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Legal Update For District School Administrators January 2007

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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 Johnny R. 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
- Disabled Students
- Discovery
- Extracurricular Activities
- Records
- Religion
- Student Discipline
- Torts

Commentary:

- No commentary

Topics

Abuse and Harassment:

"Special Education Student Sexually Assaulted in School's Restroom"
*Teague v. Texas City Independent School Dist. (C. A. 5 {Tex.}, 185 Fed. App. 355), June 16, 2006.

The United States Court of Appeals, Fifth Circuit, held that under the general rule that governmental entities have **no** constitutional duty to protect individuals from private violence (including the "special relationship" exception providing that state may be liable for private harm if it had a "special relationship" with plaintiff) did **not** apply to school district in its relationship to an 18 year old special education student who was sexually assaulted by another student in the boys' restroom between classes. The student was not subject to compulsory attendance laws; was not involuntarily confined against her will by school officials; school district did **not** have "actual knowledge" of the existence of such a danger to the student; and district did **not** expose student intentionally or unintentionally to "excessive risk".

"School Board Member/Lawyer a Pedophile"
*Doe v. Faerber (M. D. Fla., 446 F. Supp. 2d 1311), August 11, 2006.

Former middle school student brought action against estate of deceased school board member, school board, former school board member's wife, and former school board member's law firm seeking sexual abuse damages. Between 1997 and 2003, former board member would remove plaintiff from school during the school day and take him to his home, law office, or other locations and have sex with him. Various parties at the locations has knowledge of the sexual assaults, but chose not to take correct action; thus, they deliberately chose to be indifferent. A United States district court in Florida held that: (1) school board's practice and custom of avoiding and ignoring complains of sexual abuse **supported** a Section 1983 claim; (2) board's knowledge of former member's sexual misconduct **supported** Title IX claim; (3) deceased board member's wife **failed** to exercise reasonable care in protecting child as a social guest in her home **supported** negligence claim; and (4) law firm's knowledge that a member its firm was a danger to a minor boy and employee of the firm **supported** negligence claim.

Disabled Students:

"School District Properly Implemented Student's IEP"
Melissa S. v. School Dist. of Pittsburgh (C. A. 3 {Pa.}, 183 Fed. Appx. 184), June 8, 2006.

Melissa, who has Down Syndrome, was a 16-year-old ninth grade student at Brasher High School. Her parents brought action against school district, special education program officer, and high school principal, alleging that defendants violated student's rights under IDEA by failing to implement student's IEP; improperly using physical restraints and isolation in order to control her behavioral outbreaks; violated students Fourteenth Amendments rights; violated Section 504 of the Rehabilitation Act; and violated Title IX. Student committed various serious behavioral problems such as the following: sat on the floor kicking and screaming; assaulted other students; spit at and grabbed the breast of a teacher; refused to go to class; and had to be chased by her assigned aide after running out of the school building. Security guards were often called to escort her from the immediate area of her outbursts to a "time out area", where her assigned aide would supervise her and encourage her to return to class or to her assigned activity. The United States Court of Appeals, Third Circuit, held that: (1) school district **did not fail** to implement student's IEP; (2) school officials **did not deny** student of a free appropriate public education (FAPE); (3) school officials **were not deliberately indifferent** to student, as would violate her due process rights; and (4) parent **failed** to provide notice of an alleged sexual assault on her daughter by a teacher.

Discovery:

"School Records Regarding Teacher's Rape of Student Were Discoverable"
Anonymous v. High School for Environmental Studies (N. Y. A. D. 1 Dept., 820 N. Y. S. 2d 573), August 31, 2006.

Music teacher raped, assaulted, molested, sodomized, and abused the plaintiff (at the time a 14 year old student in his class) on or about February 8, 1999 in his classroom after class ended. During the rape, he also instructed plaintiff and another minor "to perform deviant oral and vaginal sexual acts upon him and upon each other". He videotaped the rape of plaintiff and her classmate and took pornographic photographs of them. In addition, he threatened plaintiff to compel her not to tell anyone what happened. In September 2000, the school district allowed the teacher to resign his position, despite the investigative finding that he should be fired, and gave him a favorable reference without mentioning the finding that he has engaged in sexual misconduct. Plaintiff began the action against the school district in December 2003. The Supreme Court of New York, Appellate Division, First Department, held that school records and documents related to hiring, retention, supervision, discipline, termination, and complaints about, claims against, investigations, and other documents **were material necessary** to a fair resolution of student's action against high school. Plaintiff charged school officials with negligence, negligent hiring, negligent retention, negligent supervision, inadequate protection, and gross negligence. Thus, school documents **were discoverable** and necessary to a fair resolution of student's action. *As a footnote to the case:* On January 18, 2001, police raided former teacher's home and found more than 10,000 photographs of children and more than 500 video clips of children, including videos depicting infants as young as four years old being raped and sodomized. Former teacher is now serving a very lengthy prison sentence.

Extracurricular Activities:

"Student Golfer Struck in the Head With Golf Club"
Bowman ex rel. Bowman v. McNary (Ind. App. 853 N. E. 2d 984), August 31, 2006.

On August 13, 2003, McCutcheon High School girls' golf team was practicing at the Ravines Golf Course. After playing a few holes, the golf coach directed the team to the driving range to stretch, loosen-up, and take a few practice swings; thereupon, the plaintiff was struck in the head by one of her teammates with a golf club. The blow left the young golfer blind in one eye. Parents of the plaintiff brought action against the school district and their daughter's golf teammate. The Court of Appeals of Indiana stated that: (1) student golfer **was barred** from proceeding with claim of negligence against golf teammate; (2) golf teammate **was <u>not</u> recklessly negligent** when she swung her club and accidentally hit teammate in her head; and (3) student golfer **was** barred by doctrine of incurred risk from proceedings with negligence action against school district. *As a footnote to the case:* Injury was of a type inherent to golf and the student golfer stated that she *was aware* of such risks, thus negating any negligence suit..

Records:

"Superintendent-Principal's Alleged Misconduct Subject to Disclosure Under Public Records Act"

BRV, Inc. v. Superior Court (Cal. App. 3 Dist., 49 Cal. Rptr. 3d 519), September 29, 2006.

Superintendent-principal of Dunsmuir Joint Union High School District (enrollment in grades 9-12: 135 students) was charged with verbally abusing student in disciplinary settings and sexually harassing female students. The board hired a private investigator to investigate the complaints against the superintendent-principal. The investigation validated the alleged allegations against the superintendent-principal. Shortly thereafter, he resigned his position on July 23, 2004. However, the resignation was not effective until December 31, 2004. Under an agreement between the board and superintendent-principal, such items as the following were agreed upon: (1) he was placed on administrative leave from July 23 through December 31, 2004, at which time his retirement would take effect; (2) his salary would increase by $5,000, payable during the time he spent on leave; (3) superintendent-principal agreed not to "participate or attend" any school district activities, functions, and meetings; and (4) school district agreed to seal all documentation related to the investigation of the superintendent-principal. Petitioner BRV, Inc. (BRV), publisher of the Redding Record Search newspaper, sought disclosure of the allegations of misconduct pertaining to the superintendent-principal under California's Public Records Act. A California court of appeals stated that the board **was required** to release the report pertaining to the alleged allegations against the former superintendent-principal.

Religion:

"Student Christian Band Excluded From School Assembly"

Golden v. Rossford Exempted Village School Dist. (N. D. Ohio, 445 F. Supp. 2d 820), July 31, 2006.

Members of a Christian musical band sued school district, alleging that band's exclusion from performing at student assembly violated their free speech (First Amendment) and equal protection rights (Fourteenth Amendment). The situation with the band arose when the Christian musical band (Pawn) were excluded from performing at a school wide assembly, while at the same time allowing a "secular band by the name of Blind Ambition to perform at the assembly. Blind Ambition was allowed to perform because it did not have a mission of a religious nature. A United States District Court in Ohio held that the assembly was not a public forum and school officials **could exclude** the Christian band with out violating free speech and/or the band members' equal protection rights. Furthermore, school officials **were entitled** to discriminate against the Christian band because students might associate the band's identity with the school and school officials had to protect the state's interest in avoiding a Establishment Clause violation.

"Boy Scouts Can Make Presentation at School"
Powell v. Bunn (Or., 142 P. 3d 1054), September 8, 2006.

After plaintiff (an atheist) learned that her first grade son's elementary school had allowed the Boy Scouts to make presentations at his school during school hours, she complained to school officials. She asserted that her son was negatively affected by their presentations, and she filed action against the school district. The Supreme Court of Oregon held that the school district's access policy allowing Boy Scouts to make in-school membership presentations to students during their lunch hour did **not** constitute "discrimination" under state statute prohibiting discrimination based on religion in public schools. Although the Boy Scouts believe in a theistic God, their recruitment was aimed at all school children without differentiation among children, and without mention of religious element.

Student Discipline:

"Student Suspended From School For Possession of Pocket Knife"
Vann ex rel. Vann v. Stewart (E. D. Tenn., 445 F. Supp. 2d 882), June 5, 2006.

On April 7, 2004, high school sophomore discovered that he had a pocket knife in his pocket during his first period class. He showed the knife to a few classmates, but did not inform his teacher, nor did he dispose of the knife. On the other hand, plaintiff did not open the knife or display it in an offensive or threatening manner. Later on during the same day, the assistant principal learned that the student had threatened a female student with whom plaintiff had carried on a turbulent romantic relationship. Student denied making any threats, but admitted possessing the pocket knife and gave it to the assistant principal. A United States District Court in Tennessee stated that there **was a rational relationship** between punishment, consisting of one calendar year suspension, and offense, possession of pocket knife on school property, thus precluding claim that school discipline hearing authority (DHA) violated student's substantive due process rights by allegedly not considering lesser penalties. Student was aware of school's no tolerance policy toward weapons possession and that he could be suspended for one year.

"Student Wrote Note Pertaining to Bomb Threat"
A.B. ex rel. Bennett v. Slippery Rock Area School Dist. (Pa. Cmwlth., 906 A. 2d 674), August 31, 2006.

A. B.. was a sixth-grade student at Slippery Rock School. From 8:42 a. m. to 8:44 a. m. on January 12, 2006, A. B. signed out of class to go to the bathroom. While in the bathroom, she found a bomb threat note on top of a toilet's flushing mechanism which read, "A bomb will go off in the school tomorrow." The note was written on a tiny piece of paper torn off the corner of a sheet of notebook paper. At first she claimed she did not write the note; but later she admitted that she wrote the note approximately two weeks prior to the incident and gave it to a friend as a joke. However, she denied that she put the note in the restroom. The school district expelled the middle school student for the remainder of the school year. The Commonwealth Court of Pennsylvania held that there **was substantial evidence** upon which school board could find that student wrote note containing the bomb threat and left the note in the school's bathroom, in violation of school district's policy governing terroristic threats/acts. Thus, student's expulsion for the remainder of the school year **was upheld**.

"School District Could <u>Not</u> Enforce Expulsion"
Tarkington Independent School Dist. v. Ellis (Tex. App.-Beaumont, 200 S. W. 3d 794), August 31, 2006.

During a routine check of high school's parking lot, a drug dog alerted on plaintiff's truck. Plaintiff consented to a search of his truck. During the search, a police officer found brass knuckles in the truck's glove compartment. Brass knuckles are "prohibited weapons" under Chapter 37 of the Texas Education Code. The school district expelled plaintiff for one school day (February 24, 2006), and then placed him in an alternative school until the end of the school term. Plaintiff requested that the court issue a temporary restraining order requiring the school district from enforcing his expulsion and fully admit him "without any limitations and with full rights of any student in good standing". A Texas court of appeals stated that student **showed** that he ***was likely to succeed*** on the merits of the case. Thus, he ***was entitled to injunctive relief prohibiting school district from continuing to enforce order that expelled him from school***.
<u>Note:</u> The brass knuckles belonged to a friend of the plaintiff, and he did not know that the friend left the brass knuckles in his truck glove box.

Torts:

"Superintendent Interfered With SRO's Investigations"
Baker v. Couchman (Mich. App., 721 N. W. 2d 251), May 30, 2006.

Sheriff's deputy acting as SRO brought action against school district and superintendent for violations of the Whistleblowers' Protection Act (WPS) and interference with employment relationship after county sheriff's department reassigned officer to road patrol. The Court of Appeals of Michigan found that: (1) superintendent's interference with officer's criminal investigations **exceeded the scope** of his executive authority such that he **lacked** absolute immunity; (2) superintendent did **not** have qualified immunity from claims arising out of interference with criminal investigations; and (3) genuine issue of material fact as to whether officer suffered a loss when county sheriff's department transferred officer to road patrol **precluded summary disposition**. **Note:** Examples of interference by the superintendent included such activities as the following: (1) student sealing another student's clothing out of his locker; (2) student threatening another student with a knife; (3) investigating of a reckless driving incident that resulted in damage to a student's vehicle; (4) engaging in a concerted effort to remove SRO from his position; (5) circulating a pamphlet to the school board denouncing SRO's efforts; (6) soliciting the assistance of parents to petition for SRO's removal; and (7) filing complaints against SRO to his superiors.

"Student Dies From Asthma Attack During Physical Education"
Upton v. Clovis Mun. School Dist. (N. M., 141 P. 3d 1259), September 12, 2006.

Parents of student who collapsed and died from asthma attack after being required by a substitute physical education teacher to continue exercising brought a negligent claim against school district under the New Mexico's Tort Claims Act (TCA). The 14-year-old student had suffered from asthma since the age of three. She learned to live with the disease, knowing when an attack began and how to treat it. After finding out that she would have to take physical education in the ninth grade, her parents met with her physical education teacher and the teacher agreed to limit the student's activity if Sarah felt that the physical exercise was triggering an attack. On the day of Sarah's death, a substitute teacher in charge of her physical education class required exercise that was more strenuous than normal. Sarah asked the teacher for permission to stop, the teacher refused. After the physical education class, Sarah used her inhaler and went to her next class. Shortly after the class begin, she collapsed at her desk. School officials waited over 15 minutes before calling 911. By the time medical personnel arriver, Sarah was no longer breathing. The Supreme Court of New Mexico held that school district **failed** to follow through on safety policies for students with special needs in acute medical distress. Thus, the lack of action on the part of school officials **was an act of negligence** and **constituted a waiver** of immunity under the state TCA.

"High School Principal Pushes Student Into Wall"
Webb ex rel. Bumgarner v. Nicholson (N. C. App., 634 S. E. 2d 545), July 5, 2006.

On September 7, 2001, the Yearbook Club of Smoky Mountain High School sponsored a dance in the school cafeteria, in order to raise money to publish the high school's yearbook. Defendant, high school principal, attended the dance to provide supervision. Plaintiff came to the dance with his brother. His brother entered the dance after paying for his own ticket, but without paying for plaintiff's ticket. Thus, plaintiff was denied entrance. Plaintiff went to a cafeteria window and leaned inside, allegedly in order to attract his brother's attention. The assistant principal saw plaintiff and told him to get back outside. High school principal pulled plaintiff back out the window and pushed him up against the exterior wall of the cafeteria. Plaintiff claimed he suffered from osteonecrosis, and the incident required him to have additional medical treatment, including surgeries. The Court of Appeals of North Carolina ruled that high school principal's supervision of school dance **was a governmental function** and he **was immune from liability**. Additionally, the use of reasonable force to maintain discipline **was a discretionary act** within his capacity as a public official.

"Seventh Grader Hit In Mouth With Golf Club"
Hemady v. Long Beach Unified School Dist. (Cal. App. 2 Dist., 49 Cal. Rptr. 3d 464), September 28, 2006.

Twelve-year-old student was struck in the face with a golf club by another student during a seventh grade physical education golf class. The Superior Court, Los Angeles County entered summary judgment for the school district. Student appealed. A California court of appeals reversed and remanded the case back to the lower court. However, the appeals court stated that **prudent person duty of care** (rather than limited duty of care) ***applied*** when policy rationales required application of "primary assumption of risk " doctrine to sporting events. A student being hit in the head by a golf club **was <u>not</u>** an inherent risk in physical education golf class taught to a group of seventh graders. The application of the "reasonably prudent person standard of care" would <u>not</u> require fundamental alteration of game of golf; nor would it inhibit teacher's roll to challenge student athletes, nor discourage competition or vigorous participation.

"Student Falls From Playground Slide"
Swan v. Town of Brookhaven (N. Y. A. D. 2 Dept., 821 N. Y. S. 2d 265), September 26, 2006.

Eleven-year-old student was injured when he fell from a school playground slide during recess. The record indicates that the student attempted to get off the slide about midway down from the top. His foot got caught under another student, and he fell to the ground. The plaintiffs alleged that the injuries sustained by the student were the result of inadequate ground cover on the surface beneath the slide, and negligent supervision by school personnel. The Supreme Court, Appellate Division, Second Department, held that elementary school student's act of going over the side of a playground slide after getting his foot stuck under another student **was a sudden and unforeseen event** which **no** amount of supervision could have prevented. Thus, even if school district and elementary school did breach their duty to supervise, that breach was **not** the proximate cause of the accident.

"Student Killed In Auto Accident"
Davis v. Lutheran South High School Ass'n of St Louis (Mo. App. E. D., 200 S. W. 3d 163), June 27, 2006.

Parents' son was killed in a car-tractor trailer collision while traveling to Lutheran South's (private school) championship softball game on October 19, 2001. Two other students in the car were also killed. On October 17, 2001, school officials announced that the girls' softball team had qualified to play in the state championship game on October 19, in Columbia, Missouri. The school also announced that: (1) students would be given an excused absence for attending the game, meaning that full credit for a day's worth of classes would be given to the students; (2) students had to bring in a permission slip indicating their parents' permission to attend; (3) classes would be held on Friday for those not attending the game; (4) students had to provide their own means of transportation to the game; and (5) once at the game, students had to sign in and out with a faculty member. A Missouri court of appeals held that, as a matter of first impression, school did **not** have physical custody and control over student. Thus, school had **no** duty to supervise student. School merely "provided an opportunity" for students to attend the game without penalty of losing credit for a day's worth of classes in order to support the girls' softball team.

*** Please review carefully and take note.**

Commentary

No commentary.

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).

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Topics

Topics:

- Abuse and Harassment
- Athletics
- Civil Rights
- Disabled Students
- Labor and Employment
- Security
- Sexual Misconduct
- Teachers

Commentary:

- Are Public Single Sex Schools Lawful?

