he was a student, H.K. made a fake Instagram account that impersonated one of his teachers. H.K. made an initial post and then added a biography falsely indicating that the account belonged to Steven Schmidt, a biology teacher at Freeland High School. H.K. soon provided two of his friends, K.L and L.F., with posting access to the account. The two friends made posts that were graphic and threatening in nature regarding four different people, three teachers and one fellow student. The posts included references to violence, sexual activity, personal family members, and threats. News of the account soon spread around the school, and numerous requests by students to follow the account were granted. H.K. eventually decided to delete the account.

FCSD was able to trace the account to H.K. and the other students involved, and the students were given a five-day suspension from school. An administrative investigation and hearing resulted in an additional ten-day suspension from school. H.K.'s father, Jason Kutchinski, filed suit against FCSD and its staff, claiming a violation of H.K.'s right to free speech and due process of law.

The District Court denied Kutchinski's motion for partial summary judgement and subsequently granted summary judgment to the District. The case was then appealed to answer two questions: (1) whether the school district could punish H.K. for the Instagram account, and (2) whether the school rule that governed H.K.'s suspension was unconstitutionally vague.

Out-of-School Speech

The First Amendment Free Speech Clause governs Kutchinski's lawsuit regarding the punishment of his child over the Instagram account and the off-campus posts. Through a series of cases, the Supreme Court has identified four categories of student speech that schools may regulate. The Court determined that the fourth category, on-campus and select off-campus speech that is a material disruption to the rights of others, is the applicable category for the present case because H.K.'s speech was made off campus. This fourth category is governed primarily by the Supreme Court's recent decision in *Mahanoy*.

In *Mahanoy*, a high-school student was rejected from her school's varsity cheerleading squad, and in anger, she posted a Snapchat that contained language and gestures that were vulgar and critical of the school and the team. Although the post was made outside of school on a weekend, the student was suspended. The Supreme Court found that the suspension was a violation of the student's right to free speech. The *Mahanoy* Court identified three characteristics that distinguish school regulation of off-campus speech from school regulation of on-campus speech:

1) Off-campus student speech typically falls under the purview of the student's parents and their responsibility to act, as opposed to the school.
2) It is essential for courts to be critical of the regulation of off-campus speech, as that type of regulation would impact all speech that students make in an entire day.
3) Student protections must include all ideas and opinions made by students,

> both those popular and not, particularly when the speech takes place off campus.

In the present case, the Sixth Circuit found:

> **The student speech at issue here involves serious or severe harassment of three teachers and a Freeland student. . . . Therefore, [the district] could regulate the speech and discipline H.K. so long as he bore some responsibility for the speech and the speech substantially disrupted classwork (or Defendants reasonably believed the speech would disrupt classwork).** [*Id*. at 358.]

Regarding whether H.K. himself was responsible for the speech, the Court found that H.K. could be held as responsible for the harmful speech **because he contributed by creating the account on which the posts were made, he granted K.L. and L.F. access, he acknowledged and joked about the posts with K.L. and L.F., and he accepted follow requests.**

The Court noted, that the Supreme Court case *Tinker v Des Moines Independent Community School District*, 393 US 503 (1969), that *Tinker* does not require that a disruption **must** take place, nor does it require **reasonable certainty** that a disruption will occur. Rather, school officials only need to "reasonably forecast" that speech will disrupt normal school proceedings.

Therefore, the Court found that FCSD also reasonably forecasted a disruption to the school environment, and therefore FCSD did not violate H.K.'s free-speech rights by disciplining him. The Court held that the District "reasonably forecasted that a fake Instagram account that impersonated a Freeland teacher and directed sexual and violent posts at three Freeland teachers and a student would substantially disrupt normal school proceedings." In finding that FCSD had reasonably forecasted a substantial disruption, the Court pointed to the nature of the posts, the fact that a teacher was crying in class, whispering among students about the posts throughout the day, and the reports from multiple teachers of disruptions in the classroom. Thus, the Court found that FCSD did not violate H.K.'s right to free speech when it disciplined him for the Instagram account.

