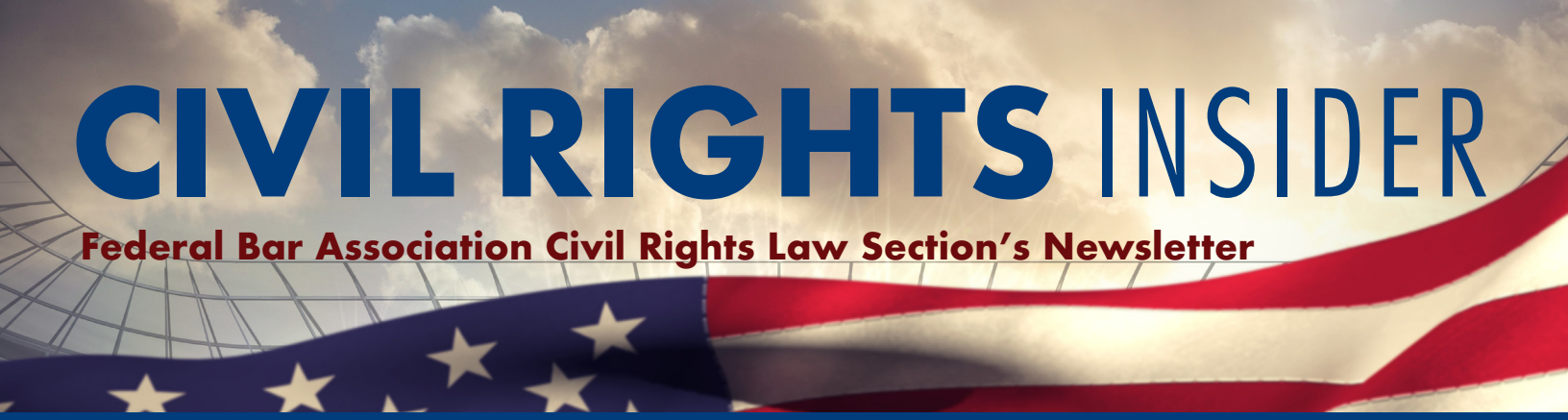


CIVIL RIGHTS INSIDER

Federal Bar Association Civil Rights Law Section's Newsletter

Winter 2019

From the Desk of the Chairperson

Hello, and happy new year from the Civil Rights Section. We have a lot going on this year, starting with our premier event, the Civil Rights Etouffee here in New Orleans on February 15, 2019. This full day CLE will be held at the New Orleans Jazz & Heritage Center next to the French Quarter, and will feature panels on topics such as First Amendment and privacy in the digital age, ending money bail, school safety, immigration, and more. That weekend is also the official start of the Mardi Gras parade season, with some great local parades happening Saturday night— a wonderful time to experience New Orleans. You can find more information and register at etouffeelaw.com. Hope to see you there!

After what promises to be a successful Etouffee, we will continue with our monthly Section calls featuring our Circuit Rider Presentations, or short presentations by a Section member about an interesting civil rights case from their Circuit. During 2018 we featured discussions of a Fifth Circuit case denying a right to receive exculpatory information from the government prior to a guilty plea; the Sixth Circuit case of EEOC and Aimee Stephens v. R.G. and G.R. Funeral Homes, Inc., which involved a sex discrimination claim brought by a transgender employee; and an Eleventh Circuit case involving accommodations for people with a hearing impairment under the Americans with Disability Act. A schedule for the upcoming calls is included below. I hope you will join us on these calls, and please let me know if you are interested in presenting on a case from your circuit.

Another initiative I'd like to work on this year will involve pro se civil rights plaintiffs in federal court. As anyone who has clerked for a judge or worked in federal court knows, a vast amount of the federal case load involves pro se civil rights plaintiffs. As I mentioned in my last message, some of the local chapters have developed programs to connect some of these pro se plaintiffs

Chair continued on page 3

In this Issue:

Protecting Access to Health Care for Transgender Individuals 2
Protecting the Rights of Students: *Reasonably Calculated* Remedies for Equity Beyond the IDEA 4
The Evolving Civil Rights Discourse of Land Use 7
Member Spotlight: Wylie Stecklow 9

Protecting Access to Health Care for Transgender Individuals

by Joseph Wardenski, Counsel, Relman Dane & Colfax PLLC, Washington, D.C.

Transgender people face significant barriers to health care, including widespread discrimination by medical providers and health insurers. A key tool to combat this discrimination is Section 1557 of the Affordable Care Act, the ACA provision prohibiting discrimination on the basis of sex and other factors in federally-funded health programs and activities, which include state Medicaid programs, most private insurers, and most hospital systems.

Recent successes in federal lawsuits by transgender plaintiffs under Section 1557 demonstrate both the scope of systemic health care discrimination facing the transgender community and the necessity of federal civil rights protections to combat this discrimination. These cases include *Flack v. Wisconsin Department of Health Services*, No. 3:18-cv-309 (W.D. Wis. filed Apr. 30, 2018), a case my firm, Relman, Dane & Colfax PLLC, is litigating with the National Health Law Program and McNally Peterson, S.C. on behalf of a putative class of transgender Wisconsin Medicaid beneficiaries challenging Wisconsin's categorical Medicaid coverage exclusion for transition-related health care.

Many transgender individuals experience gender dysphoria—the distress associated with being prevented from living in accordance with one's gender identity (one's innate hard-wired understanding of being male or female). Gender dysphoria and related distress are exacerbated for transgender individuals unable to undergo a gender transition, which often involves medical interventions including hormone therapies and surgeries. For many people, gender-confirming health care can be life-saving. There is a broad medical consensus that such care is safe, effective, and medically necessary to treat gender dysphoria and allows many transgender individuals to live authentically in their identified sex.

