SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
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United States Supreme Court to Rehear Case Involving Affirmative Action in Admissions (Fisher v. University of Texas at Austin)

Following years of litigation on the issue, the U.S. Supreme Court has agreed to rehear *Fisher v. Univ. of Texas at Austin, et al.*, which addresses the use of race in undergraduate admissions decisions. *Fisher* was filed after Abigail Fisher, a Caucasian female, was denied admission into the University of Texas at Austin "(University"). Fisher contended that considerations of race unfairly favored African American and Hispanic students in admissions.

Fisher originated in a federal district court in Texas, was appealed to the Fifth Circuit Court of Appeals, and ultimately ended up before the Supreme Court in 2013. The Supreme Court held in 2013 that the Fifth Circuit did not apply the correct strict scrutiny standard when it reviewed and upheld the University's race-based admission practices and remanded the decision back to the Fifth Circuit. On remand in 2014, the Fifth Circuit upheld the constitutionality of the University's admissions process and, in pertinent part, held that "[c]lose scrutiny of the data in this record confirms that holistic review . . . does not, as claimed, function as an open gate to boost minority headcount for a racial quota." The Supreme Court will rehear this case during its next term.

The Fifth Circuit's opinion is available at the following link: Fisher.

School Surveillance Video Subject to FERPA Disclosure Restrictions

In *Bryner v. Canyons School District* (No. 20130566), the Utah Court of Appeals ("UCA") recently affirmed a trial court's ruling that a video recording from a security camera located outside a middle school classroom is subject to the provisions of the Family Educational Rights and Privacy Act ("FERPA"). In so doing, the court prevented disclosure of the video without first redacting the images of all students shown except for the plaintiff's son. The UCA also agreed with the trial court's ruling that the plaintiff is entitled to a redacted copy of the video but must pay for the cost of redaction.

Roger Bryner filed a records request with Canyons School District ("CSD") after he learned a fight his son was involved in at Butler Middle School was recorded by a surveillance camera. CSD denied Bryner's request based on its belief that the videotape constituted an "educational record" under FERPA, which would prohibit the release of an unredacted copy of the video. Ryner responded by filing a lawsuit against the school district requesting the court to determine CSD had to produce the video. Bryner subsequently filed a motion for summary judgment, arguing that FERPA does not cover the release of a surveillance video. In denying the plaintiff's motion, the trial court opined that the request was subject to FERPA because the video

constituted an academic record and other students were clearly identifiable in the video. The trial court did, however, order CSD to provide a redacted copy of the video once the plaintiff paid the redaction fees.

The appellate court considered the issue of whether the video was an "educational record" under FERPA after Bryner submitted that only records that are academic in nature should be classified as "educational records." In affirming the trial court's decision, the UCA stated, "A plain reading of FERPA's statutory language reveals that Congress intended for the definition of educational records to be broad in scope." The appellate court cited to the United States Department of Education's Family Policy Compliance Office's position in reaching the above-mentioned conclusion and further ruled that the trial court's requirement that the plaintiff pay for redaction fees of $120 was proper.

The court's opinion can be found here.
Source: National School Board Association

School District Aims to Complete Desegregation Goal from 1967

On May 21, 2015, United States District Court Judge Dee Drell for the Western District of Louisiana in *United States v. Avoyelles Parish School Board* ("APSB"), approved a consent order declaring the district unitary (desegregated) as required by a consent decree issued in 1967. The consent order requires APSB to take numerous steps to complete desegregation over the next three years, and once completed the district may file a motion to dismiss the case after June 1, 2018. According to the Department of Justice ("DOJ"), in the past, the APSB or its members were resistant to implementing changes, but the members of that board have changed. The APSB attorney, who has been working toward this goal for the past 13 years, explained the school board has been working steadily on closing this case. According to the DOJ the school board must take the following steps:

- Implement student assignment and transfer policies that better verify residential addresses;
- Address various charter school issues including adopting uniform admission processes for the district's charter school; publicize and reach out to African-American students;
- Ensure classes within schools are desegregated;
- Revise discipline policies to reduce racial disparities in the use of exclusionary discipline and expand the school board's positive behavior interventions and supports program; and
- Hire an experienced consultant to monitor and report annually on the school board's efforts to comply with the consent order.

Similar consent decrees issued in the late 1960s are still in effect in a handful of public school districts in the South. For another district's struggle to desegregate see The Atlantic.

Source: National School Board Association

Ninth Circuit Court of Appeals Sides with Arizona in English-Language Case

In a legal fight that has lasted more than two decades, the Ninth Circuit Court of Appeals in *Flores v. Huppenthal, et al.* (No. 13-15805; D.C. No. 4:92-cv-00596-RCC) upheld a lower court's decision in favor of the State of Arizona regarding the state's program for teaching English to children in schools. Arizona's program requires four hours of daily instruction to children who don't speak English fluently. Many opponents have argued it illegally segregates students and does more harm than good.