Abuse and Harassment:

"School Board's Response to Female Student's Sexual Assault Was Unreasonably Delayed"
Doe ex rel. Doe v. Derby Bd. of Educ. (D. Conn., 451 F. Supp.. 2d 438), September 15, 2006.

Father brought action against school board on behalf of female student under Title IX, alleging that she was subjected to sexual harassment following sexual assault by a male student. School board moved for summary judgment. The United States District Court, D. Connecticut, **denied** the board's request for summary judgment. The rationale of the court including the following: (1) A Title IX claim based on student-on-student sexual harassment **is supported** when the plaintiff demonstrates the following elements: (A) the harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school; (B) the school district **had actual knowledge** of the sexual harassment; and (C) the school district was deliberatively indifferent to the harassment; and (2) **Genuine issues of material fact existed** as to whether school board's response to alleged sexual harassment of female student following sexual assault by male student was unreasonably delayed and inadequate, so as to constitute deliberate indifference on the part of the board, thus **precluding summary judgment** for the board. **Note:** Thirteen-year-old middle school female student was sexually assaulted by a 17-year-old male high school student during summer recess and off school grounds. The male student was eventually arrested and charged for sexual assault of the female student. Both the victim and the assailant returned to school in the fall of 2002. Middle school students attended school in the same building as the high school students, even though their classes were held separately. However, both groups of students could interact with each other during various times of the school day. The assailant and his friends harassed and teased the victim during the times when middle and high school students interacted during the school day, immediately after school, and immediately before school. They would harass and tease her by doing such things as spitting on her and calling her a "slut".

Athletics:

"High School Football Player Dies During Practice"
Stowers v. Clinton Cent. School Corp. (Ind. App., 855 N. E. 2d 739), October 26, 2006.

On July 31, 2001, Travis (the son of the plaintiffs) participated in morning football practice from 7:30 a. m. until 10:00 a. m. On or about 7:50 a. m., the coach noticed that Travis had the "dry heaves". He rested for a few minutes and continued practice. During a 90 minute break, plus a 20 minute team meeting, Travis ate lunch and kept it down. Thereafter he spent time lying on the locker room floor, resting. Afternoon practice ran from 12:00 noon until 2:00 p. m. During the water break, at approximately 1:45 p. m., several of the players yelled for the coach because Travis had collapsed near the team's watering device (a water tree). The coach and trainers immediately removed his helmet and shoulder pads, loaded him in a golf cart, and took him to the locker room. There they placed him in a cool shower, placed ice around him, and called 911. Travis lost consciousness in the locker room, which he never recovered. He died around 4:00 a. m. the following day. Travis was a farm boy who took care of livestock, bailed hay, mended fences, and did the many other chores necessary around a farm. He attended a university football camp that summer where he participated in three practices per day. He also participated in the team's summer weightlifting and conditioning program; plus, he did additional running on his family's treadmill. At the time of his death he was 17-years-old, a junior in high school, and weighed 254 pounds. Additionally, he had been playing organized football since the fifth grade. An Indiana superior court entered judgment on a jury verdict for the school, and parents appealed. The Court of Appeals of Indiana held: (1) release forms which were signed by Travis' mother granted permission for the student to participate in organized athletics and acknowledged that the potential for injuries were inherent and might be a possibility were relevant to the school's defense; and (2) release forms did **not** absolve school from liability for negligent acts if release form did not contain language specifically referring to negligence. Thus, the appeals court affirmed in part, reversed in part, and remanded the case back to the superior court for further judgment.

"Basketball Players Suspended From Team for Calling for the Resignation of Their Coach"

Pinard v. Clatskanie School Dist. 6J (C. A. 9 {Or.}, 467 F. 3d 755), October 30, 2006.

After one of the many losses, the boys' varsity basketball team at Clatskanie High School met at a local restaurant and signed a petition requesting the immediate resignation of their head basketball coach. There rational for requesting the coach's resignation was due to coach's many derogatory remarks about the team and individual players, and that they felt uncomfortable playing for him. Thereupon, the coach suspended all those who both signed the petition and refused to board the team bus for the next game. Subsequently, the players brought 1983 First Amendment retaliation action against the school district, alleging that players' suspension from the team was a consequence of their criticism of the team's coach. The United States Court of Appeals, Ninth Circuit, held that: (1) players' petition requesting the resignation of their coach and their complaints to school district officials during an ensuing meeting **constituted** protected speech; (2) assuming the players' refusal to board the team's bus was expressive conduct, it was **not** protected speech; and (3) **remand was required** back to the federal district court to determine whether players' protected speech was substantial or motivating factor in their suspension from the team. Thus, the Ninth Circuit affirmed in part and remanded part back to the lower court for further proceedings.

Civil Rights:

"Teacher Non-renewed After Expressing Her Opinion Concerning Fairness of Cheerleader Tryouts"

Gilder-Lucas v. Elmore County Bd. of Educ. (C. A. 11 {Ala.}, 186 Fed. App. 885), June 26, 2006.

Non-tenured public high school teacher and junior varsity cheerleading sponsor brought lawsuit against county board of education and school officials, asserting violations of her constitutional rights (First and Fourteenth Amendments), relating to non-renewal of her contract. The United States Court of Appeals, Eleventh Circuit, stated that: (1) teacher's speech expressing concerns about the fairness of cheerleader tryouts did **not** have First Amendment protection; and (2) non-tenured public high school teacher had **no** due process property interest in renewal of her teaching contract. **Events leading up to the case:** Plaintiff was a non-tenured high school science teacher and junior varsity cheerleading sponsor. Two parents complained about unfairness in the cheerleader tryouts that were held in March 2004. The school principal conducted an investigation into the complaints and asked the plaintiff to complete a questionnaire that included several questions about the cheerleading tryouts. She responded to the questionnaire and raised several concerns about the tryouts. On May 12, 2004, the principal told the plaintiff he would not recommend the renewal of her contract. In addition, he offered to permit the plaintiff to resign; but she did not resign, and her contract was not renewed by the board of education.

"Custodian Arrested For Storing Gasoline Under School Library"
Brown v. Aybar (D. Conn., 451 F. Supp. 2d 374), September 7, 2006.

Custodian (plaintiff) instituted civil action against city fire marshals alleging that they deprived him of his Fourth Amendment rights when they caused him to be arrested on July 1, 2002; and further, they maliciously prosecuted him for violations of state laws and regulations regarding the storage of flammable and/or combustible materials at the middle school where he worked. The city and fire marshals moved for summary judgment. The United States District Court, D. Connecticut stated that genuine issues of material fact as to whether fire marshals were involved in decision to seek prosecution of school custodian for storage of flammable or combustible materials at middle school; whether there was probable cause to arrest custodian; and whether fire marshals acted with malice, thus **precluding summary judgment** for fire marshals on plaintiff's claim for malicious prosecution. **Note:** The city of Waterbury Fire Marshal's Office received a complaint that excessive amounts of gasoline and diesel fuel were being stored at the Westside Middle School in a location under the school's library. Upon inspection of the location, the city's fire marshals found containers of gasoline and diesel fuel, an acetylene torch, and a number of lawn mowers. Adjacent to the same area of the school building, fire marshals found three 55-gallon drugs containing pesticide and a large storage trailer housing snow blowers, lawn mowers, and other equipment.

Disabled Students:

"Plaintiffs Stated A Valid Claim Regarding 'Child Find' Component of Rehabilitation Act"
DL v. District of Columbia (D. D. C., 450 F. Supp. 2d 21), August 25, 2006.

Suit was brought against the District of Columbia Public School District (DCPS) and superintendent, alleging that defendants failed to identify, locate, evaluate, and offer special education and related services to disabled children between the ages of three through five living in the school district. DCPS moved to dismiss the district's superintendent as a defendant. The United States District Court, District of Columbia, held that: (1) plaintiff **stated a valid claim** for the violation of the Rehabilitation Act which provides that "no otherwise qualified individual with a disability in the United States shall, solely by reason of his/her disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance"; and (2) the superintendent, in his official capacity, **was amenable (answerable)** to **civil rights** suit, even though the District of Columbia was a named defendant.

Labor and Employment:

"Principal's Oral Offer of Job Did Not Create a Property Interest"
Watson v. North Panola School Dist. (C. A. 5 {Miss.}, 188 Fed. App. 291), July 11, 2006.

Between August 1999 and June 2002, plaintiff was employed in the North Panola School District as an instructor in the high school's "JROTC". In June 2002, plaintiff resigned his position and enrolled in nursing school. In the spring of 2003, plaintiff learned that the person who had taken his position as an instructor had resigned. Plaintiff decided that he wanted to return to his previous job. He applied, and was granted an interview. During the interview, the high school principal indicated that plaintiff would get the job. Based on his belief that he was going to be employed, he withdrew from nursing school and reported for work at the school. He worked in his previous job for one week before the school's spring break. After the break, he was informed that the school board employed a different candidate. Thereupon, he filed suit against the school district, alleging denial of due process under the Fourteenth Amendment of the United States Constitution. The United States Court of Appeals, Fifth Circuit, held that principal's alleged action of orally offering plaintiff a job did **not** create a property interest in employment, inasmuch as the school board had not hired him. Under Mississippi law, there existed explicit statutorily mandated hiring procedures that required school district employees to be hired only by the school district's board of education. Thus, the plaintiff had **no** property interest in employment.

"Same-Sex Marriage Performed In Canada Not Recognized"
Funderburke v. New York State Dept. of Civil Service (N. Y. Sup., 822 N. Y. S. 2d 393), July 11, 2006.

Retired teacher brought action alleging that school district's denial of health insurance benefits for his same-sex spouse was discriminatory. The Supreme Court of Nassau County stated that same-sex marriage performed in Canada was **not** a recognizable "marriage" under the state of New York's constitution or statutes, and thus did **not** trigger retired teacher's entitlement to health insurance coverage for his same-sex spouse.

"Atmosphere of Intimidation At School Not Legal Cause of Teacher's Depression For Workers' Compensation"
Asmus v. Waterloo Community School Dist. (Iowa, 722 N. W. 2d 653), Oct. 13, 2006.

Supreme Court of Iowa held that evidence **was sufficient** to support finding of Workers' Compensation Commission that alleged atmosphere of intimidation at middle school where plaintiff taught was **not** the legal cause of the teacher's severe depression. Thus, plaintiff was **not** entitled to benefits, although the teacher's psychiatrist testified that stress produced by teacher's dealings with his principal were a major cause of his current depressive state and that he would not be able to continue teaching. The school district's psychiatrist did not agree that the workplace conditions were a producing cause of the teacher's depression. **Note:** The 26 year veteran science teacher identified stressors such as the following that were caused by his principal: identified teacher as having intimidated students; declined teacher's request to change other teachers' grading philosophy; divided his science classroom into two separate classrooms in order to have a remedial English class; and principal favored some teachers and intimidated others (including the plaintiff).

"Search of Custodian's Vehicle Considered a Grievance"
Gray v. Caddo Parish School Bd. (La. App. 2 Cir., 938 So. 2d 1212), August 23, 2006.

A Louisiana court of appeals **vacated judgment** of the First Judicial District Court of Caddo Parish and **remanded** with instructions in regard to a school custodian's petition that she had a grievance regarding her principal's search of a bag she had placed in the trunk of her vehicle. The principal had recently received information from the neighborhood that janitorial workers had been seen putting bags into their vehicles. The plaintiff did place a bag in her vehicle; but it contained soft drinks and a sympathy card to her by a coworker, plaintiff's brother had recently died. Therefore, the elementary school custodian's complaint that she was subjected to an unconstitutional search of her vehicle **was, in fact**, a grievance. Thus, her appeal should not have been dismissed on the grounds that the matter did not meet the definition of a "grievance". Instead, the school board **should have heard** the custodian's grievance.

Security:

"Student Injured In Fight at School"
McLeod v. City of New York (N. Y. A. D. 2 Dept., 822 N. Y. S. 2d 562), September 19, 2006.

Student brought action against school to recover for personal injuries caused by a fellow student who attacked him at school. The Supreme Court of New York, Appellate Division, Second Department, held that **genuine issues of material fact existed** as to whether school authorities were aware that student who assaulted infant plaintiff had propensity for violent behavior; whether school safety officer who witnessed fight took energetic steps to intervene; and whether plaintiff was voluntary participant in fight **precluded summary judgment** in action against school district to recover injuries sustained in fight.

Sexual Misconduct:

"State Law Prohibiting Sexual Misconduct Between School Employee and Students Is Constitutional"
In re Shaw (Tex. App.-Texarkana, 204 S. W. 3d 9), August 11, 2006.

Plaintiff was charged by indictment with the offense of improper relationship between an educator and a student under Texas' Penal Code which prohibits any type of sexual contact. The indictment alleged that the plaintiff engaged in prohibited sexual contact with a student who attended the secondary school where she was employed. The plaintiff filed a pretrial motion contesting the statute and related charge on the grounds that both the statute and charge violate her: (1) First Amendment rights of privacy and freedom of association; (2) the due process clauses of the Fifth and Fourteenth Amendments by being void of vagueness; (3) the equal protection clause of the Fourteenth Amendment by creating a class treated differently from any other class; and (4) the Fifth Amendment prohibition against double jeopardy by authorizing the state to prosecute twice for the same offense (being prosecuted criminally and civilly {loss of teaching license}). The Court of Appeals of Texas, Texarkana, held that: (1) statute that prohibited sexual contact or relations between employees of primary or secondary schools and students was **not** unconstitutionally overbroad; (2) statute was **not** void for vagueness; (3) statute did **not** violate the equal protection clause of the Fourteenth Amendment; and (4) statute did **not** violate double jeopardy prohibition.

Teachers:

"Teacher Dismissed for Immorality"
Bergerson v. Salem-Keizer School Dist. (Or., 144 P. 3d 918), September 28, 2006.

Plaintiff had taught for the school district for approximately 19 years and had not been subject to any prior disciplinary action. In 1999, plaintiff began having marital problems and other family difficulties. Eventually, her husband moved out of the family home to live with another woman and initiated marital dissolution proceedings. On January 6, 2001, plaintiff drove to meet her estranged husband at his girl friend's house. She and her husband had an argument, and plaintiff returned to her vehicle, where she attempted to kill herself by taking various prescription medications. She then started her vehicle and rammed it into her husband's vehicle, which was parked in the driveway. The impact of the collision pushed her husband's vehicle into his girlfriend's house, causing significant damage to the house. The district attorney charged the teacher with four crimes related to the incident, including criminal mischief. As part of the plea bargain, plaintiff pleaded no contest to the criminal mischief charge. In return the other charges were dropped. However, the plea bargain also provided that, if petitioner violated the conditions of her probation, the court automatically would sentence her on her plea of no contest. Afterward, she voluntarily committed herself to psychiatric treatment. The school district dismissed the teacher for neglect of duty, and immorality. Oregon's Fair Dismissal Appeals Board (FDAB) required the school district to reinstate the teacher because the FDAB findings did not support the school board. The Court of Appeals reversed and remanded the case back to the FDAB for a fair and reasonable interpretation of the facts of the case as applied to Oregon's statutes, because the FDAB did never addressed the facts (teacher's suicide attempt, teacher's criminal conduct, and the related publicity surrounding the case) which the school board used in dismissing the teacher. The Supreme Court of Oregon **affirmed** the Court of Appeals decision.

Commentary

Are Public Single Sex Schools Lawful?

On January 8, 2002, President Bush signed into law the No Child Left Behind Act of 2001 (NCLB), which reauthorized the Elementary and Secondary Education Act of 1965 (ESEA). Section 5131(a)(23) of ESEA allows local education agencies (LEAs) to use Innovative Program funds to support same-gender schools and classrooms with "applicable law", and Congress has allocated $450 million to promote such programming.

As of April 2006, there were 209 public school districts in 33 states offering single-sex educational opportunities, and 44 entirely single sex public schools operating in 17 states across the country. While this proliferation of single-gender public schools is encouraged by the availability of NCLB funding, it remains open to debate as to whether sex-segregated education is legally viable as one of the innovations supported by federally-induced reform efforts. This monograph will make a very brief examination as to whether a sex-segregated public education can survive a legal challenge.

In order to consider whether single-gender schools are a lawful program innovation for school districts to use in improving student achievement, the "applicable law" to examine includes Title IX of the Education Amendments of 1972 and its implementing regulations; case law; and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

To defend any statutory or constitutional claims within "applicable law" pertaining to sex discrimination (as related to single sex public schools), school officials will be required to put forward exceedingly persuasive justifications for a decision to implement single-sex schools that are free from stereotypical generalizations, and that provide equal opportunities to the excluded gender. While NCLB achievement goals are a beacon and innovative program funds are available, school officials can reinforce the need for educational experimentation, especially in troubled urban school settings. Accordingly, states should be allowed to experiment with special educational tools developed for their own particular needs. A strong empirical basis is required for a school board to justify its position that single-sex education is a viable tool to improve student achievement. "Education is not a one-size fits all business," said the Court in United States v. Virginia (518 U. S. 542), "innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity."

School administrators who are considering the creation of single-sex classrooms or schools must be able to articulate the underlying purposes for the decision, if they are faced with a legal challenge on the basis of sex discrimination. The following questions may be helpful:

1. What important governmental interest would be served by single-sex schools? Such interests may be remedial (that is to compensate for past discrimination) or nonremedial, including improving student achievement; reducing disciple problems; reducing drop-out rates; promoting diversity; and other such applicable legitimate issues.
2. Is the separation of students on the basis of sex substantially related to the aforementioned interests? School officials will need to know what created the need for the proposed single-sex classes or schools, and whether that need is based on - or reinforces - generalized or stereotyped notions of one sex. The need should be justified by strong empirical research supported by statistical or other data such that an exceedingly persuasive justification can be shown for sex segregation in their school(s).
3. Are the single-sex programs voluntary and are the curricular offerings, services, instructional methods, opportunities, transportation, co-curricular activities, equipment, facilities, and so forth, comparable or substantially equal to those offered to the excluded sex? If one sex is denied the benefits available to the other, denying admission to a qualified student of the other sex may be unlawful.

*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).

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Legal Update For District School Administrators April 2007

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Topics:

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

Commentary:

- No commentary

Topics

Abuse and Harassment:

"School Not On Notice of Hostile Environment By Soccer Coach"
Henderson v. Walled Lake Consol. Schools (C. A. 6 {Mich.}, 469 F. 3d 479), December 1, 2006.