Unfortunately, many insurers still deny coverage for transition-related surgeries and hormone treatments. According to the 2015 Transgender Survey, more than half of transgender adults seeking surgeries for gender dysphoria in the previous year were denied coverage, and approximately 25 percent had been denied coverage for gender-confirming hormones.

Although many states' Medicaid programs now cover gender-confirming care, ten states, including Wisconsin, maintain categorical coverage exclusions on these treatments. Since 1997, Wisconsin has enforced a state regulation barring Medicaid coverage for "[t]ranssexual surgery" and "[d]rugs, including hormone therapy, associated with transsexual surgery or medically unnecessary alteration of sexual anatomy or characteristics."[1]

In April 2018, we filed *Flack* on behalf of Cody Flack and Sara Ann Makenzie, two transgender Wisconsin Medicaid beneficiaries harmed by the exclusion. The suit challenges the policy as a violation of Section 1557, the Fourteenth Amendment's Equal Protection Clause, and the federal Medicaid Act. Cody, a 30-year-old transgender man from Green Bay, and Sara, a 41-year-old transgender woman from Baraboo, were unable to obtain gender-confirming surgeries that their doctors had deemed medically necessary to treat their gender dysphoria.

On July 25, 2018, U.S. District Judge William Conley granted the motion, issuing a preliminary injunction barring the Wisconsin Department of Health Services from enforcing the categorical coverage ban to deny Mr. Flack and Ms. Makenzie coverage for their needed surgeries.[2] Judge Conley found that both plaintiffs faced irreparable harm to their health and well-being if they remained unable to obtain these treatments, and held that they are likely to succeed on the merits of their claims under Section 1557 and the Fourteenth Amendment (the Court deferred consideration of Plaintiffs' Medicaid Act claims).

The Court, citing recent legal developments in which the Seventh Circuit and other federal courts have found discrimination against transgender people to violate federal sex discrimination laws, had little trouble concluding that Wisconsin's Medicaid exclusion amounted to unlawful sex discrimination in violation of federal law. Chief among those cases was *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017), a landmark Seventh Circuit decision holding that a school district's discriminatory treatment of a transgender student was unlawful discrimination on the basis of sex under both Title IX and the Equal Protection Clause.[3]

Judge Conley ruled that, as in the policy at issue in *Whitaker*, Wisconsin's Medicaid policy "creates a different rule governing the medical treatment of transgender people." The Court found that "Wisconsin Medicaid covers medically necessary treatment for other health conditions, yet the Challenged Exclusion expressly singles out and bars a medically necessary treatment solely for transgender people suffering from gender dysphoria," adding that "by excluding 'transsexual surgery' from coverage, the Challenged Exclusion directly singles out a Medicaid claimant's transgender status as the basis for denying medical treatment." The Court noted that the exclusion "feeds into sex stereotypes by requiring all transgender individuals receiving Wisconsin Medicaid to keep genitalia and other prominent sex characteristics consistent with their natal sex no matter how painful and disorientating it may be for some." Accordingly, the Court concluded that plaintiffs are likely to succeed on their Section 1557 claims. In addition, the Court found that the exclusion, as a form of sex discrimination, was also unlikely to withstand heightened scrutiny under the Equal Protection Clause.

In his decision, Judge Conley credited the health harms and social stigma experienced by Cody, Sara, and other transgender individuals obstructed from obtaining gender-confirming care. The Court observed that "[g]ender-confirming medical care may decrease mistreatment caused by being visibly gender-nonconforming," and, accordingly, that "transgender people unable to afford (or otherwise unable to access)

gender-confirming surgical procedures are more at-risk for discrimination and other harms."

After the injunction issued, both Cody and Sara received insurance approvals for their needed surgeries. In September, Cody obtained chest reconstruction surgeries, telling the Court in a subsequent filing that "[i]mmediately after the surgeries, I felt a sense of relief that my outward appearance would now match my male gender and I would no longer be misgendered because of my chest," and that he looked forward to going to public events he had long avoided. He added, "I feel more upbeat and hopeful about my life in general."

In October 2018, after two additional plaintiffs joined the suit, we moved the Court to certify the case as a class action and to expand the preliminary injunction to protect all transgender Wisconsin Medicaid beneficiaries with gender dysphoria. At the time of publication, the Court's rulings on those motions were pending. The State has also appealed the injunction issued in July, and briefing on that appeal is scheduled to commence in January 2019. ■

Joseph Wardenski is a Counsel at Relman, Dane & Colfax PLLC, a national civil rights law firm based in Washington, D.C. He litigates fair housing, fair lending, education discrimination, and other civil rights cases, and leads the firm's work on LGBTQ rights issues.

Endnotes:

[1]Wis. Admin. Code § DHS 107.03(23)-(24).

[2]Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931 (W.D. Wis. 2018).

[3]The author was lead counsel in *Whitaker.*

Chair continued from page 1

with attorneys. I believe the Civil Rights Section should be assisting in such efforts, and so plan to devote some time and energy in 2019 to figuring out how we can contribute.

Thank you again for being a part of our Section, and I hope your 2019 is healthy, happy, and prosperous. ■

Stephen Haedicke, Chair

Protecting the Rights of Students: *Reasonably Calculating* Remedies for Equity Beyond the IDEA

by Lauren A. DiMartino, J.D., City University of New York School of Law

The field of education law is undoubtedly rewarding, existing at the intersection of children and families, civil rights, and economic justice. The combination of local, state, and federal law, however, make navigating the procedural complexities equally as challenging. While states and local educational agencies are primarily responsible for education, it "is in the national interest" for the federal government to effectively educate students with disabilities, improve results for non-traditional learners, and ensure equal protection under the law.[1] Given the current dichotomy between the legislative majority in the House of Representatives and the priorities of the Federal administration, legislative avenues to remedy education inequities are not particularly friendly. As such, unique litigation strategies may prove to be the best path towards education equity. While many litigation approaches have been foreclosed,[2] an opportunity may exist to rely on special education challenges as an entry point for broader systematic change.