Rule Vagueness

The second question before the Sixth Circuit was whether the rule that was used to suspend H.K. was unconstitutionally vague. This question is governed by the Fourteenth Amendment, which prohibits "States from depriving any person of life, liberty, or property, without due process of law." US Const, Am XIV. Relying on previous Sixth Circuit jurisprudence, the Court highlighted **the standard for unconstitutionally vague school policy, which is, "when it either (1) fails to inform ordinary people what conduct is prohibited, or (2) allows for arbitrary and discriminatory enforcement."** *Id.* at 360, quoting *Meriwether v Hartop*, 992 F3d 492, 517-18 (CA 6, 2021). In reviewing Kutchinski's vagueness claim, the Court noted that Rule 10 of the FCSD Handbook stated that "[s]tudents guilty of gross misbehavior, persistent disobedience or having habits detrimental to the school will be suspended or excluded from [the school]." *Id.* at 361. Moreover, based on United States Supreme Court student speech case law, the Court also noted that "schools are not held to the utmost specificity in drafting their disciplinary rules." *Id.*, citing *Bethel Sch Dist v Fraser*, 478 US 675 (1986). Thus, the Court found that the latitude provided to schools means that the above rule was not unconstitutionally vague.

Impact

The Sixth Circuit's holding identifies some critical points for school districts to continue to be aware of. First, under factually specific circumstances, schools can regulate and punish speech that occurs outside of the school if it meets the standards as established by the Court and discussed above. Second, it is important for disciplinary rules and policies to be clear to avoid a vagueness challenge, but a certain degree of latitude may be afforded to schools. Finally, the substantial disruption standard continues to apply in the school environment and should be closely examined when disciplining student speech that occurs both on and off campus.

The student speech at issue here involves serious or severe harassment of three teachers and a Freeland student. . . . Therefore, [the district] could regulate the speech and discipline H.K. so long as he bore some responsibility for the speech and the speech substantially disrupted classwork (or Defendants reasonably believed the speech would disrupt classwork).

If you have any questions regarding student speech or the impact of this ruling, please contact our office.

MICHIGAN SUPREME COURT RULES ON LEGALITY, APPLICABILITY OF ORS NORMAL SALARY INCREASE SCHEDULES

On June 2, 2023, the Michigan Supreme Court issued an order in *Batista v Office of Retirement Services*[3] regarding normal salary increase schedules ("NSIs"), which the Office of Retirement Services ("ORS") created to aid in calculating members' final average compensations. The Michigan Supreme Court held that **ORS lacks the authority to create and implement NSIs**. Under the NSIs, school administrators had portions of their salaries omitted from their final average compensation because they were bound by the NSI schedule, which ultimately lowered the contributions made toward their pensions. The Court remanded the case to the Court of Appeals for further consideration regarding the manner in which Section 1303a(3)(f) of the Public School Employees Retirement Act (the "Retirement Act") applies to public school employees who do not work pursuant to collective bargaining agreements ("CBAs").

The plaintiffs in *Batista* are current or retired public school superintendents and

[3] *Batista v Office of Retirement Services*, order of the Michigan Supreme Court, entered June 2, 2023 (SC Docket No. 163567).

administrators who currently work or previously worked under personal employment contracts, rather than CBAs. The "final average compensation" of a school superintendent and administrator is determined as part of the calculation of pension payments under the Retirement Act. Section 1303a(3)(f) provides that compensation to be considered in this calculation **does not** include:

> Compensation in excess of an amount over the level of compensation reported for the preceding year except increases provided by the normal salary schedule for the current job classification. In cases where the current job classification in the reporting unit has less than 3 members, the normal salary schedule for the most nearly identical job classification in the reporting unit or in similar reporting units shall be used. [MCL 38.1303a(3)(f).]

The Retirement Act does not define "normal salary schedule." Instead, ORS created the NSI schedules for public school superintendents and administrators and used these schedules to determine what compensation may be credited for pension purposes under a member's final average compensation. Plaintiffs school superintendents and administrators received annual increases in compensation that were not always considered in the determination of their final average compensation. The school superintendents and administrators sued, alleging that ORS violated the Retirement Act by imposing NSI schedules on their group because the Retirement Act does not authorize the ORS to create and apply NSI schedules to them.