Prior to giving the court's decision regarding this case, the following background information will be presented. Immediately after being hired as the girls soccer coach (January 2002), he told team members and their parents that he was in charge and any complaining by them would result in reduction of their daughters' playing time. He soon developed a special interest in one of the team members (Jill) and communicated his desires to the plaintiff (Teresa). Soon Jill's parents became concerned and communicated their concerns to the school's administration. The administration issued a five point memorandum: (1) No communicating with team members between (9:30 p.m. and 7:00 a.m.; (2) no e-mail messages to team members unless a copy is also sent to assistant principal; (3) prohibited counseling team members regarding personal matters; (4) prohibited from conducting activities with team members off-campus unless a parent was present; (5) and prohibited from engaging in a relationship with a team member that might seem inappropriate for a coach. Coach continued to have a relationship with Jill, including forcing Teresa to serve as a lookout while he huddled with Jill under a blanket on a school bus. The coach told Teresa that he "would break her nose and take out her knees" so that she would never play soccer again if she was not cooperative or interfered in anyway regarding his relationship with Jill. On or about May 5, 2002, a meeting was held by the team members' parents in one of the parent's home. During the meeting, a call was received that the soccer coach had a gun to his head and was threatening to pull the trigger. The police were called and he was taken to a local hospital for evaluation. In the meantime, on May 4, 2002, the coach had communicated his resignation to the assistant principal by e-mail. Thereafter, Teresa's parents filed suite against the coach, school administrators, and school district for sexual harassment, civil rights violation, gross negligence, and slander. The Untied States Court of Appeals, Sixth Circuit, ruled that: (1) Coach's alleged threats to harm student if she disclosed his relationship with another student were **not** communications of a sexual nature; (2) school and administrators were **not** on notice that student was the victim of a hostile environment; (3) student **failed** to establish that school or administrators knew anything about student's alleged protected activity, *as was required* to hold them liable for coach's alleged retaliatory actions; and (4) coach's remark was **not** made within the scope of his authority as soccer coach, *as was required* to hold school liable.

"Third Grader Looks At Kindergarten's Pubic Area"
Hunter ex rel. Hunter v. Barnstable School Committee (D. Mass., 456 F. Supp. 2d 255), October 17, 2006.

During the 2000-2001 school year, Sharon was a kindergarten student at Hyannis West Elementary School. She rode the public school bus to and from school. From September 2000 to February 2001, an older student (third grader) on the bus, Thomas, coerced her into lifting her dress, pulling down her underwear, and spreading her legs. This occurred every time Sharon wore a dress, which was approximately two to three times per week. There were no allegations that the incidents involved any touching. On February 14, 2001, Sharon informed her mother and father about the incidents. Her mother promptly telephoned the principal of the elementary school in which Sharon was enrolled. This was the first time that any school official learned of the allegations of sexual harassment. Thomas was interviewed by the principal, but denied the allegations. School officers offered to place Sharon on another bus; but Sharon's parents did not consider this option to be appropriate because it punished the victim and not the perpetrator. Sharon parents' offered their own option, which included placing a monitor on the bus, placing two empty rows of seats between the children with discipline problems, and moving Thomas to another bus. As a result of the incident and the lack of an acceptable solution to the sexual harassment charges, Sharon did not use a public school bus, would not participate in gym classes (due to interactions with Thomas in the school's hallways and gym class), and suffered from an atypical number of absences. Thereupon, Sharon' parents filed a law suit against the school district under Title IX, seeking injunctive relief and compensatory and punitive damages, alleging school officials failed to respond adequately to the Sharon's allegations that she was sexually harassed. The Untied States District Court, D. Massachusetts, held that: (1) school officials did **not** act with deliberate indifference to the sexual harassment charges; and (2) youngster's incidental interactions with older student after plaintiff stopped riding school bus were **not** sexual harassment under Title IX.

Civil Rights:

"Psychologist Received Proper Notice of Charges Pertaining to Her Dismissal"
Fry v. Hillsborough County School Bd., Fla. (C. A. 11 {Fla.}, 190 Fed. App. 810), July 20, 2006.

Former school psychologist brought a Section 1983 action against school board and administration, alleging discrimination and retaliation. Charges similar to the following were used by the school district's administration decision to dismiss the plaintiff: need to improve using time efficiently; follow standards of ethical conduct,; collaborate and consult with colleagues and administration; improve on working in a satisfactory manner with minimal supervision; improve on speaking positively and constructively with students; late for work 18 times without a doctor's excuse during the 2001-2002 school year; refused to test a student after the school evaluation team recommended that the child was ready for testing; and called students thieves and threatened to have several arrested after her purse was taken. The United States Court of Appeals, Eleventh Circuit, held that plaintiff **received proper notice** of the charges against her; it **was reasonably apparent** to the plaintiff that she was required to submit evidence in opposition to the charges made against her; and plaintiff **received** two unopposed extensions of time to prepare her submissions.

Superintendent's Intended Speech Before Homosexual Congregation Was A Matter of Public Concern"

Scarbrough v. Morgan County Bd. Of Educ. (C. A. 6 {Tenn.}, 470 F. 3d 250), October 25, 2005.

In 1996, Scarbrough was elected superintendent of Morgan County Schools (Tennessee). The position of elected school superintendent expired by law in Tennessee on August 31, 2000. The new law provided for appointment of a Director of Schools—who would perform the same duties as the superintendent—by the local board of education. Scarbrough was asked by a friend to speak at a convention sponsored by the Metropolitan Community Church of Knoxville (Metro), a predominantly gay and lesbian congregation. Initially he agreed to speak, but later declined the invitation. On May 13, 2000, the Knoxville News-Sentinel newspaper published an article announcing incorrectly—that Scarbrough would be a speaker at the Metro convention. After the article from the News-Sentinel was published, several board members received complaints that were critical of Scrbrough's agreement to speak (remember the print-media was in error). Thereupon several members of the board became concerned that selecting Scrbrough as the school district's first board appointed superintendent would be placing the school district's "stamp of approval" on homosexuality as an acceptable alternative lifestyle. Thus, selecting Scarbrough as superintendent would undermine the public's confidence in him and impair his ability to lead the district. Therefore, the board selected another candidate as their first board appointed school superintendent. The former elected superintendent sued the board employing the First Amendment (e. g. freedom of speech, freedom of association, and freedom of religion) and the Fourteenth Amendment (e. g. equal protection under the law and due process). The United States Court of Appeals, Sixth Circuit, affirmed in part, reversed in part, and remanded the case back to the lower court for further review. In part the Court stated: (1) Superintendent's intended speech to pray or speak before a church with a predominantly homosexual congregation **touched** on a matter of public concern; (2) summary judgment **was precluded** for the school board in regard to the former superintendent's First Amendment retaliation claim; (3) summary judgment **was precluded** for the school board regarding the former superintendent's Equal Protection claim; and (4) Former superintendent's First Amendment right to be free of retaliation **was clearly established**.

"Sixth Grade Teacher Sexually Abuses Seventh Grader"

Kline ex rel. Arndt v. Mansfield (E. D. Pa., 454 F. Supp. 2d 258), September 29, 2006.

School district's failure to conduct additional training of employees to recognize signs of sexual abuse could **not** render it liable under Section 1983 for middle school teacher's sexual abuse of seventh grader. Plaintiff **would have to demonstrate** that additional training would have prevented student's sexual abuse, or that there would have to have been a nexus or showing that their failure to conduct such training reflected deliberate indifference. Unsubstantiated rumors prior to criminal charges being filed were insufficient to show deliberate indifference by the school's administration. **Note:** The former sixth grade teacher is currently incarcerated.

Disabled Students:

"Student Denied FAPE"
Blackman v. District of Columbia (D. D. C., 454 F. Supp. 2d 15), August 31, 2006.

Despite the fact that plaintiff (a 12-year-old student with a severe and permanent medical condition) now has a permanent placement at her assigned school, and District of Columbia Public Schools (DCPS) now has begun the delivery of compensatory education, plaintiff argued that her claim is not moot. She and her family assert that while DCPS agreed to provide compensatory education, in fact only two hours of counseling services and one hour of tutoring actually have been delivered to plaintiff. Based on the lack of sufficient services, numerous delays, and other difficulties, there is a very strong likelihood that delays and difficulties will continue into the future unless the court grants injunctive relief. The United States District Court, District of Columbia, held that student's claim that school district violated IDEA by failing to implement agreement concerning her educational placement was **not** rendered moot by student's permanent placement at school and district's agreement to provide compensatory education. Plaintiff continued to encounter numerous delays and other difficulties in obtaining compensatory education. Thus, student **was denied** a free appropriate public education (FAPE), and **was entitled** to preliminary injunction and reasonable attorney fees.

Labor and Employment:

"Principal Suffers Fatal Heart Attack Breaking Up Fight Between Two Girls"
Dollarway School Dist. V. Lovelace (Ark. App., 204 S. W. 3d 64), February 23, 2005.

School district challenged the award of benefits received by the widow of Jeffrey Lovelace who was the principal of Dollarway Junior High School. Mr. Lovelace broke up a fight between two female students at his school. Shortly thereafter, he was found on a bench outside the emergency room of a local hospital. After efforts to revive him were unsuccessful, Mr. Lovelace was pronounced dead (cardiac arrest because of a probable myocardial infarction) by an attending physician. He was 41-years old at the time of the incident, and physically active with no prior history of heart problems, although there was a family history of heart failure. In addition, he had begun smoking a few years prior to fighting episode. The state of Arkansas's Workers' Compensation Commission awarded benefits ($75,000 in life insurance) to Mr. Lovelace's widow, and his former school district appealed the Commission's decision. The Court of Appeals of Arkansas, Division IV, held that substantial evidence **supported** Commission's decision that Mr. Lovelace sustained a compensable injury while intervening in a fight between students. Although Mr. Lovelace had been called upon in the past to break up fights, he had previously done so with the assistance of other school personnel. Furthermore, the onset of chest pains and the trip to the emergency **room were in close proximal relationship** to principal's work and the heart attack.

Religion:

"Parents Entitled To Preliminary Injunction Prohibiting Distribution of Bibles At Elementary School"
Doe v. South Iron R-1 School Dist. (E. D. Mo., 453 F. Supp. 2d 1093), September 5, 2006.

Parents sued a school district which had allowed Bible distribution (Gideons International) in classrooms **were entitled to preliminary injunctive relief** against the distribution of Bibles to elementary school children on school property during the school day, even though the district had adopted a new policy (… allowed outside groups to distribute literature, including Bibles, on school property). The parents **were likely to succeed** on a claim that any Bible distribution allowed under the new policy, which did *not prohibit* a school employee such as a teacher or member of the school board, from being directly involved in the distribution, **would violate** the Establishment Clause of the First Amendment of the United States Constitution.

Student Discipline:

"Students Not Allowed To Wear Clothing Depicting the Confederate Flag"
D. B. ex rel. Brogdon v. Lafon (E. D. Tenn., 452 F. Supp. 2d 813), June 30, 2006.

Three students, through their parents, brought suit against school officials, alleging that school district policy of prohibiting them from wearing clothing depicting Confederate battle flag violated their First and Fourteenth Constitutional Amendments. Students moved for preliminary injunction and temporary restraining order. The United States District Court, E. D. Tennessee, Knoxville, held that: (1) Students did **not** show likelihood of success on merits of their First Amendment claim that school officials' prohibition against students wearing clothes depicting Confederate battle flag was viewpoint discriminatory, because disciplinary instances between disciplinary action pertaining to those wearing the Confederate flag and those students wearing symbols of black leaders and international flags **was insufficient** (evidence demonstrated that out of 452 dress code violations, there were 23 disciplinary actions pertaining to those wearing the Confederate flag, while there were no disciplinary violations pertaining to student dress with symbols pertaining to black leaders or international flags) to establish discriminatory intent; and (2) students did **not** demonstrate possible success regarding their First Amendment claim for a preliminary injunction and temporary restraining order **given evidence** suggesting school officials had reason to believe that display of Confederate flag might cause disruption and interfere with the rights of other students feeling safe and secure (there had been a number of prior altercations between white and black students which created a racially tense and charged atmosphere)in their school.

"Search of Student Was Illegal"
C. G. v. State (Fla. App. 3 Dist., 941 So. 2d 503), November 8, 2006.

The plaintiff, a middle school student, became dizzy and lost consciousness in the school's restroom. When he regained consciousness, he located a school monitor and told him he was not feeling well. The monitor escorted the student to the assistant principal's office. The assistant principal testified that the youngster appeared "a little quiet and subdued" and seemed "a little pale"; but she did not notice anything else about him at that time. She asked the student to empty his pockets and book bag. Thereupon, she spotted a little plastic bag filled with a green material, which she believed to be marijuana. A field test was done on a sample from the baggie's contents by a police officer who had been requested to come to the schools by school officials. The field test yielded positive results for marijuana. The plaintiff was adjudicated a delinquent by the Circuit Court, Miami-Dade County. Plaintiff appealed. A Florida court of appeals held that the assistant principal did ***not*** have reasonable suspicion to believe the student was involved in an illegal activity or violated a school rule so as to justify a search of his person or belongings. Thus, the court reversed and remanded with directions. The court went on to state that the facts associated with the case, without more evidence, are entirely consistent with non-criminal behavior such as an illness.

Torts:

"Student Slipped On Steps of School Bus and Was Injured"
Levi v. O'Connell (Cal. App. 3 Dist., 50 Cal. Rptr. 3d 691), March 3, 2005.

On January 3, 2001, while attempting to exit a school district school bus, plaintiff's child slipped on ice that had accumulated on the steps of the bus. He suffered injuries that "necessitated the constant application of medications to relieve the pain," and had to undergo "medical treatment by various medical providers and will require additional medical treatment into the unknown future." The Supreme Court of Arkansas held that the record **was insufficient** to allow the Court to determine whether school district's motor vehicle policy provided coverage for the student. Thus, the Court could **not** determine whether school district was immune from liability for the student's injuries because the district *failed* to include actual policy (motor-vehicle policy) in record for review.

"Facts Existed As To Whether Gym Teacher Gave Adequate Safety Instruction"
Mei Kay Chan v. City of Yonkers (N. Y. A. D. 2 Dept., 824 N. Y. S. 2d 380), November 14, 2006.

Student (plaintiff) was injured while playing basketball during gym class when he struck the concrete wall of the gym after colliding with another player as both chased a basketball that had gone out-of-bounds. Student's mother sued, alleging negligent supervision, lack of adequate safety instruction, and failure to install padding on the walls of the gym. Defendants (school district) moved for summary judgment to dismiss the complaint; and the plaintiffs cross-moved for summary judgment on the issue of liability. The New York Supreme Court, Appellate Division, Second Department, **denied** both the plaintiff and defendant claims because neither was able to establish their entitlement to a fair and valid judgment.

Commentary

No commentary.

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).

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Topics:

- Athletics
- Equal Access
- Labor and Employment
- Religion
- Security
- Student Discipline
- Torts

Topics

Athletics:

"Female Basketball Athlete Breaks Arm While Practicing With Males"
Schnarrs v. Girard Bd. of Educ. (Ohio App. 11 Dist., 858 N. E. 2d 1258), July 28, 2006.

Female high school student brought action against board of education, claiming that negligence and recklessness of girls' high school basketball coach in having recent male graduates practice with girls' basketball team; caused an incident in which plaintiff broke her arm. Plaintiff, a senior, was matched up against a former high school basketball player who stood 6'5" and weighed 260 pounds. As the plaintiff was about to throw a basketball across court, the male stepped in front of her and hit the ball so hard that the force of the impact forced her arm backward and snapping it (fracture of the right humerus bone). An Ohio court of appeals ruled that the school board **was immune** from tort liability for the alleged negligent manner in which high school girls' basketball team coach conducted practice.

Equal Access:

"Straights and Gays for Equality Must Be Allowed In High School"
Straights and Gays for Equality (SAGE) v. Osseo Area Schools-Dist. No. 279 (C. A. 8 {Minn.}, 471 F. 3d 908), December 22, 2006.

High school cheerleading and synchronized swimming groups are non-curriculum related student groups. Thus, schools are required under the Equal Access Act (federal law) to give a non-curriculum related student group that promotes tolerance and respect for students and faculty through education activities relevant to gay, lesbian, bisexual, transgender individuals and their allies equal access to the same avenues of communication as are provided to any other student group. These avenues would include such things as the school's public address system, yearbook, bulletin boards, meeting space, student newspaper and events such as field trips and fundraisers.

Labor and Employment:

"Teacher Nonrenewed For Insubordination"
Barnes v. Spearfish School Dist. No. 40-2 (S. D., 725 N. W. 2d 226), November 29, 2006.

Elementary teacher was employed in the Spearfish School District for 14 years. For every school year prior to the 2004-2005 school year, plaintiff had been recommended for continued employment. However, on February 24, 2004, her building principal recommend that her teaching contract not be renewed for the 2004-2005 school year. He stated that just cause existed not to renew her contract based on her "continued poor performance as it related to ineffective communication with others; continued unsatisfactory response to supervision and suggestions for improvement; continued insubordination toward the principal,; and continued violation of board policy. Specifically, the plaintiff's principal stated, "Her approach to supervision was confrontational, her communication skills were ineffective in bringing about needed improvement, and her commitment to growth was limited because she has difficulty reflecting on mistakes she has made." Accordingly, the school board confirmed the recommendation not to renew the plaintiff's contract. The Supreme Court of South Dakota held that the conduct of the tenured elementary teacher **constituted insubordination** as a statutory **basis for just cause** for nonrenewal of her teaching contract. Teacher took confrontational approach to supervision and **she was disobedient** in asserting her unsupported belief that she, rather than her supervisors, controlled her curriculum and classroom methods.

Religion:

"Opposite Sex Day Interfered With Religious Beliefs"
Stanley v. Carrier Mills-Stonefront School Dist. No. 2 (S. D. Ill., 459 F. Supp. 2d 766), September 21, 2006.

Parent kept her three own children and six foster children home from school on "Opposite Sex Day" because of her religious objection to their cross dressing. Plaintiff claimed the school district violated her children's First and Fourteenth Amendments, along with Title IX sexual harassments provisions. Additionally, the plaintiff stated that school officials deprived her of her right to raise her children according to her Christian beliefs, and alleged that her children would bear the stigma of being singled out if they attended school and did not participate in the school sponsored activity. The entire episode came about because of the school district's "Spirit Week" during which each day of the week had a theme, and students were encouraged to dress accordingly. Thus, one of the days during Spirit Week was "Opposite Sex Day". A United States district court in Illinois held that the parent **lacked standing** to seek a preliminary injunction because she could not demonstrate some direct injury. The court went on to state that the plaintiff **stated** a Title IX claim due to the offensive jokes associated with "Opposite Sex Day" and her rights under the First Amendment **were violated**. Thus, her motion was granted in part and denied in part.