The "Individuals with Disabilities Education Act" (IDEA) was implemented to ensure the protection and education of special needs children.[3] The primary vehicle for challenges under the IDEA, impartial due process hearings, only change circumstances for individual students. Further, the hearings only challenge school districts to offer students one of the remedies available within the district, but this is not always sufficient, as the remedies that exist are often insufficient to meet the students' needs. This historically results in some students receiving more protections and better educations than others.

The Supreme Court recently emphasized that nothing in the IDEA prevents a parent or advocate of a child with a disability from pursuing remedies under other federal laws or statutes.[4] Students with disabilities are fundamentally entitled to an individualized and free appropriate education, but also to the benefits, programs, and services of their schools, and protections from discrimination and harassment. When school districts fail to provide these entitlements to their students, alternative statutes may offer avenues to ensure that problems will be addressed on a more systematic scale.

Stark gaps exist between zip codes, and between white students with disabilities and their non-white peers in terms of who is given the proper supports and protections to graduate with a high school diploma. Parents have rights to advocate for more, but the process is complex. Over-crowded and under-funded districts tend to largely include families who are unaware of their rights, unable to afford an attorney, and discredited in meetings about their child. Further, the way special education is funded by Congress leaves poorer districts unable to provide proper services.[5] This increases the necessity that lawyers working in low-income communities take a holistic approach to serving their clients, and be able to recognize where educational issues may exist.[6] Understanding the scope and limitations of different remedies will, in some situations, enable lawyers to remedy a broader array of problems on a larger scale. It further asks the education lawyers working with more privileged families to consider approaches that address issues more broadly, possibly improving educational outcomes for other students that may have fallen through the very large cracks in underserved districts.

Several alternative statutes to the IDEA have the potential to improve outcomes for the school overall, within and outside of special education.[7] By challenging practices for special needs, litigation may successfully address other relevant systematic issues such as segregation, disciplinary practices, bullying and harassment, and subpar English Language Learner programs.

Statutes Available as Remedies

The Americans with Disabilities Act prohibits discrimination on the grounds of disability.[8] Title II of the ADA specifically protects individuals from discrimination on the basis of disability in services, programs, and activities of State and local governments.[9] Title II prohibits public entities from imposing eligibility criteria that tend to screen out persons with disabilities from fully participating or enjoying a service, program or activity.[10] Title III of the ADA more specifically provides protection from discrimination in the activities of places of public accommodation, including schools, and by private entities—such as private schools.[11]

An example of a successful ADA claim is where a school district was found to be discriminatorily employing exclusionary tactics of discipline against students with disabilities. The settlement in that case included the replacement of punitive discipline with more positive, holistic approaches. [12]

Section 504 of the Rehabilitation Act of 1973 is civil rights legislation that prohibits discrimination on the basis of disability in programs and activities that receive federal financial assistance from the U.S. Department of Education.[13] Section 504 focuses on educational institutions and agencies including public schools and higher education institutions. Like the IDEA, Section 504 requires that school districts meet the individual educational needs of students with disabilities "as adequately as the needs of [nondisabled students] are met." Unlike the IDEA, Section 504 emphasizes the comparison between the way the needs are met of disabled students and non-disabled students.[14] Because a student may qualify for Section 504 accommodations without triggering the need for an IEP, it broadens the scope of available remedies.[15]

Section 504 may provide remedies for a school forbidding a student from being accompanied by her service dog,[16] or inappropriately disciplining students for behaviors related to their disabilities. An example of a Section 504 violation is where a school failed to do more than a series of verbal reprimands that left student-on-student harassment unchecked, knowing the disability-based bullying was taking place.[17]

Notably, a recent court decision broadened the meaning of "disability" under Section 504 to include students who suffer from "complex trauma" as a result of living in high poverty neighborhoods.[18] In a decision denying a motion to dismiss a class action case against the Compton Unified School District in California, the District Court acknowledged that neurological changes caused by complex trauma could limit students' ability to concentrate, think, communicate, and learn. Although still novel, this opens a door to unique challenges faced by schools in low-income communities.

Section 1983 of the Reconstruction Civil Rights Acts. While originally used to remedy civil rights violations, section 1983 claims have been made available to redress federal statutory violations.[19] In order to use section 1983 to enforce a federal statute, the provision in question must also convey an individually enforceable right. Section 1983 has been found by a line of cases to hold state actors liable when they affirmatively expose a person to danger that they would not have been exposed to otherwise.[20] This theory has been and could be used to pursue remedies for bullying of children with disabilities, where the school created or allowed a "state-created danger." As such, harassment of students with disabilities that violates the IDEA would also be appropriate for a section 1983 claim.[21]

Equal Educational Opportunities Act of 1974 (EEOA) declares that no person shall be deprived of equal educational opportunity on account of their race, color, sex, or national origin.[22] Title I of the Act requires that financial assistance be provided to schools with a high proportion of students from low-income families, and allocated towards educationally deprived students. Violations of EEOA under Title II include (a) segregation—or failing to remedy segregation—in schools, (b) school assignments other than the one closest to the students home if it results in a greater degree of segregation, and (c) discrimination in the employment, employment conditions, or assignment to schools of faculty and staff.[23]

The Act also clarifies that a school's failure to "take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs" is in violation of the law. For example, a challenge could be brought for a school's "fail[ure] to communicate meaningfully with non-English-speaking or limited-English-speaking parents…by not providing [them] with written or oral translations of important notices or documents." [24]

Partnering with Agencies

While a parent or advocate may file suit directly on certain statutes, it often proves beneficial to have the action taken on behalf of the United States.

