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Legal Update for District School Administrators December 2008 - January 2009

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
- Religion
- Student Discipline
- Torts

Commentary:

- No commentary this month.

Topics

Abuse and Harassment:

"School Officials Not Indifferent Toward Student's Sexual Abuse Claim"
Kline ex rel. Arndt v. Mansfield (C. A. 3 [Pa.], 255 Fed. App. 624), November 27, 2007.

Middle school student made frequent visits to a male (Mansfield) teacher's sixth grade classroom before, during, and after school, some of which involved the cutting of classes. Finally, her seventh grades teachers met and issued a statement instructing her to not go to the teacher's classroom for any reason. The relationship continued, became intimate, and eventually became sexual. The plaintiff admits that neither she nor her mother complained to school officials about plaintiff contact with the male teacher. Furthermore, no school official or teacher possessed actual knowledge of the intimate or sexual nature of the relationship. Mansfield was charged with various sexual offenses arising from his conduct with the plaintiff and was sentenced to 11.5 years to 31 years imprisonment. Plaintiff sued, alleging sexual harassment under Title IX. The United States Court of Appeals, Third Circuit, held that there was **no evidence** that neither school officials nor teachers were deliberately indifferent to the student's right to be free from sexual abuse. Furthermore, the school district's failure to provide training to district employees to recognize and report signs of sexual abuse did **not** demonstrate a conscious or deliberate indifference to student's right to be free from sexual abuse.

Civil Rights:

"School Officials Did Not Retaliate Against Parents Who Complained About High School Softball Coach'
Springer v. Durflinger (C. A. 7 [Ill.], 518 F. 3d 479), February 29, 2008.

Plaintiffs were unhappy with the way the coach of their daughters' high school softball team had handled the previous spring 2001 season. Parents, their attorney, and a local newspaper reporter met with the school district's superintendent, the school district's attorney, principal of their daughters' high school, and the school district's athletic director. During the meeting, the parents told the school officials that they suspected the coach had suppressed their daughters' skills and abilities in order to showcase the coach's younger sister; accused the coach of doctoring statistics to favor her sister; was abusive to umpires, parents, players, and team "boosters"; was doing a poor job of coaching; and was not a positive role model for their children. Parents later filed suit against school district, board of education, and high school officials, claiming retaliation in violation of the First Amendment of the United States Constitution. The United States Court of Appeals, Seventh Circuit, stated that the court could **not** find one shred of evidence where school officials demonstrated retaliation against the plaintiffs. Furthermore, such minor adverse action (e. g. daughter hit in the head by a softball during practice, parents not informed of the correct time of awards ceremony, and coach discussing daughter's skills with college softball coach) pertaining to their daughters *could have happened* to numerous softball families in high school across America.

"Parent Failed In Her Constitutional Rights Claim against School Officials for Reporting Her for Child Abuse"
Thomas v. Evansville-Vanderburgh School Corp. (C. A. 7 [Ind.], 258 Fed. App. 50), April 2, 2008.

African-American mother **failed** to establish that elementary school officials discriminated against her due to race, in violation of her equal protection rights, when school authorities reported her to Child Protection Services (CPS) for 10 incidents (two of the reports were substantiated) of suspected abuse of her daughter that were corroborated by scars and welts on the student's body. Mother made **no showing** of similarly situated whites receiving preferential treatment.

"Diversity Education Challenged"
Preskar v. U. S. (E. D. Cal., 248 F. R. D. 576), February 26, 2008.

Former substitute teacher in a California school district and parent of a former student in the same school district **lacked standing** to bring law suit challenging the constitutionality (First, Ninth, and Fourteenth Amendments of the U. S. Constitution) of "diversity education" in public schools on the basis of their previous experiences with public schools and their status "as citizens of the United States and residents of the state of California." They **failed** to allege a concrete and particularized injury (They alleged that throughout this nation "enforced diversity education" from kindergarten through college "discriminates against people of European descent, Judeo-Christian faith, American heritage, and people who hold viewpoints, or closely held personal beliefs that are contrary to a particular type of diversity thinking.") caused by the school district that was addressable by a favorable decision by the court. Moreover, their allegations amounted to little more than a generalized grievance against 'diversity thinking" that **was inappropriate for adjudication** in federal court.

Desegregation:

"School District Has Eliminated Past Vestiges of Segregation"
Anderson v. School Bd. Of Madison County (C. A. 5 [Miss.], 517 F. 3d 292), February 11, 2008.

Since 1969, the Madison County School District (MCSD) has been under a federal court order to desegregate its schools. On June 18, 2004, the MCSD filed a motion for full unitary status, claiming it had complied with the district court's orders and has "to the extent practicable, eliminated the vestiges of racial discrimination resulting from the former racially dual system. The United States Court of Appeals, Fifth Circuit, ruled that the MCSD had **eliminated** the vestiges of prior de jure segregation to the extent practicable, as required to obtain declaration of unitary status. The location and demographic factors *outside of the district's control* were responsible for magnet program's failure to attract white students to high school that had 98.5% African-American student population. School district devoted considerable time and resources to establish a magnet program, school's facilities were adequate, and improvements were being made to athletic facilities, the decision to not force teachers to transfer was reasonable, and the method used to determine administrator pay was rational and non-discriminatory.

"School Officials' Compliance with Court Order to Desegregate School Warranted Termination"
Hart v. Community School Bd. Of Brooklyn, New York School Dist. #21 (E. D. N. Y.), 536 F. Supp. 2d 274), February 28, 2008.

The Chancellor of the City School District of the City of New York moved to terminate the remedial order imposed by the court in 1974 requiring defendants to desegregate Mark Twain Intermediate Gifted and Talented School. The United States District Court, E. D. New York, held that school officials **had complied** with remedial court order issued more than 30 years prior requiring racial desegregation of junior high school. Thus, remedial order would be terminated and the matter closed because *no* vestiges of racial discrimination remained at the school.