Security:

"School Not Liable For Student Assault"
Mohammed v. School Dist. of Philadelphia (C. A. 3 {Pa.}, 196 Fed. App. 79), June 5, 2006.

On the morning of February 4, 2003, Richard Mohammed was walking in his high school's stairwell number four on his way to his advisory room on the fourth floor. Between the third and fourth floors an unidentified student attempted to attack the student in front of Richard; but the intended victim ducked, and the attacker punched Richard in the eye. Richard suffered traumatic hyphema of the eye and a fracture of the right facial bone. Consequently, he was in the hospital for a total of six days. Richard's mother filed suit against the school district on behalf of her son, alleging violation of his Fourteenth Amendment right to bodily integrity and safety. The United States Court of Appeals, Third Circuit, stated that school district's that failure to monitor high school stairwell did **not** create a danger to the assaulted student in violation of his substantive due process rights to bodily integrity and safety. Even though the atmosphere of violence within the high school rendered the attack foreseeable, it was **not a fairly direct result** of the school district's lack of surveillance or monitoring. The school district's allegedly negligent conduct **did not affirmatively place** student in a position of increased danger.

"School Official Not Liable For Rape of Student"
Doe v. San Antonio Independent School Dist. (C. A. 5 {Tex.}, 197 Fed. App. 296), August 17, 2006.

Plaintiff was a 14-year-old special education student who was suspended from school by her high school's assistant principal for truancy and insubordination. The student claimed she did not know her home address, her student identification number, or her home phone number. She did remember the phone number of a man she told the assistant principal was her uncle. Additionally, she told the assistant principal, it would not do any good to phone her father because he was always drunk and that her mother was never home. Thereupon, the assistant principal allowed the plaintiff to call her uncle and to arrange for him to pick her up from school. The assistant principal advised the student that he needed to meet with her uncle when he arrived to pick her up. At the time of the incident, the school district had a non-discretionary release policy that provided that a student may be released only to a parent or legal guardian, a police officer, or a person whom a parent had designated by written request. The assistant principal told the plaintiff to wait in his office for her uncle's arrival. Thereupon, he went on about his duties and forgot about the student. The student left school with the uncle and he sexually abused her. It was not until about 5:00 p.m. when the plaintiff's grandmother called the school that school officials, that school officials became concerned about the student. The United States Court of Appeals, Fifth Circuit, ruled that plaintiff **failed** to allege cognizable violation of the student's substantive due process rights under the Fourteenth Amendment; and the assistant principal **was entitled to professional immunity** from student's negligence claims.

Student Discipline:

"Assistant Teacher's Physical Restraint of Student Was Not Abuse"
Lyons v. Illinois Dept. of Children and Family Services (Ill. App. 3 Dist., 306 Ill. Dec. 745, 858 N. E. 2d 542), November 2, 2006.

The Department of Children and Family Services denied request by assistant teacher of emotionally and behaviorally disturbed children to expunge an indicated report of child abuse in connection with an incident that occurred when the assistant teacher restrained a student. The incident occurred when the assistant teacher brought a 10-year-old emotionally and behaviorally disturbed student to a time-out room and asked him to stand in the corner for his time-out. Student refused to stand in the corner and begin flailing his arms. Assistant teacher thought student might injure himself, so he "took the student to the floor" and held him there for a few seconds. The student suffered a minor rug burn and a very small lump on his forehead. Upon arrival at home, the student told his mother and she called police. Police checked the student and investigated the incident, and decided not to pursue the incident. The Appellate Court of Illinois, Third District, held that evidence did **not support** indicated finding that assistant teacher's conduct in restraining student, which led to student receiving a bump on his head, constituted abuse. Thus, assistant teacher **was entitled** to expungement because evidence demonstrated that student's injury occurred while teacher was taking him to the floor for the student's own safety. Additionally, assistant teacher had **no** history of involvement in similar incidents, and the teacher did **not** use an instrument to harm the 10-year-old physically.

Torts:

"Tripping Accident Was Spontaneous and Unforeseen"
Ronan v. School Dist. of City of New Rochelle (N. Y. A. D. 2 Dept., 825 N. Y. S. 2d 249), December 5, 2006.

During gym class, the plaintiff was running toward one side of the gym when a student, who was running ahead of him collided with a padded wall and fell to the floor, causing the plaintiff to trip over him and sustain injuries. The Supreme Court of New York, Appellate Division, Second Department, held that the accident was spontaneous and unforeseen, and could not have been prevented by any reasonable degree of supervision. **Note:** The court went on to cite another case, which stated, "Where an accident occurs in so short a span of time that even the most intense supervision could not have prevented it, any lack of supervision is not the proximate cause of the injury and summary judgment in favor of the defendant (school district) is warranted."

"Playground Equipment Maintained In a Reasonably Safe Condition"
Sobti v. Lindenhurst School Dist. (N. Y. A. D. 2 Dept., 825 N. Y. S. 2d 251), December 5, 2006.

Nine-year-old plaintiff was injured during recess when she fell from a school playground horizontal ladder. As the plaintiff reached for the third rung of the horizontal ladder, her hand slipped from the rung and she fell to the ground. The plaintiffs alleged that the injuries sustained by the student were the result of inadequate ground cover on the playground surface beneath the horizontal ladder. The Supreme Court of New York, Appellate Division, Second Department ruled that the school district demonstrated that the playground where the student was injured while playing on a horizontal ladder **was maintained in a reasonably safe condition**, thus **precluding** the imposition of liability.

"Powerlifter Assumed Risk of Injury When Spotters Failed"
Cotillo v. Duncan (Md. App., 912 A. 2d 72), December 6, 2006.

Powerlifting competitor **assumed the risk** that spotters would fail to protect him in the event of a failed lift. Plaintiff was an experienced powerlifter (he had been powerlifting competitively since 1994 and won a gold medal at the World Games in Sweden in 1999), and knew that the risk of a bar falling and seriously injuring himself during a lift of heavy weights was a risk associated with the sport. **Note;** The Southern Maryland Open Bench Press & Deadlift Meet was being held at Patuxent High School where the plaintiff was attempting to bench press 530 pounds. On his third attempt to bench press the 530 pounds, he was unsuccessful in his effort and the two spotters failed to grab the bar before it fell, striking him in the jaw and shattering it.

Commentary

No commentary.

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).

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Legal Update For District School Administrators July 2007

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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 Johnny R. 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
- Disabled Students
- Labor and Employment
- School Districts
- Security
- Torts

Topics

Abuse and Harassment:

"Student Suffered Hostile Educational Environment After Being Raped Off Campus"

Doe v. East Haven Bd. of Educ. (C. A. 2 {Conn.}, 200 Fed. App. 46), October 10, 2006.

Student (plaintiff) alleged that she suffered student-on-student sexual harassment after reporting that she was the victim of an off-campus rape by two males who attended her high school. Additionally, she charged that the school's administration acted with deliberate indifference in response to the harassment and thereby deprived her of access to educational opportunities and benefits. The school district insisted that the plaintiff did not suffer sexual harassment due to her sex, but due to the public disclosure of "her sexual involvement with the two boys" and from her "initiation of criminal charges" against them. Furthermore, school officials emphasized that the harassment lasted at the most five weeks and that her grades did not suffer. The United States Court of Appeals, Second Circuit, **upheld** the awarding of $100,000 to the student because: (1) harassment **was based** on her sex; (2) a reasonable person would reasonably conclude that the student **was subjected** to a hostile educational environment that **deprived** her of educational benefits and opportunities; (3) school authorities **knew** the student was being sexually harassed; and (4) school officials **acted with deliberate indifference and in a clearly unreasonable fashion** toward the student-on-student sexual harassment.

"School Not Liable for Student's Assault in the Cafeteria"

Filiberto v. City of New Rochelle (N. Y. A. D. 2 Dept., 826 N. Y. S. 2d 711), December 19, 2006.

School officials' supervision of the high school cafeteria was **not** negligent. Thus, school board was **not** liable for injuries sustained by student when he was assaulted by fellow student while eating in the cafeteria. The school's administration did **not** have sufficiently specific knowledge or notice of the dangerous conduct that caused the victim's injury, which would have given them reason to anticipate such an incident.

Disabled Students:

"School District Is Not Required To Pay Private School Tuition"

Marissa F. ex rel. Mark and Lavinia F. v. William Penn School Dist. (C. A. 3 {Pa.}, 199 Fed. App. 151), September 27, 2006.

Parents of learning disabled student were **not** entitled to reimbursement for cost of private school tuition for one school year, although school district was aware of student's existence as a student entitled to a free appropriate public education (FAPE). At the time when the child's parents sought due process on behalf of the child, school officials were unaware of their dissatisfaction with the FAPE services it was proposing to provide. Furthermore, the school district had not yet been afforded the opportunity to provide FAPE services, because the child's parents had never enrolled the youngster in the school district due to enrolling the child in a private school outside of the school district.

Labor and Employment:

"Psychologist's Termination Appropriate"
Houlihan v. Sussex Technical School Dist. (D. Del., 461 F. Supp. 2d 252), November 16, 2006.

Plaintiff was employed as a school psychologist by the Sussex Technical School District, in Delaware. Almost immediately upon assuming her duties, she began to bring to the attention of school officials and others various incidents pertaining to noncompliance with the Individuals with Disabilities Education Act (IDEA). Shortly thereafter, she was asked to assume the Special Education Coordinator, in addition to her duties as a school psychologist. Upon assuming both duties, she soon realized that her dual positions were in conflict with each other; consequently she asked to be relieved of the Special Education Coordinator's position. During her time of employment, she was accused of being uncooperative, not focused, dragging-out meetings, and undermining the school's administration. On April 6, 2004, she was informed that her contract would not be renewed. Plaintiff contended that here contract was not renewed in retaliation for her efforts to bring the school district into compliance with the administrative guidelines associated with IDEA. The United States District Court, D. Delaware, granted her claim in part and denied in part. Accordingly, the Court stated that: (1) school psychologist **demonstrated** a prima facie case (produced enough evidence) **of retaliation** under the Rehabilitation Act of 1973; and (2) school district **stated sufficient evidence** that plaintiff's statements were **not** made in her role as a private citizen, but **were in connection with her official duties** as an employee of the school district.

"School Employee's Speaking Out About Bilingual Program Was Not Motivating Factor In Termination"

Deschenie v. Board of Educ. of Cent. Consol. School Dist. No. 22 (C. A. 10 {N. M.}, 473 F. 3d 1271), January 22, 2007.

Director of the Indian Education and Bilingual Education for Central Consolidated School District (CCSD) on the Navajo Indian Reservation in San Juan County, New Mexico, was **not** terminated from her position for: (1) speaking out regarding her concerns (e. g. lack of access to the program by many students, inadequate number of staff, inadequate salaries for staff, and high level of staff turnover) about the district's bilingual education program; and (2) writing a letter to the editor of the local newspaper concerning her criticism of the district's bilingual program. School officials were able to demonstrate that the director's termination was **not** retaliation against the director's First Amendment rights. Furthermore, the school officials **were able to demonstrate** that plaintiff's unsatisfactory management of financial resources; failure to work well with others; non-adherence to established timelines and procedures; failure to attend meetings pertaining to bilingual funding applications; and the rejection of the district's bilingual application on two occasions.

Dupre v. West Baton Rouge School Bd. (C. A. 5 {La.}, 201 Fed. App. 218), September 25, 2006.

"A Legitimate and Non-Discriminatory Reason Was Demonstrated For Hiring White Applicant Instead of Black Applicant"

Plaintiff (black female) filed action under Title VII against school district for allegedly passing her over in favor of a while female applicant for an assistant principal's position, because of her race and because she had previously filed a discrimination suit against the school district. The United States Court of Appeals, Fifth Circuit, held that the fact that white female applicant received a higher grade (including a black female on the committee) from each of the hiring-committee members than the plaintiff **created a legitimate, non-discriminatory reason** for promoting white applicant instead of the black applicant.

School Districts:

"Eighth Grader Sexually Assaulted In Locker Room"

Doe v. Fulton School Dist. (N. Y. A. D. 4 Dept., 826 N. Y. S. 2d 543), December 22, 2006.

Parents of an eighth-grader filed action against school district for injuries their son received when he was sexually assaulted by teammates on his eighth-grade football team. The incident occurred in the team's locker room following a practice. Teammates who witnessed and participated in the sexual assault testified at their depositions that there was virtually no supervision of the locker room over a 20 to 30 minute period, and that the football players were engaged in reckless and aggressive horseplay during that period of time. The New York Supreme Court, Appellate Division, Fourth Department, ruled that genuine issues of material fact **existed** as to whether school officials provided adequate supervision and whether their breach of their duty was the proximate cause of the youngster's injuries, thus, **precluding summary judgment** for the school district.

Security:

"Juvenile Committed Acts Considered an Assault"

In re Ismaila M. (N. Y. A. D. 1 Dept., 827 N. Y. S. 2d 7), November 30, 2006.

A student (juvenile) caused a disturbance in a school cafeteria, refused to comply with a school safety officer's directives to sit down, screamed, cursed, flailed his arms, and struggled with the officer. During the struggle with the officer, the student sprained the officer's wrist as she attempted to remove him from the cafeteria and escort him to the principal's office. The New York Supreme Court, Appellate Division, First Department, held that there **was sufficient evidence to support** the determination that the juvenile committed acts, which committed by an adult, **would constitute assault** in the second degree. Therefore, the court placed the student on probation for a period of 12 months.

Torts:

"Junior High Student Injured in Bungee Run"
Sherer v. Pocatello School Dist. # 25 (Idaho, 148 P. 3d 1232), November 17, 2006.

Junior high school sponsored a carnival to celebrate the last day of the school year and hired Cliffhanger Recreation, a local business, to provide activities for the students. One of the activities was a "bungee run," in which participants donned a harness tethered to a fixed object by a bungee cord. Participants ran on a inflated rubberized surface to see who could reach the farthest point before being snapped back by the bungee cord. Alyssa Sherer, a student, was injured while participating in the bungee run. The Supreme Court of Idaho, Eastern Idaho, October 2006 Term, held that: (1) fact that student's injuries are caused by a third party does **not** absolve school district from liability for its negligence if the third party's actions are the foreseeable result of the school's negligence; and (2) plaintiff **stated a valid claim against** school district in regard **not** to properly supervise business which provided the bungee run, due to the fact that the provider did not provide adequate instructions and supervision.

"Cheerleading Mat Was Not In Dangerous Condition"
Delmont v. Harrison County School Dist. (Miss. App., 944 So. 2d 131), December 5, 2006.

On March 15, 2002, plaintiff was playing basketball in her high school gym as part of an aerobics class. The basketball was thrown out-of-bounds and bounced onto a foot high stage located at one end of the gymnasium. She climbed the steps leading up to the stage to retrieve the ball. Another student called her name as she approached the top step, she turned, and proceeded to walk toward the basketball. Thereupon, she tripped and fell over a large cheerleading mat that was lying on the stage floor. Due to the injury, she underwent knee surgery and physical therapy. The Court of Appeals of Mississippi held that there was **no** evidence that a cheerleading mat left on a stage in the high school gymnasium was a dangerous condition, as required to support student's negligence action against the school district. Student tripped on the mat because she was *not* looking where she was going.

"Pedestrian Hit By Book Thrown From School"
Almonte v. City of New York (N. Y. A. D. 2 Dept., 826 N. Y. S. 2d 741), December 26, 2006.

Plaintiff was injured as she walked on a "pathway" by a junior high school when she was struck in the head by a book that she claimed was thrown out of a third-story window of the school by one of its students. The Supreme Court of New York, Appellate Division, Second Department, stated that the board of education was **not** liable for the plaintiff's injuries, absent showing that school officials negligently created a dangerous condition that caused her injuries.

"Student Faints While Watching First Aid Video"
Rathnow v. Knox County (Tenn. Ct. App., 209 S. W. 3d 629), November 6, 2006.

A 16-year-old sophomore was attending a class entitled "Life Time Wellness". One of the class activities was to watch an instructional video by the American Red Cross that depicts simulated accidents and injuries. Prior to watching the video the teacher told the class that they could put their heads down on their desks and close their eyes anytime they felt like it. At one point in the video, an actor appeared to have cut his arm with an electrical circular saw. The scene is approximately one minute in duration and included sporadic, and sometimes blurred, images of what appeared to be blood on the actor's forearm, interspersed with images of other actors portraying the victim's co-workers rendering aid. The plaintiff said that she felt "nauseous", stood up, and asked the teacher if she could "go outside and get some cold air". The teacher asked if she was okay, and plaintiff replied "yes". Plaintiff went outside; and after an undisclosed time, she fainted and fell to the ground. When she fell, a piece of her left front tooth broke off and became embedded in her lower lip. She subsequently incurred medical expenses and was left with a facial scar. Thereupon, she sought $80,000 for her injuries and medical expenses. The Court of Appeals of Tennessee, Eastern Section, at Knoxville, held that **evidence was insufficient to support** student's fainting and falling reaction to a first aid video **was a reasonably foreseeable probability**, and therefore, the teacher was **not** negligent for allowing plaintiff to exit the classroom unattended.

Commentary

No commentary.

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Legal Update For District School Administrators August 2007

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Topics:

- Abuse and Harassment
- Civil Rights
- Drug Testing
- Labor and Employment
- Student Discipline

Commentary:

No commentary this month.

Topics

Abuse and Harassment:

"Derogatory Epithets toward Student Considered Sexual Harassment"
Riccio v. New Haven Bd. of Educ. (D. Conn., 467 F. Supp. 2d 219), December 26, 2006.

Plaintiff began in the eighth grade (Nathan Hale School) to dress in a nonconforming manner (the gothic style of dress and make-up). So thereafter, various students begin to call her derogatory names including "bitch", "dyke", "freak", "lesbian", "lesbian lover", "Nazi", "gay', and "gothic". During her time at Nathan Hale, students continued to harass plaintiff; and at various times, school officials attempted keep students from harassing plaintiff through various types of disciplinary action and counseling. After graduating from Nathan Hale, plaintiff moved on to the Community Magnet High School, where the name calling and harassment continued. Plaintiff's mother brought action against school district alleging that school officials violated her daughter's right to be free from sexual harassment. The United States District Court, D. Connecticut, held that genuine issue of material fact **existed** as to whether harassment of student amounted to severe, pervasive, and objectively offensive conduct, thus **precluding** summary judgment for the school district as pertaining to peer-on-peer sexual harassment claim under Title IX.

