Legal Update for District School Administrators
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The **Legal Update for District School Administrators** is a monthly update of selected significant court cases pertaining to school administration. It is written by *Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at ***501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Abuse and Harassment
- Administrators
- Athletics
- Attendance
- Civil Rights
- Labor and Employment
- Security
- Standards and Competency
- Student Discipline
- Torts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"Elementary School Principal Turned Blind Eye to Teacher's Sexual Abuse of Students"
Sandra T. E. v. Sperlik (N. D. Ill., 639 F. Supp. 2d 912), July 23, 2009.

Evidence that a public elementary school principal turned a blind eye to reports of a music teacher's sexual abuse of his students **created fact issue** as to whether she had allowed such a climate to flourish where teacher was able to cause harm to students. Therefore, **precluding summary judgment** on behalf of the principal due to the fact that the principal provided victims' parents with a watered-down version of the students' allegations, allegedly lied to coworkers about the extent of the teacher's actions, and allegedly *failed* to impose discipline beyond mere warnings to the pervert. Furthermore, the principal was **not** entitled to qualified immunity existing from substantive due process and equal protection violations existing under the Fourteenth Amendment of the United States Constitution, along with a Section 1983 claim. **Note:** The pervert bent on sexual gratification was focused on his fetish in bondage pornography.

Administrators:

"Budget Deficit Supported Termination of Elementary School Principal"
Martinek v. Belmond-Klemme Community School Dist. (Iowa, 772 N. W. 2d 758), October 1, 2009.

Former elementary school principal (13 years) sought a review of a school board's decision to terminate her. The Supreme Court of Iowa held that (1) **A preponderance of competent evidence supported** the school board's finding that the district's enrollment (lost over 200 students) had declined so as to **support** the termination an elementary school principal's employment with the school district and (2) **A preponderance of evidence also supported** the fact that the school district was experiencing serious budgetary problems (district's solvency ration had shrunk from 25% in 2003 to 3.5% in 2006) in support of the plaintiff's employment termination.

Athletics:

"Highly Talented Basketball Player Eligible at New School"
Indiana High School Athletic Ass'n, Inc. v. Watson (Ind. App., 913 N. E. 2d 741), September 24, 2009.

Student by and through her mother, appealed a state high school athletic association decision which prohibited her from playing high school basketball at her new school because the association conclude that the move and transfer occurred primarily for athletic reasons and because of improper undue influence. The Court of Appeals of Indiana held that **evidence was sufficient to support** the lower court's finding that the state high school athletic association **acted arbitrarily and capriciously** when it declared the plaintiff's child ineligible to play basketball at her new school; furthermore, a preliminary injunction **was warranted** on the plaintiff's behalf. In addition to the aforementioned, evidence established that the student's family primarily moved because of the mother's financial difficulties and that they moved near the new school because the youngster's mother was unable to find suitable housing near the old school and wanted to be closer to her extended family so that they could provide assistance with the mother's children. **Note:** The student was a highly talented basketball player, she was named to the 2009 Indiana All-Star team and had received recruiting letters from multiple NCAA Division I programs.

Attendance:

"State's Attendance Law Could Not be Used to Impose Criminal Liability on Parents Whose Children Came to School But Cut Classes"
In re Gloria H. (Md., 979 A. 2d 710), September 14, 2009.

Defendant, a mother who allegedly permitted her high school age child to miss school, was convicted in the Circuit Court of Prince George's County, for violating the state's public school attendance law; thereupon, the defendant appealed the Circuit Court's decision. The Court of Appeals of the State of Maryland held that the defendant's conviction for violating the state's compulsory school attendance law ***required proof beyond a reasonable doubt*** that the child, rather than merely skipping a class, did not attend school. Upon entering school, the defendant's child ***was committed to the control of the state and local authorities*** and although evidence showed that the student was marked as absent from her homeroom class, **no** evidence was presented indicating whether she was absent from school. **Note:** Defendant got her daughter up to go to school and either left the house with her daughter, paid for a cab to take her daughter to school, drove her daughter to school herself, or the daughter's aunt took the youngster to school. The defendant never allowed her daughter to stay home from school. Furthermore, when the defendant received phone calls that her daughter was not at school she would leave work to go home to check in an effort to make sure she was not there, and then report to school officials. Her daughter just decided that she was not going to class once she got to school and she testified to that fact (recorded absent 74 out of 180 days).

Civil Rights:

"Banning Shirts with Printed Messages Did Not Violate the First Amendment to Free Speech"
Palmer ex rel. Palmer v. Waxahachie Independent School Dist. (C. A. 5 [Tex.], 579 F. 3d 502), August 13, 2009.

Public high school's dress code banning all shirts with printed messages, except small logos on shirts and campus principal-approved shirts that promote school clubs, organizations, athletic teams, or school spirit, and allowing political buttons and pins, did **not** violate the First Amendment right to free speech under the immediate scrutiny analysis. The school's dress code *promoted* important government interests in maintaining *an orderly and safe learning environment, increasing the focus on instruction, promoting safety and life long learning, and encouraging professional and responsible dress* for all students. The dress code was no more strict than necessary to achieve goals as it allowed speech through other mediums at school and did not restrict speech after school hours. **Note:** Student wore a shirt to school with "San Diego" written on it. Assistant principal told the student that his shirt violated the school district's dress code. Student called his parents to bring him another shirt to wear, which they did, but it was a t-shirt with "John Edwards for President 08". The student was not allowed to wear that shirt either, and process toward legal action pursued.

"Religious Music Prohibited at Graduation Ceremony"
Nurre v. Whitehead (C. A. 9 [Wash.], 580 F. 3d 1087), September 8, 2009.

High school student who was a member of the school's wind ensemble sued his school district and superintendent, claiming the violation of his First and Fourteenth Amendment rights arising out the denial of an opportunity for the ensemble to play a religious composition at high school graduation that was selected by senior members of the ensemble. The United States Ninth Court of Appeal held that school district's action in prohibiting a high school's wind ensemble from performing a religious musical work at the school's graduation ceremony, in conformity with the district's requirement that all musical performance at graduation ceremonies be entirely secular in nature, **met the requirement for avoiding a violation of the Establishment Clause of the First Amendment**. The school administration's actions prevented an excessive governmental entanglement with religion and was based on the district's intend to ensure that all music at graduation ceremonies remain secular in nature.

"Student Found Naked and Muddy After Wandering From School Was Not Deprived of His Fourteenth Amendment"
Parker v. Fayette County Public Schools (C. A. 6 [Ky.], 332 Fed. App. 229), May 22, 2009.

Sixth grade student who suffered from autism was **not** deprived of his due process rights to bodily integrity, in violation of the Fourteenth Amendment, by school or its employees when he wandered from his gym class through an open gym door into a surrounding neighborhood. With the help of local police, he was found several hours later laying naked and covered in mud a few blocks from the school. While the student was found dirty and unclothed, there was **no** evidence of any trauma or injury, physical or otherwise.

"Limited Force Used On Autistic Student Was Reasonable"
G. C. ex rel. Cosco v. School Bd. of Seminole County, Florida (M. D. Fla., 639 F. Supp. 2d 1295), June 10, 2009.

The limited incidents of physical restraint used on middle school autistic student by teacher did **not** result in an injury which rose to a level which shocked the court's conscience so as to establish a substantive due process claim under the Fourteenth Amendment. The student's teacher would restrain him to prevent him, a student known as a "runner", from attempting to run away for safety purposes. The teacher restrained the student by placing her leg over the student's legs while they waited at the school's bus stop and the amount of force used to restrain the student was **not obviously excessive, nor did it present a reasonable foreseeable risk of bodily injury**, much less a severe injury.

"School District Did Not Have Notice of Coach's Alleged Sexual Discrimination Involving Only Female Member on Football Team"
Elborough v. Evansville Community School Dist. (W. D. Wis., 636 F. Supp. 2d 812), June 23, 2009.

High school student who was the only female member of the school's freshman football team, brought action against school district and school's head football coach under Title IX, due process, and the equal protection clause of the Fourteenth Amendment. The United States District Court, W. D. Wisconsin, held that in order for the school district to be held liable under Title IX for injuries allegedly sustained by the plaintiff, who alleged that she was injured as a result of sex discrimination on the part of the head football coach. Plaintiff *was required* to show that the school district *had notice* that she was hurt as a result of intentional sex discrimination under the standard of *deliberate indifference*. The aforementioned means that *the plaintiff was required to show* that the school district made a deliberate choice to follow a discriminatory course of action from among various alternatives. Therefore, the school district did **not** have notice of alleged intentional acts of sex discrimination allegedly carried out by the high school's head football coach. **Note:** The plaintiff charged that the head football coach discriminated against her by failing to keep the girls' locker room unlocked, keeping snacks and the practice schedule in the boys' locker room where she was not allowed, and telling her that she needed to get her hair cut "like a boy".

Labor and Employment:

"No Age Discrimination in Not Promoting Employee to Assistant Superintendent"
Hill v. Augusta County School Bd. (W. D. Va., 636 F. Supp. 2d 492), July 17, 2009.

Plaintiff, then 49 years of age, holder of a doctorate degree, and a principal of a high school within his school district, applied (December 2005) for newly available position of Assistant Superintendent for Operations. Another principal within the district, who was 38 years of age, but without a doctorate (was enrolled in a doctorate program), received the position. In late April 2006, plaintiff was informed that he would not return to his current position due to a consistent record of poor performance and many student behavioral incidents throughout the school year. He did sign a contract to be the school district's Truancy Officer, but went ahead and applied for an available high school principal position within the district. The plaintiff was rejected for the principal position due to his poor performance at his previous position as a high school principal. Thereupon, the plaintiff sued the school board and superintendent, claiming discrimination in violation of the Age Discrimination in Employment Act (ADEA) in the denial of a promotional position. A United States District Court in Virginia held that the non-selection of the plaintiff was **not** motivated by age discrimination in violation of the ADEA; he was denied the position because of his poor performance as a principal in his previously assigned school.

"School District Employee Voluntarily Resigned His Position"
Brown v. Columbus Bd. of Educ. (S. D. Ohio, 638 F. Supp. 2d 856), June 30, 2009.

School district employee with an assault conviction voluntarily resigned from his job and thus could **not** maintain his legal action claim regarding a violation of his due process rights even though he was given a choice of resigning or being terminated. **Note:** While on vacation on September 24, 2005, in Washington, D. C., he was arrested for both a public disturbance and assault on a police officer; plus, disorderly conduct and simple assault.

"Teacher's Employment Terminated Due to Having Sex with a Student Twenty-Six Years Ago"
Waisanen v. Clatskanie School Dist. # 6J (Or. App., 215 P. 3d 882), July 15, 2009.

Plaintiff taught metal shop in a high school from 1977 until his termination in 2005. The plaintiff's termination was based on a complaint made in April 2005 by a former student who attended the high school in which the plaintiff taught from 1975 until her graduation in June 1979. The former student's sexual encounters with the plaintiff came to light after her husband informed the superintendent of his wife's sexual relationship with the teacher. The former student submitted to a polygraph exam to verify that she had sexual intercourse with her former teacher when she was 16 years old. The Court of Appeals of Oregon held that the results of the complainant's polygraph examination indicated that she was truthful concerning her sexual encounters with her former teacher 26 years ago and such results were adequate grounds to dismiss the plaintiff from his teaching position.

Floyd v. Amite County School Dist. (C. A. 5 [Miss.], 581 F. 3d 244), August 27, 2009.

Black former high school principal brought action against school district, school board, and others alleging a Title VII violation arising out of his termination as well as various claims under Mississippi law. The Untied States Court of Appeals, Fifth Circuit, held that plaintiff's incompetence and neglect of duty in his handling of school records and scheduling **provided good cause** for his termination under Mississippi statute governing suspension or removal of teachers and principals.

"Teacher's Behavior Did <u>Not</u> Warrant Termination"

Ripley v. Anderson County Bd. of Educ. (Tenn. Ct. App., 293 S. W. 3d 154), May 4, 2009.

On May 17, 2006, one of the plaintiff's eighth grade students walked into the school principal's office and told the principal that she was very disturbed about the plaintiff's behavior and how she had conducted her class. The principal went to the plaintiff's classroom and found her very "visibly upset" and afterward the principal escorted the teacher to her office. Thereupon the plaintiff told the principal that she was on medication for depression and that she had a doctor's appointment the next day. After the meeting the plaintiff's principal told her to go home for the remainder of the school day, afterward, the principal secured statements from 40 students who had attended the plaintiff's homeroom and reading class; plus, a compact disk entitled "The Future". A Tennessee appeals court held that although the tenured teacher (approximately 15 years of experience) broke down student class projects that had not been taken home and disposed of them in the trash, tossed gym bags and books, and played a song that delved into controversial social topics, such as politics and religion, teacher's conduct did **<u>not</u>** warrant the drastic action of termination. The teacher's actions *were a unique deviation from her usual behavior* and she was attempting to deal with her emotional difficulties (She was on prescribed medication [Effexor- an anti-depressive medication] and was under great stress due to difficulties in caring for her elderly mother.) during the time in question, and shortly thereafter had sought medical assistance. Furthermore, the teacher did *<u>not</u>* attack any of her students nor were any students harmed.

Security:

"School Owed No Constitutional Duty to Protect Student from Being Raped"
Doe ex rel. Magee v. Covington County School Dist. ex rel. its Bd. of Educ. (S. D. Miss., 637 F. Supp. 2d 392), April 27, 2009.

Parents of a nine-year-old female student, who was checked-out from her elementary school by an unauthorized individual, who then proceeded to molest, rape, and sodomize her before returning her to school filed suit against school district alleging that school officials violated their child's constitutional rights under the due process clause. A United States District Court in Mississippi held that a "special relationship" did **not** arise between a public school student attending an elementary school in compliance with Mississippi's mandatory attendance statute and school employees, solely by virtue of the fact that student was nine years old, owed **no** constitutional duty to protect the student from dangers posed by a non-state actor. **Note:** Between September 2007 and January 2009, student was checked-out of school on six occasions by a none-state actor who raped, molested, and sodomized her. The pervert had no relationship to the student and checked the victim out by representing himself to be different persons, several times as the father of the child and even one time as the child's mother. The school had a "permission to check-out form" but it was *never* consulted to determine whether the pervert was an authorized individual to check-out the student.

"Rape of School Skipper Not Foreseeable"
A. B. ex rel. C. D. v. Stone County School Dist. (Miss. App., 14 So. 3d 794), July 28, 2009.

Alleged sexual assault of a perpetually truant high school student by a school bus driver's nephew on the day that the student skipped school and went to the bus driver's home in his truck was **not** a foreseeable result of the school district's failure to exercise ordinary care in enforcing the state's compulsory attendance laws through the reporting of student's absences. The school district could **not** be held liable for the student's injuries under Mississippi's Tort Claims Act because the bus driver had been a model citizen before the incident, student's prior absences involved her leaving campus on foot, and student had *no* pattern of remaining on her school bus. **Note:** The 15 year-old had a habit of skipping some or all of her classes on an almost daily basis. She would ride the bus to school, walk to a nearby apartment complex to spend the day with her older boyfriend or other friends. She would return to the school in the afternoon to ride the bus home. The student's parents were unaware that she was missing school.

Security:

“Drug Transaction Illegal”
Com. v. Marion (Pa. Super., 981 A. 2d 230), September 2, 2009.

The Superior Court of Pennsylvania found that the Commonwealth **established by a preponderance of the evidence** that drug transaction between defendant and confidential informant occurred within 1,000 feet of a state university, as necessary to support imposition of mandatory minimum sentence of two to four years on defendant. The defendant prosecution focused on the delivery of marijuana (Undercover police officer purchased ¼ ounce of marijuana for $35.00 from defendant.) possession with the intent to deliver a controlled substance (PWID), possession of a small amount of marijuana for personal use, and criminal use of a communication facility (use of a phone to arrange purchase of illegal substance).

Standards and Competency:

“Teacher Terminated for Refusal to Earn EL Certification”
Governing Bd. of Ripon Unified School Dist. v. Commission on Professional Conduct (Cal. App. 3d Dist., 99 Cal. Rptr. 3d 903), September 29, 2009.

Tenured music teacher’s persistent refusal to comply with school district’s lawful requirement to become certified to teach English learners ***was a lawful ground on which to initiate termination proceedings*** against teacher. State law *authorized termination* of a teacher for unprofessional conduct, evidence of unfitness to service, or persistent violation of, or refusal to obey, reasonable regulations prescribed by a school district. **Note:** Teachers who teacher English to students designated as an English learner (EL) must be certified and such is monitored, along with district sanctions for school districts who fail to comply, by the State Department of Education.

Student Discipline:

“Student’s Shouting at Teacher Did Not Support Finding of Disorderly Conduct”
In re L. E. N. (Ga. App., 682 S. E. 2d 156), July 15, 2009.

Juvenile’s shouting (“I better get my fucking Sharpie back.”) in school lunchroom to teacher, who had confiscated his marker, was **not** sufficient to constitute “fighting words” so as to support finding of disorderly conduct. The mere fact that juvenile used a curse word to emphasize his statement could *not* sustain a finding of disorderly conduct. Juvenile was rude, disrespectful, and angry in conjunction with the use of profanity, but the behavior was **not** sufficient to support finding of disorderly conduct because nothing he said during the incident threatened the immediate breach of the peace or would have incited the listener to react violently to the language.

