CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™
ADVANCING ETHICS, COOPERATION AND EDUCATION

2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 1: Thursday, April 10, 2014 (10:10 am – 11:10 am)

Emerging LGBT Issues for Municipalities, Schools and other Public Entities

1. Review of Notable / Newsworthy Items

In 2013 and 2014, there has been no shortage of significant court rulings or notable news stories relating to LGBT issues, and the potential impact they will have on various public entities.

Supreme Court Cases – *United States v. Windsor,* and *Hollingsworth v. Perry*

On June 26, 2013, a highly anticipated and somewhat controversial ruling was handed down by the US Supreme Court, overturning a law that had previously denied federal benefits to same sex couples. While the decision does not provide a federal guarantee or right to same sex marriage, it does allow residents of states which currently recognize same sex marriage to qualify for and receive federal benefits, much like married heterosexual couples do.

In *United States v. Windsor, et al.*, Edith Windsor attempted to claim the federal estate tax exemption when her partner, Thea Spyer, died in 2009, leaving her entire estate to Windsor. Windsor and Speyer were married in Ontario, Canada in 2007. Windsor was prevented from doing so under §3 of the Defense of Marriage Act (DOMA), and filed suit in the USDC for the Southern District of New York. Ultimately, the US Supreme Court issued a 5-4 decision declaring §3 of the Defense of Marriage Act to be unconstitutional, as a "deprivation of the liberty of the person protected by the Fifth Amendment" focusing on due process and equal protection under the law, as ascribed to the Fifth Amendment. On page 20 of the opinion, Justice Kennedy writes "DOMA seeks to injure the very class New York seeks to protect. By doing so it violates basic due process and equal protection principle applicable to the Federal Government." (*United States v. Windsor*, 133 U.S. 2675 (2013)).

On the same day, the US Supreme Court also issued a decision in *Hollingsworth v. Perry*, 133 U.S. 2652 (2013). Briefly, California's Proposition 8, a state constitutional amendment that reinstated limitations on marriage, so that only heterosexual couples could be recognized as married, was found to be unconstitutional by the 9th Circuit. After the State of California refused to pursue an appeal of this

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ruling, private parties were allowed, on behalf of the state, to appeal the matter to the US Supreme Court. The US Supreme Court ruled that the sponsors of Prop 8 did not have standing to appeal an adverse federal court ruling, and as such, the current ruling finding Proposition 8 unconstitutional stood.

What Happens When a Clerk Takes Things into Their Own Hands – *Commonwealth v. Hanes*

On the heels of the *Windsor* decision, on July 9, 2013, the ACLU filed suit in the USDC, Middle District of Pennsylvania, seeking to overturn Pennsylvania's 1966 statutory ban on same sex marriage. Two day after suit was filed, Pennsylvania's Attorney General, Kathleen Kane, refused to defend the statute, indicating that she felt the statute was "wholly unconstitutional" among other things. The trial date in the ACLU matter is scheduled for June 9, 2014.

On July 23, 2013, shortly after Kane's refusal to defend the suit, forcing the state to retain outside counsel to defend the statute, Montgomery County's Register of Will / Clerk of the Orphan's Court, began issuing marriage licenses for same sex couples. Before the Commonwealth filed suit against him, Hanes issued almost 100 marriage licenses in the week after his announcement, when he was sued by the Commonwealth to stop. On September 12, 2013, Hanes was ordered to stop issuing marriage licenses to same sex couples, until the law is overturned (the 1966 statute banning same sex marriage) or the law is suspended by the General Assembly. Hanes had issued 174 licenses prior to the court ruling against him on Sept. 12. Hanes has appealed.

State of Utah – Gay Marriage is Banned, Overturned, and Now on Hold

On December 20, 2013 Judge Robert Shelby of the USDC for Utah ordered the State of Utah to immediately stop enforcing laws that restrict marriage to a man and a woman. Judge Shelby's ruling was predicated, as was *Windsor*, on the 5th Amendment's guarantees of due process and equal protection. Immediately after this ruling, same sex couples began filing for and receiving marriage licenses.

The State has appealed, and ultimately was able to get the US Supreme Court to issue a stay on any further same sex marriages in Utah, while the State's appeals move forward. The appeal is currently being held in the US Court of Appeals, 10th Circuit. All parties seem to agree further appeals will result from whatever ruling is made by the Court of Appeals.