The Court of Appeals held that the Retirement Act does not authorize ORS to create and implement NSI schedules and to apply them to superintendents and administrators under the language of the statute. The Court of Appeals also found that the language in MCL 38.1303a(3)(f) referring to a "normal salary schedule" necessarily alluded to a salary schedule contained in a CBA. ORS filed an application to the Michigan Supreme Court for leave to appeal the Court of Appeal's decision.

The Supreme Court's June order affirmed the prior holding of the Michigan Court of Appeals that the language of **the Retirement Act does not authorize the ORS to create the NSIs**.

The Supreme Court's order also vacated the portion Court of Appeals opinion that provided that the language in MCL 38.1303a(3)(f) referring to a "normal salary schedule" necessarily referred to a salary schedule contained in a CBA. The Court found that the **Court of Appeals erred in "holding that MCL 38.1303a(3)(f) uniquely applies only to the subset of members who work pursuant to collective bargaining agreements"** as nothing in provision 1303a(3)(f) makes such a distinction. Thus, the **"normal salary schedule" does not necessarily refer to a salary schedule in a collective bargaining agreement**.

Finally, the Supreme Court remanded the case to the Court of Appeals for consideration of the manner in which Section 1303a(3)(f) applies to **employees who do not work pursuant to CBAs** (such as superintendents and other administrators).

Until the Court of Appeals renders a subsequent opinion addressing this issue, the impact of the Michigan Supreme Court's decision on individuals who had compensation not included in their pension payments due to the NSI schedule is unknown.

If you have any questions regarding the Michigan Supreme Court Ruling, please contact our office.

FEDERAL PROTECTIONS SIGNED INTO LAW FOR PREGNANT, NURSING EMPLOYEES

On December 29, 2022, President Joseph Biden signed into law the Consolidated Appropriations Act, which includes the Pregnant Workers Fairness Act ("PWFA") and the Providing Urgent Maternal Protections for Nursing Mothers ("PUMP") Act. Both the PWFA and PUMP Act provide additional protections for pregnant and nursing employees, and the protections extend to pregnant and nursing employees of school districts. The PWFA requires employers to accept and provide reasonable accommodations for pregnant employees. The PUMP Act requires employers to compensate employees on a break for nursing purposes if they are not completely relieved from their duties.

Pregnant Workers Fairness Act

Under the PWFA, both public and private employers must provide or accept reasonable accommodations for pregnant employees, so long as there are at least 15 employees and the accommodations do not cause undue hardship to the business. The PWFA states, in pertinent part:

> It shall be an unlawful employment practice for a covered entity to—
>
> (1) Not **make reasonable accommodations** to the known limitations related to the pregnancy, childbirth, or related medical conditions of a qualified employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity;
> (2) **Require a qualified employee** affected by pregnancy, childbirth, or related medical conditions **to accept an accommodation** other than any reasonable accommodation arrived at through the interactive process referred to in [section 102(7)];
> (3) Deny employment opportunities to a qualified employee if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of the qualified employee;
> (4) **Require a qualified employee to take leave**, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions; or
> (5) **Take adverse action** in terms, conditions, or privileges of employment against a qualified employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee. [42 USC 2000gg— 1 (emphasis added).]

The PWFA took effect on June 27, 2023. Two federal laws, Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans with Disabilities Act ("ADA"), already offer certain protections for pregnant workers. Title VII protects employees from discrimination on the basis of sex—which includes pregnancy—and requires employers to treat pregnant employees the same as other employees.

The ADA protects employees from discrimination on the basis of disability and requires employers to provide reasonable accommodations for known limitations of such disability. See 42 USC 12132; 42 USC 12112. Pregnancy is not currently recognized as a disability under the ADA. Therefore, the fact that an individual employee is pregnant **does not necessarily qualify that employee for reasonable accommodations under the ADA**. However, the ADA prohibits discrimination on the basis of disabilities related to pregnancy, such as gestational diabetes, which can develop in some women during pregnancy. Pursuant to guidance from the Equal Employment Opportunity Commission, a pregnant employee may be entitled to reasonable accommodations under the ADA for disabilities related to pregnancy.[4] The PWFA aims to close this gap by recognizing that pregnancy, in general, is a condition that requires reasonable accommodations, rather than only providing reasonable accommodations for disabilities related to pregnancy.