Disabled Students:

"School District Not Required to Reimburse Expert Fees in IDEA Action"
Fisher ex rel. Fisher v. District of Columbia (C. A. D. C. 517 F. 3d 570), February 8, 2008.

Chancellor of the District of Columbia Public Schools (DCPS) appealed the district court's order requiring DCPS to reimburse plaintiff for expert fees in an action brought pursuant to IDEA. The United States Court of Appeals, District of Columbia Circuit held that expert fees are **not awardable** to prevailing parties as "costs" under IDEA's fee-shifting provision.

"School District Not Required to Reimburse Parents for Costs of Obtaining Private Independent Educational Evaluation for Student"
P. R. v. Woodmore Local School Dist. (C. A. 6 [Ohio], 256 Fed. App. 751), November 21, 2007.

Student attended public schools in the Woodmore School District from kindergarten until his graduation from high school in June 2006. When the student was about half-way through his junior year, his parents made a written request to the school district to have him tested for a learning disability due to disciplinary issues. The school district completed a multi-factored evaluation of the student, and determined that he was not eligible for special education services. The student's parents were unhappy and decided to hire someone to conduct an independent assessment of the youngster. Thereupon, plaintiffs sought reimbursement for the independent evaluation of their child. The United States Court of Appeals, Sixth Circuit, held that the school district was **not** required to reimburse plaintiffs' cost of obtaining a private independent educational evaluation for their child.

"Delay in Implementation of IEP Was Attributable to Parent"
Lessard v. Wilton Lyndeborough Cooperative School Dist. (C. A. 1 [N. H.], 518 F. 3d 18), February 25, 2008.

Stephanie Lessard (18-year-old) had been diagnosed with moderate mental retardation (IQ of 42), cognitive delays, speech impairments, a seizure disorder, scoliosis, a leg-length discrepancy, and partial paralysis of her left side. Plaintiff (Stephanie's mother) brought action against the school district under IDEA seeking a denial of a FAPE and violation of their procedural due process rights. The United States Court of Appeals, First Circuit, determined that the delay in having a signed IEP in place for Stephanie **was attributable** to the parent. **In clearing** the school district with respect to the late implementation of the student's IEP, the court discovered that the parent refused to identify specific concerns that prevented her from agreeing to plan during at least two extended meetings with school officials, school officials attempted to schedule additional meetings, and schools officials sent plaintiff at least four letters requesting her to "state specifically what she agreed or disagreed with" in regard to the student's IEP.

"IDEA Doe <u>Not</u> Require School District to Maximize Potential of Handicapped Students"
Mr. C. v. Maine School Administrative Dist. No. 6 (D. Me., 538 F. Supp. 2d 298), March 17, 2008.

IDEA's definition of FAPE does **<u>not</u> require** a school district to maximize potential of handicapped children. Rather, FAPE **requires** that education to which access is provided **be sufficient to confer some educational benefit** upon handicapped youngster.

"An Award of One-Half of the Expenditures for Autistic Child's Home-Based Services Was Reasonable"
Deal v. Hamilton County Dept. of Educ. (C. A. 6 [Tenn.], 258 Fed. App. 863), January 7, 2008.

Awarding parents of an autistic child one-half ($25,204.98) of their reasonable expenditures ($50,409.95) for home-based services provided to their child was **<u>not</u>** *an abuse of discretion* in their IDEA suit. The award was especially appropriate in light of the substantive appropriateness of the school system's IEP.

"Charter School Was <u>Not</u> Required to Modify Grading System as an IDEA Accommodation"

Claudia C-B v. Board of Trustees of Pioneer Valley Performing Arts Charter School (D. Mass., 539 F. Supp. 2d 474), March 20, 2008.

Charter middle school did **<u>not</u>** deny student with ADHD and atypical learning disorder FAPE required by IDEA through adoption of a competency-based system where teacher had flexibility in determining whether student mastered subject matter through the use of tests, discussions, or other methods of assessment. Student would be simply "passed or failed" based on performance rather than being awarded a letter grade or numerical grade. The court *ruled in favor* of the charter school despite the claim that the parents did not receive sufficient input regarding the student's progress to determine whether they should request additional assistance for their child.

"Student Must Exhaust Administrative Remedies Under IDEA After Committing Sex Acts on School Bus"

Renguette v. Board of School Trustees ex rel. Brownsburg Community School Corp. (S. D. Ind., 540 F. Supp. 2d 1036), Marcy 31, 2008.

Junior high student (7th grader) and her mother **were required to exhaust administrative remedies** under IDEA as prerequisite to bringing claims against school district, school board, and school personnel under Rehabilitation Act (Section 504), ADA, and Section 1983 arising out of alleged sexual harassment by a high school student (9th grader) while riding a school bus. Plaintiff's daughter was suspended from school, required to undergo counseling, perform 20 hours of community service, assigned to an in school suspension program, and prohibited from riding a school bus for the conclusion of the semester (Student completed the school year and was promoted to the 8th grade.) due to her participation in sexual activities on school property (school bus). Various forms of relief were sought by the plaintiff, including transportation expenses and counseling fees, under IDEA.

Labor and Employment:

"School District Intentionally Discriminated Against African-American for Failure to Promote Her to High School Principal Position"
Johnson v. Knight (E. D. Ark., 536 F. Supp. 2d 1012), January 16, 2008.

Plaintiff (female and African-American), who is now a junior high school principal, brought action against school superintendent (now retired after 25 years in the district) and school board pursuant to Section 1981, Section 1983, and Title VII, alleging race and gender discrimination and retaliation for failure to appoint her to the position of assistant principal of the senior high school. The plaintiff (B. A. from University of Arkansas at Pine Bluff, mater's degree from Henderson State University, and doctorate degree from the University of Arkansas at Little Rock), a special education teacher at the time of the alleged discriminatory action, had applied for a number of administrative positions in the school district but was told by the superintendent that he would keep her in the classroom until he decided it was time for her to come out. Plaintiff was able to demonstrate that the superintendent had a practice of placing people into positions without advertisement or application, and superintendent knew of plaintiff's interest in administrative positions, yet repeatedly denied her the opportunity for advancement. The United States District Court, E. D. Arkansas, Pine Bluff Division, held that school district **intentionally discriminated against** plaintiff when they failed to promote her. The court went on to state that the plaintiff **is entitled to** lost wages in the amount of $60,064 for the difference between her actual salary in 2003-04, 2004-05, 2005-06, and the salary she would have been paid had she been selected as senior high school assistant principal. In addition, the court stated that the plaintiff **is entitled to** compensatory damages in the amount of $150,000.

