

# LEGAL ISSUES THAT GET GOOD SCHOOLS/TEACHERS IN TROUBLE

---

Presentation for  
**Coalition of McKay Scholarship Schools  
Annual Conference**  
October 9, 2015

**Kimberley Spire-Oh, Esq.**  
**Law Office of Kimberley Spire-Oh, PA**

# Basic Compliance Issues

Be aware of state and federal legal requirements for private schools and McKay scholarship schools

Revisit them annually

- <https://www2.ed.gov/admins/comm/choice/regprivschl/regprivschl.pdf> See pg. 51-56
- [https://www.floridaschoolchoice.org/Information/Private\\_Schools/detailed\\_requirements.asp](https://www.floridaschoolchoice.org/Information/Private_Schools/detailed_requirements.asp)
- [http://www.leg.state.fl.us/statutes/index.cfm?App\\_mode=Display\\_Statute&Search\\_String=&URL=1000-1099/1002/Sections/1002.39.html](http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&Search_String=&URL=1000-1099/1002/Sections/1002.39.html)
- <https://www.flrules.org/gateway/RuleNo.asp?ID=6A-6.03315>

# Special Education Requirements

Private schools, even those that accept McKay Scholarships, do not have the same legal requirements as public schools.

- The Individuals with Disabilities in Education Act (IDEA) does not apply to private schools.
- Title II of the Americans with Disabilities Act (ADA) does not apply to private schools.

However:

- Title III of the ADA (covering public accommodations) does apply to private schools
- Section 504 applies to private schools that accept federal funding

# ADA Definition of Disability

The ADA defines a disability as a physical or mental health condition that substantially limits a major life activity. (This definition differs from SSI/SSD definitions).

- Not all people with physical or mental health conditions are disabled under the ADA.
- Limitations cannot be minor.
- Learning, concentrating, interacting with others, seeing, hearing, mobility are some major life activities.
- Individuals who do not have disabilities but who are perceived to have disabilities or have a record of disability can be protected.

# Title III of the ADA

Title III of the Americans with Disabilities Act prohibits discrimination against otherwise qualified students, employees and applicants with disabilities.

“No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation.”

Private schools are places of public accommodation, unless they are religious schools.

# Discrimination Under ADA Title III

- Title III prohibits use of “eligibility criteria that screen out or tend to screen out an individual with a disability.”
- Title III also defines discrimination as “a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford” participation by an individual with a disability.
- Failing to take steps to provide auxiliary aids and services to ensure participation is also considered discrimination under Title III.

# Discrimination Under ADA Title III

## Limitations

However, private schools are not required to **“fundamentally alter”** the nature of the goods, services, facilities, privileges, advantages, or accommodations” they provide.

Students must be **“otherwise qualified.”**

ex) specialized program

But, reasonable accommodations must be provided to students covered by the law who need them

# Fundamental Alterations

*Southeastern Community College v. Davis*, 442 U.S. 397 (1979): Nursing school applicant denied admission because her severe hearing disability would prevent her from being able to safely complete the clinical part of the program, which was an essential component of the nursing degree.

*Wynne v. Tufts University School of Medicine*, 932 F.2d 19 (1991): Must consider alternative means to accommodate student that would not lower academic standards or require substantial program alteration.



# Be Creative in Finding Accommodations and Auxiliary Services for Students with Disabilities

- They don't have to be expensive or difficult to provide
- Many universal design strategies originally developed for students with disabilities actually **enhance learning for all students.**
- Work with public school districts' Child Find and Equitable Services programs to meet students' needs.

# Child Find

Under the IDEA, public school districts have an obligation to look for and evaluate students who are suspected of having disabilities within their geographic area, including students who are home schooled and attending private schools.

The evaluations (and re-evaluations available every 3 years for students who are found eligible for special education services) are paid for by the district.

# Equitable Services

- A small portion of the special education budgets for school districts is set aside for equitable services to be provided to students in private school.
- Private schools can work with the school district to arrange to have these services provided on the private school campus.
- Private schools can also accommodate a student's need to get these services on a public school campus by modifying the student's schedule.

# Services Plan

- Private schools can develop plans for services and accommodations that do not fundamentally alter their program for otherwise qualified students with disabilities.
- Make sure the plan is clear, specific, and achievable.
- Call a meeting with the student's family if the plan needs to be changed.
- Allow input from a family's private providers as to what works for the student. Home-school consistency gets the best results.

