SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
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NLRB Sacks Northwestern Plans to Unionize

The National Labor Relations Board ("NLRB") declined to assert jurisdiction over whether football players at Northwestern University may form a union. The NLRB's vaguely written decision ends the drive to unionize at Northwestern, but left higher education, sports and labor experts divided on whether the ruling kills all efforts to unionize college football or just slows the movement down. In its order, the NLRB stated that it was not judging the merits of the players' argument, and that the board could later return to the issue.

The NLRB's decision, while narrow, effectively reverses a ruling 16 months ago by the board's Chicago regional office saying that, under the National Labor Relations Act, scholarship football players at private universities are employees. In its original ruling, the Chicago office cited multiple factors that supported its conclusion: scholarship football players perform services for the benefit of their employer and receive compensation in exchange, and they are "subject to the employer's control in the performance of their duties as football players."

The university appealed the Chicago office's decision to the full National Labor Relations Board in Washington, urging the board to reverse the regional director's decision. The NLRB, in declining to assert jurisdiction, noted that the issue of college football players unionizing affects both public and private institutions, and the NLRB has no authority over public institutions. So ruling in a case involving one private institution, the board suggested, would destabilize the competitive balance between public and private universities.

"Our decision is primarily premised on a finding that, because of the nature of sports leagues (namely the control exercised by the leagues over the individual teams) and the composition and structure of [Football Bowl Subdivision] football (in which the overwhelming majority of competitors are public colleges and universities over which the board cannot assert jurisdiction), it would not promote stability in labor relations to assert jurisdiction in this case," the board wrote in its unanimous decision.

Source: LPB Network

The Eleventh Circuit Considers Appeal Concerning Title IX Case Regarding Sting Operation

A school's "catch in the act policy" and other practices surrounding allegations of sexual harassment resulted in the Eleventh Circuit reversing summary judgment in a case concerning the rape of a fourteen-year old.

C.J.C., a fifteen – year old male student, had a record of violence and sexual misconduct. However, school records were frequently shredded and/or failed to provide significant documentation concerning the details of each occurrence. Weeks leading up to the rape of Jane Doe, Jane Doe and other female students informed administrators that C.J.C. was pressuring them to have sex with him.

On January 22, 2010, Jane Doe informed a teacher's aide that C.J.C. was asking her for sex; the teacher's aide suggested that Jane Doe meet C.J.C. in the bathroom so that school officials could catch C.J.C. in the act. School officials did not, however, catch C.J.C. in the act, and he anally raped Jane Doe. School administrators reviewed photos of Jane Does' injuries and, ultimately, suspended C.J.C. for "inappropriate touching." C.J.C. later attended an alternative school for a few months, and returned to his middle school in April 2010. Jane Doe never received any counseling or other assistance from the school board. She withdrew from school, and moved out of the state.

Jane Doe filed a lawsuit, alleging, among other things, Title IX violations. The district court ruled in favor of the school board; and the Eleventh Circuit Court of Appeals reversed, holding that a reasonable jury could find that the school board violated Title IX.

The consolidated opinion can be found here.

USDOE's Proposed Modification of FERPA School Official Exception Would Dramatically Impair Institutions of Higher Education from Obtaining Immediate Legal Advice

On August 18, 2015, the United States Department of Education ("USDOE") announced it is seeking public input regarding the protection of student medical records from inappropriate disclosure. USDOE indicated this initiative is part of the Obama Administration's desire to protect student privacy and safety on higher education campuses. Importantly, USDOE is seeking input related to its draft guidance interpreting the Family Education Rights and Privacy Act ("FERPA").

Under USDOE's draft guidance, higher education institutions would be prohibited from sharing student medical records with their own legal counsel without court order or consent. The long-standing practice under FERPA has been to permit higher education institutions to share student records with their legal counsel without a court order or student consent. USDOE now believes that this long-standing practice impairs the trust between students and the institution and would somehow negatively impact the benefits of on campus medical and counseling services. USDOE seeks to modify the school official exception to consent to offer protections similar to what is available under the Health Insurance Portability and Accountability Act ("HIPAA").

From a practical perspective, USDOE's draft guidance would significantly impair a higher education institution's ability to share student medical information with their legal counsel and thus limit an institution's ability to obtain legal advice. The only proposed exception would be in cases where litigation related to treatment or the payment thereof. An example contained in recently-published USDOE Dear Colleague Letter highlights the limitation this new position

would have on the ability of an institution to immediately and fully converse with its legal counsel (emphasis added):

> To provide a clarifying example, if an institution provided counseling services to a student and the student subsequently sued the institution claiming that the services were inadequate, the school's attorneys should be able to access the student's treatment records without obtaining a court order or consent. However, if instead the litigation between the institution and the student concerned the student's eligibility to graduate, the school should not access the student's treatment records without first obtaining a court order or consent.

US DOE is seeking public comment until **October 2, 2015.** Public comment can be submitted through the following link: Public Comment. USDOE's press release is available at the following link: USDOE.

Florida School Board and Board Chairperson Prevail in Lawsuit by Member of the Public Interrupted During Public Comment (First Amendment)

Cory Seegmiller, a member of the public, attended a Collier County School Board ("Board") meeting in January of 2015 to address improprieties he believed existed in the District related to instructional materials. Plaintiff was given 3 minutes to speak but was interrupted by the Board's Chairperson and legal counsel after Plaintiff began making personal attacks against Board members. Plaintiff subsequently filed an action in federal court alleging, among other things, that the interruptions by the Board's Chairperson and legal counsel violated his First and Fourteenth Amendment rights and rights under Chapter 286, Florida Statutes.

