SNIFFEN & SPELLMAN, P.A.

# EDUCATION LAW ALERT

**January 2014**

## U.S. Departments of Education and Justice Release Controversial Discipline Guidance Package to Address Discrimination Concerns

Critics are labeling the documents a call for race-based discipline; however, the U.S. Departments of Education and Justice believe their joint discipline guidance package "will assist states, districts and schools in developing practices and strategies to enhance school climate, and ensure those policies and practices comply with federal law." A joint press release issued by the Departments states, "[e]ach year, significant numbers of students miss class due to suspensions and expulsions—even for minor infractions of school rules—and students of color and with disabilities are disproportionately impacted." Heated debates have raged through various news outlets regarding the intent behind the release of the documents and the impact of their application.

The Departments' discipline guidance package includes the following materials (quoted from press release):

- The **Dear Colleague** guidance letter on civil rights and discipline, prepared in conjunction with DOJ, describes how schools can meet their legal obligations under federal law to administer student discipline without discriminating against students on the basis of race, color or national origin;

- The **Guiding Principles** document draws from emerging research and best practices to describe three key principles and related action steps that can help guide state and local efforts to improve school climate and school discipline;

- The **Directory of Federal School Climate and Discipline Resources** indexes the extensive federal technical assistance and other resources related to school discipline and climate available to schools and districts; and

- The **Compendium of School Discipline Laws and Regulations**, an online catalogue of the laws and regulations related to school discipline in each of the 50 states, the District of Columbia and Puerto Rico, compares laws across states and jurisdictions.

The Departments' joint press release and guidance discipline package are available at the following link: Press Release.

Additional Sources: Fox News; ABCNews.

## Proposed Florida Legislation Would Make Bullying Illegal

The mother of a Florida girl who committed suicide after she was allegedly bullied is standing behind proposed House Bill 451, and an identical bill in the Florida Senate, that would make it a first-degree misdemeanor to willfully, maliciously or repeatedly harass or cyber-bully another person and a third degree felony if there is a credible threat involved in the harassment. The possible penalties for violating the proposed legislation would include counseling, community service or juvenile detention. Punishment for a felony charge would be harsher.

Currently, Florida does not have a bullying law though it does have a law, the *Jeffrey Johnston Stand Up for All Students Act*, which requires school districts to adopt an official policy prohibiting bullying and harassment of students and staff on school grounds, at school sponsored events, and through school computer networks.

More information regarding House Bill 451 is available at the following link: HB 451.

## Eleventh Circuit Holds the IDEA Does Not Require School Districts to Request Due Process to Defend IEPs Amended Over Parental Objection

In K.A. v. Fulton County School District (Case No. 12-15483), the parents of a child with a mild intellectual disability and speech-language impairment appealed a district court ruling entered in favor of the Fulton County School District ("District"). Fairly summarized, during the course of K.A.'s first grade school year, K.A.'s Individualized Education Program ("IEP") Team proceeded to amend K.A.'s IEP over the objection of her parents. K.A.'s parents requested a due process hearing in accordance with the Individuals with Disabilities Education Act ("IDEA"). The District prevailed at the due process hearing and in a subsequent appeal to the district court.

K.A.'s issue on appeal to the Eleventh Circuit was whether the District was required to request a due process hearing and defend its IEP after it finalized K.A.'s IEP over her parents' objection. Although the IDEA is silent on this issue, the Eleventh Circuit held there is nothing in the IDEA or its regulations that requires school districts to request a due process hearing to amend an IEP over parental objection. The Court's decision also contains a thorough analysis of the standard of review in administrative appeals to district courts.

The Eleventh Circuit's opinion is available at the following link: K.A.

## U.S. Supreme Court to Consider Public Employee First Amendment Free Speech Issue

The Supreme Court recently agreed to hear a case concerning public employees' free speech rights and right to be free from retaliation for exercising those rights. In Lane v. Franks (Case No. 13-483), Plaintiff, a probationary employee at a community college, discovered a state politician was getting paid to work for his program but was not doing any work. He complained internally and fired the state politician over objection of community college officials. Plaintiff subsequently testified before a federal grand jury and, pursuant to a subpoena, testified at the

representative's federal criminal trial for fraud. After testifying, Plaintiff was laid off along with all probationary employees of the college; however, the college later rescinded every layoff except for the layoffs of Plaintiff and one other employee. Plaintiff then brought a civil rights suit alleging that his termination was in retaliation for his testimony. The trial and appellate courts ruled against Plaintiff and he appealed.

Government employers may only infringe on the First Amendment rights of their employees in limited circumstances. Public employees have the right to speak out on matters of public concern in their capacity as a citizen without fear of retaliation. If a public employee is speaking pursuant to his or her official job duties, it is not protected by the First Amendment. In Lane, the lower courts determined that Plaintiff's speech was made pursuant to his official duties. The Supreme Court will hopefully answer whether the government is categorically free under the First Amendment to retaliate against a public employee for truthful sworn testimony that was compelled by subpoena and was not a part of the employee's ordinary job responsibilities.

The appellate court decision is available at the following link: Lane v. Central Alabama Community College.

## U.S. Supreme Court to Rule on Cell Phone Privacy

Addressing areas of conflict between technology and privacy, the Supreme Court agreed to rule on police authority to search the contents of a cell phone taken from an individual they have arrested. The Court accepted for review a State case and a Federal case involving hand-held telephone capacity. Both of the cases involve the authority of police, who do not have a search warrant, to examine the data that is stored on a cell phone taken from a suspect at the time of arrest. The two cases span the evolution of the technology of cell phones: one case involves a device now considered obsolete – the simple flip phone; while the other involves the more sophisticated type of device, frequently called a smartphone, which functions as a hand-held computer.