"Teachers Lacked Constitutional Standing Regarding Action against School Board for Its Refusal to Expel Students"
Lansing Schools Ed. Ass'n, MEA/NEA v. Lansing Bd. of Ed. (Mich. App., 772 N. W. 2d 784), January 27, 2009.

Teachers **lacked constitutional standing necessary** to assert action against a school board for its refusal to expel students who allegedly assaulted a teacher, where injuries allegedly sustained by teachers were **not** caused by school board but by students who were *not* parties to the action. The lack of a constitutional standing both *prevented* teachers from establishing an injury-in-fact and causal connection elements for a constitutional standing. **Note:** According to plaintiffs, students hit two teachers with a chair, one student slapped one of the teachers, and one student threw a wristband toward one of the teachers and it struck the teacher in the face. Michigan law states that school boards have the sole power to determine whether a student physically assaulted a teacher and findings by a school board are generally deemed conclusive Michigan's courts.

Torts:

"Did a Teacher Use Excessive Force Against an Artistic Student?"
M. S. ex rel. Soltys v. Seminole County School Bd. (M. D. Fla., 636 F. Supp. 2d 1317), July 10, 2009.

Genuine issues of material fact as to whether force applied to a 12 year-old student (e. g. severely autistic, mentally retarded, unable to dress himself, could not shower alone, not able to tie his own shoes, not able to use the restroom without assistance, and basically nonverbal) by a teacher was conscience-shocking, and thus excessive, whether the student suffered physical, mental, and/or emotional injuries sufficient to constitute a constitutional deprivation, and whether the teacher acted maliciously **precluded summary judgment** for the teacher on her claim of qualified immunity. **Note:** On October 22, 2004, the student refused to put a magazine down and do his class work; thereupon his teacher jerked him out of his desk, flipped his body down on his desk, placed both his arms behind him, and held his head down on the desk. The teacher held the student head so tight against the desk that "his eyes were bulging" and "his lips started turning blue". The teacher was convicted of a third-degree felony under the state of Florida's criminal codes.

"Instructional Superintendent Slipped and Fell on a Puddle of Water"
Roy v. City of New York (N. Y. A. D. 2 Dept., 885 N. Y. S. 2d 108), September 8, 2009.

An instructional superintendent allegedly slipped and fell on a puddle of water while she was exiting the lobby of a school. A New York court held that **genuine issue of material fact existed** regarding whether the puddle on the floor in the school lobby existed for a sufficient length of time for the city board of education to discover and remedy it; therefore, ***precluding summary judgment*** on the instructional superintendent personal injury claim against the board.

“First-Grade Gym Class Was Adequately Supervised”
Paragas v. Comsewogue Union Free School Dist. (N. Y. A. D. 2 Dept., 885 N. Y. S. 2d 128), September 15, 2009.

School district **provided adequate supervision** of a first-grade gym class and any alleged inadequacy in the level of supervision was **not** the proximate cause of the accident, in which a six-year-old student allegedly was injured when he accidentally collided with another student during a game. The 19 children in the gym class were playing an age-appropriate game under the supervision of a teacher with several years of teaching experience. Furthermore, the collision *was inadvertent* and more intense supervision would *not* have prevented the spontaneous and accidental collision of the two children.

“Adequate Ground Cover under Playground Slide Might Have Prevented Student’s Injuries”
Butler v. City of Gloversville (N. Y., 885 N. Y. S. 2d 245), June 30, 2009.

Infant plaintiff, by her parent and guardian, brought negligence action against city, school district, and board of education, in an effort to collect damages due to her fall from a playground slide, which fractured her clavicle and femur. The Court of Appeals of New York held that **genuine issue of material fact existed** as to whether the failure of city and school district to install protective ground cover such as pea stone at playground was the proximate cause of the child’s injuries in her fall from a slide. Thus, **summary judgment was precluded** for the city and school district in child’s personal injury action.

“School District and Teacher Were Immune from Liability for Student’s Injury during Martial Arts Class”
Noble v. W. Clermont Local School Dist. (Ohio Com. Pt., 914 N. E. 2d 1128), July 17, 2009.

High school teacher, an employee of a public school, **was immune** from liability to student (The plaintiff was on the school’s wrestling team coached by the defendant.) who suffered a dislocated elbow while participating with other students in instructor’s martial arts course. The teacher’s acts and omissions ***were within the scope of his employment*** as a physical education teacher and were ***not*** malicious ***or in bath faith or performed in a wanton or reckless manner***. Students ***were supervised*** by three different teachers and ***were instructed*** on the exercises that they were to perform. Students ***were provided with a set of safety guidelines and class rules***. Furthermore, there was **no** evidence that the teacher’s instructions or methods were performed in disregard for the care and safety of his students.

“Board <u>Not</u> Liable for Injury to Night Watchman’s Friend”
Breathitt County Bd. of Educ. v. Prater (Ky., 292 S. W. 3d 883), August 27, 2009.

Visitor to a school watchperson’s residence on an elementary school’s campus owned by the county board of education brought action against board for injuries she sustained when a structure at the residence collapsed on her. The Supreme Court of Kentucky held that the county board of education ***was engaged in a governmental rather than a proprietary function*** in providing housing for its night watchperson on a school’s premises. Thus, it **was entitled to immunity** from damages claimed within preview of the aforementioned governmental function. **<u>Note</u>:** In exchange for the watchperson’s security services at the school “seven nights a week” and such maintenance (“weed trimming, snow removal, etc.” as requested by the principal, the watchperson resided at the residence without charge.

“Football Referees Exercised Reasonable Care to Prevent Coach’s Injury at High School Football Game”
Midwest Employees Cas. Co. ex rel. English v. Harpole (Tex. App. – San Antonio, 293 S. W. 3d 770), June 24, 2009.

Workers’ compensation insurer filed suit, as subrogee (substitute for another – An insurance company often becomes a subrogee after paying a policy claim and then turns around and files a claim against the tortfeasor who injured the insured individual.) of a high school assistant football coach. The suit was against the referees, and an individual linesman referee, who officiated a football game, seeking to recover for injuries the coach sustained when the linesman referee ran into him in the referee’s restricted area during “live play”. A court of appeals in Texas held that there was **<u>no</u>** evidence that linesman referee, in running down a restricted area at full speed, without looking where he was going during live play at a high school football game, *failed* to use reasonable care in performing his services as a referee. Therefore, there was **<u>no</u>** negligence on behalf of the referee even though referee *failed* to foresee the coach’s presence in the restricted area. **<u>Note</u>:** When the referee collided with the assistant football coach, the referee had slammed into the back of the coach’s head. The coach lost consciousness and fell to the ground. As a result of the collision, the coach suffered a Grade 3 brain injury and is permanently disabled.

Commentary:
No commentary this month

Books of Possible Interest: Two recent books published by Purvis –

1. Leadership: Lessons From the Coyote, www.authorhouse.com
2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

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Abuse and Harassment:

“Sexual Conviction of Coach Was Against the Weight of the Evidence”
People v. O’Neil (N. Y. A. D. 3 Dept., 887 N. Y. S. 2d 705), October 22, 2009.

In 2005, the defendant, then 24 years old, was hired to teach physical education and coach track at a high school in Washington County, New York. Over the next two years, he worked closely with the alleged victim, the school’s best female runner, who was a 14-year-old freshman when he began coaching her. Prior to the start of her junior year, the alleged victim’s family moved to Fulton County, New York, and she enrolled in school there. Shortly thereafter, she disclosed that defendant had raped her. The defendant was charged with three counts of rape in the second degree, two counts of rape in the third degree, six counts of criminal sexual act in the second degree, three counts of criminal sexual act in the third degree, six counts of sexual abuse in the third degree, and one count of endangering the welfare of a child. All of the aforementioned charges centered on sexual contact and 10 to 15 separate instances of rape and other sex-related crimes that allegedly occurred between December 2005 and March 2007. The New York Supreme Court, Appellate Division, Third Department, stated the following: The jury’s verdict convicting the coach of sexual abuse and related contact **was against the weight of the evidence**. Students testified that they never witnessed any inappropriate behavior or inappropriate touching by the coach toward the alleged victim. Multiple witnesses, including students, testified that the alleged victim had a reputation for being untruthful. Furthermore, multiple individuals, including students, testified as to the defendant’s professional conduct and his highly respectable reputation in dealing and working with athletes and students.

Athletics:

“Visually Impaired Student Allowed to Participate in Swim Meets but Not Track and Field Meets”
Baker v. Farmingdale Union Free School Dist. (N. Y. Sup., 887 N. Y. S. 2d 766), May 22, 2009.

Student’s father petitioned for a court order to compel a school district to permit his daughter, who was classified as visually impaired (caused by neurofibromatosis), to participate in swim team and track and field athletic activities. The Supreme Court, Nassau County, New York, held **that it would be** in the best interest of the student to participate in swim team athletic events conducted by her school district. However, it would **not** be in the youngster’s best interest to participate in track and field events because the student lacked a history of successful participation in track and field events and due to her visual limitations she would have difficulty avoiding unanticipated hazards which she would encounter while being a participant in track and field events.

Civil Rights:

“Disabled Special Education Teacher’s Contract Not Renewed”
Mason v. Clayton County Bd. of Educ. (C. A. 11 [Ga.], 334 Fed. App. 191), May 19, 2009.

Terminated disabled African-American special education teacher **failed** to establish that the school district’s *legitimate, non-discriminatory reasons* for disciplining and terminating her was a pretext for disability discrimination in violation of ADA. As a footnote, the plaintiff was neither disabled nor a “qualified individual under ADA; she claimed to have a disabling eye condition.

“Prohibiting the Display of the Confederate Flag Did Not Violate the First Amendment”
A. M. ex rel. McAllum v. Cash (C. A. 5 [Tex.], 585 F. 3d 214), October 9, 2009.

Racial tension and hostility at high school (Burleson High School, Burleson, Texas) **justified** school policy prohibiting the display of the Confederate flag at the school on grounds that the display of the flag might cause substantial disruption of school activities. Therefore, the policy and its enforcement did **not** violate students’ right to free speech and expression within view of the First Amendment. The action of school officials was associated with the “racially inflammatory meaning that was associated with the Confederate flag and the school’s experiences with racially hostile graffiti, vandalism, and physical confrontation between white and black students. In addition, a Confederate flag was flown over the school’s flagpole on Martin Luther King Jr. Day and a white student simulated the lynching of an black student.

“Disabled Student Orally Raped on Schools Bus”
Lopez v. Metropolitan Government of Nashville and Davidson County (M. D. Tenn., 646 F. Supp. 2d 891), July 7, 2009.

Mother of a disabled child with autism, mental retardation, emotional disturbance, and speech and language impairments who was allegedly orally raped by an older student while riding a school bus brought legal action against city and county government and the learning center which operated a private academy that the victim attended. The legal action focused on Section 1983, Title II of the Americans with Disabilities Act (ADA), Rehabilitation Act (504), and Title IX. The United States Court, M. D. Tennessee, Nashville Division, held that: (1) the exhaustion of administrative remedies **would have been futile**; (2) fact issues **precluded summary judgment** regarding Section 1983 claim of *deliberate indifference or state created danger theory*; (3) fact issues **precluded summary judgment** on Title IX claim; and (4) fact issue as to *reasonable foreseeability* of student’s rape **precluded summary judgment** on negligence claim. **Note:** The nine year old disabled student was orally raped by a 19-year-old while riding on his way home on board his assigned school bus by the victim performing oral sex (“eating cookies”) on the older student.

Disabled Students:

"Disabled Student's IEP Was Procedurally and Substantively Correct"
T. Y. v. New York City Dept of Educ. (C. A. 2 [N. Y.], 584 F. 3d 412), October 8, 2009.

Disabled student's IEP to address his significant developmental delays and severe language disorder resulting from autism did **not substantively violate** IDEA by allegedly depriving the student of a FAPE and failing to provide a FBA (functional behavior assessment) or BIP (behavioral intervention plan) regarding the student's crying, biting his hands, pulling his hair, and other behavioral problems. The student's IEP authorized a full-time 1:1 crisis management paraprofessional, speech and language correctional services, and parent training.

Labor and Employment:

"School Custodian's Death Was Not Related to His Work – No Workers' Comp"
Frederick v. Lindenhurst Union Free School Dist. (N. Y. A. D. 3 Dept., 886 N. Y. S. 2d 518), October 8, 2009.

Death certificate and the results of an autopsy attributing school employee's death to arteriosclerotic heart disease ***were sufficient to overcome presumption of compensability*** arising from the former school custodian's workers' compensation claim. The custodian was found not breathing and unresponsive in his assigned school's boiler room during a break during his workday. There was **no** medical evidence that linked the custodian's death with his work.

"Dust Explosion at School Not Related to Teacher's Workers' Comp Claim"
Chiesa v. Stillwater Cent. School Dist. (N. Y. A. D. 3 Dept., 886 N. Y. S. 2d 780), October 8, 2009.

Workers' Compensation Board's determination that claimant ***lacked credibility and failed to establish a causally related injury that stemmed from a "supposed dust cloud"*** released during construction and asbestos abatement work at her school. The fire department, school district superintendent, the school's principal, fellow teachers, and students clearly rebutted the teacher's claim that she suffered "airway dysfunction syndrome" as a result of a dust cloud. As a footnote regarding this particular case, the principal had asked for the teacher's resignation because of her poor classroom performance just prior to "the fabricated dust cloud". By the way, medical experts testified that the teacher suffered from preexisting respiratory ailments.

"Bus Driver Report Regarding Disabled Student's Conduct was Not Protected Speech"
Isler v. Keystone School Dist. (C. A. 3 [Pa.], 335 Fed. App. 200), May 29, 2009.

School bus driver brought action against public school district and others, alleging that the district's failure to renew his contract was in retaliation for his "advocacy on behalf of a student with disabilities," in violation of his First Amendment rights. The United Stated Court of Appeals, Third Circuit, held that bus driver's report to school officials about a disabled student's behavior on his bus did **not** amount to "protected speech," for the purposes of his First Amendment retaliation claim. The court went on to state that the plaintiff ***had a duty*** "to report" any student incidents that occurred on his bus and his failure to fulfill his duty was why his contract was not renewed.

Student Discipline:

"School District Not Required to Provide Alternative Education for Suspended Student"
King ex rel. Harvey-Barrow v. Beaufort County Bd. of Educ. (N. C. App., 683 S. E. 2d 767), October 20, 2009.

School district was **not** required to provide an alternative education program for a high school student who was suspended for the remained of the school year for fighting. The plaintiff was involved in a fight at school that involved numerous students. Initially, the principal suspended the plaintiff for 10 school days, but later the student was suspended for the remainder of the school year ("long-term suspension"). **Note:** The plaintiff alleged that the school district deprived her of a free public education because the district did not provide her with an alternative education during her long-term suspension.

"School District Did Not Deprive Suspended Student of a Right to a Free Public Education"
Hardy ex rel. Hardy v. Beaufort County Bd. of Educ. (N. C. App., 683 S. E. 2d 774), October 20, 2009.

Tenth grade female student, who was involved in a multi-student fight at school and was given a long-term suspension, did **not** state a claim that a school district violated her constitutional rights to a free public education because she was not assigned to an alternative school. The long-term suspension that she received did **not** deny her of the right to an education, but rather ***denied her the right to engage in prohibited behavior*** while within a public school setting.

Torts:

"Student Raped In Middle School Restroom"
Shannea M. v. City of New York (N. Y. A. D. 2 Dept., 886 N. Y. S. 2d 483), October 6, 2009.

A special education student who was allegedly raped in a middle school restroom brought a personal injury claim against the city of New York, as the operator of the school. The New York Supreme Court, Appellate Division, Second Department, held that: (1) Schools are **not** insurers of their students' safety, but they are under an obligation to provide such care as a reasonable prudent parent and (2) City could **not** find that the city was negligent unless it had "actual or constructive notice of prior assaults in the school's restrooms. **Note:** An expert testified for the plaintiff that middle school restrooms were "notorious" for incidents, including fights, but such testimony was not relevant to the case because *the issue was whether the incident even occurred*.

“Spectator Hit in the Head While Watching a Baseball Game”
Vivyan v. Ilion Cent. School Dist. (N. Y. A. D. 4 Dept., 886 N. Y. S. 2d 268), October 2, 2009.

Genuine issues of material fact **existed** as to whether a baseball game organizer (Ilion Memorial Post #920, American Legion, Inc.) and school district that owned the baseball field satisfied their duty of care to protect spectators from baseballs; thus, ***precluded summary judgment*** in spectator’s action to recover for personal injuries sustained when he was struck in the head by a baseball while watch a game. **Note:** Plaintiff was seated in an unscreened bleacher located behind the first baseline when the baseball struck him.

“School District Was an Additional Insurer”
Stillwater Cent. School Dist. v. Great American E. & S Ins. Co. (N. Y. A. D. 3 Dept., 887 N. Y. S. 2d 719), October 29, 2009.

School district brought action against youth football league’s insurer, seeking declaration that insurer had a duty to defend and indemnify (a duty to make good regarding a loss or damage) the district in underlying action that arose out of a spectator’s fall from bleachers on a football field owned by the school district. The New York Supreme Court, Appellate Division, Third Department, held that the school district, as owner of the football facility that was loaned to the youth football team that was a member of a youth football league, was an additional insurer, within the meaning of endorsement within the youth football league’s insurance policy that modified the policy to include as an additional insurer any owners of premises loaned to the league.

