

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT *December 2011*

New Report Addresses State Bullying Laws and Policies

Bullying continues to be a growing issue in education law. In 2011, the President and First Lady held the “White House Conference on Bullying Prevention,” where various anti-bullying laws were introduced, and numerous lawsuits were filed. Recently, a report was issued to the U.S. Department of Education titled “Analysis of State Bullying Laws and Policies.” The lengthy, must-read report includes the following key findings (quoted directly from report):

- Forty-six states have bullying laws and 45 of those laws direct school districts to adopt bullying policies. However, three of the 46 states prohibit bullying without defining the behavior that is prohibited.
- Thirty-six states include provisions in their education codes prohibiting cyberbullying or bullying using electronic media. Thirteen states specify that schools have jurisdiction over off-campus behavior if it creates a hostile school environment.
- Forty-one states have created model bullying policies, 12 of which were not mandated to do so under law. Three other states, including Hawaii, Montana, and Michigan, also developed model policies in the absence of state bullying legislation.
- Among the 20 school district bullying policies reviewed in this study, districts located in states with more expansive legislation produced the most expansive school district policies. However, several school districts in states with less expansive laws also substantially expanded the scope and content of their policies beyond the minimum legal expectations.

The report is available at the following link: [Analysis of State Bullying Laws and Policies](#).

Eleventh Circuit Holds in Favor of University in Student’s §1983 Action Seeking Preliminary Injunction for Alleged Violations of First Amendment Free Speech and Free Exercise Rights

On December 16, 2011, the Eleventh Circuit Court of Appeals upheld the denial of a student’s motion for a preliminary injunction in her §1983 action. Keeton v. Anderson-Wiley, Case No. 10-13925 (11th Cir. 2011). Plaintiff was a student enrolled in the Counselor Education Program at Augusta State University (“ASU”) in Georgia. While seeking her master’s degree in school counseling, ASU mandated that Plaintiff participate in a remediation plan due to her deficiencies in her “ability to be a multiculturally competent counselor, particularly with regard to working with gay, lesbian, bisexual, transgender, and queer/questioning (GLBTQ) populations.” ASU became concerned after Plaintiff “expressed to professors in class and fellow classmates in and out of class that she believed that the GLBTQ population suffers from identity confusion, and that she intended to attempt to convert students from being homosexual to heterosexual.” Before

she was permitted to participate in her program's clinical practicum, ASU required that Plaintiff consent to completing the remediation plan. Rather than do so, Plaintiff filed an action under §1983 alleging that her First Amendment free speech and free exercise rights were violated. Plaintiff claimed that ASU "violated her First Amendment free speech rights in three ways: by discriminating against her viewpoint; by retaliating against her for exercising her First Amendment rights; and finally by compelling her to express beliefs with which she disagrees." She also argued that she ASU violated her right to the free exercise of religion.

At the district court level, Plaintiff sought a preliminary injunction preventing ASU from dismissing her if she failed to complete the remediation plan. The district court denied Plaintiff's motion for a preliminary injunction and held in favor of ASU. Ultimately, the Eleventh Circuit held that Plaintiff failed to establish a substantial likelihood of success on the merits and, as a result, the district court did not abuse its discretion.

The opinion is available at the following link: [Keeton v. Anderson-Wiley](#).

Family Policy Compliance Office ("FPCO") Issues Guidance for Reasonable Methods and Written Agreements under FERPA

As most education professionals are aware, FERPA conditions the availability of certain federal funds to educational institutions on adherence to stringent rules regarding the release and dissemination of educational records. 20 U.S.C. § 1232(g). Earlier this month, FPCO (the office responsible for administering FERPA) issued a guidance memorandum to schools, school districts, postsecondary institutions, and SEAs to address requirements and best practices for data disclosures under the studies exception and the audit or evaluation exception. The 9-page memorandum also addresses issues related to written agreements under FERPA.

A copy of the guidance memorandum is available at the following link: [FPCO Memorandum](#).

U.S. Department of Education Releases Final Regulations Amending FERPA

On December 2, 2011, the U.S. Department of Education published its final regulations amending FERPA in the *Federal Register* (Vol. 76, No. 232). According to the U.S. Department of Education, the amendments "will have the important effect of improving access to data. Improved access to data will facilitate States' ability to evaluate education programs, ensure limited resources are invested effectively, build upon what works and discard what does not, increase accountability and transparency, and contribute to a culture of innovation and continuous improvement in education." FPCO has issued multiple memorandums providing an overview of the final regulations for SEAs, LEAs, parents and students

More information related to the final regulations (including the FPCO overview memorandums) is available at the following link: [FPCO](#).

