January 2007 (#'s 555 & 556)

Safe, Orderly, and Productive School Legal News Note January 2007

Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
201 Donaghey Avenue
316 Torreyson West
Conway, AR 72035
*Phone: 501-450-5258 (office)

The **Safe, Orderly, and Productive School Legal News Note** is a monthly update of selected significant court cases pertaining to school safety-security and student management issues. 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

"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 special education 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 the possible danger to the student; and district did **not** expose student intentionally or unintentionally to "excessive risk".

"School District and Others Held Liable for Board Member/Prominent Attorney's Pedophile Behavior"
*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/lawyer, school board, former school board member/lawyer's wife, and former school board member/lawyer's law firm seeking sexual abuse damages. Between 1997 and 2003, former board member/lawyer 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 had 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/lawyer's sexual misconduct **supported** Title IX claim; (3) deceased board member/lawyer'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 and employee of the firm **supported** negligence claim. **Special Note:** School officials' policy, practice, and custom **fostered** an environment that facilitated and enabled sexual abuse of student through allowing him to be removed from his school during the school day; when he should have been within the safety of the school's premises and under the supervision of school officials.

"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 Downs 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 student's 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.

"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 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 her 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 school officials. 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 the former music 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 music teacher is now serving a very lengthy prison sentence.

"Superintendent'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 students 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, 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 be 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.

"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 small pocket knife in his jean pocket during his first period class. He showed the knife to a few classmates, but did not inform his teacher or the school's administration, 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 at any time during the school day. Later on during the same day, the assistant principal learned that the student had verbally 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 there **was a rational relationship** between punishment, consisting of one calendar year suspension; and offense, possession of a pocket knife on school property. Furthermore, student's claim that school discipline hearing authority (DHA) violated his substantive due process rights by allegedly not considering lesser penalties **was precluded** from the suit. Student was aware of school district's no tolerance policy toward weapons possession and that he could be suspended for one calendar 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 Area School District. 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 plaintiff's truck's glove compartment. Student stated that the brass knuckles belonged to a friend and the friend was supposed to have taken them out of his truck during the weekend. Thus, plaintiff claimed he did not know that his friend left did not remove the brass knuckles from his truck's glove box. 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>** An important event that occurred during the search of the student's truck that assisted in the plaintiff's plea was the testimony of the high school principal who stated, "J. M. appeared very surprised when he saw the knuckles".

"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**. Examples of incidents in which the superintendent interfered and/or took other action included the following: (1) student stealing 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 in the sheriff department.

"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 an effort to raise money to assist in publishing 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 purchasing a ticket for the plaintiff. Thus, plaintiff was denied entrance to the dance, which was being held in the school's cafeteria. 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.

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SAFE, ORDERLY, AND PRODUCTIVE SCHOOL LEGAL NEW NOTE

March 2006

School Leadership, Management, and Administration's Safe, Orderly, and Productive School Initiative

Jack Klotz, SLMA Coordinator
**Johnny R. Purvis, Professor – School Leadership, Management, and Administration, UCA
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr., Editor, MSU

Graduate School of School Leadership, Management, and Administration
University of Central Arkansas
201 Donaghey Avenue
Main Hall
Room 104
Conway, Arkansas
Phone: 501-450-5258**

The ***Safe, Orderly, and Productive School Legal News Note*** is a monthly update of selected significant court cases pertaining to school safety-security and student management issues. It is written by Johnny R. Purvis for the **Safe, Orderly, and Productive School Initiative,** located in the Graduate School of Management, Leadership, and Administration 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** (researcher and writer) at **501-450-5258.** In addition, feel free to contact me regarding school safety and security issues; student discipline/management issues; and issues pertaining to gangs, cults, and alternative beliefs.

Cases

"Bus Drives Has Sex With Student"
*State v. Clinkenbeard (Wash. App. Div. 3, 123 P. 3d 872), November 29, 2005.