The State of Utah has stated that any marriage licenses that were filed after Judge Shelby's ruling up until the Supreme Court stay are invalid, and do not have any meaning. However, the United States Attorney General Eric Holder has stated that the federal government will acknowledge those licenses that were granted in Utah during that time period.

Transgender Students and Accommodations

In June, 2013, the Colorado State Civil Rights Division ruled against the Fountain-Fort Carson School District in a matter brought by the parents of a 6 year old transgender girl. The girl, Coy Mathis, was born a boy, but began identifying as a girl at a young age. While in Kindergarten, Coy's parents approached the school district to advise them of Coy's identity, and the district initially agreed with the family's request that Coy be treated as a girl, and allowed to use the girl's bathroom. However, that decision was reversed during first grade, when Coy was instructed to either use staff bathroom, or a gender neutral bathroom. Furious, the parents removed Coy from the school and filed a complaint with the Colorado Civil Rights Division. The division found in favor of Coy, and rebuked the school district for not allowing Coy to use the girl's restrooms.

A similar situation was argued in front of the Maine Supreme Court in June, 2013 involving a 15 year old transgender girl, who claimed she was humiliated and discriminated against, when she was not allowed to use the girl's room at her school, and forced to use a unisex bathroom. The issue arose in 2007 when the district barred her from using the girl's room, after another male student followed her into the girl's room. In 2010, the school district also barred her from using the girl's room at the middle school. The Maines family filed suit in 2007, and was joined by the Maine Human Rights Commission in 2009, who ruled that the school district engaged in discrimination.

2. Federal and State Issues

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a. Conflicts Between Federal and State Law

An example in this regard is as to the right to privacy. In *Wyatt v. Fletcher*, 11-41359 (5th Circuit 5/31/13), the federal Fifth Circuit Court of Appeals in addressing a case originating in a state high school in Texas, held that as to a 14th Amendment claim to privacy, there is no clearly established law holding that a student in a public high school has such a privacy right to prevent school officials from discussing with a parent the student's private matters, including matters relating to sexual activity of the student.

Contrast *Wyatt* with *Gryczan v. State*, 96-202 (Mont. 7/2/97), 283 Mont. 433, 942 P.2d 112, in which the Court held that Montana's Constitution affords citizens broader protection of their right to privacy than does the federal constitution and that at least as to adults, regardless of gender, their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation.

b. State Denial of Federal Benefits

A newsworthy case in this regard is *Kitchen v. Herbert*, 2013 WL 6697874, ---F. Supp. 2d --- (D. Ut. 2013), in which a District Court judge in Utah held that the state ban on same-sex marriage was violative of the plaintiff's due process and equal protection rights under the 14th Amendment. The Court found that the process of allowing same-sex marriage is straightforward and requires no change to state tax, divorce or inheritance laws. *Id.* at page 28. Subsequently, the U.S. Supreme Court has granted a stay of the implementation of the District Court's decision pending final disposition of an appeal in the U.S. Court of Appeals for the 10th Circuit. Thus, for the time being, Utah continues to not recognize same-sex marriage and thus federal benefits attendant to marriage.

c. Religious Exemptions

In *Keeton v. Anderson-Wiley*, 733 F.Supp. 2d 1368 (S.D. Ga. 2010), a graduate student in a counseling program in a state university expressed moral opposition to homosexuality and had been placed on remedial status to receive supplemental training regarding counseling of gay, lesbian, bisexual and transgender clients. The student filed suit against a professor and the university alleging 1st Amendment violations of the viewpoint of discrimination, compelled speech doctrine, the right to belief of one's choice and retaliation. The Court held that this student failed to show substantial likelihood of success on the merits that the school violated the free exercise clause of the 1st Amendment by its curricular requirement. The Court stated that the university's curricular requirement was generally applicable equally to all students enrolled in the program regardless of religion. Therefore, the requirement was not aimed at a particular religious practice.

d. Government Interpretations of Gender

Governments have established gender-sensitive laws such as a Gender-Motivated Violence Act (GMVA). In *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000), the issue was whether the GMVA

included men within the statute's protection. The Court noted that the legislative history reflected that the new law created an appropriate remedy–a civil action in federal court–by a victim of gender-based violent crime against *his* or her attacker. *Schwenk* at 1200. Thus, the Court found that the plain language of the statute was that the GMVA was to apply with equal force to both men and women. The Court also held that it applies equally to transsexuals as it applies to all persons within the United States. *Id.* In this case, the prisoner, a preoperative male-to-female transsexual, sued a state prison guard and other prison officials under the GMVA and the Court found that the prisoner had produced evidence and allegations that, if proven at trial, would establish a violation of a right to be free from gender-motivated violence under the GMVA.

