



## Education Law Alert July 2014

### **Fifth Circuit Upholds the University of Texas's Affirmative Action Plan on Remand from the U.S. Supreme Court**

Past editions of the *Education Law Alert* have highlighted the affirmative action battle concerning the University of Texas's admissions policy that has been raging in federal courts for years now. After a trip through a federal district court in Texas, the Fifth Circuit Court of Appeals, the Supreme Court, and then back to the appellate court on remand, the controversial affirmative action plan has been upheld again as constitutional by the Fifth Circuit.

Abigail Fisher, a Caucasian female, filed suit against the University of Texas after she was denied admission to the University. The University uses a holistic review process that takes race into account as a factor that influences its admissions decisions and also has a policy whereby it automatically admits students in the top ten percent of their high school class. Fisher contended that the University's admissions process and considerations of race have unfairly favored African-American and Hispanic students in admissions and that this was a violation of the Constitution. Fisher's original Complaint, filed in Western District of Texas, is available at the following link: [Complaint](#).

The case ultimately made its way on appeal to the Supreme Court after the Fifth Circuit upheld the University's admissions practices. The Supreme Court was tasked with determining whether its "decisions interpreting the Equal Protection Clause of the Fourteenth Amendment, including [Grutter v. Bollinger](#), 539 U.S. 306 (2003), permit the University of Texas at Austin's use of race in undergraduate admissions decisions." The Court issued its decision in [Fisher v. Univ. of Texas at Austin, et al.](#) (Case No. 11-345), last summer and, while it did not invalidate race-based admissions practices, it did hold that the Fifth Circuit did not apply the correct strict scrutiny standard when it reviewed and upheld the University's race-based admission practices. Instead, the Fifth Circuit initially gave deference to the University of Texas and presumed its race-based admissions practices were made in good faith. This improperly required Fisher to essentially rebut that presumption. Thus, the Fifth Circuit's opinion was vacated and remanded. The Supreme Court's opinion is available at the following link: [Supreme Court Opinion](#).

On remand, the Supreme Court directed the Fifth Circuit to apply an exacting strict scrutiny standard to the University's race-based admission process. The Fifth Circuit recently issued its opinion on remand again upholding the constitutionality of the University's admissions process. The opinion provides in pertinent part that "[c]lose scrutiny of the data in this record confirms that holistic review . . . does not, as claimed, function as an open gate to boost minority headcount for a racial quota."

The Fifth Circuit's opinion is available at the following link: [Fisher](#).

### **School District Not Liable for "Free Speech" Claims Involving a Vendor**

In [Varley v. Regional School District No. 4](#), 2014 WL 1814187 (Conn. Super. April 4, 2014), a Connecticut Superior Court judge held that a school district could not be held liable under a statute protecting employees against deprivation of "free speech" rights as the consequence of a bus contractor terminating one of its drivers.

In [Varley](#), Plaintiff was hired as a bus driver by a company that provided transportation services to a regional school district. Due to parental complaints, the school district requested that the bus contractor remove the driver from providing services to the school district's students and routes, as was permitted by its contract. The driver was removed and resigned. She then filed suit against the school district asserting, in part, that her resignation was caused partly by the school district retaliating against her for her exercise of free speech rights which was based upon the fact that on two occasions, the plaintiff appeared at school district meetings to comment about her job duties.

The school district asserted, among other defenses, that it could not be liable under state law because it was not Plaintiff's employer. The Superior Court agreed and entered summary judgment for the school district. The Court relied upon the express wording of this statute, which provides for liability for "any employer ... who subjects any employee to discipline or discharge on account of the exercise by such employee of rights guaranteed" by the free speech provisions of the United States and Connecticut Constitutions (emphasis added). While this statute does not expressly define "employer," the Court relied upon both accepted and prior case law definitions of that term in finding that the bus contractor, and not the school district, was the employer. The Court noted that the school district did not pay the wages and did not have the authority to hire or discharge Plaintiff; rather, the school district merely had the contractual right to request removal of the driver from the school district's routes.

The Court also rejected a claim that the school district "tortiously interfered" with contractual relations between the driver and the bus company, noting that absent some evidence the school district fabricated the parental complaints, the school district's expression of dissatisfaction with the Plaintiff had a valid basis, was permitted under its contract, and was not motivated by malice.

A copy of the Court's opinion is available at the following link: [Varley](#).