U.S. Departments of Education and Justice Issue New Guidance to Promote Diversity and Reduce Racial Isolation in Education

The U.S. Departments of Education and Justice recently issued two new guidance documents (one for school districts and one for colleges and universities) detailing the flexibility that the United States Supreme Court has provided to educational institutions to promote diversity and, for elementary and secondary schools, to reduce racial isolation among students. The guidance provides that educators may permissibly consider the race of students in certain circumstances to promote diversity or, in K-12 education, to reduce racial isolation. To further diversity or reduce racial isolation in K-12 schools, the guidance discusses school and program siting, drawing school attendance boundaries, grade realignment and restructuring feeder patterns, and various other options. The guidance for postsecondary institutions describes how race can be taken into account in admissions, in pipeline programs, in recruitment and in mentoring, tutoring, retention and support programs as efforts to achieve diversity. Further, the guidance discusses the legal standards under the Equal Protection Clause of the Fourteenth Amendment and Titles IV and VI of the Civil Rights Act of 1964, which are enforced by the Departments. Previous guidance issued in 2008 was withdrawn in conjunction with the issuance of these new documents.

A Dear Colleague Letter and the guidance memorandums are available at the following links: [Dear Colleague Letter](#); [Guidance on the Voluntary Use of Race to Achieve Diversity in Postsecondary Education](#); and [Guidance on the Voluntary Use of Race to Achieve Diversity and Racial Isolation in Elementary and Secondary Schools](#).

Proposed Florida Legislation Addresses Virtual Instruction for Students with Disabilities

On December 1, 2011, Representative Gwyndolen “Gwyn” Clarke-Reed filed House Bill 831 (“HB 831”) which addresses virtual instruction for students with disabilities. HB 831 provides access to online courses with reasonable and allowable accommodations for using assistive technology, requires charter school applications to include descriptions of online courses with accommodations to be used in reading, includes the use of assistive technology devices as a basis for approval of a charter, provides additional requirements for approval of virtual instruction providers by DOE regarding accommodations for students with disabilities, and provides that certain students with disabilities are eligible to participate in virtual instruction. Interestingly, HB 831 provides that a student is eligible to participate in virtual instruction if “[t]he student is a student with a disability who has an individual education plan or a 504 accommodation plan issued under s. 504 of the Rehabilitation Act of 1973 and who can access virtual instruction with reasonable and allowable accommodations.”

HB 831 has an effective date of July 1, 2012.

More information regarding HB 831 is available at the following link: [HB 831](#).

Florida Governor Rick Scott Asks for More Education Funding

On December 7, 2011, Florida Governor Rick Scott released his proposed 2013 budget for the State of Florida. Importantly, the \$66.4 billion budget includes provisions increasing education funding by \$1 billion. Last year’s budget included an 8% cut in education funding (\$1.35 billion).

Sources: [Miami Herald](#); [Tampa Bay Online](#).

Tougher FCAT Grading

On December 19, 2011, the State Board of Education unanimously approved raising the passing scores for all levels of the annual Florida Comprehensive Assessment Test (“FCAT”). The change follows Florida’s shift to a new version of the FCAT, dubbed “FCAT 2.0”, which is a more rigorous version of the FCAT. The class of 2014 will be the first group of students impacted by the new system which will begin with the FCAT exams this coming spring.

Sources: [Orlando Sentinel](#); [St. Petersburg Times](#).

Firm News

As many of our readers will notice, the *School Law Alert* has been renamed the *Education Law Alert*. This new name better reflects our education law practice that encompasses not only K-12, but also Community Colleges, Private Colleges, and Public Universities. The content of the *Alert* will not change as we will continue to monitor and bring to you current news and trends in public and private education law.

Sniffen & Spellman, P.A. welcomes new associate **Jake Whealdon**. Mr. Whealdon is a 2011 graduate of the University of Pennsylvania Law School and holds a Certificate in Business and Public Policy from the Wharton School. While in law school, Mr. Whealdon coached a national championship winning high-school moot court team through the Marshall-Brennan Project. He also served as a Senior Editor of the Journal of Business Law. Mr. Whealdon received his B.A. in History and American Studies, *magna cum laude*, from Florida State University, where he was a member of Phi Beta Kappa and an Honors Delegate. Additionally, Mr. Whealdon is currently pursuing an LL.M. in Environmental Law and Policy from the Florida State University College of Law.

Mr. Whealdon’s practice areas include Labor and Employment Law, Environmental and Land Use Law, Civil Rights Litigation, and Governmental Law.

Happy New Year

The attorneys and staff of Sniffen & Spellman, P.A. wish you and yours a happy, safe and prosperous 2012!

Past Issues of the School Law Alert Posted on Website

Past issues of the School Law Alert are available on the Firm’s website: www.sniffenlaw.com.

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