3. SCHOOLS

A. Harassment/Bullying

Title IX of the Education Amendments of 1972, 20 USC §§ 1681-1688

Federal law applies to all schools that receive federal funding (all public schools and some private schools). Title IX of the Education Amendments of 1972 prohibits discrimination, harassment, and bullying based on sex, which includes gender stereotyping.

Flores v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003)

This is a case against a school district in California where school district employees repeatedly ignored or minimized many reports by the students that they were being abused by others who thought they were gay; settled on January 6, 2004. As a result of the settlement, the district will implement a comprehensive training program for administrators, staff, and students to combat anti-gay harassment.

In addition to the training program, the lawsuit also produced a historic ruling from the 9th Circuit Court of Appeals. During the litigation, the school district argued that the law on how schools should respond to anti-gay bias among students was unclear, and so school officials shouldn't be held legally responsible for letting it continue. In 1999, U.S. District Court Judge James Ware disagreed and upheld the right of the students to sue the district. The district appealed that decision, and the 9th Circuit Court of Appeals unanimously ruled that if a school knows anti-gay harassment is taking place, it is obligated to take meaningful steps to end it and to protect students.

CPS Anti-bullying Policy

The Chicago Public School District ("CPS") recognized the particular vulnerability of students with actual or perceived disabilities and those who identify as or are perceived to be lesbian, gay, bisexual or transgender. CPS enacted its own policy to protect its students against bullying and harassment on the basis of actual or perceived race, color, religion, sex, national origin, ancestry, age, marital status, physical or mental disability, military status, sexual orientation, gender-related identity or expression, unfavorable discharge from military service, association with a person or group with one or more of the aforementioned actual or perceived characteristics, or any other distinguishing characteristic.

Bullying is prohibited during any school-sponsored or school-sanctioned program/activity, in school or on school property, through the transmission of information from a CPS computer or computer network, when communicated through any electronic technology while on school property, when it is conveyed that a threat will be carried out in a school setting. All CPS employees and contractors who witness incidents of bullying must intervene immediately, report the incident, and cooperate fully in any investigation

B. Freedom of Speech/Expression

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969)

This is a seminal case that stands for the legal principal that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." The only time a school can restrict an individual student's speech is when it causes significant disruption in the classroom.

McLaughlin v. Pulaski County Special School District, 296 F. Supp. 2d 960 (E.D. Ark. 2003)

ACLU case against an Arkansas school that punished a 14-year-old for talking about being gay at school.

Myers v. Thornsberry, filed in the Western District of Missouri, Case No. 05-5042; settled

ACLU lawsuit against a Missouri school that twice punished a student for wearing t-shirts expressing her support for gay rights. The school settled and agreed not to censor student t-shirts in the future.

C. Gay-Straight Alliances

The Federal Equal Access Act, 20 USC § 4071

The FEAA provides that if a public school permits non-curricular clubs, then it must allow students to form Gay-Straight Alliances ("GSA"). GSAs are student clubs that allow students with a common interest to get together and have discussions or activities about that interest.

Charles Pratt and Ashley Petranchuk v. Indian River Central Sch. Dist. et al., 2011 WL 1204804 (N.D.N.Y. Mar. 29. 2011)

A brother and sister sued their high school for denying their request to start a GSA and refusing to act on their reports of anti-gay harassment. After the case was filed by Lambda Legal, the school allowed a GSA to form. Although other parts of the case continue, the court has already ruled that the FEAA requires all student clubs to receive equal treatment.

Straights & Gays for Equality v. Osseo Area Sch. Dist. No. 279, 540 F.3d 911 (8th Cir. 2008)

Students tried to start a GSA at their high school in Minnesota, but the school refused to grant them the same access to school resources that other clubs enjoyed, giving a convoluted explanation of why groups like the Synchronized Swimming Club, but not the GSA, were curricular clubs. When the ACLU sued, the court ruled that the school had illegally misclassified clubs in order to treat some groups better than the GSA, and ordered the school to treat all clubs according to the law and pay over $450,000 in attorney fees.