"School Bus Driver <u>Not</u> Entitled to Unemployment Compensation for Summer Months"
Adams v. West Ottawa Public Schools (Mich. App., 746 N. W. 2d 113), January 3, 2008.

Applicable academic calendar, for purposes of determining "school denial period" exception to payment of unemployment benefits **applied such as to bar** school bus driver **from receiving unemployment benefits** for the summer months. School district for which the plaintiff drove school bus was for traditional academic year and he was not under contract, as were some bus drivers, who were under contract to provide bus services for special need students which operated year around.

"Legitimate Nondiscriminatory Reasons Existed For Firing Female Softball Coach, But Possible Violation of the Equal Pay Act"
Hankinson v. Thomas County School System (C. A. 11 [Ga.], 257 Fed. App. 199), December 3, 2007.

School district's *legitimate, nondiscriminatory reason* for firing a female softball coach at a high school specified that it had received numerous complaints about her performance as a coach that pertained to making disparaging remarks about her players. Thus, the firing of the coach was **not** a pretext for gender discrimination violating Title VII. Months before her termination, she was informed in writing that her performance had to improve, and was given a list of specific behaviors to avoid. On another issue before the court that pertained to the similarities between the softball coach and baseball coach position, ***genuine issues of material fact existed*** due to the fact that the baseball coach was paid more that the softball coach and that the baseball coach had more qualified assistant coaches that the softball coach. Thus, the court **affirmed the termination** of the softball coach, but **remanded the case back** to the lower court for further review due to possible violation of the Equal Pay Act (EPA).

"Teacher's Unsatisfactory Evaluations Were Upheld"
Batyreva v. New York City Dept. of Educ. (N. Y. A. D. 1 Dept., 854 N. Y. S. 2d 390), April 1, 2008.

Administrative decision to uphold unsatisfactory evaluation ratings of teacher was **not** arbitrary, capricious, or irrational, where there had been seven unsatisfactory observations of teacher's classroom performance for the 2003-2004 school year and four unsatisfactory reports for school year (2004-2005) at issue. The plaintiff was seeking to reverse two unsatisfactory evaluation ratings petitioner received during the 2003-2004 and 2004-2005 school years.

"Retired Teacher's Suit against Defendants Pertaining to Health Coverage for His Same-Sex Spouse Rendered Moot"
Funderburke v. State Dept. of Civil Service (N. Y. A. D. 2 Dept., 854 N. Y. S. 2d 466), March 25, 2008.

Retired teacher (plaintiff) sued the State Department of Civil Service (DCS), state officials, school district, and school officials seeking a judgment declaring that defendants were legally required to provide the teacher with spousal health coverage for his same-sex spouse. The Supreme Court of New York, Appellate Division, Second Department, ***rendered the case moot*** because of a change in policy by the DCS that recognized *foreign* same-sex marriages in regard to providing health benefits for same-sex spouses. **Note:** Plaintiff and his same-sex spouse of many years were legally married in Ontario, Canada.

"Teacher Not Required to Prove Total Incapacitation to Qualify for Temporary Total Disability"

Fendley v. Pea Ridge School Dist. (Ark. App., 245 S. W. 3d 676), December 20, 2006.

Plaintiff worked as a physical education teacher in the Pea Ridge School District until December 26, 2003. On December 26, 2003, she was leaving one class and walking to another class when she slipped on a incline and fell, injuring her right ankle. She remained off work and received medical treatment for her ankle. She underwent surgery in April 2004. She was paid temporary total disability benefits from November 14, 2003 through August 23, 2004. Another hearing was held before an administrative law judge (ALJ) on August 17, 2005, and it was determined that she was entitled to additional benefits through March 27, 2005. A letter from her physician dated April 27, 2005, fundamentally stated that she needed more time to heal due to the physical activity associated with her teaching position. The ALJ awarded additional benefits and the school district appealed the decision. The Court of Appeals of Arkansas stated that the claimant (teacher) was ***not*** required to prove that she was totally incapacitated from earning wages in order to qualify for additional temporary total disability benefits. The court further instructed the Commission to make specific findings related to the purpose of the plaintiff's second surgery as it related to her improved range-of-motion.

"Evidence Supported Suspension of Kindergarten Teacher Pending Medical and Psychiatric Evaluation"

Earley v. Marion (W. D. Va., 540 F. Supp. 2d 680), March 31, 2008.

Evidence **supported** school officials' decision to suspend kindergarten teacher with pay pending a medical and psychiatric evaluation. Therefore, there was **no** *deprivation* of teacher's substantive due process rights. Letter from superintendent to teacher informing her of suspension stated that the suspension was due to safety concerns after the teacher allegedly threatened a school employee and the letter also noted that the teacher's action had been unsettling to her colleagues and that there were incidents involving parents that could have led to physical altercations.

Religion:

"Plaintiffs Stated a Cognizable Challenge to School District Allowing Graduating Class to Vote on Whether to Allow Religious Prayer at Commencement"

Does 1-7 v. Round Rock Independent School Dist. (W. D. Tex., 540 F. Supp. 2d 735), December 20, 2007.