"Teacher's Use of Force Was Capable of Being Construed to Serve Pedagogical Objectives"
Thomas v. Board of Educ. Of West Greene School Dist. (W. D. Pa., 467 F. Supp. 2d 483), December 7, 2006.

History teacher requested that 12-year-old plaintiff present his homework to his history class. Student claimed he left it in his locker. Teacher allowed him the opportunity to go to his locker to retrieve his homework; and he returned to class, stating that he was unable to find it. Thereupon, the plaintiff's teacher approached him and forcefully punched him in the upper chest/collarbone area with a closed fist. The strike knocked the student backwards until he was able to regain his balance against a wall. Students who were in the class at the time of the incident stated that they were able to hear the impact from their seats and the punch was hard enough to make the plaintiff jerk back. Additionally, plaintiff stated that he smelled the odor of alcohol on the teacher's breath during the incident (teacher had two "DUI's" prior to the incident). Student and his mother claimed that his substantive due process rights were violated under the Fourteenth Amendment of the United States Constitution. The United States DistrictCourt, W. D. Pennsylvania, stated that (1) teacher's alleged use of force **was capable** of being construed as an attempt to serve pedagogical objectives; (2) teacher's alleged conduct was not malicious; (3) student's injury was not serious; (4) student did not establish that school district had been aware of a custom of the teacher inflicting corporal punishment on students; and (5) student's alleged psychological injuries flowing from fellow students picking on him and shunning him was not due to the incident itself, but was due to school officials discipline action against the teacher for striking the plaintiff.

Civil Rights:

"Former Coach *Failed* to Establish Title VII Retaliation Claim Base on Failure to Rehire"

Adams v. Groesbeck Independent School Dist. (C. A. 5 {Tex.}, 475 F. 3d 688), January 9, 2007.

Plaintiff and his wife begin working for the Groesbeck Independent School District in 1971 as teachers and coaches. In 1998, he and his wife worked as teachers and coaches at the Groesbeck Middle School. Groesbeck required that its coaches also teach. The school district did not renew the plaintiff's contract for the 2000-2001 school year because of complaints regarding his coaching abilities. Plaintiff's position at the middle school was not filled, and the non-renewal of his contract reduced the girls sports coaching staff from three to two. Before the start of the 2000-2001 school year, plaintiff filed his first suit against the school district in June 1999, alleging violations of Title VII. The parties settled this suit in January 2001. The terms of the settlement did not prohibit plaintiff from reapplying for employment with the school district. One of the coaches (not plaintiff's wife) for girls' sports was placed on administrative leave in October 2001. School officials hired a long-term substitute teacher to cover the teacher-coach's position. Plaintiff applied for the position (girls' middle school coach), even though no coaching position had been advertised. Plaintiff was not hired. Thereupon, he sued the school district under Title VII, alleging that the school district did not hire him in retaliation for his filing of a previous Title VII suit. The United States Court of Appeals, Fifth Circuit, held that former coach and teacher **failed** to establish retaliation, absent evidence that there was an available coaching position.

"School District Did <u>Not</u> Violate Title VII in Not Rehiring African-American Male"

Pyne v. District of Columbia (D. D. C., 468 F. Supp. 2d 14), March 16, 2006.

Plaintiff, an African-American male born in Nigeria, was employed as a financial analyst with the District of Columbia Pubic Schools (DCPS) from September 1986 through January 1997. A congressionally authorized reduction-in-force (RIF) resulted in plaintiff's termination from DCPS on January 3, 1997. Plaintiff applied for at least three different positions with the school district and was not hired. Thereupon, he sued the school district, alleging that the school officials violated Title VII and his due process rights under the Fourteenth Amendment of the U. S. Constitution. The United States District Court, District of Columbia, held that the school district **articulated legitimate nondiscriminatory reasons** for not rehiring plaintiff who had been terminated from his administrative position (financial analysis) due to RIF. Individuals selected for two of the positions for which plaintiff had applied had extensive experience, or were determined to have been the most qualified applicants. The person who was hired for the third position was an incumbent to the position which was created from a split of her duties into two positions.

Labor and Employment:

"Texas' Statute Prohibiting Sexual Conduct between School Employees and Students Enrolled in Their School Was Not Unconstitutionally Vague"
Ex parte Morales (Tex. App.-Austin, 212 S. W. 3d 483), February 7, 2007.

After being indicted under a Texas statute (Tex. Pen. Code Ann. 21.12 {West Supp. 2005}) prohibiting primary and secondary school employees from engaging in sexual conduct with students enrolled at a school where they work, employee of a private secondary school challenged the statute's constitutionally. Plaintiff was employed as a "Student Activities/Recreation Assistant" at San Marcos Baptist Academy in Hays County. He also served as a counselor or advisor to the school's R. O. T. C. program, and as a Dormitory Residential Advisor. Texas code 21.12 reads as follows: "An employee of a public or private primary or secondary school commits an offense if the employee engages in sexual contact, sexual intercourse, or deviant sexual intercourse with a person who is enrolled in a public or private primary or secondary school at which the employee works, and who is not the employee's spouse". The Court of Appeals of Texas, Austin, ruled that statute prohibiting primary and secondary school employees from engaging in sexual conduct with students enrolled at a school where they work **was rationally related to legitimate state interests**, and did **not** violate the due process rights of plaintiff who was indicted under the law. Statute **was rationally related to legitimate state interest in protecting minor students from sexual abuse and exploitation. Therefore, the legislature rationally determined** that sexual relationships between students and school employees **would undermine** the school learning environment.

"Substantial Evidence Supported Guidance Counselor's Non-renewal"
Bowden v. Lawrence County School Dist. (Miss. App., 948 So. 2d 487), February 6, 2007.

The Lawrence County School District employed plaintiff as the guidance counselor for both New Hebron Attendance Center and Monticello Junior High School. She worked Monday and Tuesday at New Hebron, and Wednesday through Friday at Monticello. The decision of the school board not to renew the counselor's contract was based on the recommendations from each of the schools' principals. The combined reasons for not recommending the counselor's contract were the following: failure to maintain student records; failure to work cooperatively with staff members; student records missing documentation; sending records without proper clearance; "not availing" herself "for resolving emergency situations requiring counseling"; and making parents wait when trying to enroll students in school. The Court of Appeals of Mississippi held that **substantial evidence supported** board's decision not to renew the counselor's contract.

Security:

"No Amount of Supervision Would Have Prevented Student's Assault"
Kozakiewicz v. Frontier Middle School (N. Y. A. D. 4 Dept., 829 N. Y. S. 2d 371), February 2, 2007.

Middle school, school district, and board of education did **not** have sufficiently specific knowledge or notice of a student's dangerous conduct to support imposition of liability in connection with the youngster's assault on a fellow eighth-grader. Offending student had *not* engaged in any prior similar conduct with any other student. Thus, school officials could ***not reasonably have anticipated*** the assault, and were **not** at fault.

"School Safety Zone Legal"
J. L. S. v. State (Fla. App. 3 Dist., 947 So. 2d 641), January 24, 2007.

An adjudicated juvenile and student at Douglas MacArthur High School North was spotted walking through Miami Central High School's ("Central") safety zone at 7:25 a.m. on a school day by a police officer. On two prior separate occasions, the juvenile had been warned not to return to Central's school safety zone. Juvenile was arrested, and a petition of delinquency was filed charging him with one count of trespass within a safety zone in violation of Florida's statute (Section 810.0975{2} – During the period from 1 hour to the start of a school session until 1 hour after the conclusion of a school session, it is unlawful for any person to enter the premises or trespass within a safety zone or to remain on such premises or within such school safety zone when that person does not have a legitimate business in the school safety zone or any other authorization, license, or invitation to enter or remain in the school safety zone.) A Florida district court held that the school safety zone statute was **not** in violation of the plaintiff's substantive due process rights. The objective of the statute was for the protection of school children from harmful or negative persons such as drug dealers, gang members, or pedophiles, **which was a legitimate exercise of government's regulatory or police power** for the safety of the community. The government's interest in protecting school children **was legitimate and compelling**. Furthermore, geographical and temporal restrictions imposed **bore a rational or reasonable relation** to legislative goal of statute. Thus, the statute **is constitutional.**

Student Discipline:

"Principal's Disclosure of Student's 'Hit List' to Her Staff Did Not Violate Student's Rights"

Risica ex rel. Risica v. Dumas (D. Conn., 466 F. Supp. 2d 434), November 17, 2006.

Student was in the seventh grade when one of the school's janitors found the youngster's geography book which contained a "hit list". The list contained the name of a female student. Neither party contended that plaintiff intended to kill the female student; however, the facts did indicate that the plaintiff may have wanted to punch the female student. Plaintiff admitted to making the list. Thereupon, the plaintiff was suspended from school for 10 days. Student's mother filed action against the school district for violating her son's rights to privacy because the principal exposed the list to her staff, and for violating his substantive due process rights. The United States District Court, D. Connecticut, held that the student's "hit list" of fellow students was not an "educational record" under the Family Educational Rights and Privacy Act (FERPA). Thus, principal's disclosure of the "hit list" to her staff did not violate student's right to privacy under the Fourteenth Amendment, where the "hit list" was written on the cover of student's geography book and found by a janitor. Additionally, the principal's disclosure of the "hit list" and suspension of the plaintiff was done in furtherance of an important governmental objective pertaining to attempting to ensure students' safety within the school-community.

Commentary

No commentary.

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).

September 2007 (#'s 547 & 548)

Legal Update For District School Administrators September 2007

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 Johnny R. 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
- Desegregation
- Disabled Students
- Labor and Employment
- Property and Contracts
- Security
- Student Discipline
- Torts

Commentary:

No commentary this month.

Topics

Abuse and Harassment:

"Teacher Did Not Violate Student's Due Process by Failing to Protect Him from Other Students"
Werth v. Board of Directors of Public Schools of City of Milwaukee (E. D. Wis., 472 F. Supp. 2d 1113), January 22, 2007.

Public high school student brought action against school board and teacher for allegedly violating the Fourteenth Amendment, Americans with Disabilities Act (ADA), and Rehabilitation Act, based on assaults on him by other students. Plaintiff was a disabled minor who began attending ninth grade at South Division High School at the start of the school year in 2001. He had been diagnosed with cleidocranial dysostosis syndrome, a congenital disorder of bone development, characterized by absent or incompletely-formed collar bones; an abnormally shaped skull; characteristic facial appearance; short stature; and dental abnormalities. When the youngster's mother registered him, she told the assistant principal about the verbal attacks and mockery her son endured at other schools that he had attended. The assistant principal assured Mrs. Werth that nothing would happen to her son at South Division, and that the school had security guards that would ensure her son's safety. During the fall semester of 2001, the plaintiff took a woodworking shop class that contained approximately 40 students and a paraprofessional to assist the woodworking instructor. During a class session, a student by the name of Larry threw two pieces of wood (4 x 4 x 1 inch) and hit the plaintiff in his back. Another student by the name of Joe threw a wood board, about four by four by one and one-half inch in size, striking plaintiff in his neck. During the same class, Larry threw two more boards at the plaintiff, striking him in the back. Both offending students were suspended from school. After the incidents, plaintiff suffered numbness in his legs and swelling in his spine. He remained out of school until January 2002. Upon his return to school, and during the same woodworking class, another student (Roberto) threw a pair of safety glasses at the plaintiff, striking him in the head and jaw. Plaintiff suffered a concussion and cracked teeth, which had to be pulled as a result of being hit by the safety glasses. Roberto was suspended from school for three days. A United States District Court in Wisconsin held that defendants did **not** violate plaintiff's substantive due process rights or his civil rights due to the three incidents in the shop class. The incidents involved three different students, and occurred on two separate days during the school year. Furthermore, neither the school board or the teacher knew of existing bad blood or past incidents between the offending three students and the plaintiff. Additionally, defendants took discipline action against the offending students that led to their suspension from school.

Civil Rights:

"School Officials Did <u>Not</u> Violate the Gifties First Amendment Rights Over the T-Shirt Incident"

Brandt v. Board of Educ. Of City of Chicago (C. A. 7 {Ill.}, 480 F. 3d 460), April 2, 2007.

Eighth-grade students in gifted program, by their parents, brought a class action suit against school board and school officials, alleging that defendants' violated their children's free speech rights in punishing them for wearing T-shirts worn as part of a protest against an election to choose an official class T-shirt. The suit was brought on behalf of 24 eighth grade gifted students who attended Beaubien Elementary School who were selected for the school's gifted program from all over Chicago. There was tension between the gifted students ("gifties") and the other students ("tards" {as called by the gifties}– short for "retards") who attended the school. The gravity of the tension is not revealed by the record. However, when it came time to vote for a T-shirt design, the gifted students agreed to vote en bloc for Brandt's T-shirt design; and when it lost they, smelled a rat, and submitted a protest to the principal. There were 27 gifted students and 72 other students in the eighth grade; and a total of 30 T-shirt designs submitted. Thus, if the gifted students voted en bloc for one design and the votes of the 72 other students were scattered across the 29 other designs, the gifties would almost certain to obtain a plurality of the votes. Ultimately, Brandt's T-shirt submission lost, and a less offensive T-shirt design won. The principal got wind that all the gifted students plan to wear Brandt's T-shirt design instead of the officially selected T-shirt design. Thereupon, the assistant principal told the gifted students that if they wore Brandt's T-shirts to school, they would face disciplinary action due to violating the school district's dress code. Despite the warning, the gifties went ahead with their plan. But, craftily, they first wore the forbidden shirt on the day when city-wide tests were administered to public school students. They believed school officials would not take any disciplinary action against them on that day; because if they were not allowed to take the test, the school's average test scores would be lower. After all, they were the gifties. After their first T-shirt protest, at least one gifted student wore Brandt's T-shirt design to school each and every day for approximately nine school days. Each time the shirt was worn by a gifty all the gifties were punished by being confined to their home-room. This caused them to miss gym, science lab, computer lab, and after school activities. Eventually, a crisis team from the board of education came to investigate the issue and decided that the "T-shirt" incident was not a safety issue, and the gifties were allowed to wear their T-shirts. The United States Court of Appeals, Seventh Circuit, held that T-shirt design worn by students to protest election was **<u>not</u>** protected speech under the First Amendment of the United States Constitution. The Court went on to state that students **were free to protest** in more conventional ways.

Desegregation:

"School District Did Not Substantially Comply With Desegregation Remedy"
Little Rock School Dist. v. Pulaski County Special School Dist. No. 1 (E. D. Ark., 470 F. Supp. 2d 963), June 30, 2004.

The United States District Court, E. D. Arkansas, Western Division, held that the school district did **not** substantially comply with requirements of desegregation compliance remedy regarding processes for assessing effectiveness of programs for remediating academic achievement of African-American students, and for determining whether to modify or replace such programs. District **failed** to maintain separate written records on each program required by compliance remedy, in lieu of documents that compiled random changes in various academic programs.

Disabled Students:

"Stay Put Provision Requires Payment to Private School"
Ringwood Bd. of Educ. v. K. H. J. ex. rel. K. F. J. (D. N. J., 469 F. Supp. 2d 267), June 13, 2006.

Under "stay-put" provision of IDEA, the Ringwood School District (New Jersey) **was required** to continue paying private school tuition (to the Banyon School) of handicapped student and his transportation costs during the student's appeal to the New Jersey Court of Appeals. **Note:** Parents did not agree with the student's IEP that was developed by the Ringwood School District and enrolled their son in a private school. The IEP required the youngster to receive specialized instruction in language arts/reading and math, one-to-one tutoring in reading utilizing the multi-sensory approach, and mainstream instruction for the rest of his subjects. The United States District Court, D. New Jersey, agreed with the school district's educational plan for the student. The student's parents did not agree and appealed the lower court's decision to the New Jersey Court of Appeals. Accordingly, the "stay-put" provision associated with IDEA would be invoked during the appeal process. Thus, the school district had to continue paying the student's tuition and transportation costs to the private school while the appeal process ran its course.

"Special Education Teacher Liable for Beating Disabled Preschooler"
Preschooler II v. Clark County School Bd. of Trustees (C. A. 9 {Nev.}, 479 F. 3d 1175), March 21, 2007.

In the 2002-2003 school year, preschooler II was four years old. He had been diagnosed with tuberous sclerosis, a neurological disease that causes tumors to form in various organs, primarily in the brain, eyes, heart, kidneys, skin, and lungs. Symptoms include seizures, rashes, and skin lesions. In addition, preschooler II suffers from non-verbal autism. Based on these diagnoses, preschooler II was eligible for special education services under IDEA. preschooler II began his schooling at a special education program known as Kids Intensive Delivery of Services (KIDS), and his teacher was Kathleen LiSanti. LiSanti abused preschooler II in ways similar to the following: grabbed the student's hands and slapped him repeatedly; hit the youngster in his head and face; body slammed him into a chair; and on at least four occasions forced preschooler II to walk without shoes from his school bus to his classroom. The United States Court of Appeals, Ninth Circuit, held that: (1) Special education teacher was **not** entitled to qualified immunity from civil liability for unlawfully beating, throwing, and body slamming preschooler II; and (2) School administrators were **not** entitled to qualified immunity against supervisory claims that they demonstrated in regard to their responsibilities for hiring, training, supervising, and disciplining the autistic preschooler.

Labor and Employment:

"Teacher Failed to Prove That Her Teaching Position Caused Anxiety Disorder"
Hassell v. Onslow County Bd. of Educ. (N. C. App., 641 S. E. 2d 324), March 6, 2007.