The Educational Opportunities Section of the Department of Justice Civil Rights Division (DOJ CRD) deals with issues of discrimination in schools on the basis of disability, race, national origin, religion, or sex under EEOA and ADA, or issues of harassment under Section 504. They also address the segregation of students with disabilities, issues faced by students dually identified as special needs and English Language Learners (ELL), and systematic issues such as students of color being disproportionately over or under identified as having a disability. Unlike the DOE, the DOJ CRD has the authority to investigate issues in private elementary and secondary schools that do not receive federal funding.[25] Generally, the types of cases the division will decide to litigate are those that could end wide-spread discriminatory practices, clarify existing law or apply it to new situations, are of unusual significance, or require the type of resources and expertise that only the DOJ CRD could offer.

The Department of Education Office of Civil Rights (DOE OCR) seeks to eliminate discrimination against students on the basis of disability. The agency may choose to monitor the implementation of a resolution, or if an organization refuses to negotiate a resolution, it may initiate enforcement proceedings to "suspend, terminate, or refuse to grant or continue Federal financial assistance to the recipient."[26]

The DOJ CRD and DOE OCR have traditionally been strong partners in investigating and remedying systematic issues, but recent actions clearly diminish this role. In 2018, Betsy DeVos's Office issued a new Case Processing Manual limiting the civil rights violations they will investigate,[27] and, along with the DOJ, rescinded a series of guidance documents on nondiscriminatory administration of school discipline.[28] These actions may indicate a decrease in Federal agencies' value as a partner in pursuit of civil rights.

State Complaint Procedures have been outlined by the IDEA as a way to address systematic issues.[29] Filing a complaint with an SEA can be used to monitor non-compliance, as SEAs are seen as powerful tools to monitor the implementation of IDEA Part B's requirements, including compliance with both systemic and individual child-specific issues.[30] Complaints also trigger evaluations of the policies, procedures, and practices that may be causing the violations, and introduce procedures for corrective actions to gain compliance, and can be used to resolve issues regarding staff qualifications.[31]

Conclusion

In a complicated area of law where the children affected are disproportionately low-income and students of color, it is imperative that attorneys understand the wide array of remedies available. The IDEA's procedural safeguards provide avenues for relief of issues that may arise for students with disabilities, and these processes can make all the difference in the life of an individual student. However, for every student whose family understood their rights and available remedies, there are an innumerable number of students with educational issues slipping through the cracks. Remedies under alternative statutes and through federal and state agencies may trigger a much needed improvement in systematic practices, and provide families with incentive to pursue that improvement for children beyond their own. ■

Lauren A. DiMartino (J.D. City University of New York School of Law, Jan. 2019) is an education and civil rights advocate. She has worked as an advisor and administrator in NYC community colleges and will serve as a clerk on the Sixth Circuit Court of Appeals 2019-2020. *Susan Horwitz of The Legal Aid Society graciously supported the writing of this article.*

Endnotes:

[1]Individuals with Disabilities Education Act, 20 U.S.C.A. § 1400 (c)(6) (2010).

[2]See Andrea Alajbegović Still Separate, Still Unequal: Litigation as a Tool for Integrating New York City Public Schools (Dec. 15, 2018) (unpublished manuscript, on file with CUNY Law Review) available at: https://ssrn.com/abstract=3303297.

[3]20 U.S.C.A. § 1400 (d)(1)(B)-(C).

[4]Fry v. Napoleon Community Schools, 137 S. Ct. 743, 753 (2017).

[5]Rebecca Klein, For students with disabilities, quality of education can depend on zip code, Hechinger Rep., (Dec. 9, 2017), http://hechingerreport.org/students-disabilities-quality-education-can-depend-zip-code/; Emmanuel Felton, Special education's hidden racial gap, Hechinger Rep., (Nov. 25, 2017), http://hechingerreport.org/special-educations-hidden-racial-gap/.

[6]For example, the New York City Legal Aid Society's Education Law Project cross-trains other practice areas on screening for child client educational needs.

[7]Stefanie Coyle (NYCLU) recommends direct advocacy, as she has seen positive change result from writing directly to schools to inform them their behavior is in violation of law.

[8]42 U.S.C. § 12101 (2008).

[9]42 U.S.C. § 12132 (1990).

[10]28 CFR § 35.130(b)(8) (2016).

[11]42 U.S.C. § 12181(7)(J) (1990).

[12]Settlement Agreement, U.S. & Covington Ind. Pub. Sch., U.S. Dep't of Justice (Jan. 18, 2017), https://www.justice.gov/crt/case-document/file/928961/download; but see Kenneth L. Marcus, Ass't Sec'y for Civil Rights,, U.S. Dep't of Educ., & Eric S. Dreiband, Ass't Attorney General, U.S. Dep't of Justice, Dear Colleague Letter: School Discipline (Dec. 21, 2018), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201812.pdf (rescinding guidance on nondiscriminatory administration of school discipline).

[13]29 U.S.C. § 794 (2016).

[14]Mark H. v. Lemahieu, 513 F.3d 922, 933 (9th Cir. 2008).

[15]Perry A. Zirkel, Does Section 504 Require a Section 504 Plan for Each Eligible Non–IDEA Student? 40 J. L. & Educ. 407, 414 (2011).

[16]Fry, 137 S. Ct. at 746.

[17]Patterson v. Hudson Area Schs., 551 F.3d 438, 448–49 (6th Cir. 2009); see also S.B. ex rel. A.L. v. Bd. of Educ. of Harford Cty., 819 F.3d 69, 76 (4th Cir. 2016); see also Zeno v. Pine Plains Cent. Sch. Dist., 702 F.3d 655, 669–70 (2d Cir. 2012).

[18]P.P. v. Compton Unified Sch. Dist., 135 F. Supp. 3d 1098, 1114 (C.D. Cal. 2015).

[19]42 U.S.C. § 1983 (1988); see Suzanne Solomon, The Intersection of 42 U.S.C. § 1983 and the Individuals with Disabilities Education Act, 76 Fordham L. Rev. 3065, 3069 (2008).