“Issue Regarding Sexual Abuse of Student Teacher was Foreseeable Which Precluded Summary Judgment for a School District”
Canaday v. Midway Denton U. S. D. No. 433 (Kan. App., 218 P. 3d 446), October 30, 2009.

Plaintiff was allegedly sexually abuse on as many as 100 occasions between the ages of 12 and 17 by Robert Baird, his counselor, coach, and teacher. Thus, former student brought negligence and intentional tort action against his former school district based on the alleged sexual abuse by his former teacher. The Court of Appeals of Kansas held that genuine issue of material fact as to whether school district had notice of teacher’s propensities, and thus whether teacher’s alleged sexual abuse of student was foreseeable, **precluded summary judgment** on student’s negligence and intentional tort claims against his former school district.

Commentary:
No commentary this month

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Legal Update for District School Administrators April 2011

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The **Legal Update for District School Administrators** is a monthly update of selected significant court cases pertaining to school administration. It is written by *Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at ***501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Civil Rights
- Labor and Employment
- Student Discipline
- Torts

Topics

<u>Civil Rights</u>:

"Instruction Coach Transferred to Teaching Position Due to Her Blog"
Richerson v. Beckon (C. A. 9 [Wash.], 337 Fed. App. 637), August 27, 2009.

Plaintiff (Richerson) alleged that defendant (Beckon – Director of Human Resources at Central Kitsap School District) involuntarily and unconstitutionally transferred her from her position as a "curriculum specialist/instructional coach" into a classroom teaching position in retaliation for the exercise of her First Amendment rights as associated with her personal internet blog. The case focused on the undisputed fact that the position from which the plaintiff was transferred required that she enter into a trusting mentor relationship with other, less-experienced teachers in order for her to give honest, critical, and private feedback. The plaintiff's publicly-available blog included several highly personal and vituperative (to speak abusively to or about) comments about her employers, union representatives, and fellow teachers. Although plaintiff did not refer to these individuals by name, many were easily identifiable by the description of their positions or their personal attributes. When the blog came to light, defendant received several complaints from teachers and other employees of the school district, including at least one person to whom the plaintiff was assigned as an "instructional coach" who thereafter refused to work with her. The defendant transferred plaintiff on the grounds that her blog had fatally undermined her ability to enter into a trusting relationship as an instructional coach. The United States Court of Appeals, Ninth Circuit, held that the decision to transfer the plaintiff did **<u>not</u>** violate her First Amendment free speech rights.

"School Police Officer Had Probable Cause to Arrest Student for Criminal Trespassing"
Williams v. Underhill (C. A. 9 [Nev.], 337 Fed. App. 688), July 7, 2009.

Under Nevada law, high school students did ***not*** have contractual right to remain on school property after the period of compulsory attendance ended, or to remain on school property after they were asked to leave. Therefore, school police officer **had probable cause** to arrest high school students for criminal trespassing.

"School's Dress Code Ban on Racially Divisive Symbols Did <u>Not</u> Violate Student's Free Speech Rights"
Defoe, ex rel. Defoe v. Spiva (E. D. Tenn., 650 F. Supp. 2d 811), August 11, 2009.

High school's dress code's ban on racially divisive symbols, including the Confederate flag, did **<u>not</u>** violate students' free speech rights; especially in light of a reasonable potential of such symbols causing a material and substantial disruption to school work and school discipline. The high school had a history of racial tension and conflict, including one incident in which a large confederate flag was hung in the school's hallway two days after two African-American students enrolled along with racial graffiti written within and around the school's facilities.
<u>Note</u>: Plaintiff violated the school's dress code on a number of occasions by wearing a t-shirt with a Confederate flag, wearing a belt buckle depicting the Confederate flag, and other articles of clothing depicting the aforementioned flag. He was suspended from school for his offenses and stated that his father had told him about his ancestors and heritage and that the flag represented his heritage.

“Officers Who Searched High School Soccer Team Had Qualified Immunity”
Lopera v. Town of Coventry (D. R. I., 652 F. Supp. 2d 203), September 9, 2009.

On September 28, 2009, the Central Falls School boys soccer team played an away game against Coventry High School. After arriving at Coventry High School several of the Central Falls team members used the restroom inside the Coventry boys locker room. After the soccer game approximately 20 members of the Coventry High School’s football team stopped the Central Falls soccer coach and accused his soccer team members of stealing electronic devices (iPods and cell phones) from their locker room. Thereupon the Central Falls coach and assistant coach searched their team members, who were already on the team’s bus, and did not find any of the missing items. In the mean time, a rather large crowd gathered around the school bus and shouted racial (several of the Central Falls team members were Hispanic) epithets and accusations of theft. Soon thereafter police arrived on the scene and in an effort to demonstrate that his players did not steal the missing items, agreed to allow the police officers search each member of his soccer team. The search of the team by the police lasted approximately one hour and none of the missing items were found. Thereupon several members of the Central Falls soccer team filed suit against the town, police chief, and the police officers who participated in the search claiming that their civil rights were violated and they were humiliated in front of the large crowd that has gathered around their school bus. The United States District Court, D. Rhode Island, held that neither the officers nor any of the other defendants violated the plaintiffs’ civil rights and all defendant parties **were eligible for qualified immunity** under both Rhode Island and federal laws.

Labor and Employment:

“School District Employee’s Complaints Were Not Protected by the First Amendment”
Converse v. City of Oklahoma City (W. D. Okla., 649 F. Supp. 2d 1310), July 23, 2009.

A school district employee’s complains about a campus police officer’s treatment of students at a high school in her school district and about an African-American student’s suspension were made **pursuant to the employee’s official duties**, and as such, was **not** protected speech under the First Amendment of the United States Constitution. The complaints were made during working hours; the comments about the officer were made at a meeting scheduled by the employee’s supervisor for the purposes of discussing the officer’s conduct. The complaint about the student’s suspension was made when the plaintiff notified the school district’s legal counsel that the student’s rights had been violated; such complaint was made in the employee’s capacity as a school district employee who was charged with the responsibility for assuring a safe learning environment for students and that students receive their due process rights. **Note**: Shortly after the aforementioned occurred, the plaintiff was transferred from the position of Executive Director of Student Performance (Plaintiff supervised principals at 15 schools.) to Executive Director of School and Community Services. Employee complained that the transfer was in retaliation for the exercise of her First Amendment rights and her attempt to assist an African American student.

“Former At-Will Police Officer Did Not Have to Exhaust Administrative Remedies before Bringing Retaliatory Discharge Claim”
Larsen v. Santa Fe Independent School Dist. (Tex. App.-Hous. [14 Dist.], 296 S. W. 3d 118), July 28, 2009.

Plaintiff began working as an at-will police officer for the defendant October 16, 2003. He was injured while participating in a work-related training exercise on October 5, 2005 and took a leave of absence from his job. The defending school district reported the plaintiff’s injury to its workers’ compensation administrator on October 11, 2005. Plaintiff began receiving workers’ compensation benefits thereafter. On January 23, 2006, the school district’s superintendent sent a letter to the plaintiff informing him that his FMLA and other leave time expired on January 18, 2006, and due to such, he was terminated from his employment with the district due to his inability to return to work. A Texas court of appeals held that plaintiff’s retaliatory discharge claim against the defendant did **not** involve “school laws of the state” and therefore the former police officer did **not** have to exhaust the school district’s administrative remedies prior to bringing his claim to the courts.

“White Applicants Were Better Qualified Than Black Applicant”
Dunklin v. Montgomery County Bd. of Educ. (M. D. Ala., 652 F. Supp. 2d 1226), August 24, 2009.

African-American employee (plaintiff) brought action against the defendant alleging racial discrimination under Title VII due to the defending school district not promoting him on two different occasions. A United States District Court in Alabama ruled that even if plaintiff was an above-average worker, any disparity between his and white applicant’s qualifications **were not strong enough** to warrant a reasonable fact-finder to disbelieve defendant’s reasons for promoting white applicant over plaintiff were racially based. Therefore, plaintiff did **not** establish that defendant’s reasons for promoting white applicant were a pretext for racial discrimination under Title VII.

Religion:

“School District’s Policy Which Prohibited Celebratory Religious Music at School Events Had a Secular Purpose”
Stratechuk v. Board of Educ., South Orange-Maplewood School Dist. (C. A. 3 [N. J.], 587 F. 3d 597), November 24, 2009.

Father and legal Guardian of two minor children brought action against a New Jersey school district alleging that the district’s policy prohibiting the performance of celebratory religious music at school-sponsored events was unconstitutional. The United States Court of Appeals, Third Circuit, held that the school district’s policy which prohibited the performance of celebratory religious music at school sponsored-events did **not violate** students’ or parents’ First Amendment right to receive information and ideas, right to learn, and right to academic freedom. Furthermore, the contested school-sponsored concerts were **not** public forums and as such, **were reasonably related** to legitimate pedagogical concerns.

“Plan to Close an Elementary School and Sell the Real Estate Did <u>Not</u> Violate the Establishment Clause”
Incantalupo v. Lawrence Union Free School Dist. No. 15 (E. D. N. Y., 652 F. Supp. 2d 314), August 24, 2009.

Consolidation plan of village school district, in which Orthodox Jews allegedly held a majority of the seats on the village school board, to close the largest and newest elementary school in the district and sell the real estate did **<u>not</u>** violate the equal protection clause of the First Amendment.

<u>Student Discipline</u>:

“Facts Existed as to whether Strip-Search of Students for iPod violated Their Fourth Amendment Rights”
Foster v. Raspberry (M. D. Ga., 652 F. Supp. 2d 1342),

According to a United States District Court in Georgia, **genuine issues of material fact**, regarding whether school district officials violated clearly established federal rights of which *reasonable officials would have know*n in conducting a strip-search of a high student to locate an electronic device (iPod), **precluded summary judgment on qualified immunity defense** to claim brought under the Fourth Amendment of the United States Constitution. **<u>Note</u>:** The situation arose after a junior ROTC instructor confiscated an iPod from one of his students and while he was using the restroom another student retrieved the contraband iPod from his desk drawer.

“Students Due Process Rights Were <u>Not</u> Violated Due to Their Long-Term Suspensions”
Hardy ex rel. Hardy v. Beaufort County Bd. of Educ. (N. C. App., 685 S. E. 2d 550), November 17, 2009.

Given that high school students admitted their involvement in an altercation that led to their long-term suspensions, students **could <u>not</u> prove** that the school board’s due process procedures violated their due process rights. Even if their due process rights were violated as alleged by the plaintiffs, *students admitted guilt, were provided ample opportunities to argue their case in administrative hearings* provided by both school officials and the district’s board of education; thus, prejudice by the board could **<u>not</u>** be demonstrated.

Torts:

"Issues as To Whether District's Employees Reasonably Suspected Child Abuse Barred Summary Judgment in Mother's Defamation Action"
Biondo v. Ossining Union Free School Dist. (N. Y. A. D. 2 Dept., 888 N. Y. S. 2d 75), October 13, 2009.

While visiting the defending school district's "Little School" classroom for two-year-old children, the coordinator of the program observed the plaintiff hit her son on his hand hard enough to leave a red mark when he threw a cookie during snack time. Soon thereafter, the coordinator reported the incident to the State's Child Protective Services. The plaintiff reported that she merely tapped her son's hand when he threw the cookie and told him softly, "Don't do that, it's not nice." Thereupon, the plaintiff brought action against the school district and two of its employees alleging negligence and defamation arising from the report of mother's alleged child abuse or mistreatment. The New York Supreme Court, Appellate Division, Second Department, held that **genuine issues of material fact existed** as to whether school district employees had *reasonable cause* to suspect possible child abuse or maltreatment of the child by his mother and if those defendants reported such alleged child abuse or maltreatment *in good faith*. Thus, summary judgment on behalf of the defending school district and employees was **precluding** due to sufficient evidence presented by the plaintiff in her negligence and defamation claim against defendants.

"School District Found Negligent After a Student Was Cut With a Scalpel in an Eighth Grade Science Class"
Heuser ex rel. Jacobs v. Community Ins. Corp. (Wis. App., 774 N. W. 2d 653), September 30, 2009.

School district **was found negligent** with respect to a cut sustained by a student in an eighth grade science class while trying to remove a cover from a scalpel prior to dissecting a flower. Two students had been cut by scalpels during an earlier class on the same day and the teacher ***took no precautionary measures*** to deal with the danger after the earlier incidents.

“School District and Employees Had Immunity from Wrongful Death Claims after High Needs Student Choked”

Boever v. Special School Dist. of St. Louis County (Mo. App. E. D., 296 S. W. 3d 487), September 22, 2009.

Wrongful death **claims** that a public school student’s parents asserted against the student’s teacher and two of the student’s aides were **not based on the failure to perform a “ministerial duty”**, and thus, **were barred by official immunity**. This was despite allegations that the teacher and aids were liable for the student’s death by choking in that they knew the student suffered from severe functional limitations, which include the propensity to choke, but failed to properly supervise the student. The plaintiff did not assert that a statute or regulations imposed a duty to give constant, individualized supervision. **Note:** The child could not be left unsupervised with food or any inedible objects in or near his reach, and that leaving him in such a situation would pose an immediate danger to his health, safety, wellbeing and life.

“Question: Was a Craft Vendor an Invitee or Licensee of a School”

Cotton v. St. Bernard Preparatory School (Ala. Civ. App., 20 So. 3d 157), April 10, 2009.

Genuine issue of material fact as to whether craft vendor who paid fee to school in order to participate in arts-and-crafts festival on school campus was an invitee or a licensee **precluded summary judgment** in vendor’s personal injury action against school to recover for arm injuries she sustained when she tripped and fell on an uneven sidewalk. **Note:** The sidewalk in question was located between the vendors’s automobile and her booth. After crossing the sidewalk several times without incident, she tripped on an uneven portion of the sidewalk and fell, fracturing her left arm, which required surgical repair.

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Legal Update for District School Administrators
May - June 2011

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- Civil Rights
- Extracurricular Activities
- Labor and Employment
- Religion
- Security
- Seniority and Tenure
- Student Discipline
- Torts
- Transportation

Topics

Civil Rights:

"Principal's Sexual Display toward School Counselor Did Not Rise to the Level of Adverse Action under Title VII"
Steele v. Mayoral (Or. App., 220 P. 3d 761), November 4, 2009.

Plaintiff filed legal action against her principal and school district alleging sexual harassment, negligence, and retaliation. The plaintiff, a counselor in the high school in which the defendant served as her supervising principal began seeing each other during non-work activities which included going to dinner, seeing a movie, and shopping. According to the plaintiff, she explained to the defendant that she was interested in a social relationship and not a sexual relationship. However, on the night of March 4, 2002, the defendant allegedly physically and sexually assaulted the plaintiff at his home. Once school officials learned of the incident, the defendant was placed on paid administrative leave pending an investigation of the alleged incident. During the two months in which it took to complete the investigation, the plaintiff stated that she felt uncomfortable at work, perceived some conduct by her coworkers as retaliatory, and on one occasion found her office unlocked and the thermostat turned-up. In July 2002, after reading the written report of the investigation, the superintendent notified the defendant that she intended to recommend that the board terminate his employment with the school district. In the mean time, the plaintiff expected the defendant to fight his dismissal "vigorously" and return to his position as principal of the high school; thereupon, she resigned her position in July 2002. The defendant resigned the following month. The Court of Appeals of Oregon, held that plaintiff did **not** experience a materially adverse employment related action, as would support a retaliation claim under Title VII; furthermore, the school district **did** investigate and discipline her supervising principal.

"Evidence Supported Coach's Use of Corporal Punishment"
Nolan v. Memphis City Schools (C. A. 6 [Tenn.], 589 F. 3d 257), December 11, 2009.

Evidence was sufficient to show that a public high school basketball coach's use of corporal punishment against a basketball player was **not unreasonable or excessive** and therefore **would not support** assault and battery charges brought on behalf of the student against his coach. Testimony was presented that the coach paddled the player on several occasions because the student was referred to him by teachers based on misconduct during their classes, he paddled the youngster once or twice for a bad conduct grade on his report card, and paddled him occasionally for improper basketball technique when he perceived the improper techniques were the product of the player's not paying attention or horsing around during basketball practice. In addition, the plaintiff stated that he was *not* seriously injured from the "corporal punishment" that he received from his coach. In addition, the court went on to state that the corporal punishment that the plaintiff received was **not** conscience-shocking, disproportionate, or inspired by malice or sadism. **Note:** The plaintiff never complained to the high school principal or anybody else about being paddled; furthermore, he never sought medical treatment for physical injuries resulting from the "board of education being applied to the seat of learning".

“School District Policy of Restricting the Distribution of Religious Related Pencils, Candy Canes, Tickets, and Other Items Was Constitutional”

Morgan v. Plano Independent School Dist. (C. A. 5 [Tex.], 589 F. 3d 740), December 1, 2009.