A 62 year-old school male bus drive had a sexual relationship with an 18-year-old high school student. The romantic relationship with the female student began when she was only 12; however, actual sexual intercourse did not occur until the student turned 18. A Washington state statue (11 RCW 9A.44.093 {1} [b]) makes it a class C felony for any school employee to have sexual intercourse with a registered student who is at least 16 years old. If there is an age difference of five years or more between the employee and the student. A Washington state court of appeals held that the statute **can be applied to criminally prosecute** the bus driver, although the student is legally an adult (over the age of 18) and does not require the school employee to be in a position of authority or supervision over the student.

"Student Suspended for Writing and Reading to Classmates a Fictional Horror Story"
*D. F. ex rel. Finkle v. Board of Educ. of Syosset Cent. School Dist. (E. D. N. Y., 386 F. Supp. 2d 119), September 12, 2005.

A sixth grade student (through his parents) sued school official; claiming his 30-day suspension from school for writing and reading to fellow classmates a fictional story (modeled after the horror movie Halloween) about students in his school being killed and maimed was unconstitutional. A United State's district court in New York state that the student did **not** have a free speech right under the First Amendment to circulate to classmates work of fiction in which he named students who were either killed or sexually assaulted, or both. Furthermore, the story **interfered materially** with work of the school by disturbing students and teachers with possibility of physical injury.

"Special Education Student Sexually Assaulted in School's Restroom"
*Teague ex rel. C. R. T. v. Texas City Independent School Dist. (S. D. Tex., 386 F. Supp. 2d 893), August 17, 2005.

Step-mother brought civil rights suit against school district as next friend of 18-year-old female special education student (Down's Syndrome) who was sexually assaulted by a male student in the boy's restroom between classes. The plaintiff claimed school officials failed to supervise students adequately and to train teachers and staff properly in student supervision. A United States district court in Texas ruled that a special relationship did **not** exist between school district and student so as to give rise to duty to protect under the Due Process Clause (14th Amendment) when school did not provide one-on-one supervision of student between classes. The court accepted the conclusion of school officials that the youngster functioned at the level of a 13-year-old and the student did not need one-on-one supervision to make it safely from one special education classroom to another, just 30 feet away.

"Student Had No Interest for Being on Campus"
*Taylor v. State (Ind. App., 836 N. E. 2d 1024), November 10, 2005.

There was **sufficient evidence** to support conclusion that student did not have a contractual interest in public school property when he was asked to leave school premises, which in turn, supported conviction for criminal trespass (a class D felony). Student finished his classes at 10:15 a.m. Around noon on that same day school police officer saw student standing in hallway by front entry and told him that he could wait for city bus as long as he waited in the hallway by the front entry. However, the student walked around the building and refused to leave when the officer asked him to do so. In fact, the officer asked the student five times to leave the school facility and the student responded, "I am not leaving the building".

"Teacher Slaps Students"
*Ketchersid v. Rhea County Bd. of Educ. (Tenn. Ct. App., 174 S. W. 3d 163), April 28, 2005.

For purposes of statue allowing school board to dismiss tenured third grade teacher for insubordination, teacher's refusal to refrain from striking students **constituted "insubordination".** Both principal and assistant principal of elementary school specifically instructed teacher to refrain from placing her hands on any of her students. Teacher admitted slapping student in their faces and hitting them on the top of their heads with a book. However, she stated that she did the aforementioned only when students were disrespectful and she was angry.

"School Lunch Policy Did Not Violate Student's First or Fourteenth Amendment Rights"
*LoPresti ex rel. LoPresti v. Galloway Tp. Middle School (N. J. Super. L., 885 A. 2d 962), July 19, 2004.

Middle school's lunch cafeteria policy which compelled all students to sit at their designated lunch tables and remain seated unless permission was granted did **not** regulate expression or symbolic speech. Thus, plaintiff's First Amendment rights were not violated. Cafeteria's policy did not in any way limit content of student's expression of speech during lunch. It did not prohibit students from discussing particular topics or expressing their opinions as to any matter. The policy **merely required** that, during the 30-minute lunch session, students were to sit at a designated table, unless permission was granted otherwise.