# Discipline

- Have clear policies—and follow them consistently—with regard to student discipline.
- For secondary schools, include policy on disclosure of disciplinary information to colleges.
- Ensure that you conduct thorough investigations and give students due process with an opportunity to be heard and an opportunity to appeal.
- Give notice to parents of disciplinary action before it is taken.
- As educational institutions, try to use discipline policies as an educational tool that teaches and reinforces good behavior.

# Advertising, Marketing, and Enrollment Agreements

- It is **absolutely essential** that you are clear and up-front about what services and accommodations your school is willing and able to provide in all communications with applicants and their families, students and their families, and the general public.
- In far too many cases, what is offered and what is provided are very different and lead to a very contentious relationship and a bad reputation for the school.

# Written Materials and Meetings

- Ensure that your web site, social media, publications, contracts, disciplinary matrix, school policies, and other written materials present a **complete, accurate and consistent** statement about what the school will offer and the responsibilities and expectations for its staff, students, and their families.
- Explain everything thoroughly to prospective and current students and families and allow opportunities for questions.
- Ensure that all school staff follow the policies, rules and expectations.

# McKay Process

- Assist families who are transitioning in with information about the McKay Scholarship process and refer them to the resources at the Department of Education to ensure they follow the procedures.
- If families of students with disabilities enroll in your school/withdraw from their previous school without following the correct procedures and timelines for McKay (ensuring they have an appropriate IEP or 504 plan, registering their intent to use McKay, etc.) they may not receive the scholarship and may blame you.



# Bullying

- Florida has one of the strongest anti-bullying laws in the country for public schools.
- However, students of private schools and their families have legal recourse using various tort laws if a student is substantially injured from bullying (by other students or by teachers and staff).
- Ex) Case in Miami of high school students allegedly sexually assaulted by bullies.

# Addressing Bullying

- Develop multi-pronged program for safely **reporting** bullying (anonymously and directly).
- **Investigate all** reports of bullying and provide results of investigation to reporter within a reasonable time.
- Include **consequences** for bullying in policies
  - Remember to address the causes of bullying
  - Do not punish the victim
  - Include plan to keep the victim safe
- Create a **school environment** where bullying is not tolerated and where witnesses are encouraged to report it.

# Bullying Trends: Cyberbullying and Reporting the Victim

- Cyberbullying has become a very prominent and problematic issue.
- Most cyberbullying occurs outside of the school setting, but—even then—it can negatively impact the educational environment.
- Make sure your policies specifically state the scope of your anti-bullying rules and whether posts made on private equipment outside of the school day is covered.
- Be aware of a recent trend for bullies to report their victims for bullying. Ensure your investigations are sufficiently thorough.

# Technology Issues: Bring Your Own Device Programs

## Issues to Consider and Address in Policies:

- Access for students with limited resources
- Student records: Are student-created materials on the device student records that must be retained by school.
- Inappropriate/adult content found on Internet: are filters applied when device used in school setting
- Intellectual property rights of teacher/student for content created
- Boundaries between teachers and students
- Privacy (cameras, recording) and right of school for search and seizure

# Technology Issues: Social Media

- Schools should develop an Acceptable Use policy for social media that specifies what is allowed, areas of coverage (on school or all locations, during school or 24 hours a day).
- The policy should be echoed in discipline and anti-bullying policies and procedures.
- Clear rules should be set for social media interactions between students and staff/teachers and between teachers/staff and students' parents.

# Technology Issues: Sexting

- Sexting by students leads to some additional thorny issues
- Possession of child pornography is illegal, so seizing phones or images related to sexting by minor students can result in criminal charges against school officials who are investigating the sexting allegations.
- Best practice would be to create and follow a school policy to refer the allegations to law enforcement.

# Technology Issues: Employee Use of Social Media

Policies should be established for employees:

- Clarifying the employees' expectation of privacy
- Prohibiting bullying and harassment or anything that harms school reputation
- Establishing guidelines for protecting confidential student and school information
- Limiting employees' ability to publicly speak on behalf of the school on private accounts

# Parent Issues: Divorce

- If a student's parents are divorced, the school needs to check legal records to find out who has authority to make educational decisions, who has access to educational records, whether custody is shared, and who is responsible for tuition and fees.
- Some school attorneys recommend having clauses in the enrollment agreement covering parental payment of attorney fees if school is pulled into a parental dispute.
- If custody is shared, develop plan for communicating with parents. (Who is called first?)