Plaintiffs, four families with students in the Plano Independent School District, alleged that over a three-year period students were not allowed to distribute various religious items, which included pencils (inscribed with “Jesus is the reason for the season”), candy canes (describing their Christian origin), tickets to a church’s religious musical programs, and tickets to a dramatic Christian play in their schools. The United States Court of Appeals, Fifth Circuit, held that under the *“time, place, and manner test”*, the school district’s policy restricting students’ distribution of religious materials, which permitted such distribution during (1) 30 minutes before and after school, (2) three annual parties, (3) recess, and (4) school hours, but only passively at designated tables, which allowed middle and high school students to distribute materials in cafeterias and hallways during non-instructional time - otherwise such distribution was generally prohibited, was in fact constitutional within review of the Establishment Clause of the First Amendment of the United States Constitution. Thus, based on the aforementioned**, the school district’s policies and related administrative procedures were reasonable and facially constitutional, regulations were content-neutral, district had a significant legitimate interest in providing a focused learning environment, and policy was sufficiently narrowly tailored.** Furthermore, the district’s policies and related procedures **served the powerful interests of the various schools within the school district to maintain order and discipline, which are essential both to its duty to teach and to protect the freedoms of its students.** In addition, students **had ample alternative channels for communicating and distributing their materials**.

“Fifth Grade Student Suspended for Writing ‘Blow up the School with All the Teachers in It’ During a Class Assignment”

Cuff ex rel. B. C. v. Valley Cent. School Dist. (C. A. 2 [N. Y.], 341 Fed. App. 692), July 21, 2009.

The United States Court of Appeals, Second Circuit, held that *allegations* by the parents of a ten-year-old student (5th grader) that their son’s suspension from school for 6 days, for writing “blow up the school with all the teachers in it” on an in-class assignment, *violated* his First Amendment free speech rights **were sufficient to state a claim** under Section 1983 (pertains to a federal law which enables an individual to file suit for monitory damages when one’s civil rights are violated). Furthermore, the court concluded that it was reasonable as a matter of law to ***not foresee*** a material and substantial disruption to the school environment. The student’s apparent threat was made in crayon in direct response to an in-class assignment. In addition, the student did *not* show the assignment to any classmates and handed it directly to his teacher after completing the assignment. In addition, the student had *no* other disciplinary history that would suggest a violent tendency.

"Assistant Principal's Refusal to Engage in Professional Misconduct May Not Have Been Protected Speech"
Fierro v. City of New York (C. A. 2 [N. Y.], 341 Fed. App. 696), July 27, 2009.

Assistant principal brought state court action against city, city department of education, former principal, and several superintendents and deputy superintendents, alleging hostile work environment, sexual harassment, retaliation, and violations of free speech rights in violation of federal law and the city's human rights law. The plaintiff stated that he exercised his First Amendment rights as so associated with free speech when he refused to follow his supervising principal's order to submit false and damaging information (sabotage) about two classroom teachers at his assigned school. Furthermore, the plaintiff stated that his principal subsequently retaliated against him in violation of the First Amendment by creating a hostile work environment for him and by transferring him to a location with inferior working conditions. The United States Court of Appeals, Second Circuit, held that it was **not clearly established** that an assistant principal's refusal to abide by an alleged instruction to engage in misconduct *was protected speech* under the First Amendment of the United States Constitution. Therefore, the plaintiff's supervising principal **was entitled to qualified immunity** on the assistant principal's retaliation claim.

"School Employee's Report of Various Irregularities within His School District Was Not Protected Speech"
Anderson v. Douglas County School Dist. 0001 (C. A 8 [Neb.], 342 Fed. App. 223), August 14, 2009.

Speech made in the course of school district employee's duties as the coordinator of technical support for information for the district's management services department, which concerned possible pay irregularities, invalid contracts, and a discrepancy in budgetary funds, was **not** protected speech under the First Amendment.

Extracurricular Activities:

"Parochial School Student Could Compel Public School District to Permit Him to Participate in School Sponsored Extracurricular Activities"
Trefelner ex rel. Trefelner v. Burrell School Dist. (W. D. Pa., 655 F. Supp. 2d 581), September 2, 2009.

The parents of a *parochial school* student who, as the result of a school district policy (based on state law) that required students to be enrolled in the school district in which they resided in order to participate in extracurricular activities offered by the school district, filed suit against the defendant school district because their son was not allowed to participate in the public high school's marching and jazz bands. **Note:** Pennsylvania law permitted *home schooled* students and under certain situations *charter schooled* students to participate in extracurricular activities offered by school districts. A United States District Court in Pennsylvania held that the school district's policy was **not** *facially neutral or generally applicable* and would thus be subject to heightened scrutiny on a challenge that such a policy violated the *free exercise of religion*. Therefore, the plaintiffs *were likely to succeed* on the merits of their claim that the policy was *not* facially neutral.

"Teacher Injured While Chaperoning High School's Ski Club Eligible for Workers' Compensation Benefits"
Case of Sikorski (Mass., 918 N. E. 2d 30), December 11, 2009.

A mathematics teacher who was injured in a skiing accident while serving as a volunteer chaperone during a ski trip for a city's high school's sponsored ski club **was acting in the course of her employment** rather than merely engaging voluntarily in a recreational activity when she was injured; thus, the plaintiff **was eligible for workers' compensation benefits**. It was customary for teachers to serve as chaperones for the ski club's trips and to perform many of their functions as teachers (e. g. supervising students, enforcing school rules, and monitoring student safety,); furthermore, the chaperones were expected to ski with their students.

Labor and Employment:

"Stated Reason for Discharge of Employee Was Not Pretext for Discrimination"
Crary v. East Baton Rouge Parish School Bd. (C. A. 5 [La.], 340 Fed. App. 239), August 6, 2009.

Even if 63-year-old white female special education director was constructively discharged and replaced by a younger black male, the school board's stated reason for discharge (Plaintiff had mishandled the reporting of special education students to the Louisiana Department of Education with disastrous consequences.) was **not** pretext for discrimination on the basis of race, sex, or age as would violate Title VII or the Age Discrimination in Employment Act (ADEA). The only evidence of discrimination was a statement by the head of the board's human resource department that it was important to the superintendent that the board projected an image of youth and vitality when recruiting new teachers, which did *not* implicate the director's position or responsibilities.

"Math Teacher Not Terminated Due to Her Involvement in Discrimination Case against Her Supervisor"
Chawki v. NYC Bd. of Educ. (C. A. 2 [N. Y.], 341 Fed. App. 660), June 5, 2009.

High school math teacher **failed** to establish, through timing alone, that her termination was based on retaliation for her involvement in another teacher's discrimination case against her supervisor. The plaintiff's first "unsatisfactory" review after five years of "satisfactory" evaluations came just five weeks after she submitted an affidavit accusing her supervisor of discriminating against another teacher. The plaintiff's supervisor had been critical of her performance before, had given her unsatisfactory evaluations twice earlier when she was a new teacher, and would have given her unsatisfactory evaluations after but for the intervention of a new principal.

"School District Did Not Violate ADA's Reasonable Accommodations Requirement as so Pertaining to Creating a New Position for a Teacher"
Johnson v. Cleveland City School Dist. (C. A. 6 [Ohio], 344 Fed. App. 104), August 25, 2009.

School district did **not** violate ADA's reasonable accommodations requirement by failing to create an "academic interventionist" position for an elementary school classroom teacher with *cervical myelopathy* (a degenerative condition that affects the nervous system) by failing to provide her with a position associated with teaching a small group of students. Simply put, such a teaching position did not exist in the school district.

“School District’s Expungement of Teacher’s Employment File Rendered His Suit Moot”
Robinson v. Alief Independent School Dist. (Tex. App.-Hous. [14 Dist.], 298 S. W. 3d 321), August 25, 2009.

Plaintiff, a teacher with the defending school district during the 2004-2005 school year, contends that in the fall of 2004 he had a brief romantic relationship with a fellow female employee. In addition, the plaintiff claims that the female in which he had the romantic relationship and a male employee in the district’s human resources department began a campaign against him in an effort to tarnish his reputation as an educator. In August 2005, he resigned his teaching position due to a stress-related medical disorder. Upon receiving the plaintiff’s resignation, the school district expunged his employment records with the school district that had any reference to his alleged romantic relationship with a district employee along with any references or documents pertaining to other comments or statements by other school district employees. The Court of Appeals of Texas, Houston (14th District), held that the plaintiff’s action against his former school district and it superintendent seeking injunctive relief to expunge portions of his employment file relating to controversy over which he resigned his position **was rendered moot** upon the district’s decision to expunge portions of the plaintiff’s employment file; accordingly, there was *no more action* that a court enjoin to satisfy the teacher’s request in regard to expunging his employment records.

<u>Religion</u>:

“Teacher Entitled to Immunity after Disapproving Student’s Religion”
C. F. v. Capistrano United School Dist. (C. D. Cal., 656 F. Supp. 2d 1190), September 15, 2009.

Plaintiffs filed suit on behalf of their son who stated that his high school teacher in Advanced Placement European History made a statement toward him that indicated “hostility toward his religious beliefs and that such statement favored *irreligion* over religion”. **<u>Note</u>:** Irreligion is an absence of, indifference towards, or hostility toward religion which could include antitheism, agnosticism, religious skepticism, and so forth. A United States District Court in California held that the teacher *did* violate the student’s First Amendment rights by making a statement improperly disapproving of the plaintiffs’ youngster’s religious beliefs; thus, a violation of the Establishment Clause. However, the teacher **was entitled to immunity** because the law was **<u>not</u>** clearly established at the time the teacher made the statement and that the parties did <u>not</u> present any cases in which a constitutional violation was found based on one or even a few hostile or disapproving statements made within a public school classroom academic setting.

Security:

“Teacher Did Not Breach His Duty by Failing to Supervise Tardy Students Who Got Into an Altercation”

Medeiros v. Sitrin (R. I., 984 A. 2d 620), December 11, 2009.

High school marine occupations (e. g. boat building, painting, welding, and fisheries) teacher did **not** breach his duty to supervise students by failing to prevent an altercation between two tardy students that occurred in his marine occupations laboratory that adjoined his classroom, which resulted in the plaintiff fracturing his ankle. There was no evidence of a specific act or omission of the teacher that indicated that he deviated from proper standard of care or evidence pertaining to supervisory expectations of a teacher regarding tardy students. The teacher actively fulfilled his obligations when he took class attendance in his classroom and observed his student for any “signs” that would indicated that they would not be able to participate in class activities. On the other hand, while the teacher did not position himself to “maximize” his view of his lab, he still had a partial view of the lab; and he heard the “just seconds-long” altercation that occurred and immediately entered his lab to assist the injured student.

“Teacher Possesses Firearm at School”

Doe v. Medford School Dist. 549C (Or. App., 221 P. 3d 787), November 18, 2009.

Plaintiff’s school district adopted a policy that prohibited their employees from possessing firearms on school district property or at school-sponsored events. Plaintiff, a classroom teacher, wished to carry a handgun while teaching and thereupon initiated legal action to challenge the lawfulness of the policy. The plaintiff was licensed to carry a concealed handgun and desired to carry her firearm with her at all times because she feared a violent confrontation with her former husband. The Court of Appeals of Oregon held that school district’s policy of prohibiting school district employees from possessing firearms on school district property did **not** represent the sort of exercise of “authority to regulate” firearms that the state statute “preempted” (to take the place of or to supplant).

Seniority and Tenure:

“Terminating a Teacher’s Contract and Sharing A Probationary Teacher With Another School District Did Not Constitute A Reduction in Force (RIF):

Miller v. School Dist. No. 18-0011 of Clay County (Neb., 775 N. W. 2d 413), December 4, 2009.

The termination of the contract of a permanent certificated art teacher (employed 23 years) who had been employed by a school district on a half-time basis and replacing her with a probationary art teacher employed by another school district and shared on a half-time basis pursuant to an “interlocal agreement” did **not** constitute a “reduction in force” as so defined as a basis for the termination of a teacher’s contract under state statute. The school district was not paring its staff to meet a reduced need, but rather was changing the method by which it secured the services of a half-time equivalency art teacher in order to save money.

<u>Student Discipline</u>:

"Student Throws Book at Teacher"
In re Shenay W. (N. Y. A. D. 1 Dept., 891 N. Y. S. 2d 67), December 17, 2009.

Evidence that juvenile threw a book containing cassettes at her teacher, which struck the teacher in the head and caused physical injury, **was sufficient** to support the determination in juvenile delinquency proceeding that the juvenile committed acts, which if committed by an adult, would have constituted second-degree physical assault.

<u>Torts</u>:

"School District Was <u>Not</u> Liable for the Alleged Sexual Molestation of a Kindergarten Student on a School Bus"
Andrew T. B. v. Brewster Cent. School Dist. (N. Y. A. D. 2 Dept., 889 N. Y. S. 2d 240), November 17, 2009.

The plaintiff's kindergarten age son was allegedly sexually molested by two second or third grade students while seated toward the rear of a school bus on his way home from school. The plaintiff commenced legal action to recover damages for personal injuries, alleging negligent supervision, training, and hiring. The Supreme Court of New York, Appellate Division, Second Department, held that the school district ***had neither actual nor constructive notice of any prior conduct similar to that claimed*** by the kindergartener who was allegedly sexually molested by two students while seated in a school bus on his way home after the end of the regular school day; thus, **precluding the imposition of liability** against the defending school district.

"Student Hit by a Vehicle after Smoking a Cigarette across the Street from Her School"
Dalton v. Memminger (N. Y. A. D. 4 Dept., 889 N. Y. S. 2d 785), November 13, 2009.

Prior to the start of the school day, plaintiff crossed the street in from of her high school to smoke a cigarette and upon attempting to cross-back over to her school was struck by a vehicle. The plaintiff claimed that school officials failed to properly supervise her and ensure her safety. By the way, this happen despite the fact that the school district provided a traffic light, crosswalk, and a crossing guard at an intersection within a very short distance from the spot where the plaintiff's injury. Supreme Court of New York, Appellate Division, Fourth Department, stated that the school's duty to its students **is coextensive with physical custody and control over them** and when a student is injured off school premises, a school district **<u>cannot</u> be held liable for breach of their duty** which *"generally"* extends only to the boundaries associated with school properties.

“Pedestrian Slipped and Fell on School’s Sidewalk”
Gary Community School Corp. v. Roach-Walker (Ind., 917 N. E. 2d 1224), December 10, 2009.

On Saturday, February 5, 2005, plaintiff took her children to a middle school to attend enrichment classes that were being conducted by an independent nonprofit organization. As the plaintiff approached the entrance to the school, she slipped and fell on the walkway. A nearby witness described the area where the plaintiff slipped as “slick” and “wet looking”. No evidence established that there had been any recent rain, snow, or sleet; however, there was testimony that there had been no precipitation that day or the night before the accident. The Supreme Court of Indiana held that the school district was **not** entitled to immunity from liability under Indiana’s tort claims act ***absent*** any showing by the school district that the plaintiff’s injuries from her slip and fall incident occurred as a result of a temporary weather condition and prior to the time in which the school was reasonably required to respond to the condition by clearing the sidewalk or otherwise remedying its slick surface.

“Children between Seven and 14 Were Presumed Incapable of *Contributory Negligence*”
Clay City Consol. School Corp. v. Timberman (Ind., 918 N. E. 2d 292), November 30, 2009.

Thirteen-year-old junior high student attended basketball practice on Monday, November 17, 2003, and sometimes during practice blacked-out. The coach immediately notified his mother; she came and got him, and took him to a medical doctor. The attending physician stated that he could walk through plays during practice beginning the following day, but could not participate in any running or other strenuous activities. During Wednesday’s night practice of the same week, and without his doctor’s clearance, the youngster participated in basketball practice without any restrictions; thereupon, he collapsed and died while participating in a running drill. His parents brought a wrongful death action against the school district arising out of the death of their son, along with claiming that the school district was negligent. The school district defense was that the student negligently contributed to his own death. The Supreme Court of Indiana held that children between the ages of seven and 14 **are presumed to be incapable of contributory negligence**.

“Youth Director of Summer Program Slipped and Fell on School’s Restroom Floor”
Cotto v. Board of Educ. of City of New Haven (Conn., 984 A. 2d 58), December 15, 2009.

Youth director for the Latino Youth Development, Inc. that ran a summer program (The entity did not pay any rent or fees for the use of the facility.) at a public school brought negligence action against a board of education, superintendent, and the principal of the school at which the plaintiff slipped and fell on a wet bathroom floor. The Supreme Court of Connecticut held that all the defendants **had qualified immunity** from liability *because the risk of specific harm* to the director as a specific identifiable person *was not sufficiently immediate* because any person using the restroom could have slipped at any time.

"Student Struck on His Shin by a Hockey Ball during Gym Class"
Spaulding v. Chenango Valley Cent. School Dist. (N. Y. A. D. 3 Dept., 890 N. Y. S. 2d 162), December 3, 2009.

A high school student who was struck on his right shin by a "hockey ball" in a game of floor hockey during gym class, when another student was aiming for a goal but accidently hit the plaintiff, **constituted spontaneous and unintentional accident** and **no** amount of supervision could have prevented the unintended accident; therefore, the school district **was precluded** from liability and negligent supervision.

"Student Slipped and Fell on Gym Floor"
Acunia ex rel. Salgado v. New York City Dept. of Educ. (N. Y. A. D. 1 Dept., 891 N. Y. S. 2d 70), December 22, 2009.

