SNIFFEN & SPELLMAN, P.A.

EDUCATION LAW ALERT
February 2017

Join Us for the Sniffen & Spellman Lunch and Learn Seminar Series

This year Sniffen & Spellman is proud to offer complimentary quarterly lunch and learn seminars for our clients and friends to discuss and answer questions on important labor and employment and business liability issues.

The first seminar will take place on March 30 from 12:00 p.m. to 1:00 p.m. This seminar will address labor and employment compliance changes to look out for in 2017. Jeff Slanker will present an overview of relevant employment trends for 2017 and moderate the discussion in conjunction with Wade Shapiro, President of Legacy Insurance Solutions, who will address insurance issues for companies to be aware of in 2017. The seminar will be held at the Firm's office at 123 North Monroe Street in Tallahassee. Lunch will be provided. Space is limited.

If you would like to attend this seminar, please RSVP here.

Tentative dates (topics to be announced later) for the rest of the 2017 series are as follows:

June 29
September 28
December 7

These dates are subject to change.

We hope you can join us for lunch and a great discussion!

Supreme Court Rules for Student and Service Dog

The U.S. Supreme Court ruled that a family of a disabled student can pursue a disability suit against her school after it banned the girl's service dog. The school argued the student did not need a service animal because she had a human aide. The family brought suit under the Americans with Disabilities Act and the Rehabilitation Act. The Supreme Court ruled that the family was not required to exhaust administrative remedies under the Individuals with Disabilities Education Act ("IDEA"), before bringing suit.

Justice Kagan, who authored the unanimous opinion, noted that the substance of the suit was not based on denial of free appropriate education under the IDEA, therefore exhaustion was not necessary.

Read more here.

Departments of Education and Justice Withdraw Transgender Guidance Letters

On February 22, 2017, the U.S. Department of Education and the U.S. Department of Justice ("Departments") withdrew their Statements of Guidance ("Guidance") addressing access to "sex-segregated facilities" based on gender identity. The previously issued Guidance asserted that Title XI's restriction on discrimination **included** discrimination based on gender identity. This position, in turn, required schools to permit access to certain "sex-segregated" facilities based on an individual's identified gender, not their biological makeup.

In their "Dear Colleague" letter ("Letter"), the Departments noted that the previously issued Guidance has given rise to significant litigation and conflicting rulings between and amongst the courts. In the Letter, the Departments noted that it is primarily the role of the States and the school districts to craft education policy. The Departments have decided to more thoroughly flesh out and consider the legal issues before they adopt the previously issued Guidance.

Read the Dear Colleague Letter here.

Read the Department of Education's press release here.

Supreme Court Permits Section 504 Claim to Proceed Without Exhaustion of IDEA Claim

It is not uncommon for plaintiff students in K-12 schools to attempt to bypass the IDEA's exhaustion requirement by filing Section 504 and other disability-based claims directly in state or federal court. In response, school districts usually seek to dismiss all claims based on the plaintiff student's failure to exhaust administrative remedies available under the IDEA. See, M.T.V. v. DeKalb County Sch. Dist., 446 F.3d 1153, 1158 (11th Cir. 2006)("whether claims asserting the rights of disabled children are brought pursuant to the IDEA, the ADA, Section 504, or the Constitution, they must first be exhausted in state administrative proceedings"); Babicz by & Through Babicz v. School Bd., 135 F.3d 1420, 1422 (11th Cir. 1998)(holding that Section 504 and/or ADA claims are subject to Section 1415(f)'s exhaustion requirement and, therefore, claims must be administratively exhausted before relief is available).