Michigan law provides similar protections for pregnant workers. Specifically, the Elliott-Larsen Civil Rights Act ("ELCRA") prohibits an employer from "refus[ing] to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of… **sex.**" MCL 37.2202(1)(a). The ELCRA defines the term "sex" to include pregnancy. MCL 37.2202(d). The PWFA will now require employers to provide accommodations to pregnant employees not otherwise covered by the ELCRA. **Therefore, under the PWFA, employers are now required to provide reasonable accommodations to known limitations of pregnancy unless such accommodations will cause undue hardship.**

<u>Providing Urgent Maternal Protections for Nursing Mothers Act</u>

The PUMP Act extends the rights of nursing mothers under the Fair Labor Standards Act ("FLSA"). Under the PUMP Act, nursing employees shall be entitled to receive compensation and a reasonable break time in a place of privacy for nursing purposes. If employers provide paid breaks, a nursing mother who expresses milk during a break must be compensated in the same way other employees are compensated for their break time. All employers covered by the FLSA, regardless of the size of their business, are required to comply with the PUMP Act. However, employers with fewer than 50 employees *are not subject to FLSA's break time requirement* if the employer can demonstrate that compliance would impose an undue hardship.

The PUMP Act states, in pertinent part:

(a) In General- An employer shall provide—

(1) A **reasonable break time** for an employee to express breast milk for such employee's nursing child for 1 year after the child's birth each time such employee has need to express the milk; and

[4] *What You Should Know About the Pregnant Workers Fairness Act,* U.S. Equal Employment Opportunity Commission, *available at* https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act.

(2) **A place, other than a bathroom**, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.

(b) Compensation

(1) In General- Subject to paragraph (2), an employer shall not be required to compensate an employee receiving reasonable break time under subsection (a)(1) for any time spent during the workday for such purpose unless otherwise required by Federal or State law or municipal ordinance.

(2) Relief from duties- **Break time provided under subsection (a)(1) shall be considered hours worked if the employee is not completely relieved from duty** during the entirety of such break. [29 USC 218d (emphasis added).]

The U.S. Department of Labor, Wage and Hour Division, previously provided a fact sheet in 2008 to assist employers in determining what constitutes compensable time under the FLSA, including break time. The fact sheet provides that "[r]est periods of short duration, usually 20 minutes or less, are common in industry (and promote the efficiency of the employee) and are customarily paid for as working time. These short periods must be counted as hours worked. Unauthorized extensions of authorized work breaks need not be counted as hours worked when the employer has expressly and unambiguously communicated to the employee that the authorized break may only last for a specific length of time, that any extension of the break is contrary to the employer's rules, and any extension of the break will be punished."[5] Moreover, an employee is *not* considered relieved from duty if the employee "is required to perform *any* duties, whether active or inactive." *Id.* (emphasis added).

Prior to the enactment of the PUMP Act, Michigan's Breastfeeding Antidiscrimination Act only provided the right to breast feed in a public place. With the passage of the PUMP Act, employers now must provide reasonable break time and compensate the employee for her time during the break if the employee is not completely relieved from her work duties.

Please contact us at Collins & Blaha, P.C. if you have any questions regarding this new law.

MICHIGAN BANS RACE-BASED HAIRSTYLE DISCRIMINATION IN WORKPLACES, SCHOOLS

On June 15, 2023, Governor Gretchen Whitmer signed the Creating a Respectful and Open World for Natural Hair ("CROWN") Act,[6] which amends Michigan's Elliott-Larson Civil Rights Act ("ELCRA") to prohibit race-based hair discrimination. MCL 37.2101, *et seq*. **Therefore, school districts may not discriminate against employees or students on the basis of traits**

[5] *Fact Sheet #22: Hours Worked Under the Fair Labor Standards Act (FLSA)*, U.S. Department of Labor, Wage and Hour Division, *available at* https://www.dol.gov/agencies/whd/fact-sheets/22-flsa-hours-worked.

