

# SNIFFEN & SPELLMAN, P.A.

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## EDUCATION LAW ALERT June 2016

### **Supreme Court Upholds University of Texas Affirmative Action Plan**

On June 23, the United States Supreme Court upheld the University of Texas's affirmative action admissions program in a 4-3 decision. In 2013, the Supreme Court ruled that strict scrutiny should be applied to determine the constitutionality of the University's admissions policy and remanded the case to the Fifth Circuit Court of Appeals to act accordingly. In last week's decision, the Supreme Court determined that the Fifth Circuit correctly applied strict scrutiny to the University's policy in accordance with the Court's 2013 holding and, in so doing, affirmed the Appellate Court's finding that the admissions program passes constitutional muster.

Last week's decision follows years of litigation for Petitioners, Abigail Noel Fisher and Rachel Multer Michalewicz, who applied to the University in 2008. The University has a unique admissions program, where students who graduate in the top 10% of their high schools are automatically accepted, regardless of race. Applicants who do not graduate in the top 10% of their high schools may be admitted based on how they score in an evaluation assessing their talents, leadership qualities, circumstances, and race. The Petitioners, both white women, were denied admission to the University and subsequently brought suit alleging violations of the Fourteenth Amendment Equal Protection Clause on the basis of their race.

The Supreme Court opinion, authorized by Justice Kennedy and joined by Justices Ginsburg, Breyer, and Sotomayor, summarized the first case's controlling principles: 1) strict scrutiny of affirmative action admissions processes; 2) judicial deference to reasoned explanations of the decision to pursue student body diversity; and 3) no judicial deference to determine whether the use of race in admissions is narrowly tailored. The Supreme Court then rejected all of Petitioners' arguments, agreeing with the Fifth Circuit that the University sufficiently articulated the rationale for diversity-associated admissions goals and passed the strict scrutiny analysis.

The opinion can be found at: [http://www.supremecourt.gov/opinions/15pdf/14-981\\_4g15.pdf](http://www.supremecourt.gov/opinions/15pdf/14-981_4g15.pdf)

### **Decision: Bullying Complaint Did Not State Cause of Action for Violation of Title IX or Fourteenth Amendment**

A Massachusetts Court rejected a 14<sup>th</sup> Amendment due process claim and a Title IX claim by a student who had agreed to being hazed as part of an initiation to unsanctioned student group known as the "Kool-Aid Club." The mother of the student brought the due process claims under the theory that when the government creates a danger, it has an affirmative duty to protect the public. Under Title IX of the Education Amendments of 1972, "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education

program or activity receiving Federal financial assistance." Upon his mother reporting the hazing incident, the school conducted an investigation and disciplined the participants instigating the initiation. Eventually, however, the student stopped coming to school claiming he feared retaliation; the principal then sent a truancy officer to his home. The mother claimed the action by the school of sending an officer to their home was a threat by the principal to intimidate the student and coerce him to come back to school.

The court found the school officials had not taken any action that was "so extreme as to 'shock the conscience.'" The appellate court affirmed the lower court's decision and stated an alleged failure of the school to be effective in stopping bullying by other students or the follow up actions did not create or increase the danger and "simply do not approach the threshold of a state-created danger." The court also affirmed the dismissal of the Title IX claim because the complaint did not allege any sex- or gender-based animus by any of the students, and none could be inferred from the allegations in the complaint.

A copy of the appellate decision can be found at <http://media.ca1.uscourts.gov/pdf/opinions/15-2174P-01A.pdf>.

### **DOE Releases Analysis Regarding Chronic Absenteeism in Schools**

The U.S. Department of Education released a new analysis with the first-ever national comprehensive data collected on chronic student absenteeism. The study showed that more than 6 million students, or 13% of all students, missed at least 15 days of school in the 2013-14 school year.

The analysis breaks down absenteeism by geography, race and ethnicity, school level, disability status, and gender and reveals that chronic absenteeism is prevalent in all parts of the country and among all races and genders. About 17% of students with disabilities were chronically absent as opposed to 12% of students without disabilities. About 20% of high school students were chronically absent; middle school students weighed in at 12% and lower school at 10%.

The new data is a part of the 2013-2014 Civil Rights Data Collection, which looks at conditions in over 99,500 (99.5% of the total) public schools across the country. The data file is available at: <http://www2.ed.gov/about/offices/list/ocr/data.html>

Read more at: <http://www.ed.gov/news/press-releases/new-data-show-chronic-absenteeism-widespread-and-prevalent-among-all-student-groups>

### **Parents Sue High School for Title IX Violations**

The parents of a female student at Lexington High School in South Carolina have filed suit in federal court alleging the school district's failure to provide equal sports opportunities and facilities for girls in violation of Title IX.

The suit cites with specificity a number of ways the school's softball team has inferior facilities and opportunities than the boys' football and baseball teams and alleges the school district is

“intentionally” violating Title IX by failing to provide comparable facilities and treatment for the girls’ team.

See more at: <http://legalclips.nsba.org/2016/06/07/title-ix-suit-claims-south-carolina-district-is-failing-to-provide-girls-softball-team-with-facilities-on-par-with-boys-athletic-teams/>

### **ESSA Requiring Schools to Report Homeless Student Graduation Rates**

For the first time in history, education legislation will hold schools responsible for reporting graduation rates of homeless students. Most of the legislation, the Every Student Succeeds Act, will go into effect in the 2017-2018 school year.