On February 22, 2017, the U.S. Supreme Court issued a decision in Fry v. Napoleon Community Schools (Case No. 15-497) impacting the failure to exhaust defense. In Fry, the U.S. Supreme Court held that **administrative exhaustion is unnecessary "where the gravamen of the plaintiff's suit is something other than the denial of the IDEA's core guarantee of a FAPE."**

Moving forward, when a plaintiff student files disability-based claims in state or federal court without first having administratively exhausting IDEA-based claims, school board attorneys will need to carefully analyze the substance of the complaint to determine whether the exhaustion defense is applicable. The following language from the Fry opinion is pertinent to any such analysis:

> The IDEA guarantees individually tailored educational services for children with disabilities, while Title II and §504 promise nondiscriminatory access to public institutions for people with disabilities of all ages. That is not to deny some overlap in coverage: The same conduct might violate all three statutes. But still, these statutory differences mean that a complaint brought under Title II and §504 might instead seek relief for simple discrimination, irrespective of the IDEA's FAPE obligation. One clue to the gravamen of a complaint can come from asking a pair of hypothetical questions. First, could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was not a school? Second, could an adult at the school have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject. But when the answer is no, then the complaint probably does concern a FAPE. A further sign of the gravamen of a suit can emerge from the history of the proceedings. Prior pursuit of the IDEA's administrative remedies may provide strong evidence that the substance of a plaintiff's claim concerns the denial of a FAPE, even if the complaint never explicitly uses that term.

The opinion is available at the following link: Fry.

Yale Graduate Students Vote to Unionize

On February 23, 2017, graduate assistants in eight of nine Yale University departments voted to unionize. Last year, the National Labor Relations Board ("NLRB"), entered an opinion which confirmed the avenue for research and teaching assistants on private campuses to collectively bargain. Yale is the third campus where graduate students have formed unions since that opinion.

Each separate department held its own separate election, with a majority of students approving unionization in the following departments: East Asian languages and literatures, English, geology and geophysics, history, art history, math, political science, and sociology. The only department that did not approve unionization was the physics department.

Read more here.

Proposed North Carolina Deal Would Repeal Bathroom Law

North Carolina Governor Roy Cooper has proposed a deal which, if passed, would repeal H.B.2, the controversial legislation that bars any state or local law extending antidiscrimination protections in employment and public accommodation to transgender individuals.

In addition to repealing H.B.2, Governor Cooper's proposal mandates tougher penalties for crimes committed in restrooms and dressing rooms and requires that local governments give state legislature 30 days' notice before voting on nondiscrimination ordinances.

Read more here.

Read Governor Cooper's press release here.

From the lighter side: Texas Resolution Urges Citizens to Use Correct Flag Emoji

Texas Representative Tom Oliverson has proposed a legislative resolution to ensure that Texans do not confuse the Texas flag and the Chilean flag, which look very similar. "Resolutions" are not binding, so legislators often use them to declare positions or convey their own agendas. In this case, the resolution's caption is self-explanatory: "Urging Texans not to use the flag emoji of the Republic of Chile when referring to the Texas flag."

Both flags have a lone blue white star on a blue section, with a red and a white horizontal stripe taking up the remainder of the flag. On the Texas flag, the blue section is a full vertical stripe; on the Chile flag, the blue section is a square which takes up half of the flag.

As explained in HCR 75, Chile's flag is usually represented in messaging applications, but Texas's flag is not. The resolution urges citizens not to substitute Chile's flag for that of Texas. The resolution, should it pass, will "reject the notion that the Chilean flag, although it is a nice flag, can in any way compare or to be substituted for the official state flag of Texas…"

Read more here.

Firm News

The Firm congratulates **Michael Spellman** for achieving an AV Preeminent® Rating from Martindale-Hubbell® once again this year. The AV Preeminent rating is the highest rating given to an attorney by Martindale-Hubbell – the leading attorney rating organization - and reflects the fact that a lawyer's peers rank him or her at the highest level of professional ethics and legal ability

Kevin Kostelnik and **Monna Lea Bryant** wrote an article titled "Wage & Hour Checkup: Are Your Holiday Season Practices FLSA-compliant?" in the Florida Society of Association Executives, November 2016 edition.

The Firm is proud to announce that it is once again sponsoring Tallahassee's **Word of South** Festival of Literature & Music. This year's festival will take place April 7-9 in Cascades park.

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. 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.