SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT *January 2012*

Office for Civil Rights Issues New Dear Colleague Letter and FAQ

On January 19, 2012, the Office for Civil Rights ("OCR") issued a new "Dear Colleague" letter to elementary and secondary education offices with an attached Frequently Asked Questions document ("FAQ"). The "Dear Colleague" letter and FAQ address issues related to the Americans with Disabilities Act Amendments Act of 2008, Title II of the Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973. Importantly, OCR states that the FAQ document "addresses the broadened definition of disability and the changes made by the Amendments Act; explores how the Amendments Act affects Section 504; discusses various obligations of school districts, including the requirement to evaluate students to determine eligibility for regular or special education and related aids and services; and addresses how OCR evaluates compliance with Title II of the ADA and Section 504 in light of the Amendments Act." We certainly recommend that ESE Directors and school board counsel review the "Dear Colleague" letter and FAQ. The following Q&A contained within the FAQ document is just a brief example of why the new OCR documents must be reviewed:

> **Q5: Should a school district revise its policies and procedures regarding the determination of coverage and provision of services under Section 504 and Title II?**
>
> A: Yes, if those policies and procedures do not implement the Amendments Act's new legal standards. As noted above, the definition of disability is to be interpreted broadly, so determining whether one has a disability should not demand extensive analysis, and the determination shall be made without regard to the ameliorative effects of mitigating measures. If a district determines that a student has a disability under these new legal standards, it must also evaluate whether, because of the disability, the student needs special education or related services as described in the Section 504 regulation. The school district must also determine whether additional requirements are implicated under Section 504 or Title II. If a district failed to implement the changes made by the Amendments Act, that district may be unlawfully denying Section 504 or Title II coverage to students.

The "Dear Colleague" letter, FAQ document, and OCR Press Release are available at the following links: "Dear Colleague" letter; FAQ document; Press Release.

United States Supreme Court Issues Important Ruling Regarding Parents' Right to Obtain Tuition Reimbursement

On January 23, 2012, the United States Supreme Court denied a Petition for Writ of Certiorari in the years-long Oregon case involving the Forest Grove School District. T.A. v. Forest Grove School District (Case No.11-630). The case was before the United States Supreme Court following the Ninth Circuit's April 2011 decision in Forest Grove School District v. T.A. (Case No. 10-35022). The Ninth Circuit's April 2011 decision can be fairly summarized as follows (quoted from Ninth Circuit's order)(emphasis added):

> T.A., a former student in the Forest Grove School District ("Forest Grove"), appeals the district court's determination that he is not entitled to an award of reimbursement for his private school tuition under the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1415(i)(2)(C). On remand from the Supreme Court's opinion and our opinion, *Forest Grove Sch. Dist. v. T.A.,* 523 F.3d 1078 (9th Cir.2008), *aff'd,* ––– U.S. ––––, 129 S.Ct. 2484, 174 L.Ed.2d 168 (2009), **the district court held that equitable considerations did not support any award of private-school tuition at Mount Bachelor Academy as a result of Forest Grove's failure to provide T.A. with a Free Appropriate Public Education ("FAPE") under the IDEA. Because the district court did not abuse its discretion when it determined T.A.'s parents enrolled him at Mount Bachelor for non-educational reasons, we affirm.**

Since the United States Supreme Court denied T.A.'s Petition for Writ of Certiorari, the case is now complete. As a result of the decision, the school district avoided paying $100,000.00 in private school tuition and $500,000.00 in legal fees.

The docket from the United States Supreme Court and the April 2011 opinion from the Ninth Circuit are available at the following links: Supreme Court Docket (Case No. 11-630); Ninth Circuit's April 2011 Order.

Sources: OregonLive.com.

United States Supreme Court Declines to Hear Appeal on Title IX Issue

On January 9, 2012, the United States Supreme Court denied a Petition for Writ of Certiorari in Equity in Athletics, Inc. v. Department of Education, et al. (Case No.11-357). The Petition for Writ of Certiorari was filed after the Fourth Circuit ruled against Equity in Athletics, Inc. ("EIA") in March of 2011. In the case before the Fourth Circuit, EIA sought declaratory and injunctive relief and challenged the Department of Education's ("DOE") interpretative guidelines implementing Title IX. EIA also alleged that James Madison University ("JMU") violated Title IX, the U.S. Constitution, and Virginia State law when it eliminated ten varsity athletic teams (seven men's teams and three women's teams) in 2006.