Prior to the ESSA reporting provision, only five states required schools to report homeless student graduation rates. A new study by Civic Enterprises explains the tenuous effectiveness of federal laws on the effectiveness of school districts in assisting homeless students. The study analyzes the new ESSA guidelines and explains how schools may use the legislation to offer better support to students in need.

Read more at: [http://www.educationworld.com/a\\_news/essa-will-require-schools-report-homeless-student-graduation-rates-first-time-ever-136412072](http://www.educationworld.com/a_news/essa-will-require-schools-report-homeless-student-graduation-rates-first-time-ever-136412072)

### **Department of Education to Propose New Rules for Online Education**

The Department of Education (“DOE”) recently proposed new and amended state authorization regulations regarding conditions of Title IV eligibility to the Office of Management and Budget.

The text of the rule is not yet public; however, regulations could require distance education to comply with all applicable state laws, or may require institutions to be authorized in each state in which they offer distance education.

The DOE previously proposed distance education rules in 2010, which were vacated on procedural grounds. The DOE then proposed another set of rulemaking in 2014, which required distance learning institutions to obtain authorization in all states in which they offer education programs as a condition of Title IV eligibility. Should the newly proposed regulations stem from the 2014 proposal, states could not use a “physical presence” test, nor could they offer an exemption based on accreditation or years of service. States could not set their own approval standards, but would be held to the federally adopted standard.

The Office of Management and Budget will first review the proposal. Next, DOE will issue a notice of proposed rulemaking for public comment. Finally, DOE will issue a final rule, which must be issued by November 1, 2016 to take effect by July 1, 2017.

See more at: <http://www.jdsupra.com/legalnews/alert-ed-to-propose-new-rules-for-44948/>

## **Secretary of Education Releases Final Round of Promise Zone Designations**

On June 6<sup>th</sup>, the U.S. Department of Housing and Urban Development announced the final round of Promise Zone designations, areas in select urban, rural, and tribal communities where the federal government promises to provide resources and work with local leaders to improve educational opportunities, reduce crime, and boost economic activity.

U.S. Secretary of Education, John B. King, Jr. made a statement regarding the designations: "I've seen first-hand the benefits of comprehensive community services for children and families. Too often, high poverty goes hand-in-hand with lower graduation rates, increased violence and high unemployment. A Promise Zone designation makes it easier for local leaders to pull together all the assets and services families need to thrive."

See more at: <http://www.ed.gov/news/press-releases/statement-us-secretary-education-john-b-king-jr-promise-zone-designations>

## **From the lighter side: Parrot Serves as Witness.**

Bud, an African gray parrot, has maintained the same story since his owner, Martin Duram, was shot and killed in his home in 2015. In Bud's words, "Don't f\*\*ing shoot" might have been Duram's last words.

Several witnesses have heard Bud's words, and believe Bud witnessed a transgression in connection with Duram's death.

It is seemingly impossible to show that Bud's repetition of the speech he overheard (which could be considered an "excited utterance" in exception to the hearsay rule) came from the victim. As a result, Bud's testimony likely will play no role in the trial.

See more at: [http://blogs.findlaw.com/legally\\_weird/2016/06/polly-want-a-conviction-mans-parrot-may-be-witness-to-his-slaying.html](http://blogs.findlaw.com/legally_weird/2016/06/polly-want-a-conviction-mans-parrot-may-be-witness-to-his-slaying.html)

## **Firm News**

On June 9, Terry Harmon presented "Transgender Student Legal Issues in School Districts" at the Florida School Boards Association's Annual Summer Conference in Tampa, Florida.

Terry J. Harmon is now recognized by The Florida Bar as a Board Certified Specialist in Education Law. Board Certified lawyers are evaluated by The Florida Bar for experience and expertise in a particular area of law and professionalism and ethics in the practice of law. Certification is the highest level of evaluation by The Florida Bar of the competency and experience of attorneys in the areas of law approved for certification.

Michael Spellman co-presented a webinar about the Department of Labor's new overtime rules to the Florida Association of Insurance Agents. Presenting with Mr. Spellman were Dave Newell, Director of Education at FAIA, Laura Boyd Pearce, Vice President and General Counsel at FAIA, and Jennifer Webb, Counsel, Federal Government Affairs at Independent Insurance Agents and Brokers of America.

In May 2016, Jeff Slanker spoke on the new Fair Labor Standards Act regulations on overtime to the Florida School Nutrition Association at their conference in Daytona Beach, Florida.

In June 2016, Jeff Slanker spoke to administrators of the Leon County School District in a presentation in conjunction with the Florida Association of School Administrators on transgender legal issues facing school districts.

Jeff Slanker has been named as a rising star in Employment and Labor Law by Florida Super Lawyers.

On May 18, 2016, Hetal Desai gave two presentations at the 36th Annual Conference of the Florida Educational Negotiators in Kissimmee, Florida, titled "Education and Labor Law that Impacts Union Negotiations" and "How to Respond to EEOC and OCR Complaints."

#### **Past Issues of the Education Law Alert Available on Website**

You may view past issues of the Education Law Alert on the Firm's website: [www.sniffenlaw.com](http://www.sniffenlaw.com). After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.