

# SNIFFEN & SPELLMAN, P.A.

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## EDUCATION LAW ALERT July 2022

### Education Budget for 2022-2023

The State of Florida's 2022-2023 education budget has been released. Highlights include:

- The Florida Education Finance Program (FEFP) will provide \$24.294B to school districts. This represents an increase of \$1.695B (7.5%).
- The Teacher Salary Increase Allocation created last year has been increased from \$550M to \$800M. The increase is expected to raise the minimum K-12 teacher salary to \$47,500.
- Public school workforce education programs have received an increase of \$56.1M (10.7%).
- \$44.8M has been added to the Voluntary Pre-K program, which is expected to boost per-student spending by \$317 (12.8%).
- State Colleges will receive an increase in total state funding of \$166M (12.2%).
- State Universities will receive a \$278M (5.2%) increase in total funding.

### Federal District Court Enjoins EEOC and U.S. Department of Education from Enforcing Guidance

In June 2020, the United States Supreme Court in Bostock v. Clayton County found that under Title VII of the Civil Rights Act of 1964 (Title VII) prohibited "sex" discrimination includes discrimination against employees because of their gender identity or sexual orientation. The Court found that sexual orientation and gender identity were "inextricably bound up with sex." Thereafter, President Biden issued Executive Order No. 13988 directing federal agencies to interpret federal laws that prohibited sex discrimination to also prohibit discrimination based on gender identity or sexual orientation. The U.S. Department of Education (US DOE) issued guidance documents on Title IX and the Equal Employment Opportunity Commission (EEOC) issued guidance documents on Title VII. The guidance documents stated that discrimination based on sexual orientation and gender identity was prohibited by federal law.

Last year, 20 states brought an action against U.S. DOE and the EEOC stating that their guidance was unlawful, because it for violated the Administrative Procedure Act and the Tenth Amendment. The states also sought a preliminary injunction from enforcing the guidance. The preliminary injunction was granted on July 15, 2022, by the U.S. District Court for the Eastern

District of Tennessee in Tennessee v. U.S. Dept. of Education (Case No. 3:21-cv-308).. In granting the injunction, the Court found that plaintiffs demonstrated a likelihood of success on their claim that the guidance documents were legislative rules that had to go through notice and comment rulemaking. The Court also stated that US DOE expanded the Bostock opinion through its guidance documents. The federal agencies have not yet appealed the ruling. With the injunction in place, the guidance documents from the Department of Education and EEOC cannot be enforced in the 20 states that brought the action. Florida is not one of the 20 states involved in the case as a plaintiff.

Click [here](#) to read the order.

### **Florida Department of Education Issues Memorandum Backing Federal Court's Rejection of US DOE Guidance Regarding Title IX**

On the heels of the decision in Tennessee v. U.S. Department of Education (referenced above), Florida Commissioner of Education Manny Diaz issued a memorandum to all Florida Superintendents, School Boards, Private School Owners, and Charter School Governing Boards strongly disagreeing with the US DOE's (and other federal agencies') position that Title IX's prohibition on sex discrimination includes discrimination on the basis of sexual orientation and gender identity. In the memorandum, Commissioner Diaz asserted that the recent guidance is not binding law, creates no new legal obligations, and should not be treated as governing law. Importantly, Commissioner Diaz further stated as follows:

...nothing in these guidance documents requires you to give biological males who identify as female access to female bathrooms, locker rooms, or dorms; to assign biological males who identify as female to female rooms on school field trips' or to allow biological males who identify as female to compete on female sports teams.

It will be interesting to see how the federal government responds, if at all, to the memorandum. Of note, the Eleventh Circuit Court of Appeals (sitting *en banc*) has yet to issue a final decision in Adams v. School Board of St. Johns County, Fla. (Case No. 18-13592). The decision in Adams is likely to have a significant impact on the issues raised in the memorandum.

A copy of the memorandum is available at the following link: [July 28, 2022, Memo](#).

### **U.S. Department of Education Releases Guidance on Supporting Students with Disabilities and Avoiding "Discriminatory Use" of Discipline**

On July 19, 2022, the U.S. Department of Education provided important guidance on supporting students with disabilities and avoiding the discriminatory use of discipline. Included with a press release are four resource documents that "reflect the concern, particularly in light of the prevalence of student mental health issues associated with the pandemic, that some students with disabilities are not receiving the supports and services necessary to address their educational needs, including their disability-based behavior." Notably, the U.S. DOE also advised that "schools do not need to choose between complying with Section 504 of the Rehabilitation Act of

1973 (Section 504) and the Individuals with Disabilities Education Act and keeping their school community – including students and staff – safe.”

On the issue of threat assessments involving students with disabilities, the U.S. DOE [offered](#), among other things, the following guidance:

**Question E-4:** Does IDEA require or prohibit a risk or threat assessment when a child with a disability commits a violation of the school’s code of student conduct?

**Answer:** No. Neither the statute nor the IDEA regulations address the completion of a risk or threat assessment of a child with a disability.

**Question E-5:** When school personnel are conducting risk or threat assessments of a child with a disability, how must the LEA ensure FAPE is provided to the child?

**Answer:** Under IDEA, the procedural safeguards and right to FAPE for a child with a disability must be protected throughout any threat or risk assessment process, including the provision of services during any removals beyond 10 cumulative school days in a school year. 34 C.F.R. §§ 300.101 and 300.530(d). States and LEAs should ensure that school personnel involved in screening for, and conducting, threat or risk assessments of children with disabilities are aware that the child has a disability and are sufficiently knowledgeable about the LEA’s obligation to ensure FAPE to the child, including IDEA’s discipline provisions. Where appropriate, the LEA can ensure that the school personnel conducting the threat or risk assessment have access to, and are coordinating with, the child’s IEP Team.