[6] Public Act 45 of 2023.

historically associated with race, such as hair texture or protective hairstyles. Before the CROWN Act was signed into law, Michigan's State Board of Education ("SBE") adopted a resolution in support of the Act, affirming the SBE's support of student learning "in schools free of discrimination, harassment and bullying."[7]

The ELCRA prohibits discriminatory practices, policies, and customs in employment, housing, education, and places of public accommodation on the basis of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status.[8] The CROWN Act amends the ELCRA to define "race," for purposes of the ELCRA, as including traits historically associated with race, which include hair texture and protective hairstyles such as braids, locks, and twists.

The CROWN Act prohibits discrimination, or the denial of employment or educational opportunities, on the basis of an individual's hair texture or protective hairstyle. For example, a student or employee may not be disciplined for wearing their hair in a natural or protective style, nor may a student or employee be required to change their hair texture or protective hairstyle to attend school or work.

The CROWN Act became effective on June 15, 2023. Therefore, it would be prudent for districts to review their board policies, administrative guidelines, and student and employee handbooks to ensure that dress and grooming policies do not include language that would have the effect of prohibiting natural or protective hairstyles in school.

If you have any questions regarding this legislation or updates to related District policies and procedures, please contact our office.

PROPOSED TITLE IX RULES ON TRANSGENDER ATHLETES EXPECTED IN OCTOBER 2023

Since being signed into law, Title IX of the Education Amendments of 1972 ("Title IX") has prohibited sex-based discrimination in any school or education program that receives funding from the federal government. On April 6, 2023, the U.S. Department of Education ("USED" or the "Department") issued proposed Title IX rules that address transgender students participating in athletics consistent with their gender identity. While the rules are still undergoing the rule-making

[7] *Michigan's State Board of Education Resolution in Support of Michigan Crown Act*, State of Michigan Department of Education, *available at* https://www.michigan.gov/mde/-/media/Project/Websites/mde/State-Board/Resolutions/FINAL-Resolution-on-CROWN-Act.pdf?rev=402721fe5db3400ab3a6bd94e2cb90cd&hash=8E2942C27429F56D0F6BCDA71C0417FA.

[8] ELCRA is enforced by private lawsuits, and by the Michigan Civil Rights Commission, which investigates discrimination complaints through the Michigan Department of Civil Rights ("MDCR").

process, the USED expects to issue a final rule in October 2023.

Currently, there is an increase in litigation surrounding transgender athletes. See *Hecox v Little*, 479 F Supp 3d 930 (D Idaho, 2020); *B.P.J. v West Virginia State Bd of Ed*, 550 F Supp 3d 347 (SD W Va, 2021). As more cases begin to rise, schools face greater uncertainty and debate regarding whether to allow transgender students to participate on sports teams that align with their gender identity. With the proposed rule, the Department will provide new guidelines to bring clarity and direction on this topic. Specifically, the new proposed rule of Title IX aims to extend its protections to include students who wish to partake in the sports teams that align with their gender identity and prohibits blanket bans.

Because of the benefits that come from being a member of an athletic team, such as the importance of physical fitness, learning how to be a member of a team, and gaining exposure to leadership opportunities, the Department's proposed rule looks to prohibit any complete bans on transgender athletes participating in sports consistent with their gender identity. Further, the Department states that the proposed rule does not look to implement a "one-size-fits-all" policy, but rather seeks to give schools some flexibility to enact specific requirements to ensure safety and fairness for each participant.[9]

The proposed regulation's text states that if a school wishes to limit the eligibility of a student to participate on a team consistent with their gender identity, the criteria must be tailored towards two objectives. First, the criteria must be "substantially related to the achievement of an important educational objective." Second, the criteria must be made in a way that minimizes the "harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."

Although schools are being provided some flexibility to create their own guidelines, the Department has released three considerations that schools must consider:

1. The grade levels of the students participating in the sport.

   This consideration accounts for the different ages in which students may be transitioning. The Department stated that it would be extremely difficult to justify excluding younger students from a team that mainly focuses on building basic skills and sport knowledge. However, in higher grade levels and college, where "competitive success" is the goal, some restrictions may be permitted.