Student who slipped and fell while playing basketball in his school's gymnasium **failed** to demonstrate that school district's alleged failure to maintain gym floor was the proximate cause of his injuries, as required to sustain a negligence action. The plaintiff alleged that he slipped on wax, but acknowledged that was the wax was *not* wet and that he *never* experienced any slipperiness prior to his fall.

"Student Highsticked in Gym Class"
Bramswig v. Pleasantville Middle School (N. Y. A. D. 2 Dept., 891 N. Y. S. 2d 160), December 22, 2009.

The proximate cause of alleged injuries sustained by a middle school student, who was struck in his mouth by a teammate's hockey stick during a game of floor hockey in a gym class, was **not** the school's alleged failure to issue proper instructions regarding the act of "highsticking". Thus, the school could **not** be held liable for the plaintiff's injuries based on the "theory of negligent instruction".

Transportation:

"School Bus Driver Motioned For Motorist To Cross Intersection Which Resulted In A Fatal Accident"
Downing v. Kingsley (Kan. App., 221 P. 3d 115), December 24, 2009.

A school bus driver was traveling north and stopped at an intersection, while at almost the same time a vehicle was stopped at the same intersection facing east; thereupon the bus driver gestured with his hands for the motorist to cross the intersection so he could make a wide left turn with his school bus. Upon seeing the bus driver's gesture, the motorist proceeded across the intersection and collided with a second vehicle that was traveling north in the outside lane. The motorist in the second vehicle died as a result of the collision. The Court of Appeals of Kansas held that the school bus driver's hand gesture to motorist to proceed through the intersection *was **not** undertaking to render services* to another as necessary for the protection of a third person and provided **no** basis to impose liability on the bus driver for the resulting fatal accident.

Books of Possible Interest: Two recent books published by Purvis –

1. Leadership: Lessons From the Coyote, www.authorhouse.com
2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

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Legal Update for District School Administrators

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The **Legal Update for District School Administrators** is a monthly update of selected significant court cases pertaining to school administration. It is written by *Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at ***501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Abuse and Harassment
- Civil Rights
- Disabled Students
- Labor and Employment
- Religion
- Security
- Student Discipline
- Torts

Topics

Abuse and Harassment:

"Legal Representation Denied Principal by School District"
Brown v. New York City Dept. of Educ. (N. Y. Supp., 891 N. Y. S. 2d 878), December 2, 2009.

City (New York) corporation legal counsel's determination that an intermediate school principal had violated chancellor's regulation prohibiting verbal abuse of a student; therefore, she was not entitled to assigned legal representation. The legal counsel's decision **was arbitrary and capricious** because it could not be rationally concluded that the investigator's telephone interview with the student was "substantially" reinforced by input from other interviewees. Thus, the city of New York **must provide** legal counsel for the principal (plaintiff), the city, and the department of education. **Note:** The case arose after the plaintiff asked the school's librarian to select a student to represent the school in a regional spelling bee. The librarian asked each English teacher to select a student; one teacher complied by referring "Student A", an eighth-grader and a special education student. Thereupon, Student A was rejected by the plaintiff because she thought "it was too high of stakes to send a child that will not be able to cope." Thus, legal action was filed pertaining to discriminating against a special needs student.

Civil Rights:

"Search of Student Was Reasonable"
State v. Best (N. J., 987 A. 2d 605), February 3, 2010.

The search by a high school assistant principal of a vehicle belonging to "first student" **was reasonably related in the scope of circumstances** that had justified assistant principal's search of the "first student's" outer clothing. The search of the "first student's" outer clothing occurred after the assistant principal had met with a "second student", who appeared to be under the influence of drugs and who indicated that "first student" had given him a green pill, which the "first student" denied any wrongdoing. The search of the "first student's" clothing revealed three white capsules in his pants pocket, but no green pills. Thereafter, the "first student" admitted that he sold a white pill for $5.00, claiming the pill was a nutritional supplement. Next, the assistant principal extended the search to the "first student's" locker, and, when that proved unproductive, to the "first student's" vehicle. **Note:** The search of the passenger compartment of the "first student's" car revealed a liquid-filled syringe, a fake cigarette with a hole in it that could be used as a pipe, a wallet, a bottle of pills, a bag of suspected marijuana, a bag containing a white powdery substance, and a vial.

Disabled Students:

"Student Catches Finger in Door Hinge While Attending an After School Program"
Ferraro v. North Babylon Union Free School Dist. (N. Y. A. D. 2 Dept., 892 N. Y. S. 2d 507), January 5, 2010.

School's custodial duty to supervise developmentally delayed student, who was injured by catching one of his fingers in a hinge of a heavy self-closing door at school, **ceased** when the student *passed outside of the school's orbit of authority* while attending a special education program that was *contracted-out* to a regional educational service agency.

Labor and Employment:

"Decision to Not Hire Plaintiff Was Not a Pretext for Discrimination"
Loris v. Moore (C. A. 2 [Conn.], 344 Fed. App. 710), September 3, 2009.

There was **no evidence** that the qualifications of the white school employee were superior to those of an applicant who was selected for the position of "subject area leader". Thus, the board's explanation for its decision to hire another applicant, who was black, instead of the plaintiff was **not** a pretext for unlawful discrimination in violation of Title VII and the Fourteenth Amendment of the United States Constitution.

"Principal's Complaints about Misuse of Funds Was Not the Cause of Being Transferred Back to the Classroom"
King v. Charleston County School Dist. (D. S. C., 664 F. Supp. 2d 571), May 21, 2009.

Elementary school principal's complaints, which expressed a belief that the school at which he was principal misused federal money by allowing students living in another attendance zone to attend its child development program, were **not** a substantial factor in the district's decision to reassign him to a classroom teaching position. There was **not** a causal relationship between the plaintiff's protective speech and the school district's alleged retaliatory employment action. The district based its decision to reassign plaintiff on grounds *totally independent of his speech*; which included the following: micromanager, controller, intimidator, and manipulator.

“School Psychologist Failed to Demonstrate Pretext in Equal Protection Claim”
Dorcely v. Wyandanch Union Free School Dist. (E. D. N. Y., 665 F. Supp. 2d 178), September 30, 2009.

Former school psychologist, a Haitian male, **failed** to demonstrate that an elementary school principal’s proffered legitimate nondiscriminatory reasons for recommending his employment termination, namely his failure to adhere to school district policies and his inappropriate workplace behavior (e.g. intimidation, inappropriate conduct toward school personnel, and failure to maintain effective professional communication with the school’s administration) *were pre-textual* due to his particular gender and national origin. Therefore, the plaintiff **failed** to link principal’s recommendation and other disciplinary measures to his national origin and/or gender.

Religion:

“Pledge of Allegiance Did Not Violate the Free Exercise Clause of the First Amendment”
Freedom from Religion Foundation v. Hanover School Dist., (D. N. H., 665 F. Supp. 2d 58), September 30, 2009.

The act of leading classes in recitation of the Pledge of Allegiance, as mandated by the New Hampshire School Patriot Act, did **not** place an unconstitutional burden on students’ ability to freely believe or practice atheism or agnosticism. Therefore, reciting the Pledge of Allegiance did **not** violate students’ rights under the Free Exercise Clause of the First Amendment of the United States Constitution. The Pledge was a civic patriotic affirmation, rather than a religious exercise, the inclusion of the words “under God” constituted, at most, a form of ceremonial or harmless deism, and students were *not* required to affirm the Pledge or participate in its recitation.

Security:

“Fourteen Year-Old Runs Away With School Security Guard”
Kach v. Hose (C. A. 3 [Pa.], 589 F. 3d 626), December 23, 2009.

Plaintiff was a 14-year-old student at the time in which she became intimate with a privately-employed school security guard at her middle school, ran away with him, and spent approximately 10 years clandestinely living with him; brought civil action against security guard, law enforcement personnel, and others after she disclosed her true identify to a friend (when she was approximately 24 years of age) and was removed by law enforcement from the security guard’s house. The United States Court of Appeals, Third Circuit, held that the plaintiff **failed** to present any evidence suggesting that the security guard’s actions in engaging in a impermissible relationship with her were committed on anyone’s initiative but his own or with anything other than his own interests in mind. Therefore, the security guard’s actions could **not** be fairly treated as actions of the state, so as to establish the security guard’s actions *as a state actor*. **Note:** While living with the security guard, the plaintiff did remain in his house much of the time; however, she walked around the neighborhood on foot, rode city buses around town, went shopping, and made frequent visits to convenience stores.

“Etching Cream, Aerosol Pain, Etc. Not Allowed On Public School Properties”
In re Miguel H. (Cal. App. 2 Dist., 103 Cal. Rptr. 3d 884), January 12, 2010.

Public high school **was a “public place”** within meaning of a state statute prohibiting the possession of etching cream or aerosol container of paint in a public place, even though public access to the school was limited to some degree by state statute. **Note:** High school student was accused of drawing graffiti on school property (e. g. restroom, glass casing, classroom table, folder in his backpack, and classroom chalkboard), along with the school assistant principal finding black shoe polish, white shoe polish, yellow spray paint, and etching tool in the student’s backpack.

Student Discipline:

“Suspension of Student Did Not Violate Her Constitutional Rights”
Ariz. (D. Ariz., 664 F. Supp. 2d 1070), October 8, 2009.

Thirteen-year-old student was **not** denied due process in receiving two temporary school suspensions of less than ten days each for her alleged use of alcohol and marijuana on high school premises due to superintendent’s alleged bias against her based on her mother’s prior Equal Employment Opportunity Commission (EEOC) charge against him. There was **no** personal involvement or animosity by the district’s superintendent, it was part of his job to maintain student discipline within the district’s schools and investigate possible disciplinary violations. The student’s short-term suspensions ***were clearly based*** on school policies that pertained to precluding the use and possession of prohibited substances on the district’s school campuses.

Torts:

“Officer Had Probable Cause to Arrest School Bus Driver for Assault”
Washington v. Blackmore (Conn. App., 986 A. 2d 356), February 2, 2010.

Town police officer **had probable cause** to arrest school bus driver. The officer arrived at a middle school in response to an emergency call (911) from a student on the bus stating that the bus driver had assaulted a passenger; furthermore, the officer observed on one of the passengers redness on his left cheek and a bleeding scratch in his mouth. In addition the school’s principal informed the officer that students exiting the bus punched a student, and a school security guard at the school told the officer that a student had alleged that the bus driver had yelled and spit at the student and had hit and punched the student while on the bus. **Note:** The bus driver was found not guilty on all the charges that were filed against him; thereupon, he commenced legal action against the officer claiming false imprisonment, intentional infliction of emotional distress, negligent infliction of emotional distress, malicious prosecution, municipal liability, and violation of his constitutional rights (e. g. unreasonable seizure, equal protection, and due process)

"School District at Fault for Student's Fall In a School Cafeteria"
Musachio v. Smithtown Cent. School Dist. (N. Y. A. D. 2 Dept., 892 N. Y. S. 2d 123), December 15, 2009.

School district's evidence in support of a defense for summary judgment in a personal injury suit brought by a seventh grade middle school student, who allegedly slipped and fell during lunch, was due to an accumulation of water in his school's cafeteria; therefore, the district's evidence **was insufficient** to meet its initial burden on the issue of lack of constructive notice. Deposition testimony by the school's custodian **failed** to establish when the area where the accident occurred was last cleaned or inspected prior to the occurrence of the plaintiff's accident. **Note:** The accident occurred when the plaintiff attempted to sit down on a seat in the cafeteria which required him to first step over a bench.

"School District Did Not Breach Its Duty to Supervise Injured Student"
Wagner v. Oneonta School Dist. (N. Y. A. D. 3 Dept., 892 N. Y. S. 2d 250), December 24, 2009.

Even if school district breached its duty to supervise eight-year-old student and her classmates, such breach was **not** the proximate cause of the plaintiff's injuries when her classmates closed student's fingers in a door. Neither plaintiff nor her classmates had any relevant disciplinary problems, nor were they engage in any type of horseplay prior to the accident, which was spontaneous and unintentional.

"School District Properly Treated and Removed Snow and Ice from Its Parking Lot"
Tucker v. Bensalem Tp. School Dist. (Pa. Cmwlth., 987 A. 2d 198), December 17, 2009.

Despite conflicting evidence in negligence action, there **was sufficient evidence** that school district **properly treated and removed** snow and ice from its parking lot. Furthermore, such treatment and removal occurred even after various storms hit the area, leaving generally icy conditions in the general area; which were continuing at the time of the bus driver's slip and fall on the ice in the parking lot. Thus, school district **exercised ordinary care** under the existing circumstances.

"School Not Responsible for Student's Suicide"
King v. Pioneer Regional Educational Service Agency (Ga. App., 688 S. E. 2d 7), November 5, 2009.

Parents of student who committed suicide at school for children with emotional disorders filed action against school system and the Georgia State Department of Education (DOE). Defendants could **not** be held liable in regard to alleged inadequate policies, procedures, and training of staff for student's suicide while confined to a time-out room at a school for youngsters with emotional behavior disorders. Furthermore, there was **no** violation of the student's constitutional rights.

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Legal Update for District School Administrators

August 2011

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Topics:

- Abuse and Harassment
- Administrators
- Civil Rights
- Labor and Employment
- Security
- Student Discipline
- Torts

Topics

<u>Abuse and Harassment</u>:

"School Was <u>Not</u> Deliberately Indifferent Regarding Biracial Harassment of Student"
DT v. Somers Cent. School Dist. (C. A. 2 [N. Y.], 348 Fed. App. 697), October 15, 2009.

School's investigation of incident of alleged student-on-student racial harassment in the school's cafeteria that involved one student tapping a biracial student on his head while sitting with a group of students who regularly sat together at the same lunch table was **<u>not</u>** unreasonable in light of known circumstances. Therefore, the school was **<u>not</u>** deliberately indifferent to race discrimination as so prohibited under Title VI of the Civil Rights Act of 1964. The teacher who was supervising the cafeteria at the time of the incident did *not* believe that the incident involved any malicious intent, and thereafter, kept an informal eye on the biracial student for the rest of the school year, who continued to eat lunch with the same group of student. Furthermore, school officials advised the mother of the student that she has a right to file a complaint regarding the incident.

"Public High School Was Public Property"
People v. Ojeda (Ill. App. 2 Dist., 921 N. E. 2d 490), December 31, 2009.

A student was convicted of aggravated battery for using his fist to strike a classmate in the face causing a cut and severe swelling. Due to the incident occurring on school property the incident was upgraded from battery to aggravated battery and the student appealed his conviction. The Appeals Court of Illinois held that the public funded high school constituted "public property" and as such met the requirement for the offender's conviction to be upgraded under Illinois' enhancement statute from battery to aggravated battery.

<u>Administrators</u>:

"Probable Cause Was Not Required for Principal's Search of Student"
State v. Burdette (Kan. App., 225 P. 3d 736), February 19, 2010.

Search of a student by a high school principal **was a school search** (based on reasonable suspicion), **<u>not</u>** a law enforcement search, even though two sheriff's deputies were present in the room at the time of the search, and thus probable cause was **<u>not</u>** required to support the search. The principal did **<u>not</u>** conduct the search at the request of the deputies; and the search was conducted after a teacher noticed the student acting strangely and reported such to a school guidance counselor. The deputies only became involved after overhearing the teacher's conversation with the counselor and the deputies did **<u>not</u>** initiate an investigation or search as so pertaining to the student. Furthermore, the deputies did **<u>not</u>** speak to the student prior to the search, and the principal, **<u>not</u>** the deputies told the student that he was required to empty his pockets. **<u>Note</u>:** The student's pockets contained a money in a clip and two "little baggies of weed" (marijuana).

Civil Rights:

"Student's Rights Were Not Violated When He Was Suspended From School"
Copper ex rel. Copper v. Denlinger (N. C., 688 S. E. 2d 426), January 29, 2010.

High school student's due process rights were **not** violated when he was suspended from school without a hearing. Therefore, he could **not** demonstrate a claim in the 14th Amendment nor Section 1983 due to the fact that he did **not** allege that *remedies* available under state law and school district policy *were inadequate*. In addition, the student ***failed*** to appeal the decision to suspend him in any way and there was **no** allegation that any such request was ignored or denied. **Note:** The suspension pertained to "gang-related behavior".

Labor and Employment:

"Student's Book Throwing Incident Led to Teacher's Termination"
Weintraub v. Board of Educ. of City School Dist. of City of New York (C. A. 2 [N. Y.], 593 F. 3d 196), January 27, 2010.

Public elementary school teacher's filing of a grievance with his union to complain about his school administrator's failure to discipline a student who threw a book in his classroom ***was speech pursuant to the teacher's official duties, rather than speech as a citizen***. Therefore, the teacher's speech was **not** protected by the First Amendment. The filing of the grievance ***was in furtherance of one of the teacher's core duties, which was to maintain classroom discipline***. Thus, such internal communication by the plaintiff had **no** analogue to private citizen speech. **Note:** The teacher alleged that school officials retaliated against him through acts of intimidation, harassment, workplace abuse, and deliberate attempts to undermine his authority. Furthermore, the plaintiff alleged that he received unfounded negative classroom evaluations, performance reviews, and disciplinary reports; was wrongfully accused of sexually abusing a student and abandoning his class; and was arrested for a misdemeanor due to his attempted assault of another teacher; and was ultimately terminated.