Coordination with the child’s IEP Team prior to reaching the threat or risk assessment determination can allow for providing additional or different behavioral supports to mitigate or eliminate the perceived threat or risk. In addition, the IEP Team can provide valuable information about: (1) the nature of the child’s disabilities and the needs of the child; (2) whether positive behavioral intervention and supports to address the specific behavior(s) have been implemented with fidelity, and, if so, the effectiveness of those supports; (3) specific additional supports and services that could be provided to mitigate or eliminate the risk of harm, without requiring exclusion from school; and (4) any proposed changes to the child’s IEP or review of placement that are in process. When appropriate, the LEA could seek an expedited due process hearing to seek a removal of the child to an IAES for up to 45 days if returning the child with a disability to the previous placement is substantially likely to result in injury to the child or to others. 34 C.F.R. § 300.532(a). Regardless of the risk or threat assessment process utilized, the LEA is responsible for ensuring that IDEA’s discipline protections are followed, and that FAPE is made available as appropriate.

The press release and guidance documents are available at the following link: [U.S. DOE guidance](#).

### **Ninth Circuit: Public Officials’ Blocking Members of the Public from Social Media Platform Violates First Amendment**

In a case of first impression in the Ninth Circuit Court of Appeals, the Court addressed the question of “whether a state official violates the First Amendment by creating a publicly accessible social media page related to his or her official duties and then blocking certain members of the public from that page because of the nature of their comments.” On July 27, 2022, the Court in Garnier v. O’Connor-Ratcliff (9th Cir. Case Nos. 21-5518; 21-55157) held that under the facts of the case, the government officials violated the First Amendment by blocking particular members from the public from their social media account. In support, the Court reasoned, “we have little doubt that social media will continue to play an essential role in hosting public debate and facilitating the free expression that lies at the heart of the First Amendment. When state actors enter that virtual world and invoke their government status to create a forum for such expression, the First Amendment enters with them.”

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

### **FL DOE Proposed Rule Essentially Provides for Full Evidentiary Hearing to Address Unresolved Student Welfare Complaints filed by Parents**

During the 2022 legislative session, the Florida Legislature passed amendments to F.S. 1001.42 (8)(c) allowing parents to request the appointment of a special magistrate when their concern of their child’s welfare have not been resolved by the school principal or school district. The proposed rule also includes a form for use by parents when seeking to appoint a special magistrate. School districts should carefully review the proposed rule and be ready once it is final. Based on the language of the proposed rule, hearings involving parental complaints will operate in the same manner as full evidentiary hearings typically held before the Florida Division of Administrative Hearings.

The full text of the proposed rule is available at the following link: [F.A.C. Rule 6A-1.094125](#).

### **FL DOE Proposes Rule Addressing Certain Fundamental Rights of Parents**

On June 15, 2022, FL DOE published proposed rule 6A-10.085 (Field Trips, Extracurricular Activities, and Other Supplemental Programs and Activities). The proposed rule requires school districts to create certain policies related to field trips, extracurricular, and other programs while at the same time maintaining the rights of students and their parents. The following is a portion of the rule:

- (2) School District Policies for Field Trips, Extracurricular Activities, and Supplemental Programs. Any policies adopted by a school district under s.

1001.43(3), F.S., for field trips, extracurricular activities, and supplemental programs must:

- (a) Be consistent with the Parental Bill of Rights created under Chapter 1014, F.S.;
- (b) Protect the privacy of educational records as set forth in s. 1002.22, F.S., as well as the privacy interests of all students and parents; and
- (c) Provide for parental notification as set forth in subsection (3) of this rule.

(3) Parental Notification.

- (a) Districts must adopt procedures to fully inform parents of the details of field trips, extracurricular activities and supplemental programs.
- (b) District procedures must require signed parent or guardian permission forms for field trips that includes, at a minimum, the following information:

1. The nature of the field trip;
2. The date(s) and time(s) of the field trip;
3. Specific location(s) and type(s) of establishment(s) to be visited;
4. Mode(s) of transportation;
5. Method of student supervision provided, such as anticipated number of chaperones; and
6. Whether room assignments for overnight lodging will be separated by biological sex at birth.

- (c) District procedures for overnight lodging must include accommodations or modifications in order to ensure that all eligible students have the opportunity to participate in the field trip.

The full text of the proposed rule is available at the following link: [F.A.C. Rule 6A-10.085](#).

**From the Lighter Side: Do the Truffle Shuffle! Scientists Stumble onto 330-Year-Old Shipwreck in Cave off Oregon Coast**

NPR reports on the discovery nearly 330-year-old timbers from a real-life shipwreck off the Oregon Coast. According to NPR, for centuries “mysterious blocks of beeswax and Chinese porcelain have washed up on the Oregon coast.” This rings of legends and lore of pirates and sunken treasure becoming the known as the Beeswax Wreck.

Timbers from the wreck were found in a hard to access cave in Oregon. Very [Goonies](#).

Read more [here](#), including a discussion had by NPR with Scott Williams, the president of the [Maritime Archeological Association](#).

## **Firm News**

**Rob Sniffen** presented “Something Old, Something New – Current Issues Facing Florida School Districts” at the Florida School Boards Insurance Trust Summer Meeting in St. Augustine, Florida.

**Elmer C. Ignacio** moderated a panel discussion on “The Great Resignation” and co-presented “Labor and Employment Case Law Update” at the Florida Association of Self-Insureds (FASI) Annual Educational Conference in Naples, Florida.

**Elmer C. Ignacio** was a featured speaker and presented “Labor and Employment Law: Topics and Special Issues” and “Employment Contracts” at the Florida Veterinary Medical Association (FVMA) Power of 10 Leadership Conference in Orlando, Florida.

## **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.