Two groups of anonymous plaintiffs challenged the Round Rock Independent School District's (RRISD) policy of allowing graduating class at each of the district's high schools to vote on whether to have a student say a prayer at high school's commencement ceremony. A United States District Court in Texas stated that plaintiffs ***stated a cognizable claim*** for relief under the Establishment Clause of the United States Constitution in connection with their challenge to a Texas school district's facially invalid policy of conducting "majoritarian election on religion" by having graduating seniors at each high school to vote on whether to have student say a prayer at commencement.

"Establishment Clause Was Violated By School District Allowing Gideons to Pass-Out Bibles to Fifth Grade Students"

Roark v. South Iron R-1 School Dist. (E. D. Mo., 540 F. Supp. 2d 1047), January 8, 2008.

The Establishment Clause of the First Amendment of the U. S. Constitution **was violated** by a Missouri school district's past practice of allowing an evangelical Christian organization (Gideons) to distribute Bibles in fifth grade classrooms during school hours. Distribution of Bibles served ***no*** secular legislative purpose and *its principal or primary effect was the advancement of religion*.

Student Discipline:

"Remand Required to Determine Whether Search of Student's Vehicle Required Reasonable Suspicion or Probable Cause"

R. D. S. v. State (Tenn., 245 S. W. 3d 356), February 6, 2008.

On November 25, 2003, G. N. a student at Williamson County's Page High School, was taken to the office of the vice-principal due to being "under the influence of some type of intoxicating substance". Vice-principal and the school's SRO (sworn law enforcement officer-Deputy with the Williamson County Sheriff's Office) learned that he had been with another student (R.D.S.) and they had been in this particular student's pick-up truck while skipping class and going off campus. Vice principal and the SRO found R.D.S. and escorted him to his truck. Thereupon, they found a plastic bag containing marijuana and a glass pipe. R.D.S. was transported by the school's SRO to the juvenile detention center and he was charged with the delinquent act of simple possession of marijuana or casual exchange of marijuana and possession of drug paraphernalia. Thereafter, the R.D.S was adjudicated a delinquent in the Circuit Court of Williamson County. Juvenile appealed the decision of the court based on the law enforcement status of the SRO and how such status related to Miranda rights and his interrogation. The Supreme Court of Tennessee, Nashville, affirmed in part, reversed in part, and remanded back to the lower court. In so ruling, the court stated that: (1) SRO's questioning of juvenile constituted interrogation or its functional equivalent for purposes of ***Miranda***; (2) Juvenile was **not** in custody at the time he was interrogated by SRO and Miranda was **not** required; (3) The **reasonable suspicion standard** ***is the appropriate standard to apply*** to searches conducted by a law enforcement officer assigned to a school on a regular basis; (4) A law enforcement officer who is not assigned to a school on a regular basis must be held to **the probable cause standard**; and (5) ***Lack of evidence existed*** in the record regarding the deputy's role as a SRO and the case should be remanded back to trial court for a new trial to determine whether the deputy (SRO) was required to have reasonable suspicion or probable cause to conduct the search associated with the case.

"Reasonable Suspicion Justified Search of Student by School Security Officer"
R. B. v. State (Fla. App. 3 Dist., 975 So. 2d 546), February 6, 2008.

Reasonable suspicion **justified** search of a juvenile by school security officer (non-certified law enforcement officer). Security officer had personal knowledge of the high school student being at school under the influence of illegal drugs within the past two or three weeks. Officer *not only* observed juvenile's state but had observations confirmed by the student's parents, who came to school and expressed concern that juvenile was obtaining illegal drugs at school. Officer observed the student showing something to another student concealed inside his cupped hands and then return the object to his pocket in a furtive (stealthy or sneaky) gesture. The officer directed the student to empty his pockets; R. B. removed a lighter and a pen. Thereupon, the officer reached into the student's pocket and removed a small bag of marijuana. Officer then called the police and the juvenile was charged with possession of cannabis in violation of Florida law.

"Search of Student Was <u>Not</u> the Result of a Reasonable Suspicion of Criminal Activity"
C. A. v. State (Fla. App. 3 Dist., 977 So. 2d 684), March 5, 2008.

In-school search was **<u>not</u>** the result of a reasonable suspicion of a criminal activity by a 14-year-old student. Although teacher smelled the odor of marijuana after juvenile left classroom, teacher did *not* smell marijuana while in student's presence or while escorting him to the classroom door. The teacher did *not* see him take anything from or pass anything to the student he was visiting. The teacher *simply associated* student *with her suspicion* that the other student possessed marijuana. As a footnote to the case, the student was found with a small bag of marijuana in his wallet.

<u>Torts:</u>

"Parent Slips on Debris at Son's School"
Walls v. City of New York (N. Y. A. D. 2 Dept., 853 N. Y. S. 2d 122), February 26, 2008.

On motion for summary judgment in parent's action against city school construction authority for injuries sustained when she allegedly slipped on debris on the stairs to the main entrance of her son's school, authority established prima facie entitlement to judgment as a matter of law by demonstrating that it did **<u>not</u>** create an allegedly dangerous condition. Furthermore, the construction authority **had neither actual nor constructive notice** of debris upon which the plaintiff fell, and that it **owed <u>no</u> duty** to the parent.

"School District Did Not Negligently Supervise Student Who Slipped and Fell During P. E. Class"
Milbrand v. Kenmore-Town of Tonawanda Union Free School Dist. (N. Y. A. D. 4 Dept., 853 N. Y. S. 2d 809), March 21, 2008.

School district did **not** negligently supervise student who was injured while engaged in a game of "tape ball" (Plaintiff's son stepped on one of the rubber bases placed on the gym floor for the tape ball game, the base slipped, and he fell.) during a physical education class, **or otherwise fail to provide** him with proper equipment to engage in the game. The teacher was present throughout the class and closer supervision could **not** have prevented student from suddenly slipping and falling. School district **used appropriate equipment** in its accepted manner, and prior to the incident, **no one had sustained an injury** from the use of the equipment, **nor had school district been informed** that the equipment created a dangerous condition.

"Principal of Elementary School Not Deliberately Indifferent to the Risk of Sexual Abuse of a Student by Gym Teacher"
Sanders v. Brown (C. A. 4 [Va.], 257 Fed. App. 666, December 11, 2007.