*Possible implications for Arkansas's Schools

April 2007 (#'s 559 & 560)

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Topics

"School <u>Not</u> 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 providing the court's decision regarding this case, the following background information will be presented. Immediately after the Russell Todd Crawford was 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 a reduction of their daughters' playing time. Soon thereafter, he 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 high 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 sent to the assistant principal; (3) no counseling of team members regarding personal matters; (4) no activities with team members off-campus unless a parent is present; and (5) a prohibition against 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 suit against the coach, school administrators, and school district for sexual harassment, civil rights violations, gross negligence, and slander. The Untied States Court of Appeals, Sixth Circuit, ruled that: (1) Coach's allege threats to harm student if she disclosed his relationship with another student were **<u>not</u>** communications of a sexual nature; (2) school and administrators were **<u>not</u>** on notice that student was the victim of a hostile environment; (3) student **failed** to establish that school 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 **<u>not</u>** 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 (third grader) student (Thomas) who also rode the bus 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 by Thomas. 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 a school official learned of the allegations of sexual harassment. Thomas was interviewed by the principal, but denied the allegations. School officials 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 from school. Thereupon, Sharon's parents filed a law suit against the school district under Title IX, seeking injunctive relief and compensatory and punitive damages The plaintiff alleged that 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) Sharon's incidental interactions with older student after she stopped riding school bus were **not** sexual harassment under Title IX.

"Principal Suffers Fatal Heart Attack After 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 during the 2000 – 2001 school year. 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 he was 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 while serving as principal of Dollarway Junior High. Although Mr. Lovelace had been called upon in the past to break up fights, he had previously done so with the assistance of at least one other school employee. Furthermore, the onset of chest pains and the trip to the emergency **room were in a close rational relationship** to principal's employment responsibilities and his heart attack.

"Students <u>Not</u> 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 and 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 **<u>not</u>** 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 **were insufficient** (Evidence demonstrated that out of 452 student 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 **<u>not</u>** 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) at 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 (school security) 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 out of the ordinary 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 district policy so as to justify a search of his person or belongings. Thus, the court reversed and remanded (with directions) the case back to the lower court. 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.

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May June 2007 (#'s 561 & 562)

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Topics

"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 that failed 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.

"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.

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July 2007 (#'s 543 & 544)

Safe, Orderly, and Productive School Legal News Note
July 2007

Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
201 Donaghey Avenue
316 Torreyson West
Conway, AR 72035
*Phone: 501-450-5258 (office)

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Topics

"Female Student Suffered Hostile Educational Environment after Being Raped Off Campus by Two Male Students"

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

Student (plaintiff) alleged she suffered student-on-student sexual harassment after reporting that she had been 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 related 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 male students" 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 plaintiff because: (1) harassment **was based** on her sex; (2) a reasonable person would have reasonably concluded 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 <u>Not</u> 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 a high school cafeteria was **<u>not</u>** negligent. Thus, school board was **<u>not</u>** liable for injuries sustained by a student when he was assaulted by fellow student while eating in the cafeteria. The school's administration did **<u>not</u>** have sufficiently specific knowledge or notice of the dangerous conduct that caused the victim's injury, which would have given them reason to anticipate the assault.

"Eighth Grader Sexually Assaulted in School's Locker Room Following Football Practice"

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 football 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 and school officials.

"Juvenile's Misconduct 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 his school's 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.

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August 2007 (#'s 545 & 546)

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Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
201 Donaghey Avenue
316 Torreyson West
Conway, AR 72035
*Phone: 501-450-5258 (office)

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Topics

"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 {black} and make-up). Soon thereafter, various students began 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 amount to severe, pervasive, and objectively offensive conduct, **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 his homework in his locker. Teacher allowed him time to go to his locker to retrieve his homework. 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 District Court, 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 officials were aware of the custom of the teacher's infliction of 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.

"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, Texas. He 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 worked **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** a school's learning environment.