[20]See, e.g., Bright v. Westmoreland Cty., 443 F.3d 276, 281 (3d Cir. 2006).

[21]See Mark C. Weber, Disability Harassment in the Public Schools, 43 Wm. & Mary L. Rev. 1079 (2002).

[22]Equal Educational Opportunities Act, H.R. 40, 93rd Cong. (1973-1974).

[23]20 U.S.C.A. § 1703 (a)-(e) (1974).

[24]20 U.S.C.A. § 1703 (f); Felton, supra note 5.

[25]Dep't of Justice, Information about filing a complaint with the U.S. Dep't of Justice, Civil Rights. Division and the U.S. Dep't of Educ., Off. for Civil Rights 9 (2011), https://www.justice.gov/sites/default/files/crt/legacy/2011/09/22/filecomp.pdf.

[26]U.S. Dep't. of Educ. Off. Civ. Rights, Complaint Processing Procedures 3 (2018), https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf.

[27]U.S. Dept. of Educ. Off. Civ. Rights, Case Processing Manual (Nov. 19, 2018), https://www2.ed.gov/about/offices/list/ocr/docs/ocrcpm.pdf; see Annie Waldman, DeVos' Inspector General to Audit Dismissals of Civil Rights Complaints, ProPublica (Nov. 29, 2018), https://www.propublica.org/article/devos-inspector-general-to-audit-dismissals-of-civil-rights-complaints ("the department has pulled back from…emphasis on investigating allegations of systemic civil rights violations…instead focusing its attention on individual complaints of mistreatment.").

[28]School Discipline Letter supra at 12; Catherine E. Lhamon, Ass't Sec'y for Civil Rights, U.S. Dep't of Educ., Dear Colleague Letter: Restraint and Seclusion of Students with Disabilities (Dec. 28, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201612-504-restraint-seclusion-ps.pdf (stating that 67% of those who adversely impacted by restraint and seclusion in school were students with disabilities).

[29]34 CFR § 300.151(a)(1) (2011); 71 FR 46600 (August 14, 2006); U.S. Dep't of Educ., Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B), State Complaint Procedures 15 (2013).

[30]34 CFR §§ 300.149, 300.600(a) (2018).

[31]34 CFR §§ 300.152(b)(2)(iii), 300.149(a)(2)(ii), 300.600(e) (2018).

The Evolving Civil Rights Discourse of Land Use

by Thomas Silverstein, Lawyers' Committee for Civil Rights Under Law, Washington, DC

Racial exclusion has been a core purpose of land use regulation since the inception of zoning at the dawn of the twentieth century.[1] Some of the first zoning ordinances, most notably in Baltimore and Louisville, explicitly segregated cities block-by-block. Though the Supreme Court struck down racial zoning at the first opportunity,[2] the exclusionary motivations behind the race-neutral zoning schemes that followed were not hard to detect.[3] Restrictive zoning has played a major role in keeping disproportionately Black and Latinx, low-income households out of predominantly White suburbs and was virtually unchecked between 1926 and the passage of the Fair Housing Act in 1968. Early Fair Housing Act cases, including the first one in which a federal appellate court held that disparate impact claims were cognizable under the Act,[4] as well as few exceptional state court decisions,[5] provided some deterrent to exclusionary zoning. Simultaneous with the development of the Fair Housing Act as a legal tool for combatting land use restrictions that perpetuate residential racial segregation, however, the Supreme Court's restrictive standing jurisprudence emerged as a major impediment to attempts to root out exclusionary zoning.[6]

Metropolitan residential development patterns, the land use regulations that influence them, and their effects on residential racial segregation have not stood still since the 1970s. Although exclusionary zoning in predominantly White suburbs remains all too common, gentrification has followed White Flight in many cities, particularly on the coasts.[7] Ironically, increased use of high-density zoning, traditionally associated with greater inclusion for people of color, has contributed to this phenomenon and to the displacement of Black and Latinx residents in some instances. In addition, where civil rights law has helped undo exclusionary zoning, the mere cessation of discrimination, predictably, has not been sufficient to advance true racial equity. Interventions like inclusionary zoning, wherein developers are required or incentivized to provide affordable housing units within broader market-rate projects, are necessary to ensure that the benefits of increased density accrue to the people and communities that have been injured by low-density zoning. In order to be truly relevant to efforts to ensure equitable land use policy in the twenty-first century, constitutional and statutory civil rights law must continue to put pressure on traditional exclusionary practices, evolve to combat new forms of exclusion, and not bar the door to needed remedies.

There is little precedent, whether helpful or forbidding, for challenges under the Fair Housing Act and other civil rights laws to zoning densification policies that result in the displacement of people of color.[8] At the same time, there is no shortage of examples of that problematic phenomenon, and New York City provides an exemplary case in point. Under the administration of Mayor Bill de Blasio, the city has approved rezonings in East Harlem, Inwood, Jerome Avenue, East New York, and Downtown Far Rockaway, all low-income communities of color. From the South Shore of Staten Island to Douglaston, Queens, the city has declined to make similar changes in predominantly White communities where current zoning is actually exclusionary. Litigation challenges to New York City rezoning process have tended to focus on procedural deficiencies in the planning process and violations of state environmental law rather than on allegations of discrimination,[9] but the time when the courts will have to answer how the Fair Housing Act applies to this new form of exclusionary zoning is drawing near.[10] The nascent and well-funded Yes in My Backyard or YIMBY movement is seeking to decrease restrictive zoning in cities across the country and has been inconsistent at best when it comes to ensuring that land use reforms prioritize racial equity.[11] Absent some intervention, the frequency with which zoning changes that allow greater density will displace residents of communities of color will only increase in the years to come.