"School District Not Entitled to Summary Judgment on Teacher's Claim That She Was Regarded As Disabled"
Chappell v. Butterfield-Odin School Dist. No. 836 (D. Minn., 673 F. Supp. 2d 818), November 17, 2009.

Genuine issue of material fact, as to whether a high school teacher with epilepsy and congenital fusion of two vertebrae in her neck was regarded as disabled by her school district, **precluded summary judgment** on teacher's discrimination claim based on her inability to establish a prima facie case (production of enough evidence) under ADA. *A reasonable jury could find* that the school district superintendent regarded the teacher as unable to work in the field of teaching. **Note:** After teaching for approximately seven weeks in the fall of 2005 the plaintiff was asked to "voluntarily enter into a release from her employment with the school district"; however, there was evidence that school officials implied a threat that they would ask the state to revoke her teaching license if she did not resign, attempts by the teacher to obtain information about her termination were rebuffed, and the district pressured the teacher into signing a release by giving her essentially no time to consider it.

Security:

“City Ordinance Barring Sex Offenders From Entering Schools Was Not Vague”
People v. Conti (N. Y. City Ct., 895 N. Y. S. 2d 660), January 26, 2010.

City ordinance barring sex offenders from entering schools, child care facilities, playgrounds, and parks **was sufficiently definite** to put a person of ordinary intelligence on fair notice that term “school” meant both school buildings and school grounds; thus, ***satisfying*** a constitutional analysis so related to the vagueness test. The offender was charged with violating the ordinance based on his alleged conduct of walking on a paved pathway from the south end of a high school property near a baseball field and north toward the school’s football field, while making stops along the way, including near the girls’ restroom.

Student Discipline:

“Student’s Suspension for Creating a Fake Internet Profile of His Principal Violated His First Amendment Rights”
Layshock ex rel. Layshock v. Hermitage School Dist. (C. A. 3 [Pa.], 593 F. 3d 249), December 10, 2010.

A school district’s suspension of a 17-year-old high school student who created, while using his grandmother’s home computer during non-school hours, a fake internet “unflattering profile” of his school’s principal on “MySpace” **violated** the student’s First Amendment right of free expression; even though the plaintiff accessed the profile from a school district own computer. There was **no** evidence that he engaged in any lewd or profane speech while in school and student’s speech did **not** result in any substantial disruption of his high school.

“Student’s Suspension for Creating a Profile of Her Principal Was Not Unconstitutional”
J. S. ex rel. Snyder v. Blue Mountain School Dist. (C. A. 3 [Pa.], 593 F. 3d 286), February 4, 2010.

Middle school’s suspension of an eighth grader for creating a principal’s internet profile on MySpace of her principal, containing a misappropriated photograph of him and profanity-laced statements insinuating that he was a sex addict and pedophile, did **not** interfere with her parent’s substantive due process right to direct their youngster’s upbringing free from governmental intervention. Furthermore, such suspension did **not** usurp the child’s parents’ disciplinary authority due to the fact that they also punished their child for creating the profile. **Note:** The internet profile was created on a Sunday by the plaintiff and her friend and disseminated to at least 22 other middle school students prior to the opening of school on Monday morning. The profile was distributed to the 22 aforementioned students at off-campus locations due to the MySpace being blocked at school.

“School District’s Code of Conduct Pertaining to Prohibited Group Affiliations Was Unconstitutionally Vague”
Lopez v. Bay Shore Union Free School Dist. (E. D. N. Y., 668 F. Supp. 2d 406), November 9, 2009.

Hispanic high school student, whose suspension from school for allegedly making remarks related to a violent street gang, was reversed and expunged from his record by the New York State Commissioner of Education, brought action through his mother, against the school district, seeking damages pursuant to Fourteenth Amendment of the United States Constitution. A United States District Court in New York held that the school district’s code of student conduct pertaining to group affiliations, which provided that any activity, affiliation, or communication in connection with non-school sanctioned clubs or groups, including fraternal organizations or gang, was prohibited; **was unconstitutionally vague under the 14th Amendment**.

Torts:

“School District Lacked Control Over Elementary Teacher’s Sexual Abuse of a Student”
Doe-2 v. McLean County Unit Dist. No. 5 Bd. of Directors (C. A. 7 [Ill.], 593 F. 3d 507), January 22, 2010.

From 2002 to 2005, Jon White was an elementary school teacher in McLean County and during such time he sexually harassed female students through methods that included hugging and holding student on his leg, having students massage him and wrap their legs around him, showing students sexually suggestive photographs, commenting on students’ sexual attractiveness, and students playing a “taste test game” in which the teacher would blindfold students and then place various foods in their mouths using a banana, his hand, or his penis. In 2005, Jon White entered into an agreement to resign from the McLean County School District with a positive letter of recommendation. In August 2005, the Urbana School District hired White to teach second grade in one of its elementary schools. While teaching in Urbana from 2005 to 2007, he harassed several of his female students using similar methods to those in McLean County. The plaintiff, the mother of a student that the teacher sexually assaulted in the Urbana School District filed legal action against the McLean County School District for not sounding an alarm about the teacher’s conduct and allowing him to simply resign and obtain a new teaching position in another school district. The United States Court of Appeals, Seventh Circuit, held that the McLean County School District **lacked requisite control over** the sexual abusive behavior committed by the teacher in the Urbana School District; thus, **precluding their liability**, even assuming the county school district had knowledge of the risk that the teacher would sexually abuse students in his new school district.

"School District <u>Not</u> Liable for Student's Assault as He Walked Home"
Pistolese v. William Floyd Union Free Dist. (N. Y. A. D. 2 Dept., 895 N. Y. S. 2d 125), January 19, 2010.

School district was **<u>not</u>** liable for injuries sustained by a student who was allegedly assaulted by other youths as he walked home from school, rather than ridding a school bus. The incident occurred at a time when the student was **<u>no</u>** longer in the district's custody **nor** under its control; therefore, ***outside of the orbit of its authority***. **<u>Note</u>:** The incident occurred in late June 2008, on the last day of school as the plaintiff walked home from school with friends rather than ride his assigned school bus.

"School <u>Not</u> Liable for a Student Who Was Shot With a BB gun on Negligent Security Theory"
Robinson v. Sacred Heart School (N. Y. A. D. 2 Dept., 895 N. Y. S. 2d 136), February 2, 2010.

School was **<u>not</u>** liable on a "negligent security theory" for injuries to an 11-year-old student allegedly sustained when he was shot with a "BB gun" by an unknown assailant as he was leaving a school building following an after-school basketball program. The school's principal testified that the school had doors with buzzers, an alarm system, and security cameras; and that he had instructed the basketball coaches that all doors had to be closed at the end of the school day, with access to the building only by buzzers, and that only students on the basketball team were permitted in the building during practice.

"Student's Floor Hockey Injuries Were <u>Not</u> Due to Inadequate Supervision"
Odekirk v. Bellmore-Merrick Cent. School Dist. (N. Y. A. D. 2 Dept., 895 N. Y. S. 2d 184), February 16, 2010.

The plaintiff, a high school student, sustained injuries to his hand while playing a game of floor hockey during a physical education class. His injuries occurred when he was struck on his left hand by the blade of an opposing player's stick within such a short span of time that it could **<u>not</u>** have been prevented by the most intense supervision. Therefore, the plaintiff's claim of inadequate supervision was **<u>not</u>** the proximate cause of the student's injuries.

"School District Was Not Liable for Student's Trip and Fall"
Giulini v. Union Free School Dist. No. 1 (N. Y. A. D. 2 Dept., 895 N. Y. S. 2d 453), February 2, 2010.

School district did **<u>not</u>** create **nor** have notice of, an alleged defect purportedly that caused the trip and fall four-year-old child as she ran from one area of a playground to another, thus **precluding the imposition of liability** on the district. The school district had **not** received any prior complaints regarding an alleged hole under the wood chips in the playground and the district's use and maintenance of the mulch ***was in accordance with good and accepted industry practices***.

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September 2011

Johnny R. Purvis*

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- Abuse and Harassment
- Civil Rights
- Disabled Students
- Extracurricular Activities
- Labor and Employment
- Student Discipline
- Torts

Topics

<u>Abuse and Harassment</u>:

"High School Student Sends a Fellow Student a Threatening Message"
D. C. v. R. R. (Cal. App. 2 Dist., 106 Cal. Rptr. 3d 399), March 15, 2010.

High school student and his parents brought hate crime, defamation, and intentional infliction of emotional distress against another student (both students attended a private educational institution) and his parents for posting derogatory comments on the plaintiff's website and threatening him with bodily harm. A California Court of Appeals, Second District, Division 1, held: (1) offending student, who posted message on victim's website stating that he wanted to rip his heart out and pound his head with an ice pick, did <u>**not**</u> establish under the objective standard test that his message was protected speech and (2) offending student who claimed he establish his website to promote his entertainment career was <u>**not**</u> a public figure or a limited public figure and therefore California's hate crimes laws were applicable.

"Student's Calling a Teacher a Bitch and Other Epithets Amounted to Fighting Words"
In re Nickolas S. (Ariz. App. Div. 1, 226 P. 3d 1038), March 2, 2010.

The first incident occurred on January 27, 2009, a teacher (B. B.) was monitoring an on-campus high school student suspension class in a classroom when she saw one of the students "texting" on his cell phone and told him to put it away. The juvenile refused to put the phone away and she directed him to bring the phone to her desk. He refused to bring the phone and the teacher told him that she was going to call security. The student told her, "Go ahead and call them if they think they can take it away." Thereupon, security arrived and removed both the phone and student from the classroom. The second incident occurred two days later when the same student entered the on-campus suspension classroom and demanded that he be sent to the "special needs student" classroom and he was told to sit down by the same teacher in the first incident until she secured approval from the school's administration. The student responded by getting out his cell phone and playing with it and he was told by the teacher to put it away. Thereupon, the student started yelling and calling the teacher all sorts of derogatory names. Due to his conduct the student was adjudicated a delinquent and he appealed his conviction. An appeals court in Arizona held that (1) Student's muttering the word "bitch" under his breath while not looking at the teacher after the teacher told him to hand over his cell phone did <u>***not***</u> amount to fighting words in order to demonstrate abuse of a teacher and (2) student's conduct in calling a teacher a "bitch", shouting "this is fucking bull shit", and "you're a fucking bitch" in a challenging manner approximately 10 to 12 feet from the teacher **amounted to fighting words as required in order to adjudicate the student as a delinquent for the abuse of a teacher**.

“Evidence Supported Finding That Teacher Did Engage in Sexual Misconduct in Student’s Presence”

Moro v. Mills (N. Y. A. D. 3 Dept., 896 N. Y. S. 2d 493), February 25, 2010.

Substantial evidence supported Commissioner of Education’s determination that teacher (taught band and marching band in grades 7 – 12) **had engaged in sexual misconduct** in the presence of a 14-year-old female student; thus, warranting revocation of his teaching certificate. Female student was the sole eye-witness to the incident; however, she was able to provide a very detailed description of the incident. In addition, her testimony was supported by additional evidence and the teacher’s conflicting testimony was inconsistent and contradicted by other testimony.

“School Administrators Failed to Take Action Regarding Teacher’s Sexual Abuse of First Grade Female Students”

Doe 20 v. Board of Educ. of Community Unit School Dist. No. 5 (C. D. Ill., 680 F. Supp. 2d 957), January 11, 2010.

Parents of elementary school students brought action against teacher, school district, county, and school administrators, alleging sexual harassment, sexual discrimination, and sexual abuse of female first grade students, in violation of the Fourth Amendment of the United States Constitution, Title IX, Section 1983, and Illinois law. The United States District Court, C. D. Illinois, held that: (1) Teacher had explicit and implied authority to control, direct, and restrain the movement of his students that are under his control, but he **exceeded his authority** when he unlawfully seized and detained students, deprived them of their liberty of movement, and blindfolded them under forced commitment to silence. Furthermore, the teacher used illegal and unreasonable force when, without consent, he inserted his fingers, objects, and other items in students’ mouths, and otherwise came into contact with them while they were isolated in his classroom; thus, **violating their Fourth Amendment rights**. (2) Parents of the victims notified the school administration of the abuse of their children by their youngsters’ teacher and the administration **failed** to take action regarding the teacher’s conduct; thus, **a Fourth Amendment claim is so stated against** the school administrators. (3) The school administrators were **<u>not</u>** entitled to qualified immunity from Fourth Amendment claims alleged by parents of elementary school students that the school’s administration **were personally aware of and turned a blind eye to known, obvious, and substantial risk of sexual abuse** that teacher posed to first grade female students; thus, violating their Fourth Amendment rights, Title IX, and Illinois law.

Civil Rights:

"Banning the Confederate Flag Clothing Was Reasonable"
Hardwick ex rel. Hardwick v. Heyward (D. S. C., 674 F. Supp. 2d 725), September 8, 2009.

School district and high school officials **had a reasonable basis** for determining that a ban on Confederate flag clothing was necessary to prevent disruption or interference with school activities. Thus, school officials did **not** violate the middle school student's First Amendment free speech rights by prohibiting her from wearing clothing (t-shirts) that displayed images of the Confederate flag. This was despite the student's contentions that incidents of racial conflict were too remote to support the ban, and that no disruption occurred while she wore the flag. The school had a long history of racial conflict and the testimony of both students and school administrators demonstrated that tension existed between black and white students during the time in which the plaintiff attended the school, including at least one classroom disruption. In addition, several more racially motivated incidents has occurred sine the plaintiff left school.

"Elementary Teachers *Stated* Valid First Amendment Retaliation Claims Against School District"
Kelly v. Huntington Union Free School Dist. (E. D. N. Y., 675 F. Supp. 2d 283), December 23, 2009.

Two elementary school teachers **stated First Amendment retaliation claims against** their school district and board of education regarding actions purportedly motivated by their speech to students about a gifted and talented program and its chairperson despite the defendant's claim that the plaintiffs' speech did not address a matter of public concern. However, the plaintiffs' speech related to important changes to the program and encouraged students' parents to participate in the next school board meeting; therefore such speech ***was*** a matter of public concern.

“Bus Driver Not Terminated Due to His Relationship to His Wife”
Reyes v. Weslaco Independent School Dist. (C. A. 5 [Tex.], 354 Fed. App. 904), December 3, 2009.

Former school bus driver brought suit against defendant, alleging First Amendment retaliation, Fourteenth Amendment (Equal Protection) claims, and violation of Texas’ Constitution due to his employment termination with the school district. The plaintiff had engaged in a lengthy affair with a fellow bus driver, his wife became upset and informed the school district’s superintendent, the superintendent directed that the transportation director meet with both employees, and the plaintiff decided to resign. Later, the plaintiff was hired back as a substitute driver and after a brief time he secured a full-time bus driver’s position. In August 2005, he attended a mandatory in-service meeting in which he raised an issue regarding the policies governing bus driver management of disruptive students on school buses. The director of transportation told him that he would discuss the issue privately with him; thereupon, he signed the “acknowledgment attendance form” for the meeting as “George Washington” in protest for not receiving a response to his question during the in-service meeting. Soon thereafter, the plaintiff’s employment with the district was terminated for falsely signing the attendance form. The plaintiff filed a grievance that stated that his employment termination was related to his prior extra-marital affair. The United States Court of Appeals, Fifth Circuit, held that the plaintiff was **not** terminated **or denied** his grievance because of his relationship to his wife. Furthermore, his First Amendment rights were **not** violated for his behavior or his right to associate with his wife.

“Probable Cause Existed to Arrest Student”
Fitzpatrick v. City of Ft. Wayne (N. D. Ind., 679 F. Supp. 2d 947), December 22, 2009.

Father, whose juvenile son was arrested for allegedly attacking another student at a middle school, brought suit against city and police officer for false arrest and imprisonment. A United States District Court, N.D. Indiana, Forth Wayne Division, held that (1) In determining whether probable cause existed to arrest a juvenile for his alleged assault of another student in a school bathroom, police officer **could consider the fact** that the juvenile was seen on video tape recorded on a security camera fleeing the scene of the beating, as well as the officer’s **knowledge that the juvenile returned to class without reporting the incident, but whether the juvenile provided aid to the victim was not part of the probable cause analysis** and (2) the fact that the juvenile was identified and reported to have fled the scene of a crime **is part of the “trustworthy information”** a prudent police officer **is entitled to consider** when determining if probable cause exists to arrest an individual.

"Principal Can Be Held Liable for Music Teacher's Sexual Abuse of Elementary Students"
T. E. v. Grindle (C. A. 7 [Ill.], 599 F. 3d 583), March 17, 2010.

Student victims of music teacher's sexual abuse, and their parents, brought Section 1983 action against teacher, school district, and individual school officials, alleging violations of the Fourth Amendment, substantive due process (14th Amendment of the United States Constitution), equal protection (14th Amendment of the United States Constitution), Title IX, and state law claims for intentional infliction of emotional distress. The United States Court of Appeals, Seventh Circuit, held that an elementary school principal **could be held liable**, as a supervisor, for participating in or deliberately turning a blind eye to music teacher's sexual abuse of students in violation of their equal protection rights, which **were clearly established** at the time of the teacher's abusive conduct. Thus, the principal could **<u>not</u>** claim qualified immunity from plaintiff's equal protection and other such claims.