Plaintiff (20 years old at the time of the law suit) claimed that beginning around 1995-1996, when she was nine-years-old and in the fourth grade, she was subjected to "frequent and ongoing physical and sexual touching by her gym teacher (Mr. Brown) and the touching continued until she left the school at the end of the sixth grade. The United States Court of Appeals, Fourth Circuit, held that any negligence on the part of elementary school principal with regard to the risk of sexual abuse of a student at the hands of a gym teacher did **not** rise to the level of *deliberate indifference*, as required to support imposition of supervisory liability in connection with the teacher's alleged "physical and sexual touching of students". The principal *immediately responded to complaints* against the teacher by two other students, *conducted her own investigation and inquiry* into the complaints, *reported* the allegations to her superiors and other appropriate individuals, and *sought their guidance* in investigating and handling the situation.

"Teacher Not Successful in Premises Suit against Education Conference Providers"
Lombard v. Colorado Outdoor Educ. Center, Inc. (Colo. App., 179 P. 3d 16), January 25, 2007.

Teacher ("while acting in the course and scope of her employment) and her employer school district (plaintiff) brought action against operator of a conference facility ("The Nature Place") that hosted an education conference, to recover losses resulting from teacher's fall (either missed a step or slipped) from a ladder when she was climbing to a lofted sleeping area at the facility. A Colorado Court of Appeals held that even if negligence per se was not abrogated (revoked or canceled) by the premises liability statute, conference facility that hosted the education conference was **not** liable for negligence per se to teacher who fell from a ladder when she was climbing to a lofted sleeping area at a facility operated by the conference center. Ladder did *not* comply with applicable building code; however, property and facility had been approved by a building inspector for occupancy. Thus, *indicating compliance with applicable* ordinances.

"Four-Year-Old Left on School Bus"
Ware ex rel. Ware v. ANW Special Educ. Co-op. No. 603 (Kan. App., 180 P. 3d 610), April 11, 2008.

The Court of Appeals of Kansas held that symptoms of post-traumatic stress disorder (PTSD), including nightmares, anxiety, nervousness, physically shaking, acting-out, hypervigilance, sleep difficulties, bedwetting, a significant increase in weight, and a refusal to attend school, exhibited by a four-year-old who was inadvertently left asleep on a school bus, were **not** compensable physical injuries for purposes of his negligent infliction of emotional distress claim against preschool that operated school bus. **Note:** When Daniel was four-years-old, he fell asleep on a school bus on his way to school. Somehow, he was inadvertently left on the bus by the driver. He woke-up, got out of the bus, and began walking to his mother's place of employment. A relative saw him, picked him up, and returned him to his mother.

"Superintendent Failed to Show Statements Were Made With Actual Malice"
Atkins v. News Pub. Co. (Ga. App., 658 S. E. 2d 848), March 6, 2008.

School superintendent **failed** to show *by clear and convincing evidence that statements made by newspaper defendants were made in actual malice*, which were essential elements of his defamation action against writer, newspaper, and publisher seeking superintendent's ouster. Defendants stated that superintendent abused his position, failed to properly perform his duties, spent funds on pet projects, and unfairly expelled students.

"School District Not Responsible for Students at Intersection"
Cerna v. City of Oakland (Cal. App. 1 Dist., 75 Cal. Rptr. 3d 168), April 11, 2008.

Intersection near but not contiguous to school was **not** in a "dangerous condition," as required to support city's liability as landowner for death and injuries of pedestrians (Six members of a family were struck by a motorist, one was killed and all were injured.) struck by motorist while crossing intersection; although crosswalk was painted white rather than yellow. There was no "SLOW-SCHOOL XING" sign painted in approaching roadway, no traffic signal, no crossing guards, and crosswalk was not painted with diagonal or longitudinal lines. City *had discretion* to paint ordinary crosswalk rather than yellow school crosswalk at intersection.

Commentary:

No commentary this month.

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).

Special Note:

The "Legal Update for District School Administrators" is dedicated to the memory of **Dr. Wm. (Bill) Leewer** (November 17, 1950 – May 26, 2008) and **Dr. Jack Klotz** (February 26, 1943 – May 20, 2008). Dr. Leewer was a professor at Mississippi State University-Meridian, Mississippi and editor of the Legal Update for District School Administrators. Dr. Klotz was a professor in the Department of Leadership Studies at the University of Central Arkansas and a former professor of educational administration at the University of Southern Mississippi. Both of these gentlemen and educators will be greatly missed by their families, friends, and their students. They were not just colleagues of mine, but very dear friends. Their memory and legacy will live on through their students and their writings. Strength and honor

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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:

- Athletics
- Abuse and Harassment
- Attorney Fees
- Civil Rights
- Disabled Students
- Discrimination
- Dress Codes
- Judgment
- Labor and Employment
- Religion
- School Boards
- School Districts
- State Funding
- Student Discipline
- Torts

Commentary:

- No commentary this month.

Topics

Athletics:

"Middle School Student Injures Knee in High Jump"
Feagins v. Waddy (Ala., 978 So. 2d 712), August 3, 2007.

After arriving late for a city-wide middle school track meet, plaintiff (an eighth grader) was told by her track coach that she had missed her first track event and would have to perform in the high-jump, an event the plaintiff had never done. She told her coach that she did not know how to perform the high-jump. The coach told her that she was one of his best runners and that he knew she could perform the high jump. As plaintiff attempted a practice jump, she felt pain in her left knee. Later it was determined that she had torn her "ACL" and surgery was required to repair the damage. The Supreme Court of Alabama held that the middle school track coach **was entitled** to state-agent immunity regarding the negligent claim arising from the plaintiff's knee injury. The court went on to state that the coach **was exercising his professional judgment** in discharging his duties in educating students by selecting which students would participate in which track events.