### **Victory in Lawsuit Over Transgender Student is in the Eye of the Beholder**

Domaine Javier, male by birth, registered as a female student at California Baptist University ("CBU") in Riverside, California. Javier lives as a female and is identified as a female on her driver's license and social security card. CBU learned of Javier's transgender status from a realtor upon which Javier appeared. This resulted in Javier's expulsion from CBU and an Order prohibiting Javier from CBU property and attending on campus events which are open to the public. At the administrative appeal, CBU said the expulsion was based on fraud. The decision for expulsion and the restriction from CBU property was upheld; however, the Order to stay away from public events on campus was reversed.

Javier sued under California's Unruh Civil Rights Act ("Act"), which bars discrimination on the basis of gender or gender identity. CBU argued that it was not a "business establishment" thus the Act was inapplicable. The Superior Court determined that the Act was inapplicable to the on-campus educational activities. However, the Court found that CBU's for-profit properties, including a library and restaurant, were business establishments and thus Javier could not be barred under the Act. Javier was awarded \$4,000.00 in damages and attorney's fees on that count.

Both sides claimed victory from the "split decision." Legal counsel for CBU stated that they were pleased by the ruling that a private, religious school is not a business. Likewise Javier's legal counsel was satisfied with the "really strong statement from the Court" that businesses may not discriminate against transgender people.

Source: [ABA Journal](#).

### **Eleventh Circuit Finds Florida Atlantic University Immune from Claims Brought Under Florida Age Discrimination in Employment Act**

On July 24, 2014, the Eleventh Circuit Court of Appeals issued its opinion in [Crisman v. Florida Atlantic University Board of Trustees](#), where it found that FAU was entitled to Eleventh Amendment immunity for claims brought under the Florida Age Discrimination in Employment Act, §112.044, [Florida Statutes](#) ("FL-ADEA"). Crisman sued FAU under the FL-ADEA claiming that a younger black male had been transferred into her position. FAU moved to dismiss the claim and argued that as an agency or instrumentality of the State of Florida, it was entitled to immunity under the Eleventh Amendment to the U.S. Constitution. The Court discussed the analysis applicable to claims of Eleventh Amendment immunity and analyzed whether in enacting the FL-ADEA, the Florida Legislature explicitly consented to suit against state entities such as state universities. The Court held that as an arm of the State of Florida, FAU was immune because no such consent had been provided.

A copy of the Court's opinion is available at the following link: [Crisman](#).

### **Florida Office of the Attorney General Releases Advisory Opinion on Government Contractor's Obligation to Comply with State Public Records Laws**

The Florida Attorney General's Office has released guidance in the form of an advisory legal opinion on compliance with public records laws for government contractors. Florida's public records law requires that documents or records made or received by public agencies in the course of conducting official business be available for inspection by the public. The public records law applies to state government contractors, just as it does to public agencies, if those contractors are "acting on behalf of" the agency in providing services under the government contract.

The Attorney General's Opinion clarifies when a government contractor is obligated to comply with Florida's public records law, or when a contractor is "acting on behalf of the public agency." The advisory opinion notes that if a contractor is acting on behalf of a public agency it is essentially taking the place of, or standing in the shoes of, the public agency, and thus has to comply with the same public records requirements as the public agency would have to if itself was performing the service. The advisory opinion indicates that contractors under the terms of the law are those that not only have a contract to perform certain services with the state government or its agencies, but those that are providing services in a manner in which they are acting on behalf of that agency in providing those services.

The opinion is available at the following link: [AGO 2014-06](#).

### **OCR Investigates More Colleges and Universities for Title IX Compliance**

In our May 2014 Special Edition of the *Education Law Alert*, we highlighted a May 1, 2014, [press release](#) issued by the United States Department of Education ("US DOE") announcing that 55 higher education institutions were under investigation for possible violations of federal law over the handling of sexual violence and harassment complaints. US DOE also issued new Title IX policy guidance in May ("[Questions and Answers on Title IX and Sexual Violence](#)").

News came out this month that the list has grown from 55 to 67 higher education institutions. Colleges and universities are encouraged to review their Title IX policies and training programs as soon as possible in light of OCR's heightened emphasis on Title IX compliance.

Source: [Inside Higher Ed](#).