"School Officials Did <u>Not</u> Violate Teacher's Right to Free Speech"
Smith v. Central Dauphin School Dist. (C. A. 3 [Pa.], 355 Fed. App. 658), December 11, 2009.

Teacher filed suit against school officials and school district alleging retaliation in violation of her First Amendment free speech rights. The United States Court of Appeals, Third Circuit, held that the school board's decision to deny the plaintiff a coaching position was based solely on the plaintiff's health condition and the need to prevent her from being exposed to mold in a school building. Therefore, the denial was **<u>not</u>** in retaliation for the plaintiff's speech about unsafe mold in her school; thus, plaintiff's free speech rights under the First Amendment were **<u>not</u>** violated. **<u>Note</u>:** The teacher began teaching and coaching cross-country at old Central Dauphin High School ("old CDHS") where mold was discovered after the teacher experienced shortness of breath, fatigue, and joint problems. She was transferred to Linglestown Junior High School ("LJHS"), where she continued to experience health problems. On August 25, 2003, the board approved a FMLA leave for the teacher, despite the teacher never having requested such leave. In April 2004, the teacher learned that she would be teaching at the newly constructed Central Dauphin High School ("new CDHS"), but her working conditions were different in at least three ways. First, instead of teaching classes she had taught before, she was assigned to teach classes with which she was unfamiliar. Second, unlike at "old CDHS", where she was assigned a permanent classroom, she became a "floating teacher." Third, while the teacher had previously been an assistant cross-country coach at "old CDHS", though not at the conclusion of her time there, she did not coach at the "new CDHS" at all.

"Ban on Teacher-Worn Political Buttons in School Does <u>Not</u> Violate Free Speech"
Weingarten v. Board of Educ. of City School Dist. of City of New York (S. D. N. Y., 680 F. Supp. 2d 595), January 22, 2010.

School chancellor regulation which banned teacher-worn political buttons in high schools **was reasonably related to school district's legitimate pedagogical concerns**, so prohibition did **<u>not</u>** violate teachers' free speech rights. The school district's concern that political paraphernalia **could improperly influence children** and the district's **desire to maintain neutrality on controversial issues, were legitimate pedagogical concerns**.

Disabled Students:

"Student's IEP Did Not Reflect Evaluators' Recommendations"
District of Columbia v. Bryant-James (D. D. C., 675 F. Supp. 2d 115), December 28, 2009.

IEP for a student ("suffers from difficulties with reading and processing speed" – should be given shorter assignments and test questions and extra time to complete his work) did **not** reflect evaluators' recommendations, and thus, did **not** provide the student with the FAPE required by IDEA. Every evaluation and the testimony of an evaluator make clear that the student had to be instructed differently from other students to access educational information and had to be taught in a small, structured classroom, and the IEP failed to address those concerns.

"School Administrators Did Not Violate Student's Rights under IDEA by Placing Him in the District's Disciplinary Alternative Education Program"
Hollingsworth v. Hackler (Tex. App.-Forth Worth, 303 S. W. 3d 884), December 31, 2009.

Due to the fact that the district's admission, review, and dismissal (ARD) committee determined that the disabled student's behavior (making obscene gestures and physical threats toward other students) was **not** a manifestation of his disability (ADD), the principal and assistant principal of his middle school did **not** violate his rights under IDEA by placing him in the school's Disciplinary Alternative Education Program (DAEP) for 45 days; therefore, the student could be disciplined in the same manner as children without disabilities.

Extracurricular Activities:

"School District Protected from Wrongful Death Suit Stemming from Student's Death during Football Practice"
Covington County School Dist. v. Magee (Miss., 29 So. 3d 1), January 28, 2010.

On August 8, 2007, Lonnie, age 17, collapsed during high school football practice and was later pronounced dead at a local hospital; death of the young man was allegedly attributed to a heat stroke. The Supreme Court of Mississippi held that the state statute mandating that school personnel maintain appropriate control and discipline of their students while they were in the care and supervision did **not** apply to the timing or oversight of football practice so as to create a statutory duty regarding football practice; thus, the school district **was protected** under Mississippi's Torts Claims Act.

Labor and Employment:

“School District’s Technology Coordinator Failed to Establish Retaliation for Exercising Her 1st Amendment rights”
Palfrey v. Jefferson-Morgan School Dist. (C. A. 3 [Pa.], 355 Fed. App. 590), December 10, 2009.

There is **no** evidence beyond speculation and theorization that school district board members knew about school district employee’s testimony and conversations with Pennsylvania Ethics Commission concerning superintendent prior to their decision *not* to renew plaintiff’s contract as the school district’s technology coordinator, as would support plaintiff’s First Amendment retaliation claim. **Note:** The school district’s superintendent was under investigation by the Pennsylvania Ethics Commission when plaintiff became aware that one of her subordinates was going to deliver the hard drive from the superintendent’s computer to the Ethics Commission. She took it upon herself to contact the Ethics Commission to arrange for her to turn over the hard drive instead of her subordinate. In addition, she was subpoenaed to testify and did testify before the Ethics Commission in April 2005. At a board meeting in May 2005, the superintendent informed the board that his office had been broken into and that a document was missing. On June 27, 2005, plaintiff was informed that her contract would not be renewed. The board had knowledge that the plaintiff did break into the superintendent’s locked office and stole the hard drive from the superintendent’s computer.

Student Discipline:

“Evidence Supported Conviction for Underage Consumption of Alcohol”
State v. Hoe (Hawaii App., 226 P. 3d 517), February 25, 2010.

Circumstantial evidence **was sufficient to support** conviction for under-age consumption of liquor, although there was no direct testimony that a witness saw the student consume liquor or a blood alcohol content reading. The high school principal and vice-principal both testified that they smelled alcohol emanating from the student from a distance of about two feet and ranked the smell as probably an eight on a ten-point scale. The police officer who was called by the school administration to secure the student stated that he smelled alcohol on the student’s breath and possibly from his pores. In addition, he also observed the youngster engaging in behavior that demonstrated that he had recently consumed alcohol, including his unsteadiness on his feet, his belligerent and defiant behavior, which was out-of character for the student. In addition, the student attempted to prevent the officer from obtaining a reading (preliminary breath test – PBT) on the defendant’s blood-alcohol content.

Torts:

“Soccer Spectator Injured by Falling Tree”
Picco v. Town of Voluntown (Conn., 989 A. 2d 593), March 16, 2010.

Plaintiff, a spectator at a school sponsored soccer game that was injured when a portion of a white ash tree (51 inches in diameter and 60 feet tall) that stood on the athletic field separated from the main trunk and fell on top of her, brought nuisance claims against town and board of education that owned, maintained, and controlled the athletic field. The Supreme Court of Connecticut held that allegations that town and board of education that owned, maintained, and controlled athletic field knew or should have known of dangerous propensities of tree that stood on their soccer field and that their failure to remove the tree was unreasonable **failed** to allege that town and board of education, by any positive act, created the alleged nuisance.

“Neither School Bus Driver nor School District was Liable for Students Injuries”
Miloscia v. New York City Bd. of Educ. (N. Y. A. D. 2 Dept., 896 N. Y. S. 2d 109), February 16, 2010.

School bus driver **was reasonably prudent** in braking abruptly to avoid a collision with a car that suddenly pulled out in front of his bus, thus **precluding**, under “emergency doctrine”, liability on behalf of both the driver and school district for the injury (fractured her wrist) that a 6-year-old passenger sustained when the bus stopped short to avoid the collision.

“School Board Not Liable for Student’s Slip and Fall on Stairwell”
Naulo v. New York City Bd. of Educ. (N. Y. A. D. 2 Dept., 896 N. Y. S. 2d 155), February 16, 2010.

Student sued board of education for damages for injuries she sustained in an alleged slip and fall on an interior staircase at school on a rainy day. The New York Supreme Court, Appellate Division, Second Department, stated that the defendant did **not** create the alleged wet condition of the stairs on which the student fell, **nor** did it have actual or constructive notice of its existence for a sufficient length of time to discover and remedy the alleged condition, *as so required to be responsible for the plaintiff’s injuries*.

“Student’s Father Did Not Appear at Hearing Pertaining to His Son’s Wrongful Death”
Billman v. City of Port Jervis (N. Y. A. D. 2 Dept., 897 N. Y. S. 2d 507), March 23, 2010.

Parents of a student who died from injuries sustained from a fall through a skylight situated on the roof of a high school sued school district for wrongful death based on *negligence and attractive nuisance*. The New York Supreme Court, Appellate Division, Second Department, stated that the failure of a student’s father to appear for a hearing in a wrongful death suit against a school district did **not** warrant dismissal of the complaint pursuant to the general municipal law insofar as asserted by him where the parties had agreed to adjourn a scheduled hearing date and the district had failed to reschedule the hearing for the earliest possible date available.

“Factual Issue Existed as to the Extent Participant Assumed Risk of Injury from Improper use of Leg Press Machine”
Capuano v. Rochester Institute of Technology (N. Y. A. D. 4 Dept., 897 N. Y. S. 2d 822), March 26, 2010.

Genuine issue of material fact **existed** as to whether instructor, who did *not* have any formal background in weight training and *may not have been in* the weight room at the time of the accident providing supervision, **precluding summary judgment** on personal injury claim against defendant school. The plaintiff alleges that he injured his back while using a leg press machine (horizontal Cybex leg press machine).

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2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

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Legal Update for District School Administrators

October 2011

Johnny R. Purvis*

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The **Legal Update for District School Administrators** is a monthly update of selected significant court cases pertaining to school administration. It is written by *Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at ***501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Athletics
- Civil rights
- Disabled Students
- Labor and Employment
- Religion
- Standards and Competency
- Student Discipline
- Torts

Topics

Athletics:

“Cheerleader Assumed Risk of Possible Injury When She Practiced a Stunt Without Permission”
Christian v. Eagles Landing Christian Academy, Inc. (Ga. App., 692 S. E. 2d 745), March 24, 2010.

Fourteen-year-old ninth grader **assumed the risk of possible injury** when she and her fellow cheerleaders took it upon themselves to practice a stunt called the “extended liberty” without their coach’s permission and direct supervision. The plaintiff **knew** that falling when doing this particular stunt was a possibility, even though she had performed the stunt approximately 500 times in the past, and had fallen 20 to 25 times before and had injured her knee. Furthermore, both the plaintiff and her cheerleading team members **knew** that cheerleading was risky and injury was a possibility.

Civil Rights:

“Student’s Website – Ms. Sarah Phelps is the Worst Teacher I’ve ever met”
Evans v. Bayer (S. D. Fla., 684 F. Supp. 2d 1365), February 12, 2010.

High school senior’s protected speech right in the creation of a group social networking site (“Ms. Sarah Phelps is the Worst Teacher I’ve Ever Met”) expressing a dislike for a high school teacher **was clearly established** for the student’s Section 1983 action against her high school principal that alleged her suspension from school for the creation of the website violated her First and Fourteenth Amendments of the United States Constitution rights. The website **was an opinion of a student** about a teacher; **was published off-campus**; **was not accessed and did not cause any disruption on-campus; and was not lewd, vulgar, threatening, or advocating illegal or dangerous behavior**. The student posted the following on her website: “Ms. Sarah Phelps is the worst teacher I’ve ever met! To those students who have had the displeasure of having Ms. Sarah Phelps, or simply knowing her and her insane antics: Here is the place to express your feelings of hatred.”

“Requiring Student to Leave Backpack in Classroom Subject to a Dog Sniff Was Reasonable”

In re D. H. (Tex. App. Austin, 306 S. W. 3d 955), March 5, 2010.

Police officers with the assistance of an assistant principal conducted an inspection of a number of his high school’s classrooms for drugs. Upon entrance to each classroom the assistant principal instructed students to leave their property in the classroom and wait in the school’s corridor; thereupon, law enforcement personnel and their dog were allowed to sniff the items left in each of the classrooms. When the dog sniffed the plaintiff’s backpack, the dog alerted. The officers called the plaintiff into the classroom, read the plaintiff her rights, searched her backpack, and found a small bag of marijuana; she was adjudicated a delinquent by a district court. The Court of Appeals of Texas held: (1) **The Fourth Amendment requires only that searches and seizures by school officials be reasonable**; the public school context requires a relaxed standard of reasonableness because insisting on a search warrant requirement **would unduly interfere with the maintenance of swift and informal disciplinary procedures** that are necessary in a school setting. Furthermore, strict adherence to the requirement that searches within a school environment be based on “probable cause” **would undercut** the substantial need for school officials to maintain discipline and order in their schools. (2) Even assuming that a seizure occurred when the plaintiff, along with her classmates, were asked to leave her backpack in her classroom while she waited outside of the classroom as a police dog sniff was conducted, the school’s actions **were both reasonable and constitutionally permissible**. The school’s actions implicated *a relatively minor privacy inter*est in that the backpack was **not** opened until after the dog alerted to the drugs contained in the plaintiff’s backpack. The dog sniffed only belongings, **not** people, and did so *outside the presence of students*. Furthermore, in light of the school’s drug problem, the action by school and law enforcement officials **served an important governmental interest in protecting students’ safety and health**.

“Student in High School Nursing School Class Strip Searched”

Knisley v. Pike County Joint Vocational School Dist. (C. A. 6, 604 F. 3d 977), May 14, 2010.

Eleven plaintiffs stated that they and every other student in their high school nursing class were strip searched after a student in their nursing class reported that a credit card and other items were missing. The United States Court of Appeals, Sixth Circuit, held that school officials violated student’s constitutional rights under the Fourth Amendment of the United States Constitution and thus, they were **not** entitled to qualified immunity due to their unconstitutional strip search of their students.

“High School Principal Could Not Be Liable for Teacher’s Sexual Harassment of Student”
Doe v. School Bd. Of Broward County, Fla. (C. A. 11 [Fla.], 604 F. 3d 1248), April 28, 2010.

Plaintiff was sexually assaulted by her high school math teacher in his classroom. Prior to the plaintiff’s sexual assault there had been two other complaints of sexual harassment and misconduct by the offending teacher. The principal of the high school conducted an informal on-site investigation of the two previous alleged misconduct charges against the teacher and turned the investigations over to the school district’s Special Investigative Unit (“SIU”). A formal investigation was completed by this investigative unit. The SIU determined that the evidence was inconclusive. The United States Court of Appeals, Eleventh Circuit, held that the principal could **not** be held individually liable for the teacher’s sexual assault of the plaintiff where he did *not* personally participate in the teacher’s sexual assault and he was **not** on notice of the history of the teacher’s widespread abuse of female students. There was **no** basis for claiming that the two prior complaints against the teacher rose to the level of sexual harassment which could be considered obvious, flagrant, rampant, and of a continued duration.

Disabled Students:

“School Officials Complied With IDEA Requirements Even Though They Did Not Answer Parents’ Letters for Several Months”
D. S. v. Bayonne Bd. Of Educ. (C. A. 3 [N. J.], 602 F. 3d 553), April 22, 2010.

School district **complied with IDEA’s procedural requirements**, even though it did not answer letters from the parents of a special needs student for several months and the student’s parents did not sign the student’s IEP. Although the district’s initial responsiveness in the face of the parents’ concerns was unfortunate and undoubtedly frustrating to them, student’s alleged deprivation of benefits could **not** reasonably be traced to the district’s delay in responding to the plaintiffs’ letters. The student’s parents ultimately had an opportunity to participate in a meaningfully way in the creation of the youngster’s IEP which was in effect for most of his ninth grade school year. Furthermore, they and their outside experts, made suggestions, some of which were included in the student’s IEP. **Note:** The student had been suffering from epileptic seizures attributable to brain tumors since she was six years old. The plaintiffs’ son underwent brain surgery in 2001 and 2001, in which the tumors were removed successfully and his seizures abated completely and he was classified as “other health impaired”. In 2006, an audiologist concluded that the youngster displayed a severe deficit in central auditory processing skills, with specific deficits in the areas of auditory decoding, auditory memory, phonemic conceptualization, and binaural separation.

Labor and Employment:

"Former Kindergarten and Preschool Female Principal Was Not Sexually harassed by Male School Board Member"
Nuzzi v. Bourbonnals Elementary School Dist. (C. A. 7 [Ill.], 360 Fed. App. 664), January 11, 2010.

Female former principal of a kindergarten and preschool was **not** sexually harassed by a male school board member, absent evidence of harassment that was objectively severe or pervasive. There was **no** evidence or sexist words or conduct, and while the male board member's exaggerated staring at the plaintiff at public board meetings could have possibly been interpreted as sexually motivated, **it fell far below "severity" as required for a sexual harassment claim**.

"Teacher Aide Entitled to Workers' Compensation When She Broke her Leg"
North Little Rock School Dist. V. Lybarger (Ark. App., 308 S. W. 3d 651), April 29, 2009.

Plaintiff, a teacher's aide, **was performing her assigned duties** at the time in which she broke her leg while climbing stairs at an elementary school in which she was attending a staff development session; therefore she **was entitled to compensation under the state's workers' compensation statute**. The plaintiff had been required to attend the staff development session, even though the session was held at another elementary school in the school district rather than her regularly assigned elementary school. In fact, she was carrying handouts from the staff development session in her hand at the time of the accident.

"School Security Counselor' Lung Condition Was Not Related to Exposure to Mothballs"
Kelly v. AME Janitorial Services Co. (La. App. 4 Cir., 33 So. 3d 358), March 3, 2010.