Just as the need has arisen to use civil rights law to challenge new forms of exclusionary zoning, threats have emerged to the policy tools needed to remedy the effects of past exclusionary zoning. Specifically, well-funded libertarian public interest legal organizations are trying, despite virtually no supporting case law from the lower federal courts, to interest the U.S. Supreme Court in prohibiting mandatory inclusionary zoning on the theory that the practice impermissibly conditions land use approval upon a property owner doing something that the state could not require directly.[12] Since 2015 alone, two parties, both represented by the Pacific Legal Foundation, sought *certiorari* in cases in which California state courts upheld the mandatory inclusionary zoning ordinances of the Cities of San Jose[13] and West Hollywood[14] respectively. Although the Court denied review in both cases,[15] the vast number of municipalities in California with inclusionary zoning ordinances[16] and the fact that the California Supreme Court conclusively affirmed the permissibility of mandatory inclusionary zoning[17] combine to mean that there is a fast track to the *certiorari* petition stage for real estate development interests. *Cherk v. County of Marin*, in which the California Court of Appeal upheld the defendant's inclusionary zoning ordinance, consistent with California Supreme Court precedent, and in which the plaintiffs are represented by the Pacific Legal Foundation, may be the next serious threat to inclusionary zoning though the plaintiffs have yet to file a *certiorari* petition.[18]

In the coming years, the civil rights bar will have to navigate two key ironies latent in the discussion above in order to effectively advance housing justice and inclusive communities. First, despite low-density zoning being the primary manifestation of exclusionary land use policy for nearly a century, practitioners will have to develop strategies for fighting its apparent opposite of high-density zoning when it makes contextual sense to do so. Second, despite the fact that the U.S. Supreme Court's minimalist approach to property rights in the *Village of Euclid* decision opened the door to exclusionary zoning, practitioners will have

to guard against a maximalist approach to property rights that undermines government's ability to not only cease discriminating but also to remedy the effects of past land use discrimination. Successfully navigating this landscape will require a nuanced appreciation of local context and a willingness to follow the lead of grassroots organizers working in communities of color facing displacement, but it can be done. ■

Thomas Silverstein is a Counsel in the Fair Housing & Community Development Project at the Lawyers' Committee for Civil Rights Under Law. His work focuses on impact litigation under the Fair Housing Act and efforts to increase compliance with the duty to affirmatively further fair housing (AFFH) through policy advocacy, administrative enforcement, and technical assistance. He earned his J.D. from the University of Virginia School of Law.

Endnotes:

[1]DAVID M.P. FREUND, COLORED PROPERTY: STATE POLICY & WHITE RACIAL POLITICS IN SUBURBAN AMERICA 45-98 (2007).

[2]Buchanan v. Warley, 245 U.S. 60 (1917).

[3]Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924) (*rev'd* by Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926)).

[4]U.S. v. City of Black Jack, 508 F.2d 1179 (8th Cir. 1974).

[5]*See, e.g.*, Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975); Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 336 A.2d 713 (N.J. 1975).

[6]Warth v. Seldin, 422 U.S. 490 (1975).

[7]Mike Maciag, *Gentrification in America Report*, GOVERNING (Feb. 2015), http://www.governing.com/gov-data/census/gentrification-in-cities-governing-report.html.

[8]*Zone In*, CITYLIMITS.ORG (last visited Dec. 27, 2018), https://citylimits.org/series/zonein/.

[9]*See* Complaint, Ordonez v. City of New York, No. 0450100/2018 (N.Y. S. Ct. Jan. 18, 2018).

[10]*See* Amended Complaint, Current Area Residents East of the River v. District of Columbia, No. 1:18-00872 (D.D.C. Sep. 4, 2018) (alleging that the District of Columbia pursued zoning policies designed to attract the "creative class" and that the purpose and effect of doing so was to displace Black residents).

[11]Liam Dillon, *A Major California Housing Bill Failed after Opposition from the Low-Income Residents It Aimed to Help. Here's How It Went Wrong*, L.A. TIMES (May 2, 2018), https://www.latimes.com/politics/la-pol-ca-housing-bill-failure-equity-groups-20180502-story.html.

[12]This theory draws heavily on a body of cases in which the Supreme Court held that, in order for dedication or exaction to be permissible, there must be an essential nexus and rough proportionality between the impact of the development at issue and the dedication or exaction. Koontz v. St. Johns River Water Management District, 570 U.S. 595 (2013); Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

[13]Petition for Writ of Certiorari, California Building Industry Association v. City of San Jose, No. 15-330 (U.S. Sep. 15, 2015)

[14]Petition for Writ of Certiorari, 616 Croft Ave., LLC v. City of West Hollywood, No. 16-1137 (U.S. Mar. 15, 2016).

[15]616 Croft Ave., LLC v. City of West Hollywood, 138 S. Ct. 377 (2017); California Building Industry Association v. City of San Jose, 136 S. Ct. 928 (2016).

[16]Rick Jacobus, *Inclusionary Housing: Creating and Maintaining Equitable Communities*, LINCOLN INSTITUTE OF LAND POLICY (Sep. 2015), https://www.lincolninst.edu/sites/default/files/pubfiles/inclusionary-housing-full_0.pdf (noting that California has over 100 municipalities with inclusionary zoning policies and that California and New Jersey combine to account for 65% of all inclusionary zoning programs).

[17]California Building Industry Association v. City of San Jose, 351 P.3d 974 (Cal. 2015).

[18]2018 WL 6583442 (Cal. Ct. App. 2018).

Call for Articles for the Civil Rights Insider

The editors of The Civil Rights Insider invite submissions for publication. Publication allows you to announce your latest win (or loss,) publicize a successful appeal that offers a valuable precedent, share a local phenomenon in the law that may have national implications, invite others to a conference that will be addressing novel issues of civil rights law, provide your personal take on a recent Supreme Court decision and its implications for your practice, or highlight a member whose work you believe should be acknowledged. We welcome your contributions as well as suggestions of subjects that should be addressed so that the newsletter serves us all.

