

SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT March 2015

OCR Releases New Case Processing Manual

Last month, the U.S. Department of Education's ("USDOE") Office for Civil Rights ("OCR") published a revised Case Processing Manual ("CPM"). The CPM includes OCR's procedures for investigating and resolving complaints, compliance reviews and directed investigations. The last edition of the CPM was published in January of 2010. OCR also updated its [website](#) to provide updated information on how it handles complaints.

The new CPM is available at the following link: [U.S. Department of Education](#).

Supreme Court to Decide Child Abuse Issues

The U.S. Supreme Court recently entertained oral argument in Ohio v. Clark (Case No. 13-1352), a case involving a three-year-old boy who was physically abused. The young boy showed up at day-care with bruises and bloodshot eyes and told his teacher his mom's boyfriend caused the injuries. The main issues the Court is set to determine are (1) whether an individual's obligation to report suspected child abuse makes the individual an agent of law enforcement for purposes of the Confrontation Clause of the U.S. Constitution and (2) whether a child's out-of-court statements to a teacher in response to the teacher's concerns about potential child abuse qualify as "testimonial" statements subject to the Confrontation Clause. At its core, the Confrontation Clause guarantees an accused criminal the right to face and answer prosecution witnesses at trial.

At the heart of the matter is the definition of "testimonial" evidence. The boy is considered too young to testify for himself, so prosecutors argued the teacher should be allowed to testify about what the boy told her because she is not a law enforcement agent, and the Confrontation Clause should only prohibit evidence gathered by government agents who do not appear at trial. Lawyers representing the boyfriend who was convicted at trial simply want an opportunity to interview the child since teachers, law enforcement officers and prosecutors were permitted to do so when preparing for trial.

The Court must also determine what a teacher's first obligation should be. Is it keeping the child out of harm's way or is it reporting the incident to police?

Source: [Ohio v. Clark SCOTUS Blog](#).

General Knowledge that Student-on-Student Sexual Assault May Occur in School Setting Insufficient for Title IX Liability

In Doe v. Bibb County School District (Case No. 5:12-CV-468 (MTT)), Plaintiff was a special education student at Northeast High School when she was led to a boys' restroom and sexually assaulted by 6 male students who were allegedly members of a gang known as MOB, which stands for "Money over Bitches." Plaintiff had never been sexually assaulted by another Northeast student nor had any of the 6 male gang members been accused of sexually assaulting another Northeast student. Plaintiff's theory of liability was that because the Defendant school knew of two past instances of sexual harassment involving different students and different scenarios, it should have anticipated the attack on the Plaintiff and thus liability under Title IX. The United States District Court for the Middle District of Georgia rejected Plaintiff's theory holding that general knowledge that student-on-student sexual assault may occur in the school setting is insufficient for the imposition of Title IX liability. In the absence of a common perpetrator or a common victim of ongoing harassment, there must be another similarity to alert a defendant of a substantial risk of harassment to other students.

A copy of the opinion is available at the following link: [Doe](#).

For Teachers, Being Afraid of Kids is Not a Disability Under the ADA

Perhaps not surprisingly, fear of kids is not necessarily a disability that requires an accommodation under disability laws such as the Americans with Disabilities Act ("ADA"). In Waltherr-Willard v. Mariemont City Schools (Case No. 14-3168), Plaintiff was a teacher who complained to her employer that she had a fear of young children. She taught high school students initially but was later transferred to a middle school. Eventually, Plaintiff requested a transfer back to the high school and claimed that further teaching in the middle school would be bad for her health. Unfortunately for Plaintiff, there were no openings in the high school and her request was denied.

Plaintiff subsequently retired and brought a wrongful termination lawsuit alleging that the school district's refusal to transfer her to the high school was a failure to accommodate her disability (fear of young kids). The Sixth Circuit Court of Appeals held that the refusal to transfer Plaintiff to high school was not disability discrimination because there were no openings. The Court further found it would be unreasonable under the ADA for the school district to be required to create a position for her.

A copy of the opinion is available at the following link: [Waltherr-Willard](#).

James Madison University Sued Under Title IX

The Title IX train keeps rolling. James Madison University ("JMU") joins a long list of higher education institutions dealing with Title IX-related issues. A former student sued JMU in federal court alleging, among other things, that JMU waited 372 days for JMU to discipline three male students alleged to have sexually assaulted her. She further alleged JMU mishandled her sexual assault complaint. The sexual assault, which was captured on cell phone video, allegedly took place on Spring Break in Panama City, Florida, in 2013. According to *The Breeze*, the expulsions were the first sexual assault-related expulsions in the last 15 years at JMU.

Source: [The Breeze](#).

Proposed Legislation Mandates Revisions to Bullying and Harassment Policies

Section 1006.147, [Florida Statutes](#), requires that school districts in Florida adopt policies prohibiting bullying and harassment. HB 603 amends the statute by requiring school districts to revise bullying and harassment policies at least every 3 years. The bill also clarifies that reporting of bullying and harassment is mandatory and must be included in school board policies. Finally, the bill requires school districts to “list authorized programs” that “provide instruction to students, parents, teachers, school administrators, counseling staff, and school volunteers on identifying, preventing, and responding to bullying or harassment, including instruction on recognizing behaviors that lead to bullying and harassment and taking appropriate preventive action based on those observations.”

A copy of the bill is available at the following link: [HB 603](#).

OCR Publishes Fact Sheet Addressing How to Respond to Measles and Protect Civil Rights

OCR published a new Fact Sheet on March 18, 2015, that, [according to OCR](#), addresses “how school officials can implement [recommendations and resources from the Centers for Disease Control and Prevention \(CDC\)](#) related to protecting children and their families from measles without discriminating on the basis of disability, particularly in the case of students who are medically unable to receive a vaccine because of a disability, and explains what school officials must do to ensure continuity of learning if a student is legitimately excluded from school.” The Fact Sheet further states it was issued to:

- inform parents and assist school officials in implementing CDC’s measles recommendations in a manner consistent with civil rights requirements; and
- explain, in those uncommon situations where a student is legitimately excluded from school, what school officials must do to ensure a continuity of learning.

The new Fact Sheet is available at the following link: [OCR Fact Sheet](#).

From the Lighter Side: March Sadness

March – the month when employee productivity decreases and employee water cooler conversations increase. While office and friendly college basketball brackets will continue in strong force, there is one bracket employees will not be discussing. Last year, Warren Buffett, Quicken Loans and Yahoo! joined together and offered \$1 billion to anyone who could complete a “perfect bracket.” The \$1 billion bracket challenge is no more thanks to several lawsuits surrounding the promotion.

Source: [CNN](#).

Firm News

On March 19-21, 2015, **Terry J. Harmon** attended the National School Boards Association's Council of School Attorneys' Annual School Law Seminar in Nashville, Tennessee.

Jeff D. Slanker published an article in the March, 2015 edition of the Checkoff, a publication of the Florida Bar's Labor and Employment law section. The article focuses on recent court rulings in Florida declaring that Florida's Constitutional Ban on Same-Sex Marriage violates the U.S. Constitution. The article can be found at the following link: http://www.laboremploymentlaw.org/show-publication.php?publications_id=166

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