Teacher (plaintiff) was fifty-six years old and worked as an elementary teacher from 1987 until 1996, when she became a sixth-grade teacher in a middle school. While working at the middle school, plaintiff had problems maintaining order in her classroom on a continual basis. During 2001, she experienced some type of serious student discipline incident at least once a week. Several of the student discipline-management problems experienced by the plaintiff included: physical harassment; psychological intimidation; called a "grease monkey"; cursed during class by students; students walked out of class with permission; students threw spitballs and wads of paper at the plaintiff; and students wrote rude remarks about the teacher in their textbooks. On January 25, 2002, the plaintiff received her fourth "Action Plan" (plan to improve her performance) that was developed by the school's administration and a curriculum specialist. Plaintiff was scheduled to meet with the middle school principal regarding the "Action Plan" on February 28, 2002, but asked for a four day extension. She left school and never returned. On April 19, 2002, plaintiff officially resigned her position, effective June 3, 2002. Her psychologist found that the teacher was experiencing a severe emotional crisis and he considered hospitalizing the plaintiff. Simply put, the plaintiff's psychologist stated that the plaintiff's "job was driving her crazy", and that her total job experience was a major stressor in her life. Plaintiff sought workers' compensation benefits from the North Carolina Workers' Compensation Act. The Workers' Compensation Commission ruled that the claimant was not required to do anything unusual as a teacher, and that her inadequate job performance and inability to perform her job duties was the cause of her stress and anxiety, not some "occupational disease". Teacher appealed the Commission's decision. The Court of Appeals of North Carolina held that claimant **failed** to prove that her position as a sixth-grade teacher placed her at increased risk of developing an anxiety disorder. Thus, claimant's employment did **not** expose her to unusual and stressful conditions; and school officials did **not** require claimant to perform any extraordinary tasks.

"Seventy-Three Year-Old *Failed* To Establish Age Discrimination"
Myers v. Dallas Independent School Dist. (C. A. 5 {Tex.}, 206 Fed. App. 401), November 27, 2006.

A 73-year-old job applicant brought action against school district under the Age Discrimination in Employment Act (ADEA). The United States Court of Appeals, Fifth Circuit, stated on school district's motion for summary judgment on 73-year-old unsuccessful job applicant's claim under ADEA, **neither** applicant's unsubstantiated assertions that the position he sought was filled by a younger applicant, **nor** his subjective belief that he was the subject of discrimination **was sufficient to refute** school district's evidence that applicant's applications were sloppily prepared, that he interviewed poorly, and that he made inappropriate comments to interviewers. **Note:** To prevail on an ADEA claim, a plaintiff presenting no direct evidence of age discrimination **must make a *prima facie* (produce enough evidence) showing of discriminatory treatment** by demonstrating that: (1) s/he is a member of a protected class; (2) s/he was qualified for the employment s/he sought; (3) in spite of his/her qualifications, s/he was not hired and the employer continued to seek applicants with similar qualifications; and (4) the employer ultimately hired someone outside of the protected class or otherwise declined to hire the applicant because of his age.

"Teacher *Failed* To State a Claim Regarding Tuberculosis Screening and His Contraction of Meningitis"
Levin v. Board of Educ. Of City of Chicago (N. D. Ill., 470 F. Supp. 2d 835), January 8, 2007.

Teacher at an alternative Chicago public high school for county inmates filed state court suit against city board of education and provider of medical services for detainees and staff at county jail. Plaintiff alleged that school officials improperly disclosed his personal medical information in violation of the Health Insurance Portability and Accountability Act (HIPAA) and Illinois common law. After removing case to federal court, defendants (school district) moved to dismiss. HIPPA claims were dismissed; but plaintiff was found to have raised claims under Section 1983 for violation of his constitutional right to privacy and under Illinois common law for public disclosure of private facts, intrusion upon seclusion, and loss of privacy. School district moved to dismiss. The United States District Court, N. D. Illinois, Eastern Division, ruled that: (1) Teacher **failed** to state claim under Section 1983 based on his tuberculosis screening; and (2) Teacher **failed** to state claim under Section 1983 relating to his contraction of meningitis. **Note:** Teacher, along with approximately 20 other employees, was asked to stand in line to be given a tuberculosis skin test. He had previously tested positive for tuberculosis, and refused to take the test and left the room. Once school officials learned that the plaintiff had tested positive for meningitis, they provided information about meningitis to other employees about contacting the disease and its dangers. The plaintiff was not identified in the memorandum.

"State Board's Suspension of Teacher's Certificate for Moral Turpitude Questionable"

Brehe v. Missouri Dept. of Elementary & Secondary Educ. (Mo. App. W. D., 213 S. W. 3d 720), February 13, 2007.

On December 31, 2002, while school was out of session, plaintiff (a teacher of learning disabled students in an elementary school) drove from her home (Holt's Summit, Missouri) to a casino in Boonville, Missouri. She left her three children (ages 11, 10, and 2.5) in her car and went into the casino for approximately 45 minutes. By the time she returned to her children, police were on the scene. Apparently, someone had observed the children alone in the car and notified law enforcement. She was charged with a misdemeanor pertaining to endangering the welfare of a child. Several months later, plaintiff pleaded guilty to one count of second-degree child endangerment. The court suspended imposition of sentence and placed the teacher on one year of probation on the condition that she obey all laws and not go on the premises of the Isle of Capri Casino. On December 23, 2004, the Department of Elementary and Secondary Education ("Department") filed a complaint against the teacher before the Missouri State Board of Education. The Department sought to discipline the teacher through the use of a state statue pertaining to suspending or revoking her teaching certificate for pleading guilty or being found guilty of a felony or a "crime involving moral turpitude". The Board voted to suspend the plaintiff's teaching certificate for 90 days. The Circuit Court reversed the Board's decision and the Board appealed. A Missouri court of appeals held that the Board **was required** to show that the circumstances of the offense involved moral turpitude. Thus, the case was **reversed and remanded back** to the Circuit Court. **Note:** "Moral turpitude" has been defined as "an act of baseness, vileness, or depravity in the private and social duties which an individual owes to his/her fellow person or to society in general" or "anything done contrary to justice, honesty, modesty, and good morals."

Property and Contracts:

"Baseball Coach Not Liable for Construction of Hitting Facility"
Brown v. Penland Const. Co., Inc. (Ga., 641 S. E. 2d 522), January 22, 2007.

After some discussion with a number of people including Michael Brown, the former baseball coach of Ridgeland High School, Penland Construction Company (PCC) constructed an indoor baseball hitting facility ($150,000) for the high school on land owned by Walker County Board of Education (Board). There was no formal agreement between the construction company and the board of education; and fundamentally, the coach was acting beyond the scope of his authority in creating an implied agreement with PCC. When the Board refused to pay for the facility, PCC sued Brown, the Board, the school district, and the school's athlete boosters club (boosters). The Supreme Court of Georgia held that that the Board accepted the company's construction services and was liable for payment under the "Quantum meruit theory". 'Quantum meruit theory' operates on the theory that "when one renders a service or transfers property which is valuable to another, which the latter accepts, a promise is implied to pay the reasonable value thereof." It is often pleaded as an alternative claim in a breach-of-contract case so that the plaintiff can recover even if the contract is voided.

Security:

"Student Found Guilty for Possessing a Closed Pocketknife on Campus"
In re B. N. S. (N. C. App., 641 S. E. 2d 411), March 6, 2007.

Assistant high school principal saw plaintiff standing in a stairwell wearing a hat, in violation of school district policy. Assistant principal asked the student to remove the hat, and the juvenile refused. Thereupon, the assistant principal escorted the student to the school's SRO office. Assistant principal asked the plaintiff if he would consent to a search, and he replied, "Go right ahead". The assistant principal found a closed pocketknife (with a 2.5 inch blade) located inside the student's coat pocket. A trial court adjudicated the juvenile to be delinquent for possession of a weapon on a school campus or property. The Court of Appeals of North Carolina **supported** the court's finding that the juvenile **was delinquent** for possessing a weapon on a school campus.

Student Discipline:

"School Safety Trumped Student's Constitutional Right"
Pace v. Talley (C. A. 5 {La.}, 206 Fed. App. 388), November 21, 2006.

High school student filed action under Section 1983 against high school teacher, counselor, and administrator, in connection with report to police of threat of school violence purportedly made by student. The Untied States Court of Appeals, Fifth Circuit, ruled that: (1) Student's contention that school officials made report to police without giving him prior opportunity to respond to allegation did **not** establish violation of any clearly established constitutional right; and (2) Student **failed** to demonstrate that *public interest in school safety* was outweighed by his expectation of privacy in confidential information.

Torts:

"School District Did Not Owe Duty to Protect Student Who Was Sexually Assaulted by Classmate"
Wilson ex rel. Adams v. Cahokia School Dist. #187 (S. D. Ill., 470 F. Supp. 2d 897), January 19, 2007.

On April 27, 2004, Teniesha Adams, a sixth grade student at a middle school in Cahokia, Illinois, was sexually assaulted on the school's premises after regular school hours by Craig Nichols, a classmate who was assigned to after-school detention. Adams immediately reported the incident to Lela Prince, the principal of the middle school. She immediately informed Dwayne Cotton, the school's SRO, of the alleged rape. Teniesha's mother, Brenda Wilson, was also immediately informed of the incident by Prince, and was told there would be an investigation of the incident. Wilson informed Prince that she did not wish for her daughter to be interviewed by Cotton concerning the sexual assault. The following morning, April 28, 2004, Cotton called Adams out of class, escorted her to his office, and interviewed her about the alleged attack. During the interview, Wilson spoke to Cotton and asked him to terminate the interview and send her daughter home. Cotton declined to end the interview, but invited Wilson to retrieve her daughter from the school. Wilson filed suit against school officials, alleging deprivations of her daughter's constitutional rights, specifically the Fourteenth and Fourth Amendments of the United States Constitution. The Untied States District Court, S. D. Illinois, held that: (1) School officials did **not** violate substantive due process rights of student by failing to protect student from a sexual assault by classmate; (2) School officials did **not** violate Fourth Amendment of student by conducting a prompt investigation of her sexual assault without her mother's presence; and (3) School officials **were immune** from student's false imprisonment claims.

"Supervision of Playground Was Adequate"
Benson v. Union Free School Dist. # 23 (N. Y. A. D. 2 Dept., 830 N. Y. S. 2d 757), February 27, 2007.

The student plaintiff was allegedly injured while attending a summer camp sponsored by the school district. While swinging on rings located on an elementary school's playground, she lost her grip and fell into a pile of sand located beneath the rings. The plaintiff alleged that a lack of adequate supervision was the proximate cause of the accident. The Supreme Court of New York, Appellate Division, Second Department, held that school officials demonstrated that there **was adequate supervision** of the playground and that a lack of supervision was **not** the proximate cause of the youngster's accident.

"Construction Shed Not Cause of Driver's Injury"
Rodriguez v. Hernandez (N. Y. A. D. 2 Dept., 830 N. Y. S. 2d 780), February 27, 2007.

The plaintiff allegedly sustained injuries when the vehicle he was driving was hit by another vehicle, which caused plaintiff to lose control of his auto and collide into a sidewalk shed (protecting pedestrians from falling debris) erected in connection with a school construction project. When the sidewalk shed collapsed, a pole stored on top of the shed fell through the plaintiff's windshield and pierced his leg. The Supreme Court of New York, Appellate Division, Second Department, stated that the shed was **not** the cause of the accident and the school district did **not** owe a duty to the plaintiff.

"School Officials Not Liable for Student's Broken Jaw"
LaPage v. Evans (N. Y. A. D. 3 Dept., 830 N. Y. S. 2d 818), February 22, 2007.

While being transported on a school bus, plaintiff (Ball) thought another student (Evans) poked him. The two boys exchanged words and stood up in the aisle of the bus. Ball pushed Evans, and both boys returned to their seats. Nothing further transpired throughout the remaining 10 minutes of the bus ride. Immediately after Ball and Evans exited the bus at their school, Ball either turned around or was spun around by Evans, and Evans struck him in the face approximately 10 times in rapid succession, breaking Ball's jaw. The Supreme Court of New York, Appellate Division, Third Department, held that the brief altercation between the two students **was insufficient** to alert school officials that it should have anticipated that student would attack plaintiff. Neither student had been involved in fights before; neither had any serious disciplinary history; the two hardly had any interaction; and school officials were not aware of any problems with either one individually or between the two of them.

Commentary

No commentary.

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Legal Update for District School Administrators October 2007

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Commentary:

No commentary this month.

Topics

Civil Rights:

"Parents of Learning-Disabled Student Not Entitled to Private School Tuition"
Z. W. v. Smith (C. A. 4 {Md.}, 210 Fed. App. 282), December 21, 2006.

Seventeen-year-old student who has a learning disability and Attention Deficit Hyperactivity Disorder (ADHD) attended Maryland's Anne Arundel County Public Schools (AACPS) through the school year 1999-2000. During his last year of attendance at his assigned public school, he encountered both academic and emotional problems; consequently, his parents enrolled him (at their own expense) in a non-public day school ("Baltimore Lab") for the 2000-2001 school year. AACPS confirmed that it did not have an appropriate public school placement for the student, and agreed to fund his education at a non-public school (High Road Academy). However, the Maryland State Department of Education (MSDE) had not granted Baltimore Lab approval for a fundable non-public special education school. On the other hand, the High Road Academy had been approved by the MSDE as a fundable non-public special education school. However, the student's parents continued sending Z. W. to Baltimore Lab at their own expense. The United States Court of Appeals, Fourth Circuit, stated that the student's parents were **not** entitled to be reimbursed by the school district because the district ***offered*** to provide a FAPE that met the youngster's unique educational needs at the district's expense.

"Principal Demoted Due to Disciplining Board Member's Child"
Cavazos v. Edgewood Independent School Dist. (C. A. 5 {Tex.}, 210 Fed. App. 414), December 18, 2006.

High school principal filed law suit against school district, alleging she was demoted and reassigned to another school in retaliation for taking disciplinary action against a student who is the son of a school board member. The former high school principal took disciplinary action against the school board member's son due to his criminal activity at school, which included the possession of marijuana. Additionally, the plaintiff claimed emotional distress due to the threats made against her by the student's parents. The United States Court of Appeals, Fifth Circuit, held that: (1) The principal's speech did **not** involve a "matter of public concern", for purposes of First Amendment retaliation; and (2) The alleged conduct by the board member did **not** rise to the level of intentional infliction of emotional distress.

"Student Harassed By Other Students"
Saggio v. Sprady (E. D. N. Y., 475 F. Supp. 2d 203), February 16, 2007.

This case came about after several incidents occurred while plaintiff (white) was a student at Westhampton Beach Union Free School District, where she was harassed by several fellow students. She claimed that the actions taken by school officials in response to these incidents violated her right to a public education, alleged to exist under the United States and/or New York State Constitutions. The plaintiff suffered at least three verbally or physically abusive encounters with a group of minority fellow students. They were as follows: (1) Minority male middle school student verbally sexually harassed her on a school bus. Principal suspended the offending student from school for four days and from riding the bus for about three weeks. Additionally, the offending student was required to attend counseling sessions; (2) While attending a basketball game three female minority girls jumped her in the school's parking lot. The principal suspended each girl for five days; (3) About one week after the basketball game incident, three female minority female students attacked plaintiff at a school bus transfer site. All three offenders were suspended for five school days. Plaintiff's mother met with the principal and demanded a "guarantee" for her daughter's safety and a private security guard to escort plaintiff from classroom to classroom. The principal declined, but offered the following options for the plaintiff: (1) Attend classes at another public schools in a nearby school district; (2) Attend a private school at her cost; (3) Receive home schooling at district expense; and (4) Continue attending her current school. After about six weeks of home schooling, plaintiff returned to her home high school, and graduated in the top third of her class. The United States District Court, E. D. New York, held that the plaintiff **failed** to state an equal protection claim; student **failed** to state a substantive or procedural due process claim based on district's alleged deprivation of her claimed right to a public education by "coercing" her into accepting home schooling; and school officials **exercised discretionary judgment** in imposing disciplinary measures on offending students.

"Student Suffers At the Hands of Other Students"
Magwood v. French (W. D. Pa., 478 F. Supp. 2d 821), February 27, 2007.

Plaintiff's son began attending Duquesne Elementary School as a third-grader during the 2002-2003 school year. Soon after started attending Duquesne, a boy began pushing him on several occasions. When the youngster told his teacher, she moved to offender to a desk in the back of the classroom. In the fourth grade, four boys chased him and pushed him into some bushes located on the school's campus. When the principal was told of the incident, he suspended each offender for three days. In the fifth grade, the student suffered several more instances of violence at the hands of fellow students; and each time, the school principal punished the offending students. Thereafter, the mother of the student sued the school district, its curriculum director, and elementary school principal seeking relief under Section 1983 (Civil Rights Act of 1871) for repeated injuries suffered by her son at the hands of other students in his elementary school. The United States District Court, W. D. Pennsylvania held that the school district and school officials did **not** affirmatively use their authority in a way that created danger to bullied student or that rendered him more vulnerable to danger than had they not acted at all. School district and its agents **took some disciplinary action** against offending students **after each incident of misconduct directed** at the bullied student. The legal test was *not* whether the student's situation actually improved, but whether school officials **acted with good faith intention in their efforts to improve the situation for the victim.**

Desegregation:

"Unitary Status Warranted"
Lee v. Lee County Bd. of Educ. (M. D. Ala., 476 F. Supp. 2d 1356), March 8, 2007.

The United States District Court, M. D. Alabama, Northern Division, held that declaration of unitary status and termination of school desegregation litigation **was warranted** as to the issue of special education and the obligations undertaken in a 2000 consent decree. State **had fully and satisfactorily complied** with the orders of the court, and the vestiges of the prior de jure segregated school system in special education area **had been eliminated to the extent practicable**. **Note:** The 2000 consent decree required the state of Alabama to: (1) revise the administrative code procedure and policies related to the special-education process, including the pre-referral and referral states, evaluation, and eligibility criteria; (2) provide extensive teacher professional development; (3) undertake comprehensive monitoring of special education plans and programs in local school districts; and (4) file annual reports detailing the monitoring process.

Disabled Students:

"Student Not Entitled to Special Education"
Hood v. Encinitas Union School Dist. (C. A. 9 {Cal.}, 482 F. 3d 1175), April 9, 2007.

At the time the California special education hearing officer issued a decision, Anna Hood was 10 years old, and was performing at grade-level appropriate/average or above average levels in her public school classroom. Anna's second, third, fourth, and fifth grade teachers did chronicle her consistent difficulties completing tasks, turning in homework on time, and keeping her belongings organized. Anna's performance on various intelligence tests indicated high intellectual potential. Additionally, plaintiff had a significant medical history, which included multiple ear infections that required tube placement, as well as farsightedness and strabismus. The school district provided an accommodation plan for Anna under Section 504 of the Rehabilitation Act of 1973. However, Anna' mother desired that her daughter be placed in special education under IDEA. The United States Court of Appeals, Ninth Circuit, held that plaintiff was **not** entitled to special education on a "specific learning disability"; and also **not** entitled to special education on other health impairment.