### **High School Female Sues School District Under Title IX (Pregnancy)**

A Georgia high school student has filed a civil rights complaint with OCR under Title IX alleging, among other things, that her rights were violated when she was denied at-home school instruction while she was on pregnancy-related bed rest. The complaint further alleges the following violations (quoted):

Maintaining a policy and practice of treating pregnancy-related absences as unexcused without any regard for federal civil rights law;

Denying pregnant and parenting students the opportunity to enroll in homebound instruction while offering that same opportunity to students with other temporary medical conditions, which also violates Georgia Department of Education Rule 160-4-2-.31;

Maintaining a policy with a negative presumption that pregnant students cannot and will not continue attending school or keep up with/make up their schoolwork, including allowing the Principal to decide at what point in the student's pregnancy it is no longer safe for her to continue attending school;

Not excusing Mikelia's medically necessary absences;

Denying Mikelia homebound instruction despite her eligibility for homebound instruction;

Discouraging Mikelia from continuing her studies while she was on bed rest and recovering from childbirth by telling her that that work would not "count" for credit;

Not giving Mikelia credit for the work she did in Spring 2014, including the work she completed prior to going out on bed rest and during the period of time she was working from home while she was on bed rest; and

Not allowing Mikelia to make up the work she missed, for full credit, while she was on bed rest and recovering from childbirth.

We will continue to provide updates on this case and other Title IX cases in future editions of the *Education Law Alert*.

Source: [WTXL](#); [National Women's Law Center \(Copy of Complaint\)](#).

### **US DOE Issues Guidance to School Districts on Keeping Parents Informed on Collection of Student Data**

This month, the US DOE issued a [press release](#) and new guidance document "on how to keep parents and students better informed about what student data is collected and how it is used." Additionally, US DOE announced a new website addressing the privacy and use of student records (<http://familypolicy.ed.gov>). US DOE's press release and the guidance document recommend that school districts:

- Keep the lines of communication open;
- Review parental questions, concerns and suggestions in a thoughtful and careful manner;
- Respond to parental or student requests in a timely manner; and
- Periodically review old inquiries and resolutions to evaluate and improve communication and transparency efforts.

The new guidance document is available at the following link: [Guidance](#).

### **From the Lighter Side: Making Money in his Sleep**

The Yankees-Red Sox rivalry is revered as one of the best rivalries in sports. Unfortunately, one fan got a little drowsy and dozed off during the game. Unbeknownst to the sleeping fan, the live TV camera panned on him, and the announced proceed to poke fun at him. The fan subsequently filed a \$10 million lawsuit alleging he was defamed and is now emotionally distraught.

Source: [New York Post](#).

### **Firm News**

**Sniffen & Spellman, P.A.** welcomes new associate **Todd C. Hunter Jr.** Mr. Hunter received his Juris Doctorate from the Florida Coastal School of Law in 2010. While in law school, Mr. Hunter served as a law clerk for a local judge and was a certified legal intern with the Consumer Law Clinic. Prior to attending law school, Mr. Hunter graduated from Florida State University where he double majored in Finance and Real Estate. Prior to joining the firm, Mr. Hunter served for three years as an Assistant State Attorney with the Office of the State Attorney, Second Judicial Circuit where he gained invaluable trial experience prosecuting cases ranging from DUI's to homicides.

Mr. Hunter is admitted to The Florida Bar and the United States District Court for the Northern District of Florida. He is active in various community groups such as the William H. Stafford American Inn of Court and the Exchange Club of Tallahassee.



**Michael P. Spellman** presented "The Ethics of Internal Employment Investigations in the City" at the 33<sup>rd</sup> Annual Seminar of the Florida Municipal Attorneys Association, held in Bonita Springs, Florida.

Mr. Spellman also presented the Human Resources Update at the 45<sup>th</sup> Annual Education and Trade Show of the Florida Association of Self Insureds, held in Naples, Florida.



**Terry J. Harmon** presented on topics of child abuse reporting, the importance of documentation, social media, and cyber bullying to school district administrators from Leon County as part of professional development for members of the [Florida Association of School Administrators \(FASA\)](#).

**Sniffen and Spellman, P.A.** is pleased to announce that [Robert J. Sniffen](#), [Michael P. Spellman](#), and [Maureen M. Daughton](#) have been honored as *Legal Elite* for 2014. Attorneys are chosen for *Legal Elite* status through a state-wide vote by the *Florida Trend Magazine*.



**Sniffen and Spellman, P.A.** recently participated in "A Full Summer" to fight against hunger in the Big Bend and surrounding areas. The event was hosted and organized jointly by St. John's Episcopal Church and First Baptist Church of Tallahassee in partnership with Hope2theHungry and Second Harvest of the Big Bend. Sniffen & Spellman's attorneys, staff and their family members joined more than 250 volunteers to package over 50,000 meals for children in need during the summer months in the Big Bend. Pictured from left to right are the following members of the Sniffen & Spellman team: Angie Wylie, Trae Wylie, Sydney Wylie, Jeff Slanker, Teri Wolfe, Sarah Evans, Jacob Sniffen, Charlotte Homme, Angie Herron, Michael Spellman, and Elizabeth Davis.



### **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.