Gonzalez ex rel. Gonzalez v. Sch. Bd. or Okeechobee County, 571 F.Supp.2d 1257 (S.D. Fla. 2008)

The school board denied students' application to start a GSA at their high school, claiming that the club would interfere with the order and discipline of the school and that the club was incompatible with the school's abstinence-only policy. When the ACLU sued the school, a federal court ruled that the club's tolerance-based message didn't interfere with the abstinence education policies of the school and that the school failed to provide any credible reason the club would impact the order and discipline of the school. The court ordered the school to allow the club and to pay $326,000 in attorney fees.

D. Privacy

Sterling v. Borough of Minersville, 232 F.3d 190 (3d Cir. 2000)

ACLU case against a town where two police officers threatened to tell a teenager's family he was gay against his will. The young man then committed suicide. A court ruled that the government cannot reveal a minor's sexual orientation without permission.

Nguon v. Wolf, 517 F. Supp. 2d 1177, 1185 (C.D. Cal. 2007).

In 2005, Charlene Nguon and her girlfriend were repeatedly disciplined by the school's principal for violating the school's policies against certain types of public displays of affection. After several infractions, Nguon was suspended from school for several days. Consistent with his understanding of California's School Discipline Code, the school's principal, Benjamin Wolf, called a meeting with Nguon's mother in which he told her that the discipline arose from sexual behavior with a female student. This statement outed Nguon to her parents; until that point, she was openly gay at school but not in her home. There was no evidence that Principal Wolf acted out of malice toward Charlene due to her sexual orientation.

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The District Court held, on summary judgment, that Charlene did have a constitutionally protected privacy right with respect to disclosure of her sexual orientation. The court then engaged in a three-part inquiry to determine whether Nguon's privacy right was infringed:

1) Did Nguon have a reasonable expectation that her sexual orientation would not be disclosed to her parents?
2) Did Principal Wolf actually disclose to Charlene's mother that she was gay?
3) Assuming disclosure occurred; did Principal Wolf have a compelling state interest in making the disclosure?

The Court held that although she had a protected privacy interest in nondisclosure of her sexual orientation within her home, Principal Wolf did not violate her right to privacy under the First Amendment or California Constitution by disclosing a student's sexual orientation to her mother in the context of explaining the student's suspension for engaging in inappropriate public displays of affection with another female student. The court held that Principal Wolf had a legitimate governmental purpose in describing the context of the suspension in view of his statutory duty to make disclosures in the context of suspensions and in view of the need to ensure that the student was afforded due process.

CPS Anti-bullying Policy

If a student is bullied after coming out as gay, the Principal/Designee shall not disclose the student's sexual orientation to the parent/guardian without the student's permission, unless there is a legitimate, school-related reason for doing so.

E. <u>Prom</u>

Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980)

A male homosexual high school senior sought a preliminary injunction ordering school officials to allow him to attend senior prom with a male escort. The District Court held that it was a denial of his First Amendment rights for school officials to preclude him from bringing a male escort to the senior prom since the student's action amounted to a political statement protected by the First Amendment and, although school officials sought to prevent attendance in order to eliminate possibility of violence, they failed to show that barring the student was the least restrictive means of obtaining that goal.

McMillen v. Itawamba County School District, 702 F. Supp. 2d 699 (N.D. Miss. 2010)

ACLU case against a Mississippi school that canceled the prom rather than let a female student go with her girlfriend and wear a tuxedo. The Court found that the student's First Amendment rights were violated, that there was a substantial threat of irreparable injury, that the threatened harm outweighed any damage the school district would suffer from requiring it to host prom, but that the issuance of an injunction did not serve the public interest, and thus, she was not entitled to one.

F. <u>Proposed Legislation</u>

The *Safe Schools Improvement Act* (S. 403/H.R. 1199)

The Act was reintroduced in the Senate by Sens. Bob Casey (D-PA) and Mark Kirk (R-IL) on February 28, 2013, and in the House by Rep. Linda Sanchez (D-CA) on March 14, 2013. It would require all public K-12 schools to enact an anti-bullying policy that includes specific protections for bullying based on sexual orientation and gender identity, along with other categories like race and religion.

The *Student Non-Discrimination Act* (S. 1088/H.R. 1652)

The Act was reintroduced in the House by Rep. Jared Polis (D-CO) and Ileana Ros-Lehtinen (R-FL) on April 18, 2013. It would prohibit discrimination in public schools based on actual or perceived sexual orientation or gender identity. The Act would give LGBT students similar rights and protections against harassment as those that currently apply to students based on race and gender.