In Seegmiller v. The School Board of Collier County, Case No. 2:15-cv-00087-SPC-DNF (M.D. Fla. 2005), the Court ultimately dismissed all of Plaintiff's federal claims due to his failure to plead sufficient facts entitling him to relief. With respect to his Florida law claims under Chapter 286, the Court declined to exercise jurisdiction and dismissed them without prejudice so that Plaintiff could re-file in the appropriate State court. We will keep you updated on this litigation if Plaintiff re-files in State court.

A copy of the Court's opinion is available at the following link: Seegmiller.

ACLU Sues Kentucky Sheriff's Department for Handcuffing Two Disabled Students

The American Civil Liberties Union ("ACLU") and the Children's Law Center recently filed suit in federal court against the Kenton County Sheriff's Office on behalf of two disabled children. The lawsuit claims a deputy used illegal use of force when he handcuffed two disabled children on separate occasions for misbehaving at school. One incident allegedly occurred in November 2014 after a student, identified only as S.R., did not sit down when asked to do so by the school resource officer. S.R. was allegedly handcuffed for approximately 15 minutes. S.R. suffers from attention deficit hyperactivity disorder ("ADHD") that apparently makes it difficult for him to follow instructions and control his behavior. The other incident occurred in October 2014 when a student identified as L.G. was handcuffed behind her back after she tried to leave the school's

"isolation room," where she was being held as punishment for failing to follow instructions. L.G. was taken by ambulance to a hospital after she suffered what was described as a severe mental health crisis. She also suffers from ADHD.

Susan Mizner, disability counsel for ACLU, claims, "Using law enforcement to discipline students with disabilities only serves to traumatize the children. It makes behavioral issues worse and interferes with the school's role in developing appropriate educational and behavioral plans for them." Statistics show 12 percent of public school students have a disability but they account for approximately 75 percent of the students who are physically restrained at school. The suit alleges the deputy's actions are unconstitutional and violate the Americans with Disabilities Act.

Source: National School Boards Association

Indiana School Teacher Sued For Disciplining Atheist Second-Grader

The American Civil Liberties Union ("ACLU") filed suit against a second-grade teacher who allegedly forced a student to sit by himself at lunch and was not allowed to talk to other students because he told a classmate he did not believe in God. The isolation continued for three days until the parent of the child contacted the school and demanded the child not be punished for what he believed. The teacher allegedly questioned the student about his religious beliefs after a playground supervisor reported an incident where the student was asked about his church, to which he replied he did not attend church and did not believe in God. The lawsuit is against the teacher for violation of the student's First Amendment rights, but not against the public elementary school or the school board, the Fort Wayne Community School of Indiana. The school board submitted a press statement condemning the infringement of religious rights.

Source: National School Boards Association

Middle School Students Focus on Preparing for Careers

Apprenticeship opportunities at the high school level have been commonplace for quite some time and everyone remembers participating in career days, but now even middle schools are starting to get involved. Middle schools across the country are exposing younger students to different career opportunities so they can appreciate and understand the relevance of what they are learning today and how it can be applied at their future jobs. Organizations, such as the United Way, are backing the programs by issuing grants worth thousands of dollars to middle school communities that help place students with different companies.

There are hurdles, however, that must be overcome. For instance, middle school students cannot drive themselves to work like a high school student can. And, many believe the middle school-aged children are too immature to benefit from a work experience. Others believe it is still important to start the process in middle school so that students will have an idea of the types of jobs that they want to pursue by the time they reach high school. Jason Cascarino, CEO of Spark, submitted, "We need to meet middle school kids where they are. They are going through the process of identity information and finding their place in the world." Spark is a nonprofit organization that partners with schools to match middle school students with professionals.

Look for the middle school participation to trend upwards in the coming years. Research shows 60 to 70 percent of students in 7th and 8th grades become "chronically disengaged" so it is important to provide an early sense of career opportunities. As more and more organizations and businesses get involved, the overarching hope is to reduce dropout rates and get children excited about their future.

Source: Education Week

From the Lighter Side: Explaining the Cold Office Phenomenon

Have you ever sat in your office during the middle of summer wondering why is it so cold? Does it seem like the women are always colder than the men? Well, as it turns out, there is a scientific formula to it. According to a study performed by two male scientists, most office buildings set temperatures based on out-of-date formulas from the 1960's that use the metabolic rates of men. Their study concludes that office buildings should "reduce gender-discriminating bias in thermal comfort." Click on the link below to learn more.

Source: New York Times

Firm News

Hetal H. Desai, senior attorney, was selected for Leadership Florida's Class XXXIV. Each year Leadership Florida selects 55 individuals representing business and industry, professional organizations, the public sector and non-profit organizations to participate in an eight month state-wide program learning about Florida's unique industries, environments and challenges. Members are chosen after an intense screening process and are selected based on past service or leadership and their potential impact on the state's future.

Jeffrey D. Slanker wrote an article entitled *Abercrombie & Fitch: Disparate Treatment Claims Do Not Require Actual Knowledge of Need for Religious Accommodation*, which was published in the August 2015 Checkoff of the Florida Bar Labor and Employment Law Section.

Past Issues of the Education Law Alert Available on Website

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