# Parent Issues: Negative Behavior

Schools should adopt policies reserving the right to remove parents from campus if they engage in negative or inappropriate behaviors on campus or engage in threatening or intimidating behavior toward teachers, school staff, or other parents (at school events, etc.) and to ban them if they repeatedly engage in this behavior.

This should not prevent parents from being able to access campus for calm discussions expressing dissent about matters involving their children's education.

Schools should also make it clear if they reserve the right to remove a student from school as a result of offending behavior by the parents (and provide specific guidelines).

# Reporting Abuse

Under Fla. Stat. Section 1006.061(1), all McKay private schools must prominently post a notice stating that all employees and agents of the school have an affirmative duty to report all actual or suspected cases of child abuse, abandonment, or neglect.

School staff have been held individually liable for failure to report allegations raised by students.

There are extensive protections for school staff who makes these reports, and law enforcement and DCF take responsibility for the outcome.

# Reporting Misconduct

Fla. Stat. Section 1006.061(2) requires posting at the school site and on the school's web site policies and procedures for reporting alleged misconduct by instructional personnel or school administrators that affects the health, safety or welfare of a student.

The notices must include contact information for the person to whom the report should be made and the penalties to personnel and administrators who fail to report suspected child abuse or misconduct by other teachers or administrators.

# Misconduct

Educator misconduct includes:

- Obscene language
- Drug and alcohol use
- Disparaging comments
- Prejudice and bigotry
- Sexual innuendo
- Cheating or testing violations
- Physical aggression
- Accept or offer favors
- Refusing to follow the law

# Educator Ethics

Florida Educational Professional Code of Ethics, 6A-10.080, and Principles of Professional Conduct, 6A-10.081, can be found at <http://www.fldoe.org/teaching/professional-practices/code-of-ethics-principles-of-professio.shtml>

These include:

- Disparaging and embarrassing students
- Violating or denying students' legal rights
- Releasing students' private information
- Retaliation against staff that advocate for students
- Failing to stop bullying/harassment
- Intentionally suppressing or distorting information relevant to a student's academic program

# ADA Protections for Educators

Title I and Title V of the ADA cover educational staff, with some limitations for religious schools.

- **Title I prohibits discrimination** against job applicants and employees on the basis of disability and requires employers to **reasonably accommodate** employees with disabilities who are otherwise qualified to perform the **major duties** of the job.
- **Title V prohibits retaliation** against anyone who **advocates on behalf** of a person with a disability. *Ex) teachers for their students, and for their children who are students.* They do not have to have a disability.

# Employment Issues: Independent Contractors vs. Employees

New guidance and initiatives by the IRS, and plans for random audits, are making employee classification a hot-button issue

This could affect tutors, proctors, after-school program staff, coaches, arts/music instructors

Penalties for misclassification include payment of unpaid employer taxes, increased employee benefit costs, fines, personal liability for employer's officers

# Redesigned IRS Test

## Independent Contractor vs. Employee

### Three Types of Control:

- **Behavioral:** Does the employer control what the worker does and how the worker does the job; how is the worker evaluated
- **Financial:** Are business functions of the independent contractor controlled by the employer, payment, reimbursement of expenses, purchase of supplies, insurance, opportunity/responsibility for profit and loss
- **Nature of relationship:** Is there a contract or employee benefit plan? Does the worker get vacation and paid holidays? Length of relationship? Does worker have other clients?



# If you have questions

Feel free to reach out to me

Kimberley Spire-Oh, Esq.

Law Office of Kimberley Spire-Oh, PA

6141 Lake Worth Road

Lake Worth, FL 33463

Tel. (561) 307-9620

Fax (561) 537-7034

[kimberley@ksolawfirm.com](mailto:kimberley@ksolawfirm.com)

<http://www.ksolawfirm.com>

# LEGAL ISSUES THAT GET GOOD SCHOOLS/TEACHERS IN TROUBLE

Powerpoint presentation can be found at:

<http://www.ksolawfirm.com/#!/blog/c1ghi>

I can be reached at:

Kimberley Spire-Oh, Esq.

Law Office of Kimberley Spire-Oh, PA

6141 Lake Worth Road

Lake Worth, FL 33463

Tel. (561) 307-9620

Fax (561) 537-7034

kimberley@ksolawfirm.com

<http://www.ksolawfirm.com>