There was **no factual support** for a school district's employee's claim that his chronic lung condition was caused by his alleged mothball exposure at one of the school district's junior high schools as so required to support his claim against a janitorial service that provided janitorial services at the school. **Note:** On the morning of November 6, 2003, the plaintiff was summons to a junior high school on a medical call because several of the school's teachers had become sick due to some type of chemical exposure. Upon his arrival at the school he noticed crushed mothball in several locations, which were assumed to have been placed in and about the school by a custodial service (AME) that was contracted to provide training and supervision for the school district's custodial personnel. However, there was no evidence to indicate that AME directed or approved the use of mothballs by the school district's janitorial personnel.

Religion:

“School Board Opening Board Meetings with Prayer Did Not Violate the First Amendment”
Doe v. Indian River School Dist. (D. Del., 685 F. Supp. 2d 524), February 21, 2010.

Public school students’ parents brought legal action against school district and school board, challenging the constitutionality of the board’s policy of opening their meetings with prayer. A United States District Court in Delaware held that the defendant’s policy of opening their public school board meetings with prayer offered by board members **fell within the legislative prayer exception to traditional Establishment Clause analysis**, requiring the determination whether prayer was used to advance or disparage a particular religion. Furthermore, the board was statutorily-created, publically-elected, a deliberative body, and **board meetings were dissimilar to classrooms in that student attendance was voluntary**.

Standards and Competency:

“Teacher’s Comments about Her Students Caused Her Employment Termination”
Chattooga County Bd. of Educ. V. Searels (Ga. App., 691 S. E. 2d 629), March 9, 2010.

Termination of special education teacher by Board of Education for insubordination and willful neglect of her duties **was supported by well documented evidence**, including evidence that the teacher was warned by her principal after leaving a note on another teacher’s desk degrading the abilities of her special needs students in performing elective classes and she violated her principal’s warning regarding commenting about her students by stating to a fellow teacher in presence of the student that he would be dead before he was 21-years-of-age. In addition, she removed a student’s prescription medication from school in violation of school district policy. **Note:** Teacher’s note to another teacher stated, “You can put my students into any elective class—no matter how advanced—except PE—because they cannot do any of it anyway. This is just to please the parents.” As a teacher’s assistant pushed one of her student by in a wheelchair, the teacher told a fellow teacher that the student’s grandmother “thinks he is going to be an attorney or a doctor or a pharmacist, but he will probably be dead before he is 21.” The aforementioned comment was made with the student only two feet away from the teacher.

“Teacher’s DUI Conviction Supported Suspension of Teaching Credential”
Broney v. California Com. on Teacher Credentialing (Cal. App. 3 Dist., 108 Cal. Rptr. 3d 832), May 6, 2010.

The evidence supported the trial court’s finding that teacher’s conduct in being convicted for a third time for driving under the influence (DUI) was **not** remote in time; thus, denying the plaintiff’s petition challenging the California Commission on Teacher Credentialing’s suspension of her teaching license for unprofessional conduct. The elementary school teacher was convicted in 1987 at the age of 21 of one count of driving under the influence. In 1997 she was again convicted of driving under the influence with a blood-alcohol content of .08 percent or greater. On November 4, 2001, at approximately 1:50 a.m. she was arrested on suspicion of driving under the influence and failed all of the field sobriety tests given her by the arresting officer.

“Principal Statement That ‘The White Man is Going to Kick Your Ass’ did Not Violate the Morals of the Community”
McFerren v. Farrell Area School Dist. (Pa. Cmwalth., 993 A. 2d 344), April 8, 2010.

High school principal’s statement (“The white man is going to kick your ass.”) to a student and his father for appearing with his “stomp group” at his school’s basketball game in violation of the student’s “double detention” for both violating school rules and the principal’s directive forbidding his appearance with his stomp group at his school’s basketball games did **not** violate the morals of the community in order for the principal to be dismissed from his position for immorality under Pennsylvania state statues. The principal, student, and the student’s father were all African-Americans and within the African-American community the phrase “white man” is meant “the establishment and the people who are in control”.

Student Discipline:

“Student Stated Procedural Due Process and Equal Protection Claims Based On Racially Disparate Discipline”
Heyne v. Metropolitan Nashville Public Schools (M. D. Tenn., 686 F. Supp. 2d 724), November 3, 2009.

White high school student who was subjected to a ten-day suspension for driving over a black student’s foot **stated a plausible claim for the violation of his right to equal protection** (14th Amendment), where he alleged he was intentionally discriminated against because of his race, in that school officials had been instructed to “be more lenient in enforcing the school’s student codes of conduct against black students because there were too many black students serving in in-school suspension.” Furthermore, the plaintiff **contended** that the disciplinary action taken against him **was escalated to give an appearance of being sufficiently strict with white students and to improperly appease real or anticipated claims of racial bias** by parents of minority student. **Note:** Student got into his car after football practice and started moving slowing toward the exit of the school’s parking lot when either because the student misjudged the clearance available or because the injured student shifted his foot forward at the last instant; the left front tire of the student’s car made contact with the injured student’s foot; which caused no serious harm. As soon as the student realized what happened he backed-up, jumped out of his car, apologized and attempted to make sure the student was not hurt. Thereupon, the injured student threatened to kill the student as he was attempting to apologize for the unintended accident.

"Insufficient Evidence Supported Student's Expulsion for Possession of Alcohol"
A.B E. v. School Bd. Of Brevard County (Fla. App. 5 Dist., 33 So. 3d 795), April 23, 2010.

Insufficient evidence supported school board's finding that student was subject to expulsion for possessing or being under the influence of alcohol while at school. The student had consumed alcohol at home approximately 45 minutes prior to the beginning of the school day; however, there was **no** evidence that the student was under the influence of alcohol while at school on the day the incident in which the student behaved in an impaired manner. Furthermore, school officials did **not** demonstrate sufficient evidence that the student's conduct actually disrupted the school's educational setting. **Note:** The incident involving the plaintiff occurred during the first period of the school day in which the assistant principal and a school nurse responded to all call in which they found the plaintiff, a middle school student, sitting on the floor outside of her assigned classroom with vomit all over her. The student and a classmate, who had spent the night with her, took an alcoholic beverage from the plaintiff's parents beverage cabinet and poured a little in two cups, along with some coke. Afterward, both girls drank some, but poured most of it out due to their dislike of the alcoholic beverage. In fact the plaintiff stated, "It was a horrible decision and I probably messed up my life, but I'm sorry."

Torts:

"School District Was Entitled to Summary Judgment Regarding Student's Slip and Fall on Playground"
Daefler v. Briarcliff Manor Union Free School Dist. (N. Y. A. D. 2 Dept., 898 N. Y. S. 2d 263), April 20, 2010.

Kindergarten student, who was injured when she slipped and fell while running across the gravel surface of her school's playground during kindergarten recess, **failed** to raise an issue of fact in opposition to the school district's motion for summary judgment regarding plaintiff's personal injury claim based on allegedly dangerous or defective condition of the school's playground. Plaintiff offered **no** proof of the actual depth of the gravel in the area of the playground where the accident occurred, and **no** evidence that the allegedly inadequate depth of the gravel created a slipping hazard which proximately caused the student's fall.

"School District Not Liable for Cheerleader's Injuries during Tryouts"
Ballou v. Ravena-Coeymans-Selkirk School Dist. (N. Y. A. D. 3 Dept., 898 N. Y. S. 2d 358), April 15, 2010.

In seeking summary judgment on negligence claim arising out of injuries that freshman high school student sustained from an unforeseeable accident during basketball cheerleading tryouts, school district **met its threshold burden of establishing its entitlement to judgment as a matter of law by offering proof** of the student's experience as an experienced cheerleader and testimony of the school's varsity cheerleading coach. In addition, the school district **had provided ample supervision and other necessary precautions** at the time of the accident. **Note:** The cheerleader was attempting to perform a stunt known as a "prep cradle twist" when the accident occurred. She was an experienced cheerleader, having been a member of the junior varsity football and basketball cheerleading teams during the eighth grade and a member of the varsity football cheerleading team in the ninth grade.

"Student Member of School's Rotary Interact Club Injuries Were Not Foreseeable"
Hansen v. Bath & Tennis Marina Corp. (N. Y. A. D. 2 Dept., 900 N. Y. S. 2d 365), May 4, 2010.

While serving spaghetti dinner on behalf of a local community's Rotary Club, a senior high school student sustained burns when another student dropped a sterno canister while attempting to light it. The New York Supreme Court, Appellate Division, Second Department held that the school district had **no** duty to supervise the high school student who was injured while participating in a voluntary off-campus activity. Furthermore, the student voluntarily left her high school with other members of her club to serve food at a community fundraiser.

"Teacher Was Not Immune from Liability for Her Abusive Conduct of Students - Supervisory Defendants were Immune"
Vicky M. v. Northeastern Educational Intermediate Unit (M. D. Pa., 689 F. Supp. 2d 721), September 16, 2009.

The United States District Court, M. D. Pennsylvania, held that genuine issues of material fact **existed** as to whether a teacher of autistic students was immune from liability for employing the following techniques for disciplining her students: used bungee cords to restrain students, left students restrained in chairs or on the floor for several minutes, grabbed student by the back of their necks, hit students with the back of her hand, stepped on students feet in an effort to intimidate, struck a student in his head with a tissue box, deprived a communication device for a non-verbal student, withheld food from students as a means of punishment, grabbed students by their ears and nose causing bruising, dragged students by their hair and arms, screamed into the faces of student, backhanded a student causing a bloody lip, and other acts that would be considered "shocking to one's conscience." Thus, based on the aforementioned charges, qualified immunity **was precluded** on behalf of the teacher. In addition, the court ruled that the administration's failure to investigate the allegations associated with the teacher's conduct potentially rose to the level of deliberate indifference; however, they were **immune** from liability because there was **no** evidence of their intended abuse of students or that they were certain that such abuse had actually occurred.

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The **Legal Update for District School Administrators** is a monthly update of selected significant court cases pertaining to school administration. It is written by *Johnny R. Purvis for the **Safe, Orderly, and Productive School Institute** located in the Department of Leadership Studies at the University of Central Arkansas. If you have any questions or comments about these cases and their potential ramifications, please phone Purvis at ***501-450-5258**. In addition, feel free to contact Purvis regarding educational legal concerns; school safety and security issues; crisis management; student discipline/management issues; and concerns pertaining to gangs, cults, and alternative beliefs.

Topics:

- Abuse and Harassment
- Civil Rights
- Disabled Students
- Searches and Seizures
- Security
- Student Discipline
- Torts
- Transportation

Topics

<u>Abuse and Harassment</u>:

"History Teacher Shows Student Pictures of Naked and Dismembered Women"
Young v. Pleasant Valley School Dist. (M. D. Pa., 267 F. R. D. 163), April 12, 2010.

Student and her parents brought action against defendants (school district, school board, principal, and teacher) alleging that the student's high school history teacher created a sexually hostile environment in his classroom by showing students sexually explicit material and that the principal of the school retaliated against the student for complaining about the materials. The United States District Court, M. D. Pennsylvania, held that pictures of naked and dismembered women **were relevant** to the issue as to whether a history teacher created a hostile environment in his classroom by showing students purportedly sexually explicit material. Accordingly, the pictures **were admissible** in plaintiff's suit against defendants so as pertaining to the creation of a sexually hostile environment and retaliation.

<u>Civil Rights</u>:

"Frisk Search of Student by Officer Was Reasonable"
In re D. L. D. (N. C. App., 694 S. E. 2d 395), April 20, 2010.

Officer's frisk search of a high school student in a school restroom **was <u>not</u> unnecessarily intrusive** in light of the juvenile's age, gender, and the nature of his behavior; thus, the search **was reasonable**. Student's behavior, which included exiting the school's male restroom where other students had been arrested for drug offenses, observing the assistant principal and the officer in the corridor, turning and running back into the restroom, and placing an item inside his pants, provided ample suspicion to search the student. The officer frisked the student around his waistband and found a container which had three bags of marijuana.

<u>Disabled Students</u>:

"School Failure to Comply With Requirements of IDEA Did <u>Not</u> Impede Student's Right to a FAPE"
C. H. v. Cape Henlopen School Dist. (C. A. 3 [Del.], 606 F. 3d 59), May 25, 2010.

Public school's failure to comply with the procedural requirements of IDEA, namely, its failure to have an IEP in effect for a learning-disabled student on the first day of classes, did **<u>not</u>** impede the student's right to a FAPE or cause a deprivation of an educational benefit. Therefore, the school district did **<u>not</u>** have to reimburse the student's parents for the year in which the student spent in a private school for learning-disabled youngsters. Public school officials evaluated the student and began developing an IEP relevant to the school year in question, but the student's parents withdrew the youngster from his assigned school and he never attended a single class.

Searches and Seizures:

"Anonymous Tip Did Not Give Rise to Reasonable Suspicion to Justify Warrantless Search of Student"

People v. Perreault (Mich. App., 782 N. W. 2d 526), January 10, 2010.

Anonymous tip by liaison police officer for a high school did **not** give rise to reasonable suspicion necessary to justify a warrantless search of a high school student's vehicle parked on school premises without the student's consent. The search was conduct by the officer and the school's assistant principal and was based on an anonymous tip that contained very little information about the alleged offender, including whether the informant had actually witnessed the alleged drug trafficking or was relaying information heard secondhand.

Security:

"Evidence Supported Delinquency Adjudication Based on Possession with the Intent to Distribute Marijuana on Campus"

In re T. M. (Ga. App., 693 S. E. 2d 574), April 1, 2010.

Sufficient evidence **existed to support** juvenile delinquency adjudication based on the possession with the intent to distribute marijuana on school property. The 16-year-old juvenile, who was a student at the school, denied giving the marijuana to a second student and testified that the second student attempted to pass marijuana to him just before the school's campus security supervisor observed the plaintiff. **Evidence indicated** that the security supervisor was patrolling the school's parking lot shortly after the regular school day had been dismissed and observed the plaintiff approach the second student in the school's parking lot and hand the second student something, which turned-out to be a plastic bag containing marijuana.

Student Discipline:

"Elementary Student Suspended For a Bag Containing a White Substance"

Anthony v. School Bd. of Iberia Parish (W. D. La., 692 F. Supp. 2d 612), February 5, 2010.

An elementary school student's substantive due process rights **were not violated** due to the fact that he was suspended for disturbing his school's instructional environment in connection with his brining a clear plastic bag containing a "white powdery" substance to school and allowing other students to handle and taste the substance. There **was a rational basis** for the student's suspension, namely, *protecting against the threat of illegal drugs and furthering the school's interest in providing a save and secure school environment* that is free of from disruption. Furthermore, school officials **had sufficient and substantial evidence** that the student had been involved in *drug-related role playing* with other students within the school.

Torts:

"Assumption of Risk Did Not Apply to Bar School District's Liability"
Trupia ex rel. Trupia v. Lake George Cent. School Dist. (N. Y., 927 N. E. 2d 617), April 6, 2010.

An almost 12-yer-old summer school student brought negligence action against plaintiff, alleging he was injured when he fell off a stairway banister and injured himself while he was attempting to slide down the banister. The Court of Appeals of New York held that the doctrine of primary assumption of risk did **not** apply to bar school district's liability for negligence relating to the plaintiff's fall while attempting to slide down a stairway banister. The student's injury-producing "horseplay", while totally unsupervised, was **not** an activity that lent itself to protection usually reserved for participation in athletic activities that possess social value.

"Student Runs Into Park Vehicle on School Campus and Looses Sight in His Right Eye"
Diaz v. Canutillo Independent School Dist. (Tex. App.-El Paso, 311 S. W. 3d 588), February 3, 2010.

Father brought negligent action against school district, seeking damages arising out of injuries allegedly sustained by his son when he ran into a parked vehicle owned by the school district while playing football on a school's playground, which allegedly caused him to loose sight in his right eye. A Texas appeals court held that the school district **had a right not to waive its sovereign immunity rights** as to the father's claim of negligence. Furthermore, the vehicle was parked, empty, stationary, and its engine was disengaged.

Transportation:

"Bus Driver Had a Poor Safety Record"
Anderson v. Durham D & M, L. L. C. (C. A. 8 [Mo.], 606 F. 3d 513), May 26, 2010.

Unsafe driving record of 73-year-old white male bus driver **was a legitimate reason** for his removal as a bus driver, and was **not** a pretext for race discrimination in violation of Title VII. Furthermore, there was **no** evidence that similarly situated black school bus drivers received preferential treatment.

Books of Possible Interest: Two recent books published by Purvis –

1. Leadership: Lessons From the Coyote, www.authorhouse.com
2. Safe and Successful Schools: A Compendium for the New Millennium-Essential Strategies for Preventing, Responding, and Managing Student Discipline, www.authorhouse.com

Note: Johnny R. Purvis is currently a professor in the Department of Leadership Studies at the University of Central Arkansas. He retired (30.5 years) as a professor, Director of the Education Service Center, Executive Director of the Southern Education Consortium, and Director of the Mississippi Safe School Center at the University of Southern Mississippi. Additionally, he serves as a law enforcement officer in both Arkansas and Mississippi. He can be reached at the following **phone numbers**: 501-450-5258 (office) and 601-310-4559 (cell)