Articles need only be between 500 – 1000 words. If interested, contact Steve Dane of Relman, Dane & Colfax PLLC, at sdane@relmanlaw.com.

MEMBER HIGHLIGHT

WYLIE STECKLOW

According to Immediate Past Chair Wylie Stecklow, the FBA is about Building Relationships and Having an Impact.

It's hard to say which has more horsepower: Wylie Stecklow or his customized Harley Sportster 1200. In the six years since Wylie joined the FBA, he's served as Chair-elect and then Chair of the Civil Rights Section, chaired the Civil Rights Committee of the SDNY Chapter, and began serving as President of the SDNY Chapter last October. All this while he also runs a solo civil rights practice in New York, and sits on the board of Figment Project, an interactive, multi-city arts event, which he co-founded in 2005.

Wylie's first introduction to the FBA was reading an issue of the Federal Lawyer magazine while waiting in a magistrate judge's chambers during a 2013 settlement conference. The quality of the magazine made him curious about its publisher, the FBA, and he discovered that a friend from law school was very involved. He reached out to his friend who suggested that he find a committee that touched on his legal interests and see if there was an opportunity to contribute as a leader. Which he promptly did in the SDNY Chapter, contributing to the chapter's civil rights committee and serving as the chapter's delegate to the FBA national convention.

Wylie organized his first CLE for the FBA in 2014—a panel of seven magistrate judges from the SDNY discussing pre-trial practice. One hundred practitioners attended, and Wylie experienced genuine pride at having served the bar in this way. "I truly feel that magistrate judges, especially in SDNY, are the backbone of our justice system," and bringing them together to share their insights with a packed room was the kind of impact he wanted to have for his colleagues and the bar.

Then in 2015, seeking to have a more national impact, Wylie reached out to then-Chair of the Civil Rights Section Eileen Rosen who wisely sensed his energy and promptly suggested he become Chair-Elect. Wylie's impact on our section was instant and profound. He initiated monthly conference calls and regular emails to members to connect and engage us. He also began to organize a CLE event sponsored by our section that would bring together civil rights practitioners—plaintiffs and defendants alike.

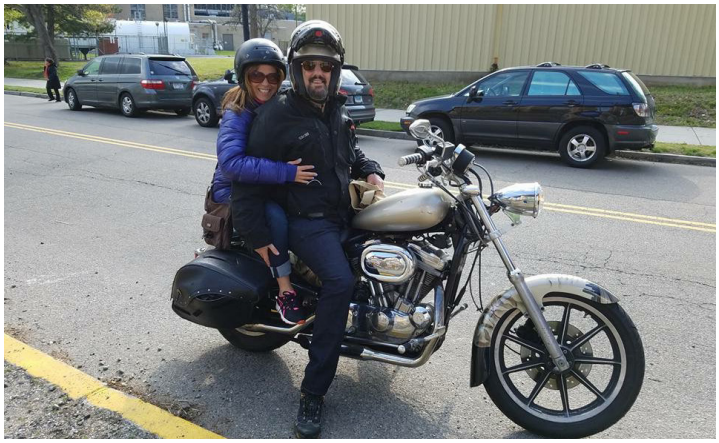
And that is how our New Orleans-based Civil Rights Étouffée came to be.

Why New Orleans? Wylie loves that city as much as any New Yorker could love any other city. He often quotes the adage attributed to Tennessee Williams: "America has only three great cities: New York, San Francisco, and New Orleans. Everywhere else is Cleveland."[1] Wylie first visited New Orleans in 1987 as a college senior cheering on Syracuse in the NCAA Final Four. His next trip was in 1994 to experience the city's renowned Jazz Fest, and since then he does not miss Jazz Fest if he can help it. In 25 years since his first Jazz Fest, Wylie counts many musicians among his friends, and when Hurricane Katrina devasted the city in 2005 he helped create Fat Friday NYC, which has become an annual event raising money for musicians in New Orleans (including the New Orleans Jazz & Heritage Foundation, where our February 15, 2019 Civil Rights Étouffée will be held).

Our current chair, Stephen Haedicke, joined the first planning call in 2016 for the CLE, and soon the plans were rolling to host the event in New Orleans, where he lives. Additionally, the New Orleans Chapter is very active and embraced the idea of co-hosing the CLE. That first Étouffée took place on April 7, 2017 with ten panels and nearly 100 In attendance. Add to that the timing during a music festival, it was a great event and a proud moment for Wylie. "Now we have a whole team of people who feel ownership" and are making our second Civil Rights Étouffée possible.

As much as Wylie has given to the FBA, he finds that he derives immense benefit from his involvement. "As a solo practitioner, the relationships with the bench and other members of the bar are priceless to me. It doesn't mean that I'm going to win a motion just because the judge knows me, but it does mean that I won't be outshone in court just because the other side is represented by a big, well-known firm." He added that his practice is not the type that lends itself to referrals, which other FBA members find to be a substantial benefit. However, "I have been able to build relationships with colleagues, and that has been super helpful for my professional development." And of course, the ability to create a CLE in New Orleans has been as much a perk for him as it is a service to us all.

Wylie's career as a solo practitioner has a great origin story. He graduated from Fordham Law in 1990 and set out as many young law-school grads to earn a living; so, he took the best paying job he could find—in big law. He quickly realized this wasn't for him. "I felt like a cog in a job that was to move decimal points on balance sheets of large corporations." He left big-law for a



Wylie Heads to Court.

boutique litigation firm, which he found more interesting, but still not where he wanted to see his life.