"School Entitled to Dismissal of Parents' IDEA Claim"
David T. ex rel. Kaitlyn T. v. City of Chicopee (D. Mass., 474 F. Supp. 2d 215), February 15, 2007.

Kaitlyn T. is a minor with a language disability who had attended Chicopee Public Schools up to the fall of 2003. At that time, Kaitlyn's parents concluded that the IEP plan prepared for their daughter did not meet FAPE. Thereupon, they transferred her to a private day school in Westfield, Massachusetts. Afterward, they filed a suit claiming that they were entitled to reimbursement under IDEA for their daughter's education at a private educational institution. The United States District Court, D. Massachusetts, held that the plaintiff's suit **was entitled to dismissal** because their attorney **failed** to communicate with the Hearing Officer or respond to her order to show cause during the hearing proceedings before the Massachusetts Bureau of Special Education Appeals (BSEA).

"Parents of Autistic Child <u>Not</u> Entitled to Private School Placement"
A S. v. Madison Metropolitan School Dist. (W. D. Wis., 477 F. Supp. 2d 969), March 13, 2007.

Parents of a high school age student who was diagnosed with autism and a language impairment sued a Wisconsin school district for failure to provide a FAPE under IDEA. The California school district from which they moved had provided a FAPE at a private board school (Heartspring) at an annual cost of $85,000. The Wisconsin school district's IEP included a primary placement at West High School in Madison, with five hours per day, five days a week, of specialized services in a special education setting, and two hours per day, five days a week of instruction in a regular education setting with a behavior intervention plan. In addition, the school district offered 3.5 hours per week of extended school year (ESY) services. Student's parents disagreed and file suit. The United States District Court, W. D. Wisconsin, stated that the school district **complied** with IDEA procedures, despite parents' claims it failed to incorporate student's special education teacher in its IEP meeting; failed to conduct additional assessments; failed to comply with statutory time limits; failed to properly include transition plan in the IEP; and failed to provide prior notice to parents.

<u>Labor and Employment:</u>

"Be Careful About Financial Accountability"
Williams v. Dallas Independent School Dist. (C. A. 5 {Tex.}, 480 F. 3d 689), February 13, 2007.

High school football coach and athletic director in the Dallas Independent School District (DISD) was removed as athletic director and was informed that his contract would not be renewed for the next school year due to his memorandum to his school's principal and officer manager pertaining to their handling of the school's athletic funds. Within the same month when the plaintiff was informed of his employment status, both the officer manager and principal were placed on administrative leave pending an investigation of matters pertaining to "financial accountability". The United States Court of Appeals, Fifth Circuit held that the memorandum sent by the plaintiff questioning the handling of the school's athletic funds ***was made in the course and scope of performing his employment duties***, and thus was **<u>not</u>** protected against retaliation by the school district under the First Amendment of the United States Constitution. Furthermore, the court went on to state that while he was not required to write the memorandum, it was nevertheless ***related to his job duties***.

"State Board of Education Not Violate ADA"
Nunn v. Illinois State Bd. of Educ. (C. A. 7 {Ill.}, 211 Fed. App. 502), December 22, 2006.

May Nunn worked for the Illinois State Board of Education (ISBE) for over 25 years, and was, as her former employer put it, "a valued employee whose services were in great demand". In late 2002, Nunn began acting out of character. For example, in the office she was observed crying hysterically, skipping around her cubicle and chanting, falling into a trance-like state and becoming unresponsive to coworkers, and running through the office exclaiming "Praise Jesus." At times she stopped answering her phone. The plaintiff was ordered to undergo a psychiatric evaluation to determine her fitness to work. In February 2003 she met with a psychiatrist who diagnosed her with severe bipolar disorder, manic type, with auditory hallucinosis. The psychiatrist stated that Nunn was not a danger to herself or others, was disruptive, had "no insight" into her disorder, and could be expected to get worse without treatment. Nunn's supervisors advised her that she had one year to seek treatment for her illness and then return to work. In addition, they suggested that she use her paid sick days (144) and then take unpaid leave as necessary. The plaintiff insisted that she was not sick, refused to take any sick leave, and stated that she did not need medical treatment. Shortly thereafter, on March 23, 2003, Nunn was fired. Thereupon, Nunn sued the (ISBE) claiming they violated the Americans with Disabilities Act (ADA). The Untied States Court of Appeals, Seventh Circuit, held that the ISBE did **not** violate ADA because the plaintiff could not perform the essential functions of her job.

"Paraprofessional Not Able to Establish Disability Under ADA"
Curcio v. Bridgeport Bd. of Educ. (D. Conn., 477 F. Supp. 2d 515), March 15, 2007.

A paraprofessional (Special Education Instructional Assistant), who suffered serious head trauma, broken teeth, a broken bone in her neck, myofacial-tissue damage in her upper body and at the base of her skull, permanent damage to her neck, posttraumatic stress disorder, panic attacks, and major depression from a prior assault (not school related) **failed** to establish that her impairments substantially limited her ability to perform the requirement of her job assignment. Plaintiff did **not** provide any evidence of a disability outside of her own unsupported assertions. She **never** specified how her cognitive impairments actually limited her ability to work aside from alleging, without producing supporting evidence, that they prevented her from completing required vocational profile forms. Additionally, *she admitted that she had "always found a way"* to do her job.

"Teacher Entitled to Award for Facial Disfigurement"
Fayetteville School Dist. v. Kunzelman (Ark. App., 217 S. W. 3d 149), November 16, 2005.

Plaintiff, an art teacher, was stirring a ceramic glaze for his art class when either some glaze splashed into his eye, or it splashed onto his face, and he wiped his face with his hand. The accident left the teacher with a permanently dilated pupil, difficulty in focusing, and the inability to perceive colors as he could prior to the accident. His principal described the teacher as an individual with a strong work ethic, very professional, very honest, and an excellent employee. The Arkansas Workers' Compensation Commission stated that the teacher sustained a compensable right-eye injury and should be entitled to additional medical treatment necessary for his injured eye. The Fayetteville School District contended that the Commission's opinion was not supported by substantial evidence. The Court of Appeals of Arkansas, Division III, held that **substantial evidence supported** the Commission's decision that claimant **was entitled** to additional medical treatment.

<u>Security:</u>

"The Tip and Marijuana"
T. S. v. State (Ind. App., 863 N. E. 2d 362), March 27, 2007.

On October 13, 2005, Sergeant Mark Driskell, of the Indiana Public Schools Police ("IPSP"), received a phone call in the Broad Ripple High School ("BRHS") IPSP office. The anonymous tipster stated that a student by the name of T. S. had marijuana in the right front pocket of his pants. The tipster did not state how she knew T. S. had marijuana in his possession. Additionally, Sergeant Driskell testified that he had "no idea" who the anonymous caller was. Sergeant Driskell searched the suspect and found two baggies of marijuana in his possession. The Court of Appeals of Indiana held that the SRO **acted to further the educational goals of the school district**, rather than as an outside law enforcement officer. Accordingly, **the legality of the search was determined by reasonableness of the search under all circumstances, *rather than the more stringent probable cause and warrant requirements***. Furthermore, the officer did not act in conjunction with other school officials prior to the initial contact with the student; however, he **intended** to involve the school's dean of students.

Textbooks and Curriculum:

"Inclusion of Respect for Gay Persons in School's Curriculum Did Not Infringe On Rights of Parents and Students"
Parker v. Hurley (D. Mass., 474 F. Supp. 2d 261), February 23, 2007

The Massachusetts Department of Education (MDE) issued curricula frameworks for pre-kindergarten through fifth grade that encouraged instruction that describes "different types of families" and "the concepts of prejudice and discrimination". Thereupon, the Lexington, Massachusetts public schools implemented the program as prescribed by the MDE. Parents sued the school district on behalf of their elementary school children because they believed that the curriculum violated their U. S. Constitutional rights associated with both their free exercise rights and their rights to raise their children as they wish. The United States District Court, D. Massachusetts held that the school district's inclusion in their elementary-school curriculum materials intended to encourage respect for gay persons and couples, including depictions of families with same sex parents, did **not** infringe on plaintiffs' substantive due process rights (Fourteenth Amendment). Furthermore, plaintiffs' did **not** have a fundamental liberty interest permitting them to prescribe what the state could teach their children, because the state had a fundamental interest in preparing students for citizenship in a diverse society.

Torts:

"Do Not Mess With Cheetos"
Howerton ex rel. Howerton v. Blomquist (E. D. Mich., 240 F. R. D. 378), February 1, 2007.

On November 8, 2004, plaintiff (male student) was walking down a school corridor with a female student while school was in session. Plaintiff tried to grab the female student's bag of Cheetos in an allegedly playful-type manner. After witnessing plaintiff's behavior with the other student, Sandra Blomquist (teacher) allegedly grabbed the male student and pushed him into a locker. It is also alleged that Blomquist verbally abused the plaintiff at the same time. The incident was reported to the middle school principal. The principal issued a formal reprimand and placed the teacher on administrative leave during the investigation of the incident. Subsequently, Blomquist resigned her teaching position. On April 7, 2005, plaintiff filed a complaint against Blomquist alleging assault, battery, intentional infliction of emotional distress, gross negligence, and civil rights violation. The teacher brought forth a motion "in limine" (present only to the judge before and during a trial) and motion to exclude witnesses. The United States District Court, E. D. Michigan, Southern Division, ruled that: (1) evidence that teacher had allegedly assaulted another student **was inadmissible** as character evidence; (2) evidence that teacher's alleged romantic relationship with another student and her alleged psychological problems were **not** relevant; (3) teacher's personnel file was **not** relevant; and (4) the court **would exclude** plaintiff's witnesses who were identified only on plaintiff's final pretrial order.

"Vehicle Rear-Ends School Bus"
Perry v. Board of Educ.of Rondout Valley Cent. School Dist. (N. Y. A. D. 3 Dept., 831 N. Y. S. 2d 776), March 15, 2007.

Plaintiff's pickup truck was the second vehicle behind a stopped school bus at a designated school bus stop when it was rear-ended by another vehicle. Afterward, he commenced a negligence claim against the school district, alleging that it negligently designated the stop. Additionally, he filed a negligence claim against the bus company, alleging that it negligently operated the bus by stopping at a "dangerous location". School district presented evidence that the bus stop had been in existence for at least 30 years, there had never been any type of accident, and traffic had always been able to stop behind a school bus without incident. The Supreme Court of New York, Appellate Division, Third Department, held that the school district and bus company was **not negligent** in designating school bus stop, nor for stopping the school bus in an allegedly dangerous location.

"Be Careful Unloading PTA Prizes"
Rabalais v. St. Tammany Parish School Bd. (La. App. 1 Cir., 950 So. 2d 765), January 26, 2007.

On the morning of February 27, 1997, plaintiff was unloading prizes for a PTA activity from her husband's truck when she slipped and hit her head on the school's parking lot curb. Plaintiff had worked as a substitute teacher for the school, but was not working as a substitute teacher at the time of the accident. Plaintiff alleged that the school district failed to maintain school property properly; failed to supervise school activities properly; failed to provide adequate support for persons, such as herself; and failed to warn her of hidden defects on school property. A Louisiana appeals court ruled that plaintiff **failed to establish** that school district owed or breached a duty to her; and she was **not** working within the course and scope of employment as a substitute teacher at the time of her accident.

"Elementary Student Raped By High School Student"
Doe ex rel. Doe v. Wright Sec. Services, Inc. (Miss. App., 950 So. 2d 1076), March 6, 2007.

Plaintiff was a 10 year old student in the Jackson Public School District (Jackson, Mississippi), and was assigned to the school district's alternative school which served students who had either exhibited violent behavior or who had committed felonies. The plaintiff was one of approximately 60 students who ranged in ages from ten to seventeen at a bus stop next to a McDonald's restaurant. Two security guards employed by the school district and a third guard, who was under contract with a security company, were assigned to monitor the bus stop. Plaintiff asked one of the guards if he could go to the McDonald's to use the restroom. The guard gave the plaintiff permission to go unescorted. While in the restroom, the plaintiff was sexually assaulted by a 15 year old student who was also assigned to the alternative school. The Circuit Court of Hinds County granted the security company's motion for summary judgment, and student appealed. The Court of Appeals of Mississippi **reversed and remanded** the case back to the lower court because material facts existed as to whether the student's injuries were foreseeable. Thus, summary judgment **was precluded** for the security company.

"School Not Liable for Student's Injuries Who Voluntarily Participated In a Fight"
Legette v. City of New York (N. Y. A. D. 2 Dept., 832 N. Y. S. 2d 669), March 27, 2007.

Although schools are under a duty to supervise adequately the students under their charge and will be held liable for *foreseeable* injuries proximately related to the absence of adequate supervision, schools are **not** insurers of the safety of their students. School officials *cannot reasonably* be expected to supervise and control continuously all of the students' movements and activities. Therefore, school officials could **not** be considered the cause of a student's injuries who was injured in a very brief fight with another elementary school student in which he ***was a voluntary participant***.

Commentary

No commentary.

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).

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Legal Update for District School Administrators November-December 2007

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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 Johnny R. 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
- Disabled Students
- Extracurricular Activities
- Labor and Employment
- Security
- Torts

Commentary:

"Peer Sexual Harassment in the Elementary Grades"

Topics

Civil Rights:

"School District Failed to Offer FAPE"
A. K. ex rel. J. K. v. Alexandria City School Bd. (C. A. 4 {Va.}, 484 F. 3d 672), April 26, 2007.

The school district **failed** to offer a FAPE, as required to comply with IDEA when its IEP did not identify a particular school at which it anticipated the middle school student with disabilities (e. g. Semantic Pragmatic Language Disorder, Aspergers Syndrome, and obsessive compulsive disorder) would be educated. Merely stating that an unspecified private day school would be appropriate would **not** be sufficient, even though parents agreed that an appropriate private day school would provide a FAPE. However, they favored keeping the student at an out-of-state residential school because they had not found a local private day school which they felt would meet their youngster's specialized needs.

"Teacher's Bulletin Board Materials Not Protected Speech"
Lee v. York County School Div. (C. A. 4 {Va.}, 484 F. 3d 687), May 2, 2007.

A complaint from a citizen within the community prompted the school's administration to go to a high school Spanish teacher's classroom and examine items posted on the teacher's classroom bulletin board. The crux of the citizen's complaint was that some of the teacher's postings were overly religious in nature. At the time of the visit, the teacher was not present. After viewing the items posted on the bulletin board, the principal removed five items and placed them on the teacher's desk in the teacher's lounge with an explanatory note in the teacher's mailbox. The United States Court of Appeals, Fourth Circuit, stated the materials posted by the high school Spanish teacher **were curricular in nature** and thus, not speech on a school matter related to a public concern. Therefore, the materials **were not protected** under the First Amendment of the United States Constitution.

"Banning the Confederate Flag"
D. B. ex rel. Brogdon v. Lafon (C. A. 6 {Tenn.}, 217 Fed. App. 518), February 21, 2007.

On May 30, 2005, plaintiff and other students at William Blount High School were informed that depictions of the Confederate battle flag on students' clothing would be considered a violation of the school's student dress code. On September 1, 2005, plaintiff wore a shirt depicting the Confederate battle flag, two dogs, and the words "Guarding our Southern Heritage". The high school principal reminded the plaintiff of the ban and asked him to turn his shirt inside out or take it off, then threatened him with suspension if he refused to cooperate. Thereafter, plaintiff and another student brought suit against the school district and its administration, alleging that the defendants violated their First and Fourteenth Amendments. Plaintiffs in their affidavits stated they had seen other students wearing foreign flags, Malcolm X symbols, and political slogans. The Untied States Court of Appeals, Sixth Circuit, held that school officials were **not** required to prove that students' displays of the Confederate battle flag had actually led to disruption in the past, prior to applying the policy banning depictions of the Confederate battle flag. The court reasoned that school officials **had ample reason to anticipate unrest and disruption** if the wearing or display of the Confederate flag was allowed. The court's rationale was based on racial tension, intimidation, and violence that had occurred in the high school during the previous school year. In fact, the violence and intimidation were so severe that law enforcement officials had to be brought into the school to maintain order. The court was also **supported** school officials' efforts to reduce a racially hostile educational environment that existed within the school-community.

Disabled Students:

"Former Student's IDEA Claim Was Moot Due to Graduation"
Moseley v. Board of Educ. Of Albuquerque Public Schools (C. A. 10 {N. M.}, 483 F. 3d 689), April 16, 2007.

In 2003, when Mr. Moseley was a student at Del Norte High School in Albuquerque , his parents filed an IDEA due process request against the Albuquerque Public Schools (APS) on his behalf. The request also alleged disability discrimination under Section 504. The request was base in part on the failure of APS to provide Mr. Moseley with assistive technology, specifically real-time captioning. Plaintiff is deaf, has visual tracking problems, and suffers from attention deficit disorder (ADD). The United States Court of Appeals, Tenth Circuit, held that plaintiff's claim that board of education violated IDEA, Section 504, and ADA by failing to provide him with services, including assistive technology, **were moot**. Student had graduated from high school *before* his appeal was filed. He did *not* contest his graduation from high school. He requested *no* compensatory damages or compensatory education services, and he articulated *no* effective equitable remedy that could be fashioned.

"School District Complied With IDEA Without Updating IEP"
C. P. v. Leon County School Bd. Florida (C. A. 11 {Fla.}, 483 F. 3d 1151), April 10, 2007.

High school student suffered from post traumatic stress syndrome and other disabilities, and was eligible for special education and related services. Additionally, the youngster was a juvenile offender with a number of nonviolent offences. He enrolled at Lawton Chiles High School after serving time in a West Florida Wilderness institute. The Untied States Court of Appeals, Eleventh Circuit, stated that the school board **properly complied** with IDEA by maintaining emotionally disabled student's then-current placement through the school year, without updating his IEP, because the student's claims were on appeal through the school year and parties **could not** reach an agreement on an alternative placement. Therefore, the stay-put provision *remained in effect* and school board ***could not*** unilaterally alter the plaintiff's IEP.

"Parents Are Entitled to Represent Themselves Under IDEA"
Winkelman v. Parm City School District (U. S., 127 S. Ct. 1994), May 21, 2007.