The docket from the United States Supreme Court and the March 2011 opinion from the Fourth Circuit are available at the following links: Supreme Court Docket (Case No. 11-357); Fourth Circuit's March 2011 Order.

Student's Suicide Prompts Federal Wrongful Death Lawsuit Against School District Alleging School District Failure to Protect Against Bullying

Parents of a high school senior, J.H., filed suit against the North Sanpete School District, the School Board, the Superintendent and various individually named school district officials and employees arising out of instances of harassment and bullying towards their son, which the complaint asserts ultimately lead to his suicide. The complaint asserts that school district officials knew that J.H. was the target of physical and emotional abuse from other students and school district employees for more than five years but failed to act adequately to protect him, including by failing to implement already existing policies against bullying, hazing and suicide prevention. Further, the lawsuit contends that the harassing conduct was so prevalent and obvious that J.H.'s actions in taking his own life were a foreseeable result of the defendants' tortious acts. The parents are seeking unspecified financial damages.

More information regarding the lawsuit can be found at the following link: Seattle Post-Intelligencer.

Superintendent and Principal Entitled to Qualified Immunity in Palm Beach County Case

The Eleventh Circuit recently overturned a decision of the United States District Court for the Southern District of Florida and, in doing so, instructed the trial court to grant summary judgment in favor of the Palm Beach County Superintendent and the Principal of Roosevelt Middle School based on qualified immunity. The Superintendent and Principal were defendants in a series of complaints filed by a high school history teacher who alleged he had been subjected to transfers, suspensions, and eventual termination in retaliation for exercising his First Amendment rights to free speech. The teacher complained that the school district was not in compliance with a state statute mandating infusion of African and African-American history into the district's history curriculum.

On appeal, the question to be answered was whether the termination of the teacher was objectively reasonable based upon all of the available information at the time the decision was made. The Court explained that in cases involving qualified immunity and mixed motives, a defendant is entitled to immunity if preexisting law does not dictate that the merits of the case be decided in plaintiff's favor.

The Court's opinion is available at the following link: Sherrod v. Johnson.

Senate Bill 98 (Allowing Prayer in Schools) Continues to Progress through the Florida Senate

Senate Bill 98 ("SB 98") continues to move successfully through the Florida Senate. This month, SB 98 received favorable votes from the Judiciary (5 to 1) and Rules (12 to 2) committees and is presently on the January 31, 2012, Special Order Calendar. SB 98 authorizes school boards to adopt resolutions that allow prayers of invocation or benediction at secondary school commencement exercises or any other noncompulsory student assembly.

More information related to SB 98 is available at the following link: SB 98.

Florida Commission on Ethics Issues Opinion Regarding Conflicts of Interest and Service on Governing Board of Charter Schools

On December 7, 2011, the Florida Commission on Ethics ("Commission") issued an opinion holding that no prohibited conflict of interest exists under Sections 112.313(3) or Section 112.313(7)(a), Florida Statutes, "were district school board officers or employees also to serve as uncompensated members of the board of directors of a charter school applying to and sponsored by the district school board, where the school board submits the application to itself for the charter school." The opinion further noted, "[s]uch a situation presents a unity of interest justifying the application of Section 112.316, Florida Statutes, to negate a rote application of the statutes. And, no voting conflict would be created under Section 112.3143(3)(a), Florida Statutes, for the district board members regarding measures/votes of the district board concerning the charter schools." Finally, the opinion concluded, "neither a prohibited conflict nor a voting conflict would be created for the officers or employees, in their capacity as governing board members of the charter school, pursuant to Section 1002.33(26)(a), Florida Statutes."

The Commission's opinion is available at the following link: 11-23.

Firm News

Sniffen & Spellman, P.A. welcomes new associate **Chasity H. O'Steen.** Ms. O'Steen practices in the areas of Local Government Law, Water and Wastewater Utilities, Administrative Law, Labor and Employment Law, and Civil Rights Defense. She currently serves on the Second Judicial Circuit Grievance Committee, and is a member of The Florida Bar Special Committee on Diversity and Inclusion and The Florida Bar Voluntary Bar Liaison Committee. Ms. O'Steen is a Past-President of Tallahassee Women Lawyers. Ms. O'Steen is a 2003 graduate of Florida State University College of Law. While in law school, Ms. O'Steen served as Notes & Comments Editor for the Florida State University Law Review and was a member of the Florida State College of Law Moot Court Team and Phi Delta Phi International Legal Fraternity. Ms. O'Steen received her B.A. from Florida State University.

Past Issues of the Education Law Alert Available on Website

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

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