So, Wylie took a big leap and joined the criminal defense practice of Murray Richmond, whom he knew through a friend. In the two years Wylie spent at "Don't Worry Murray," he did "everything you see lawyers do on t.v."—he was in court all the time arguing motions and trying cases. The clients were members of organized crime and others who were regularly involved with the criminal justice system as well as people facing criminal charges for the first time. "I learned how to do small practice—how to evaluate a case, how to charge a client, how to appear in court, and how to try cases."

Right about the time Wylie was hanging out a shingle to go it alone, he had a client he liked who got arrested during a "driving while black" police stop. The police had no probable cause, but when they searched the vehicle, they found a gun under his client's seat and $100,000 in cash in the trunk. The police seized both the gun and the cash. Wylie made a deal with his client: "I'll represent you for free, but if I get you dismissed, I want to go after the seized cash and take 1/3 as my fee." With that deal in place, he filed a motion to examine the car, since the police justified the search by claiming to have seen the gun from outside the car. The car, however, had already been sold at auction. Wylie persuaded the court to require the police to produce the same year, make and model car for him to inspect. When the police could not produce a car for inspection, the gun was suppressed and the case dismissed. $34,000 later, Wylie started a new law firm and bought himself a Harley Sportster 1200—and both are still running great for him over 20 years later.

Wylie counts among the high points of his career in solo practice being retained by the governing counsel of the Occupy Wall Street movement to provide them with a variety of legal services. In that role he helped them organize as a corporate entity and set up their finances and banking "so that they could focus on their movement." Even though there were arrests related to their protests—and Wylie represented many of them in the criminal and civil cases—he's proud to say that there was never any issue with the structure and finances of OWS. Wylie also contributed to the moment by providing know-your-rights training.

When Wylie is not practicing law and serving in his many leadership positions within the FBA, he can be found riding on his customized Harley or travelling the world. He loves exploring different cultures and has been to 60 different countries. He also, of course, loves seeing live music. And even then he's making a civil rights impact—for the past three years he's provided know-your-rights training and defense at the Burning Man Festival!

Robin Wagner of Pitt, McGehee, Palmer and Rivers, Royal Oak, Michigan, contributed to this Member Highlight. ■

Endnotes:

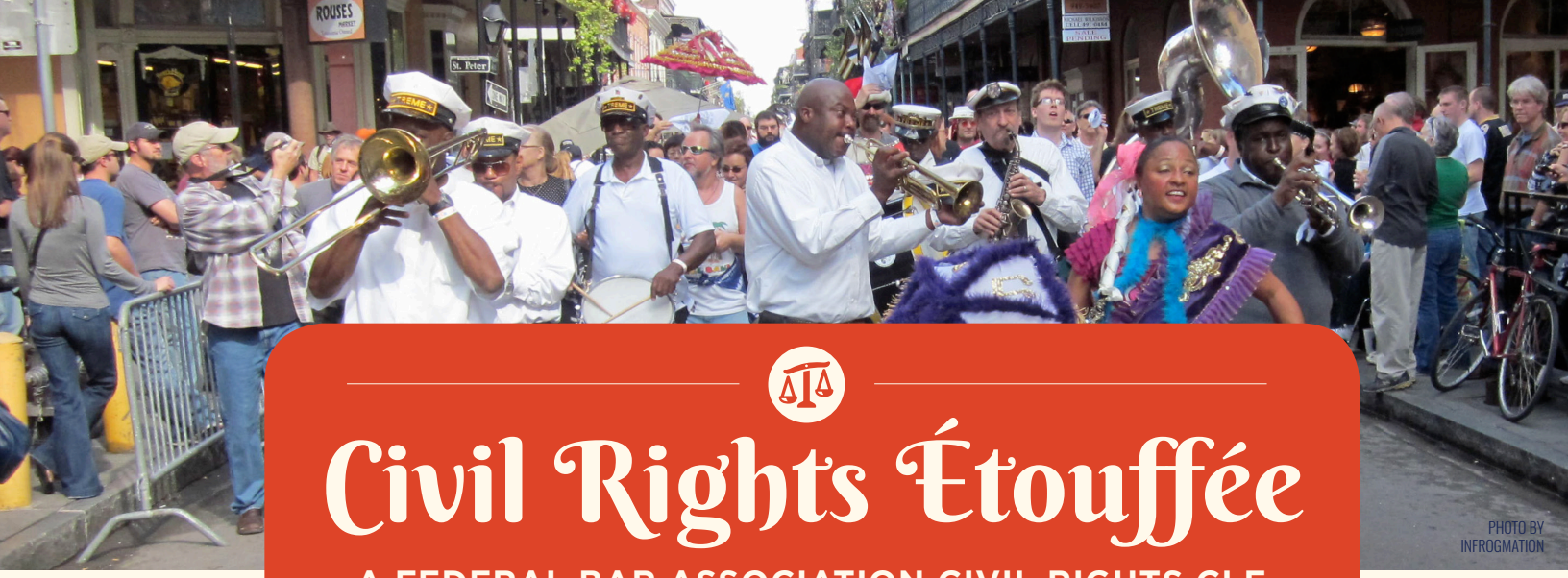
[1] This attribution is one of many: https://quoteinvestigator.com/2015/06/18/cleveland/#note-11477-13. If you are from somewhere other than NY, SF or NOLA and feel the need to express your opinion about this quotation, please see Wylie—at our February 15, 2019 CLE in New Orleans—where he will be happy to debate the merits of your hometown, compared with those of NOLA. For what it's worth, Wylie would add Memphis and Austin to this list.

[2] Wylie claims to have made it to all but four Jazz Fests since 1994, but this assertion is based on an unsworn statement.

Section Conference Calls

All members of the Civil Rights Law Section are invited to participate in monthly conference calls where Section business is discussed. Calls are scheduled for the following dates. All calls being at 12 PM CST. Dial-in instructions are emailed to Section members in advance of each call.

Dates:
2/20/19
3/20/19
4/17/19
5/15/19



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