Abuse and Harassment:

"Substitute Teacher Attempted to Kiss Student"
People v. Miller (N. Y. City Crim. Ct., 856 N. Y. S. 2d 443), February 21, 2008.

Defendant, a substitute teacher, was charged with attempted sexual abuse to the second degree, attempted sexual abuse in the third degree, unlawful imprisonment, harassment, and endangering the welfare of a child. The situation arose when a 24-year-old substitute teacher attempted to kiss and retain a 13-year-old female student at his residence. The Criminal Court, City of New York, Kings County held that allegations that substitute teacher attempted to kiss a female student by moving his face in close proximity to the student's face **was sufficient** to establish sexual contact which is associated with attempted sexual abuse of a minor.

Attorney Fees:

"Parent-Attorney Not Allowed to Recover Attorney Fees"
Pardini v. Allegheny Intermediate Unit (C. A. 3 {Pa.), 524 F. 3d 419) May 12, 2008.

Attorney-parent who successfully represented his own child, who suffered from cerebral palsy, in administrative and federal court proceedings under IDEA could **not** recover reasonable attorney fees.

"Teacher Was Entitled to Reimbursement of Attorney Fees"
Timmerman v. Board of Educ. of City School Dist. of City of New York (N. Y. A. D. 1 Dept., 856 N. Y. S. 2d 103), April 29, 2008.

The Supreme Court of New York, Appellate Division, First Department, held that teacher **was entitled** to reimbursement of attorney fees and expenses he incurred in defending himself against criminal charges which ***clearly arose*** out of disciplinary action he took against students who violated school district policy.

Civil Rights:

"Student's Rights Violated When School Banned T-Shirt with Anti-Gay Statement"
Nuxoll ex rel. Nuxoll v. Indian Prairie School Dist. #204 (C. A. 7 [Ill.], 523 F. 3d 668), April 23, 2008.

High school student ***was likely to succeed*** on merits of his claim that school would violate his speech rights by preventing him from wearing T-shirt with slogan "Be Happy, Not Gay" in response to "Day of Silence" intended to draw attention to harassment of homosexuals. Therefore, plaintiff **was entitled to preliminary injunction** to prevent school from banning his "T-shirt". School rule banning derogatory comments referring to sexual orientation appeared to satisfy the First Amendment. Slogan on plaintiff's T-shirt **was only *tepidly negative*** (moderately negative) and it ***was highly speculative*** that it would poison the school's educational atmosphere.

"Reasons for Not Promoting Black Teacher Were Legitimate and Germane"
Moore v. Forrest City School Dist. (C. A. 8 [Ark.], 524 F. 3d 879), May 7, 2008.

School district **presented legitimate reasons** for selecting white candidate for assistant principal's position over a black teacher due to the fact that white applicant had more administrative experience. Furthermore, there was **no** evidence associated with possible retaliation in regard to the black candidate filing a recent Equal Employment Opportunity Commission (EEOC) complaint pertaining to racial discrimination.

"Sweep of School Parking Lot Not Constitute a Search"
Hill v. Sharber (M. D. Tenn., 544 F. Supp. 2d 670), February 28, 2008.

On or about October 21, 2005, two deputies from the Williamson County Sheriff's Department conduct a canine sweep of Franklin High School's (FHS) parking lot. A deputy, who was employed and assigned as a resource officer (SRO) at FHS, and the school's assistant principal accompanied the aforementioned deputies during the sweep. The canine hit on the plaintiff's vehicle, who was a special education student that attended FHS. During the search of the plaintiff's vehicle a duffel bag containing 10 twelve ounce bottles of beer were found. It was determined that the student's conduct was *not* a manifestation of his disability (IDEA) and he was assigned to the school district's alternative school for one month. At the conclusion of one month, the plaintiff was returned to classes at FHS. The plaintiff claimed that his rights associated the Fourth Amendment and Fourteenth Amendment had been violated. The United States District Court, M. D. Tennessee, Nashville Division, held that (1) Student did **not** have a reasonable expectation of privacy in the school's parking lot where he parked his vehicle; (2) Search of the student's vehicle **was supported** by probable cause (Fourth Amendment); (3) Handcuffing of student during the search did **not** constitute an unreasonable seizure; and (4) Student's Fourteenth Amendment rights were **not** violated.

"Girl's Basketball Coach Non-renewal Upheld"
Samuelson v. LaPorte Community School Corp. (C. A. 7 [Ind.], 526 F. 3d 1046), May 22, 2008.

A girls' basketball coach (plaintiff) filed civil rights suit against school district and others, alleging that his coaching contract was not renewed in retaliation for his protected speech and that the school district's "chain-of-command" policy was an unconstitutional prior restraint. The United Stated Court of Appeals, Seventh Circuit, held that there was **no** evidence that non-renewal of the coach's contract as girls basketball coach was motivated by his speaking out on school hiring policies and technology changes nor his discussions with a board member regarding possible redistricting as required for First Amendment retaliation claim. Board member with whom he discussed redistricting abstained from the non-renewal vote, and the board members stated that the sole basis for their action *was the troubled state of the high school's girls' basketball program* (Members of the basketball team and parents signed petitions pertaining to the state of the basketball program and problems associated with the plaintiff's ability to coach and create a team spirit within and among the team members. In addition, he and the middle school girls' basketball coach got into a physical altercation after a game in January 2003.).

"Basketball Coach Stated Claim of Deprivation of Occupational Liberty Against Athletic Director"

Bryant v. Gardner (N. D. Ill., 545 F. Supp. 2d 791), March 7, 2008.