Parents of six-year-old child with autism spectrum disorder worked with the school district to develop their youngster's IEP. All parties agreed that the child's parents had the statutory right to contribute to this process, including an "impartial due process hearing" with school officials. The disagreement at the center of the dispute pertains to the parents' right to represent themselves in further review in a United States District Court. The United States Supreme court held that IDEA grants parents independent, enforceable rights, which encompass the entitlement to a free appropriate public education (FAPE) for their child which are **not** limited to certain procedural and reimbursement-related matters. Therefore, parents **are entitled to prosecute** their IDEA claims on their own behalf, unrepresented by legal counsel, even though they are not trained or licensed attorneys.

"Battery Claim Against Preschool Teacher Had to Show Touching Was Unreasonable"

Austin B. v. Escondido Union School Dist. (Cal. App. 4 Dist., 57 Cal. Rptr. 3d 454), April 13, 2007.

Two autistic preschool students and their parents brought suit against school district and preschool teacher, whom they alleged engaged in abusive conduct toward their three-year-olds. The plaintiffs alleged that the teacher bent their hands back to force them to stand or sit, pinched them, held their hands tightly to prevent them from bolting, held their wrists/hands while walking with them in a way that would cause discomfort if they attempted to escape, used too much pressure on their hands when they were engaged in an activity such as coloring, applied unreasonable pressure on their necks, stepped on their fingers and feet, and tossed a child through the air. A *California* appeals court held that: (1) To be charged with battery, plaintiffs are required to show that the teacher **was unreasonable and intended to harm** them; (2) Since the youngsters' parents chose to enroll their children in school, their children's teachers assumed the standing in loco parentis, which included reasonable touching necessary to guide and control them; and (3) Under California law, the school district was entitled to attorney fees.

"IEP Inadequate"

North Reading School Committee v. Bureau of Special Educ. Appeals of Mass. Dept. of Educ. (D. Mass., 480 F. Supp. 2d 479), March 30, 2007.

Kindergarten student with a language-based learning disability, along with deficits in memory and marked distractibility, attended a private, regular education school where his mother was a substitute teacher. The child's parents pulled their child out of public school because they were dissatisfied with the IEP the school district had developed for him. The school district offered only a full-day kindergarten. At the private school, the student could attend a half-day kindergarten and have private speech therapy in the afternoons. The United States District Court, D. Massachusetts, stated that the private school placement by the youngster's parents **was the appropriate placement**. In addition, the court ruled that a student's IEP **must be reasonably calculated to enable** a handicapped student to achieve passing marks and advance from grade to grade.

"Deaf Student's Service Dog Not Allowed At High School"
Cave v. East Meadow Union Free School Dist. (E. D. N. Y., 480 F. Supp. 2d 610), March 19, 2007.

High school student has a profound sensory neural hearing loss. He is deaf; and without amplification, he has no hearing ability. The family of the hearing-impaired youngster sought permission for their child to bring his service dog into the school and into his classes. School officials refused on grounds that the student was being satisfactorily accommodated already and the dog would cause problems for the student himself, other students, and teachers. The United States District Court, E. D. New York held that: (1) Plaintiffs **failed** to exhaust their administrative remedies under IDEA and they did **not** establish a clear likelihood of success on merits of their claims for violations of the ADA and Section 504 of the Rehabilitation Act; (2) School district **provided** student with **reasonable, even extraordinary, accommodations** (e. g. sign language interpreter, FM transmitter, student note taker, and extra time to take exams) under ADA and Rehabilitation Act; and (3) Allowing student to be accompanied by his service dog **would impose a hardship** on students and teachers who are allergic to dogs.

Extracurricular Activities:

"High School Gay-Straight Alliance Entitled to Injunction"
Gay-Straight Alliance of Okeechobee High School v. School Bd. of Okeechobee County (S. D. Fla., 483 F. Supp. 2d 1224), April 6, 2007.

Gay-Straight Alliance of Okeechobee High School ("OHS GSA"), which promoted sexual orientation tolerance and equality, **demonstrated substantial likelihood of success on the merits** as required to obtain a **preliminary injunction** on claim that school officials violated the Equal Access Act (EAA). The EAA prohibits federally financed secondary schools with limited open forums from discriminating against students based on speech content where schools have granted other non-curricular clubs or organizations access to school facilities. **Note:** A court will typically issue a preliminary injunction when the plaintiff (moving party) demonstrates: (1) a substantial likelihood of success on the merits of the case; (2) that irreparable injury will be suffered unless the injunction is issued; (3) the threatened injury to the plaintiff outweighs whatever damage the imposed injunction may cause the defendant (opposing party); and (4) if issued, the injunction would not be adverse to the public interest.

Labor and Employment:

"Removal of Custodian Did Not Violate Age Discrimination Act"
Abraham v. Abington Friends School (C. A. 3 {Pa.}, 215 Fed. App. 83), December 27, 2006).

In July 2000 plaintiff was hired by the Abington Friends School as a custodian. According to the plaintiff, beginning sometime in 2001, he was: (1) harassed and criticized by his supervisor because of his age; (2) unfairly sent home and docked pay on two occasions; (3) denied overtime opportunities that went to younger employees; (4) removed from extra work as a security guard; (5) transferred to an less desirable shift; and (6) laid off with others on his new shift. The plaintiff contented that the aforementioned actions amounted to discrimination in violation of the Age Discrimination in Employment Act (ADEA). The United States Court of Appeals, Third Circuit, held that: (1) Custodian **failed** to prove that non-discriminatory reasons presented for his termination were pretext for age discrimination or retaliation; and (2) Alleged instances of name calling could **not** support hostile work environment or harassment claim.

"Teacher Terminated Due to Testing Irregularities While Administering State Tests"
Rodriguez v. Ysleta Independent School Dist. (C. A. 5 {Tex.}, 217 Fed. App. 294), January 30, 2007.

Plaintiff filed suit against the Ysleta Independent School District ("YISD") alleging that school officials denied her due process rights under the Due Process Clause of the Fourteenth Amendment of the United States Constitution. Rodriguez was accused of testing irregularities in the administration of the Texas Assessment of Knowledge and Skills ("TAKS") reading test to her third grade class on March 3, 2004. While the test was in progress the teacher was observed by her colleagues inappropriately helping her students by calling them to her desk, returning their tests to them, pointing to the tests, directing students back to their desks with their tests, and making comments to the class that were outside the test script. The United States Court of Appeals, Fifth Circuit, ruled that the teacher **received *all*** the due process that she was entitled in connection with her termination, despite her claim that a hearing examiner was biased and committed various errors during an administrative hearing.

"Art Teacher With Arthritis Had A Disability Under ADA and Rehabilitation Act"
Gordon v. District of Columbia (D. D. C., 480 F. Supp. 2d 112), March 26, 2007.

Plaintiff had been employed in the District of Columbia School District as a teacher since 1979. Beginning in 1990, she was employed as an art teacher at the Ballou Senior High School. Plaintiff has degenerative arthritis, which affects her mobility and manual dexterity. Teacher alleges that while at Ballou, she did not have access to an accessible bathroom; she did not have keys to locked emergency doors; the heating and cooling system was non-functional; the shelves were too high; she did not have access to a copier; and mandatory meetings were held on second floor. Teacher retired January 2006. The United States District Court, District of Columbia held that there **was sufficient evidence** that high school teacher's arthritis **substantially limited her in performing major life activity of *walking*** so that she **had a "disability"** under ADA and Rehabilitation Act.

"Teacher's Absences Prevented Him From Being Qualified Within ADA"
Ramirez v. New York City Bd. of Educ. (E. D. N. Y., 481 F. Supp. 2d 209), March 30, 2007.

Plaintiff was hired as a Provisional Preparatory Teacher ("PPT") to teach high school Spanish. A PPT teacher is defined as "a person who has not yet completed all the requirements for a New York State provisional teaching certificate. A PPT is permitted to teach for a period of three years without full certification. The renewal of the license to teach each year is dependent on receiving a satisfactory rating from the school at which the PPT is assigned. Plaintiff was classified as a PPT because he had not passed either the liberal Arts and Sciences Test (LAST) or the Assessment of Teaching Skills-Written (ATS-W). Both are required for full certification in the state of New York. The school's administration assigned the teacher a performance rating of unsatisfactory ("U") during his annual review. According to the guidelines associated with PPT teachers, the plaintiff could not maintain his PPT status after he was rated unsatisfactory; thus, his employment was terminated. The school's administration testified that due to the teacher's excessive absences, the continuity of instruction for 150 students was broken. Therefore, New York state Regents diplomas for his students, along with their academic success were put in jeopardy. The school administration went on to state that the teacher performed well in class, but he had to be present to deliver services. Teacher sued the school board under the Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA) stating that his absences from class were due to acute bronchitis and upper respiratory infections. The United States District Court, E. D., New York, held that teacher's bronchitis and upper respiratory infections were temporary conditions and would **not constitute** a disability under ADA since they were not substantially limiting a major life activity. Additionally, his claim under FMLA **was untimely** due to the length of time between termination of employment and filing of his claim.

"School Police Officer Not Entitled to Overtime"
Ferrell v. Gwinnett County Bd. of Educ. (N. D. Ga., 481 F. Supp. 2d 1338), March 30, 2007.

School police officer (SRO) sued the Gwinnett County School System for overtime compensation under the Fair Labor Standards Act (FLSA). The United States District Court, N. D. Georgia, Atlanta Division, ruled that school police officers' primary duty involved non-manual work, for purposes of FLSA's **administrative exemption** from overtime pay requirements in that their duties directly related to management or general business operations of the school system. This also included planning their day, unless called to the scene of an emergency. Gwinnett County School System's police officers primary duties pertained to teaching classes and faculty-staff orientation that were not performed by rank and file police officers. Furthermore, school police officers were required to have a higher level of education than regular police officers, along with maintaining their law enforcement certification. The school police officers occasionally broke up fights. However, they were prohibited from engaging in vehicle chases, and most officers never pulled their service handguns.

Security:

"Search of Student Not Unconstitutional"
Lindsey ex rel. Lindsey v. Caddo Parish School Bd. (La. App. 2 Cir., 954 So. 2d 272), April 12, 2007.

Two female students were tutoring a male student at their high school's counseling complex when the girls had to run an errand for a school employee. One of the girls left her purse and wallet at the table where they had been sitting. When the girls returned, one of the girls discovered that $50 was missing from her purse. A school security guard took the male student into the boys' restroom and asked him to fold down his waistband so he could look for the missing money. The student was not touched. No currency was found. The student's mother brought action against the school district alleging that her son was embarrassed and humiliated because of the search. A Louisiana appeals court stated that the search **was reasonable** and did **not** amount to an unconstitutional search. The court went on to state that had not the officer not removed the student to the boys' restroom, there would have likely been complaints about having his waistband searched in front of the females who were present.

Torts:

"School's Door Falls on Parent's Head"
Poston v. Unified School Dist. No. 387 (Kan. App., 156 P. 3d 685), April 27, 2007.

The school district operates a middle school in Altoona, Kansas. The school has an indoor gymnasium, which is generally accessed through the south doors of the building. The south doors open onto a commons area, and the double doors lead from one side of the commons areas to the gym. In January 2003, the plaintiff was at the middle school to pick up his stepson, who was at a city sponsored basketball practice. Plaintiff walked through the south doors and through the commons areas to the gym doors. Plaintiff testified that he motioned to his stepson that he was there, and that it was time for the stepson to come out to the car. The plaintiff was exiting the building through the south doors when one of the brackets on the door came loose and fell on the plaintiff's head. Plaintiff's head was cut and bleeding and he sought medical attention. The Court of Appeals of Kansas held that since the commons areas of the school was directly adjacent to the gym and provided direct access to it, recreational use exception of Kansas' Tort Claims Act applied to the outside door leading into the commons area. Therefore the school **had recreational use immunity**.

"School Officials Not Liable for Student Assault"
Stagg v. City of New York (N. Y. A. D. 2 Dept., 833 N. Y. S. 2d 188), April 3, 2007.

On May 3, 2004, at approximately 4:00 p.m., the plaintiff (then 15 years of age) was on his way home from school when he was assaulted by a fellow student who attended the East New York Transit Technical High School. The student had just exited from "A" train onto the Utica Avenue subway platform in Brooklyn, New York, when the attack occurred. The plaintiff alleged that the City of New York (City) and the New York City Department of Education (Board of Education) were both negligent in failing to provide "adequate security and protection from foreseeable criminal activity." The New York Supreme Court, Appellate Division, Second Department, held that ***neither*** city nor board of education **could be held liable** to high school student who had been assaulted by a fellow student because the incident occurred **outside** of the school district's custody.

"Student Injured In Auto Accident"
Gross v. Bezek (N. Y. A. D. 4 Dept., 833 N. Y. S. 2d 798), April 20, 2007.

Joseph Poole, a security activity coordinator employed at Lockport High School, gave permission to a third student to drive his vehicle to the Orleans Center Board of Cooperation Educational Services (BOCES) to perform service on his vehicle at an automobile repair class. However, the operator of the vehicle on the way back to the home high school was Joel Bezek. Bezek agreed to allow the plaintiff's son to ride with him back to their school. On the way back to their high school, Bezek lost control of the vehicle on an icy stretch of the road and the auto struck a tree, causing the plaintiff's son's injuries. The New York Supreme Court, Appellate Division, Fourth Department, held that: (1) School district owed **no** duty to parents to prevent student from leaving the vocational center in a vehicle driven by another student rather than riding in a school bus; and (2) Genuine issue of fact **existed** concerning whether school employee was negligent in permitting third student to drive his vehicle and whether the employee was acting within the scope of his employment.

"Player Hit in Head During Batting Practice"
Elston v. Howland Local Schools (Ohio, 865 N. E. 2d 845), May 16, 2007.

On April 29, 2002, while preparing for an away baseball game, 15-year-old plaintiff was pitching batting practice in a batting cage located in the high school gym. On the fourth or fifth pitch, a batted ball ricocheted off the screen protecting the plaintiff and struck him in the head. Thereupon, he walked to the team's locker room, obtained an ice pack (which he applied to his head), and then accompanied the team on a bus to a baseball game at another school. He told the coach he could play. However, the coach noticed that his speech was slurred and his balanced was impaired. Thereupon, the coach advised the plaintiff's parents to take their youngster to an emergency room for medical attention. The youngster's parents took their son to a local hospital, he was transferred to children's hospital by helicopter, where physicians surgically implanted four titanium plates and screws into his head. Parents brought personal injury action against school district and head baseball coach. The Supreme Court of Ohio stated that high school baseball coach's decisions in conducting practice, including providing instruction to pitchers regarding the use of screen as well as general guidance regarding game-day preparations, represented **the exercise of his judgment and discretion** in the use of equipment and facilities. Therefore, the coach was acting within his scope of employment; and as such, the school district **was immune from liability** for the personal injuries suffered by the plaintiff during baseball practice.

Commentary

Peer Sexual Harassment in the Elementary Grades

Peer sexual harassment in our elementary schools is a reality that many teachers and school administrators often ignore, mislabel, or otherwise mishandle. Since the United States Supreme Court's decision in *Davis v. Monroe County Board of Education* (526 U. S. 629{1999}) sanctioned suits alleging violations of Title IX in cases of peer sexual harassment, parents/guardians of elementary school students have sought redress through the courts for what they perceive as school officials' (e. g. teachers, principals, and superintendents) indifference to the harassment their youngsters have experienced. Few of these plaintiffs have prevailed in their lawsuits, perhaps because the conduct in their complaint seemed implausible when considering the ages of the alleged perpetrators. An examination of the courts' rationales in deciding such cases suggests that judges may be considering the **intent and culpability** of the young harassers, rather than their actions and the responses of school officials.

Intent is not an explicit element of a Title IX violation. Title IX predicates liability on the school district's actions, not the actions of the harasser. To demonstrate a violation of Title IX, Justice Sandra Day O'Conner majority opinion demands an analysis that encompasses: (1) the nature and severity of the harassment; (2) the degree of notice the district has received about the harassment; and (3) the steps it has taken, or not, to curtail or end the harassment. Justice O'Conner's ruling displays the palpable tension between the judicial desire to protect students from peer harassment and the need to recognize that children's behaviors differ from the actions and expectations of adults. School officials **cannot be deliberately indifferent** to allegations of peer sexual harassment, **no** matter what the ages or sexual awareness of the children involved. Justice O'Conner noted that whether "gender-oriented conduct" rises to the level of actionable "harassment" depends on a constellation of surrounding circumstances, expectations, and relationships. Factions in the *Davis* "constellation" include the ages of the harassers and victims; but they also include the numbers of children involved; knowledge of what constitutes "normal" students' interactions in school and on school playgrounds (including students' propensities to tease, push, shove, and call each other names); and the difference between *age-appropriate* children's sexual behaviors and *age-inappropriate* sexual harassment.

On the other hand, individual students differ greatly in their capacity to recognize or understand the concept of sexuality. Therefore, a student's chronological age may be irrelevant to a Title IX cause of action for peer sexual harassment: (1) because of an alleged harasser's sexual precocity; or (2) because of the diminished mental capacity of either the victim or the alleged harasser. Students with diminished mental capacity (mental age is significantly lower than their chronological age), typically classified in public schools as needing special education and related services, are especially vulnerable to peer sexual harassment. Several court have suggested that their need for heightened supervision may expand a school district's legal duty of care or create a special relationship that supplements or replaces the deliberate indifference analysis. Conversely, however, a student with low mental functioning may not be able to control sexual impulses and may become the harasser.

Peer sexual harassment is an unfortunate reality in our schools, even among students formerly thought to be "innocents". School officials cannot solve the problems of our society. On the other hand, school officials must involve all parties (e. g. students, parents/guardians, teachers, classified staff, school administrators, and leadership within the school-community) when they are confronted with societal issues such as peer sexual harassment. Therefore, it is vital that school officials take the lead in educating students, faculty, staff, parents/guardians, community, and others about peer sexual harassment and what constitutes peer sexual harassment. It is very important for school officials to educate students, beginning in the primary grades, about sexual harassment and how to recognize it and how to report it. Teachers must report incidents of student sexual harassment; and school administrators cannot ignore or dismiss such reports because of the young age of the alleged harasser. Most importantly, court decisions must clearly reflect that intent is not an element of the Title IX liability analysis. Judges cannot excuse peer sexual harassment simply because they believe that young children cannot "mean it" when they act out sexually toward their peers.

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).