Advocates for Spanish-speaking students claimed Arizona was violating the state's Equal Educational Opportunities Act ("EEOA"), which was enacted to prevent discrimination and segregation, because the Spanish-speaking students were forced to study English for four hours a day while neglecting other academic content. However, the appellate court determined that Arizona is not violating the EEOA and that the implementation of the state-mandated framework satisfies the requirements of the Act. The court specifically cited to how individual districts within the state offer after-school and summer programs to the Spanish-speaking students and place the students in math classes while they simultaneously learn English.

The opinion can be found here: Flores v. Huppenthal, et al
Source: Education Week

US DOE Bends Rules for Miccosukee Indian School in Support of Native Youth

The United States Department of Education recently announced it will allow the Miccosukee Indian School ("MIS") to depart from the standard definition of Adequate Yearly Progress ("AYP") as used in the Elementary and Secondary Education Act ("ESEA") in order to better strike a balance between Native American students' cultural backgrounds and their educational needs. AYP is a measurement based on standardized tests created by the No Child Left Behind Act to assess every public school and school district's academic performance. MIS is a K – 12 school for Native Americans located in Miami that is funded by the Bureau of Indian Education. Approximately 150 students are enrolled in MIS, and it is the Miccosukee Indian Tribe's only school.

The decision is designed to improve the students' college- and career-readiness and will allow the school to assess its students on a slightly different scale than a more traditional school. U.S. Department of the Interior Secretary Sally Jewell stated, "This flexibility will help the Miccosukee Nation achieve their goal of maintaining a unique way of life, cultural customs and language by transmitting the essence of their heritage to their children." MIS is the first tribal school to use a definition of AYP that is different than the rest of the schools in the state.

Other efforts supported by the Obama administration to improve educational opportunities for Native Americans include initiatives such as:

- Generation Indigenous
- Native Youth Community Projects
- National Tribal Youth Network

- Free Application for Federal Student Aid ("FAFSA") Completion Initiative Guidance

Source: U.S. Department of Education

South Dakota High School Athletic Association Looks to Tweak Transgender Athlete Policy

The South Dakota High School Activities Association ("SDHSAA") first implemented policies regarding transgender student-athletes participating in sports one year ago and the state legislature is now looking to revise them. The proposed changes would enable transgender student-athletes to request which gender they want to participate as instead of being forced to play as the gender identified on their birth certificate. Although not a single person has applied under the policy, many people believe it is smart to have a plan in place for when the time comes.

Under the new policy, transgender students would apply to the SDHSAA requesting to play as their preferred gender. Then, an independent hearing officer would recommend to the SDHSAA Board of Directors which gender the applicant should participate as, and the Board of Directors would make a final determination on the applicant's request. Under the current policy adopted a year ago, a committee makes the recommendation to the Board. The new policy could be adopted as early as August but is certain to still face significant resistance.

Source: Casper Star Tribune

University in Utah Implements Texting Lanes on Campus

In an attempt to save students from injury and embarrassment, Utah Valley University ("UVU") has painted lanes similar to those found on a street onto one of its stair cases. The lanes are located on stairs inside the university's Student Life and Wellness Center and divide students into three separate lanes: walkers, runners and "texters." Although jokingly created as part of a design project, the lanes have been popular amongst the student body. UVU creative director Matt Bambrough explained, "You have 18-to-24 year olds walking down the hall with smartphones, you're almost bound to run into someone somewhere." The lanes at UVU are similar to those found elsewhere around the world, including China's "mobile phone sidewalks," and highlight a growing epidemic described as distracted walking.

Source: Fox News

From the Lighter Side: Man Summoned for Jury Duty Wears Prisoner Costume

People try all sorts of ideas to avoid partaking in jury duty but a Vermont man recently did so in a most creative way. James Lowe arrived at the local courthouse clothed in a black-and-white striped jumpsuit with a matching beanie similar to what one would see a prisoner wearing. Before the start of jury selection, Lowe was escorted to a separate, empty courtroom where he

was dismissed by a judge, but not before the judge admonished him and warned that he could be held in contempt of court.

Source: WCTV Eyewitness News

Firm News

Terry J. Harmon has been selected for inclusion on Super Lawyers' Florida Rising Stars list for 2015 under the area of Schools & Education. No more than 2.5% of the lawyers in the State of Florida are named to this list of outstanding young attorneys.

On June 10, 2015, **Terry J. Harmon** presented "Hot Legal Topics: Off-Campus Student Behavior/Title IX" to Florida school board members and superintendents at the Florida School Boards Association's 2015 Annual Summer Conference in Tampa, Florida.

Michael P. Spellman was recently honored by the Federal Court Practice Committee as he completed his six-year term, one of which he served as Chair. The Federal Court Practice Committee serves as the Bar's liaison to the federal courts, federal bar organizations in Florida, the Eleventh Circuit Judicial Conference, and others interested in federal practice. Mr. Spellman will continue to serve as the Florida Bar's appointed delegate of the Northern District of Florida to the Eleventh Circuit Judicial Conference.

Past Issues of the Education Law Alert Available on Website

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