John Marshall High School (Marshall) has a very rich tradition of high school basketball and the school's teams have won numerous tournaments and championships. Lamont Bryant (plaintiff) the former boys' basketball coach brought action against the girls' coach and athletic director (Dorothy Gaters- "Gaters") and interim principal (Juan Gardner- "Gardner") [defendants] under the Fourteenth Amendment of the United States Constitution, alleging *deprivation of his occupational lib*erty when Gaters slandered him in the context of his termination as boys' basketball coach (He continued serve as a gym teacher.). In brief, Gaters remarks focused on a statement akin to the following: "Bryant breached a code of conduct that was expected of Marshall's coaches", "Bryant guided the boys' basketball program under his own agenda", and "the program had ceased to be Marshall High School's program and was now functioning as Bryant's program". The removal of the plaintiff from his basketball duties stemmed from his record for the past four years, which has been outstanding (The boys' varsity basketball team had a consistent winning record at the conference, regional, sectional, and state championship levels.). While at the same time, the girls' varsity team "struggled" and did not reach the state tournament or win a league or sectional championship. Thus, the plaintiff was able to establish that Gaters was actually undermining the plaintiff's accomplishments and was attempting to assume control of the boys' basketball program in order to ensure that the girls' basketball team would regain its previous status as the dominant force in Marshall High School's athletic program. Examples of additional undermining efforts include the following: awarding scholarships only to female basketball players and male athletes in sports other than basketball, providing lower quality travel arrangements to the boys' basketball team, and denying the boys' basketball team the same access to practice facilities given to the girls' basketball team. The United States District Court, N. D. Illinois, Eastern Division, held that (1) Athletic director's alleged statement during meetings with students, parents, media, and alumni **were sufficiently stigmatizing** *to implicate plaintiff's occupational liberty interests*; (2) Plaintiff **sufficiently alleged** that athletic director's statements were publicly disclosed; and (3) Plaintiff **sufficiently alleged** that he suffered a tangible loss of employment opportunities as a result of the actions of the school's athletic director.

"Audio/Video Monitoring of Classrooms Permissible"

Plock v. Board of Educ. of Freeport School Dist. No. 145 (N. D. Ill., 545 F. Supp. 2d 755), December 18, 2007.

Special education teachers (plaintiffs) brought suit against school board under the Fourth Amendment of the U. S. Constitution and Illinois Eavesdropping Act, challenging a proposed audio monitoring of their classrooms through the use of audio/video equipment. The United States District Court, N. D. Illinois, Western Division, held that plaintiffs *did **not** have a reasonable expectation of privacy* concerning communications in their public school classrooms. Thus, proposed audio/video monitoring of their classroom activities would **not** violate their Fourth Amendment rights and their state's Eavesdropping Act.

Disabled Students:

"Parents Not Entitled To Private School Expenses under IDEA"
Fairfax County School Bd. v. Knight (C. A. 4 [Va.], 261 Fed. App. 606), January 16, 2008.

Parents of a student who had dyslexia and other learning disabilities **failed** to establish that the county school board did not provide student with FAPE, as required for parents to be awarded reimbursement for private school expenses under IDEA. Student's reading scores showed remarkable progress once the student was removed from county schools and placed in a private school. However, such evidence **was insufficient** to demonstrate that the student did not receive benefit from county schools or that IEP implemented by county schools was **not reasonably calculated** to provide student with non-trivial educational benefits.

"Autistic Student's Assignment to Extended School Year Not Violate IDEA"
Travis G. v. New Hope-Solebury School Dist. (E. D. Pa., 544 F. Supp. 2d 435), March 13, 2008.

School district's proposed placement of an eight-year-old autistic student in its extended school year (ESY) program did **not violate** IDEA's requirement that student be placed in a least restrictive environment (LRE) setting. Therefore, the school district was **not** required to pay for student's attendance at a private art camp, even though the district's ESY program did *not* have an art program for exceptional students. However, the school district *did provide evidence* as to the types of classes and instructional therapies student would receive, and there was *no* testimony as to what types of programs the private art camp proposed.

Discrimination:

"School District Did Not Violate ADA in Not Hiring Deaf Applicant"
Adeyemi v. District of Columbia (C. A. D. C., 525 F. 3d 1222), May 16, 2008.

James Adeyemi (plaintiff) is deaf. After failing to obtain an information technology position (Level 11 Technology Specialists) in the Washington D. C. Public School System, he sued the District of Columbia (defendant) for unlawful employment discrimination under the Americans with Disabilities Act (ADA). The United States Court of Appeals, District of Columbia Circuit, held that the defendant *proffered reason* (two applicants hired were better qualified) *for not hiring* the plaintiff was **not pretext for disability discrimination** in violation of the ADA. The plaintiff had a high ranking within the pool of applicants, but he was *not* as qualified as the hired applicants. The hired applicants were also qualified to perform the higher-grade position and they both possessed significant experience that the plaintiff largely lacked. The manager had sought to fill the vacant positions with applicants qualified for the higher-grade level position because he was not satisfied that the applicants within the applicant pool for the lower-grade level position, which included the plaintiff.

Dress Codes:

"Student's Free Speech Challenge to School's Dress Code Failed"
Jacobs v. Clark County School Dist. (C. A. 9 [Nev.], 526 F. 3d 419), May 12, 2008.

Plaintiff (Kimberly Jacobs), than an eleventh grader at Liberty High School (Liberty) repeatedly violated Liberty's uniform policy (wearing shits containing religious messages). She was suspended from school five times for a total of approximately 25 days. During her suspensions, she was provided with educational services, and in fact, her grade point average improved during the time in which she was suspended from school. The plaintiff claimed that she missed out on classroom interaction, suffered reputational damage among her teachers and peers, had a tarnished disciplinary record, and was unconstitutionally deprived of her First Amendment rights to free expression and free exercise of religion because of Liberty's enforcement of its mandatory school uniform policy. The United States Court of Appeals, Ninth Circuit, held that Liberty's mandatory dress codes for students were viewpoint and content neutral, and thus *Tinker* "substantial interference" test governing schools' viewpoint-based suppression of students' speech did **not apply** on plaintiff's free speech/expression conduct challenge to school district's dress code because it allowed an exception for clothing containing a school's logo. Stated purposes of dress policy were increasing student achievement, promoting safety, and the logo exception by itself *did **not** covert otherwise content-neutral policy into content-based one*.