The legal question before the Court is whether a search for such information, after a defendant is arrested, violates the Fourth Amendment of the United States Constitution, which bans unreasonable searches. The outcome could determine whether prosecutors in such circumstances could submit evidence gleaned from cell phones in court to obtain convictions.

Source: Reuters.

## Anonymous Search of Student's Bag Upheld by Florida Court

A gun bounty program in Miami-Dade County received an anonymous tip that a high school student, K.P., was possibly in possession of a firearm. After being informed of the tip, the school's assistant principal and two school security guards went to K.P.'s classroom and took possession of his book bag. During a search of K.P.'s book bag, the officers discovered a loaded, semi-automatic handgun. K.P. was charged as a juvenile with carrying a concealed weapon and possession of a firearm on school property.

In K.P. v. State (Case No. 3D12-1925), K.P. sought to exclude the handgun from evidence arguing that the search of his book bag violated his Fourth Amendment right to be free from unreasonable searches and seizures. The search of K.P.'s book bag was upheld and the search deemed legal. The Court held that "the level of reliability required to justify a search is lower when the [anonymous] tip concerns possession by a student of a firearm in a public school classroom." The Court reasoned that a student's expectation of privacy in the school setting is reduced and the government's interest in protecting school children is heightened.

The Court's opinion is available at the following link: K.P.

## Federal Class-Action Lawsuit Filed Against National Federation of State High School Associations (NFHS) Over Football Concussions

A first-of-its-kind lawsuit against the national body governing high school athletic associations has been filed by a Mississippi father in Federal court. The suit seeks class action status for all high school football players as of December 2013. The NCAA is also a named defendant in the suit which wants both organizations to provide high school players with current concussion-related risk information and standard of care practices within their possession. The suit also seeks a program where high schools certify that they have certified concussion management plans in place and also provide insurance as a last resort to uninsured players.

The NFSHSA and NCAA have not yet filed responses to the Complaint. Other similar lawsuits have been filed against the NCAA as well as the NFL. The Plaintiff in the Mississippi litigation is represented by the same attorney that previously sued the NCAA on the use of player images and likenesses.

Source: AL.com.

## White House Task Force Created to Address Rising Number of Sexual Assaults on College Campuses

On January 22, 2014, President Obama issued a Presidential Memorandum establishing a White House Task Force to Protect Students from Sexual Assault. The Task Force is "charged with sharing best practices, and increasing transparency, enforcement, public awareness, and interagency coordination to prevent violence and support survivors." The Task Force was created the same day the White House Council on Women and Girls published a report (titled, "Rape and Sexual Assault: A Renewed Call to Action") revealing that " nearly 1 in 5 women, and 1 in 71 men have experienced rape or attempted rape in their lifetimes." The Task Force is composed of the Office of the Vice President and the White House Council on Women and Girls.

More information addressing the Presidential Memorandum is available at the following link: The Official Blog of the U.S. Department of Education.

## U.S. Supreme Court Declines to Review Music Teacher's RIF Case

The Supreme Court has declined an appeal from the Eleventh Circuit Court of Appeals related to a school district's reduction in force ("RIF"). In Demaree v. Fulton County School District (Case No. 12-15900), the Eleventh Circuit held that the school district had a basis for treating its music teachers differently than other employees. The school district laid off 54 music instructors without regard to their tenure status and performance. The school district categorized music teachers and other paraprofessionals as non-essential employees whereas other teachers were let go after their positions were analyzed through a five-step analysis based on tenure and performance. The music teachers sued under the Fourteenth Amendment and Equal Protection Clause arguing there was no rational basis for treating music teachers differently than other teachers. The Eleventh Circuit held that Georgia law treats basic education teachers and "elective" teachers differently and also noted there were no other music teaching positions open for Plaintiffs.

## From the Lighter Side: Top 10 Most Ridiculous Lawsuits of 2013

A disability discrimination case filed in Ohio makes the top ten list put out by the U.S. Chamber Institute for Legal Reforms of ridiculous lawsuits in 2013. An Ohio teacher sued for disability discrimination after she was transferred from a high school to a middle school. Her purported disability was Pedophobia, a fear or anxiety caused by young children. Other suits that made the top ten list include a false advertising lawsuit against a sandwich company whose "foot long" sandwiches were only eleven inches; a "negligent parenting" lawsuit by a son against his parents for failing to mortgage their home so they could invest in his restaurants; and a father who sued his son's high school when they dismissed him from the track team for unexcused absences, claiming the dismissal would cause his son to loose potential college scholarships.

The U.S. Chamber Institute for Legal Reform notes abusive lawsuits both big and small take a collective toll on society.

Source: U.S. Chamber Institute for Legal Reform

## Firm News

**Michael P. Spellman** was recently appointed by the Florida Bar to a three-year term as the Northern District of Florida's representative to the Eleventh Circuit Judicial Conference.

On January 21, 2014, **Terry J. Harmon** presented a webinar titled, "Avoiding Legal Issues for Administrators." Mr. Harmon's presentation addressed the importance of documentation, child abuse reporting requirements, and disciplining students with disabilities. The webinar was sponsored by the Florida Association of School Administrators.

## Past Issues of the Education Law Alert Available on Website

You may view past issues of the Education Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.