2. The degree of competition in which the team is participating.

   The degree of competition relates to the seriousness of the team's playing level. Most schools offer clubs and no-cut teams, which are focused on development rather than success. The Department believes that participation in these less competitive teams should remain unrestricted for all students.

3. The nature of the sport in which the students wish to participate.

   The Department recognizes that different sports require different sets of skills, and any restrictions would have to be considered in relation to the nature of the sport.

[9] *Fact Sheet: U.S. Department of Education's Proposed Changes to its Title IX Regulations on Eligibility for Athletic Teams*, U.S. Department of Education, *available at* https://www.ed.gov/news/press-releases/fact-sheet-us-department-educations-proposed-change-its-title-ix-regulations-students-eligibility-athletic-teams.

After releasing the proposed regulations, the Department opened for public comments for thirty days and drew in over 150,000 comments. The Department announced on May 26, 2023, that it is expected to release its final rule in October 2023 after it reviews comments to the proposed rule.[10]

If you have any questions regarding Title IX or the proposed rule, please contact our office.

US Department of Education Issues Report on Artificial Intelligence In Schools

Artificial Intelligence ("AI") has been finding its way into a variety of environments—including education—as the technology becomes more user friendly and accessible. The U.S. Department of Education's Office of Educational Technology (the "OET") describes AI as "automation based on associations."[11] As this technology becomes more refined and accessible, more employees and students are likely to implement AI into their professional and classroom work.

In May 2023, the OET released a report titled "Artificial Intelligence and Future of Teaching and Learning: Insights and Recommendations," which outlines the ways in which "all constituents involved in making educational decisions . . . can prepare for and make better decisions about the role of AI in teaching and learning."[12] The OET noted in its report that an area of concern regarding AI implementation involves individuals submitting material created by AI and claiming it as their own work. As with other forms of plagiarism in educational environments, the first step in preventing AI use is implementing a comprehensive anti-plagiarism policy in school policies or handbooks. The OET emphasizes that AI is a fantastic resource for learning, but if it is implemented poorly, AI may hinder student work and academic integrity. Because text written by AI is original and not copied, it may be more challenging for plagiarism-detection software to detect plagiarism via AI than traditional forms of plagiarism.

The best way to dissuade students from using AI's assistance in completing school assignments is to explicitly prohibit AI writing tools in school handbooks or policies. The OET notes that the process of implementing AI-specific board policies is well under way: "We have already seen educators rise to the challenge of creating overall guidelines, designing specific uses of available AI-enabled systems and tools, and ferreting out concerns."[13] Accordingly, given that this fast-

[10] *A Timing Update on Title IX Rulemaking*, Homeroom: Official Blog of the U.S. Department of Education, *available at* https://blog.ed.gov/2023/05/a-timing-update-on-title-ix-rulemaking/.

[11] *Artificial Intelligence and Future of Teaching and Learning: Insights and Recommendations* (May 2023), U.S. Department of Education, Office of Educational Technology, *available at* https://www2.ed.gov/documents/ai-report/ai-report.pdf.

[12] *Id.* at 6.

[13] *Id.* at 58.

developing technology is appearing in the educational environment, it may be prudent for Districts to review their handbooks and policies to address AI.

While AI may have downsides, OET reports that platforms with more restricted AI implementation can aid teachers and instructors in helping students thrive. These AI models can detect patterns in student behavior and offer pertinent feedback. The OET emphasizes that educators must "differentiate between products that have simple AI-like features inside and products that have more sophisticated AI models."[14]

Products with AI-enhanced features can be used to assist, rather than hinder, the education process for students. The OET encourages educators to continue "[e]xercising judgment and control in the use of AI systems and tools."[15] Furthermore, as students will certainly be exposed to this technology regularly throughout their academic careers, the OET notes the importance of helping students utilize AI technology in a safe and responsible manner.

If you have any questions regarding handbook or policy revisions or need assistance in addressing Artificial Intelligence in schools, please contact our office.

[14] *Id.* at 24.

[15] *Id.* at 17.