"*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 eighth-grader's assault on the plaintiff. Offending student had *not* engaged in any prior similar conduct with any other student. Thus, school officials could **not** ***reasonably have anticipated*** the assault.

"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 and 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 and 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 **was constitutional.**

"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 student "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 her son's substantive due process rights. The United States District Court, D. Connecticut, held that the student's "hit list" of a fellow student 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 the 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.

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September 2007 (#'s 547 & 548)

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Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
201 Donaghey Avenue
316 Torreyson West
Conway, AR 72035
*Phone: 501-450-5258 (office)

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Topics

"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 teacher knew of existing bad blood or past incidents between the offending three students and the plaintiff. Additionally, defendants took disciplinary action against the offending students that led to their suspension from school.

"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 suffered 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.

"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.

"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 a report to police regarding a threat of school violence purportedly made by the student. The Untied States Court of Appeals, Fifth Circuit, ruled that: (1) Students 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.

"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.

"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 exchange between the two boys 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.

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October 2007 (#'s 549 & 550)

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Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
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Topics

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

This case came about after several incidents which 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 New York State Constitutions. The plaintiff suffered at least three verbal or physical abusive encounters with a group of minority (black) 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 approximately three weeks. In addition, 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 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 school 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.

"Elementary Student Bullied By Fellow 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 he started attending Duquesne, a boy pushed him on several occasions. When the youngster told his teacher, she moved the 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 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 a danger for the pupil to be bullied by fellow students or to render him more vulnerable to a dangerous situation than if they had not acted at all. School district and its agents **took 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.**

"The Anonymous Tipster and the Discovery of 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. However, upon searching the suspect, Sergeant Driskell found two baggies of marijuana in the student's 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.

"Do Not Mess With a Student's 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 an additional 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.

"Elementary Student Raped By High School Student at McDonald's"
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 6 to 17, 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 <u>Not</u> 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 all students under their charge and will be held liable for *foreseeable* injuries proximately related to the absence of adequate supervision, schools are **<u>not</u>** insurers of the safety of their students. School officials *cannot reasonably* be expected to supervise continuously and to control all of the students' movements and activities. Therefore, school officials could **<u>not</u>** be considered the cause of injuries to a student who was involved in a very brief fight with another elementary school student in which he ***was a voluntary participant***.

<u>Note:</u> 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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Safe, Orderly, and Productive School Legal News Note
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Johnny R. Purvis*

Terry James, Chair of the Department of Leadership Studies
Jack Klotz, Program Coordinator of Leadership Studies
Shelly Albritton, Technology Coordinator
Wm. Leewer, Jr. Editor, Mississippi State University
Safe, Orderly, and Productive School Institute
Department of Leadership Studies
University of Central Arkansas
201 Donaghey Avenue
316 Torreyson West
Conway, AR 72035
*Phone: 501-450-5258 (office)

The **Safe, Orderly, and Productive School Legal News Note** is a monthly update of selected significant court cases pertaining to school safety-security and student management issues. 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

"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, along with threatening him with out-of-school 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 on their clothing during the regular school day. 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 a disruption in the past, prior to applying the school district's 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 ban the display of the Confederate battle flag at school in an effort to reduce a racially hostile environment that existed within the school-community.

"School District Complied With IDEA Without Updating Current 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 student's IEP stated that he be mainstreamed and continue receiving both regular and special education services. The student's mother objected to the IEP's failure to include extended year school services (summer classes). 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.

"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 wrist/hand 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 neck; stepped on their fingers and feet; and tossed at least one 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 choose 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.

"High School Gay-Straight Alliance Entitled to Preliminary 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. As a footnote to this case, a court of legal jurisdiction will typically issue a preliminary injunction when the plaintiff (moving party) demonstrates that: (1) a substantial likelihood of success on the merits of the case; (2) 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.

"School Police Officer <u>Not</u> 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 and dictating 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 <u>not</u> 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.

"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 and searched in front of the females who were present.

"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.

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