Judgment:

"Softball Player Not Entitled to Judgment against School District and Village"
Shatzkin v. Village of Croton-on-Hudson (N. Y. A. D. 2 Dept., 858 N. Y. S. 2d 362), May 20, 2008.

School district and village, moved for summary judgment in high school varsity softball player's personal injury suit. Plaintiff alleged she was injured (Claimed that the fence was placed too close to the foul line and unreasonably increased the risks inherent in the game.) when she ran into a chain link fence while chasing a fly ball across foul line during a softball game on a field owned by the village. A New York court held that both the school district and village **established that they were entitled to summary judgment as a matter of law** by demonstrating that the plaintiff was an experienced softball player, that the condition of the fence was open and obvious, and that softball players appreciated the risks associated with playing near the fence.

"School Not Liable For Student Being Kicked During Physical Education"
Paca v. City of New York (N. Y. A. D. 2 Dept., 858 N. Y. S. 2d 772), May 27, 2008.

On March 22, 2005, Taylan Paca (plaintiff) was injured during a gym-class soccer match when another student playing the game kicked him on the ankle. The city and city board of education moved for summary judgment in a negligent supervision action brought by the plaintiff. The court held that both the city and the school district **established their prima facie entitlement to judgment as a matter of law** by demonstrating, through injured student's own deposition testimony that his injuries were caused by another student's accidental conduct in the course of the soccer match. Furthermore, the incident occurred in such a short span of time that it could **not have been prevented by the most intense supervision**.

Labor and Employment:

"School Superintendent Is Not the Final Policy Maker for Hiring Decisions"
Milligan-Hitt v. Board of Trustees of Sheridan County School Dist. No. 2 (C. A. 10 [Wyo.], 523 F. 3d 1219), April 22, 2008.

School district's superintendent was *not* the final policymaker for hiring decisions, even though the district's school board could only act upon the recommendation of the superintendent on hiring matters. Thus, school district could **not** be held liable for superintendent's decision declining to recommend applicants for administrative positions, allegedly based on their sexual orientation (The former principal and former assistant principal had been observed holding hands while they entered a Victoria's Secret store.). Under Wyoming law, school boards were vested with the authority to make personnel decisions and if the board did not like candidates put forward by the superintendent, it could demand new recommendations.

"Third Grader Seriously Injured Teacher"
Stroh v. Calcasieu Parish School Bd. (La. App. 3 Cir., 978 So. 2d 1114), March 5, 2008.

Evidence **overwhelmingly supported** the trial court's finding that a third grade teacher met her burden of proving that she was seriously injured while escorting an out-of-control student from her classroom to the principal's office. While attempting to escort the third grader to the principal's office, the teacher's feet became entangled with the student's feet as he resisted her efforts. Consistent with the teacher's testimony, a witness testified that the student was pulling and fighting the teacher as she tried to lead him out of her classroom, down the hall, and to the principal's office. Therefore, she **was entitled** to paid sick leave without a reduction in pay.

"Teacher Reassignment Did Not Violate Age Discrimination Act"
Francis v. Elmsford School Dist. (C. A. 2 [N. Y.], 263 Fed. App. 175), February 8, 2008.

Elementary teacher (age 67) was **not** subjected to a hostile work environment in violation of the Age Discrimination in Employment Act (ADEA). Many of the conditions about which she complained about, such as her chair, the lack of a budget, and a job description were remedied within a few months of her reassignment to teaching Academic Intervention Services (AIS) [somewhat comparable to special education] in a school interior corridor. Locating the teacher in a hallway did **not** constitute discriminatory intimidation, ridicule, and insult sufficient enough to alter the conditions of her employment.

"Termination of African-American Teacher Was Not Discriminatory"
Brown v. Pulaski County Bd. of Educ. (C. A. 11 [Ga.], 263 Fed. App. 842), January 31, 2008.

School district's stated reasons for African-American employee's termination, namely, that she was unprofessional, exhibited insubordination, displayed poor attitude, refused to follow instructions of her supervisors, and her unwillingness to correct poor behavior. **None** of the aforementioned causes for terminating the plaintiff's employment could be classified as a pretext for discrimination as pertaining to Title VII.

"SRO Termination Upheld For Insubordination"
Grey v. Dallas Independent School Dist. (C. A. 5 [Tex.], 265 Fed. App. 342), February 14, 2008.

Grey (plaintiff) was hired by the Dallas Independent School District (DISD) as a School Resource Officer (SRO) in 2001. In January 2002, the Chief of the DISD Police and Security Services discovered that the plaintiff's driver's license had been suspended and assigned him to dispatch until the license situation was resolved. While the order was in place, the plaintiff rode on patrol with other officers for several shifts. When the Chief confronted the plaintiff about disobeying his direct order, the plaintiff responded by stating "you want to talk, we can talk to my attorney." Thereafter, the plaintiff was discharged from his employment for insubordination. The United States Court of Appeals, Fifth Circuit, held that former employee: (1) **failed** to establish a case of race discrimination under Title VII, (2) did **not** engage in a protected activity, (3) did **not** have a due process liberty interest in his reputation and good name, and (4) did **not** have due process property interest in his continued employment.

"Placement of a Special Education Teacher on a Growth Plan Did Not Constitute Adverse Employment Action"
Anderson v. Clovis Mun. Schools (C. A. 10 [N. M.], 265 Fed. App. 699), February 15, 2008.

Plaintiff accused his new principal of the following *adverse employment actions* (violations related to violation of Title VII): (1) Unlawful placement on a professional growth plan; (2) General harsh treatment during their times of verbal interaction; and (3) General discrimination in regard to the principal's judgment of his teaching. The United States Court of Appeals, Tenth Circuit, held that (1) Placement of plaintiff on a professional growth plan did **not** constitute adverse employment action; (2) Formal reprimand of plaintiff did **not** constitute employment action; (3) Plaintiff **was required** to demonstrate that following the arrival of the new principal there were *no* issues related to his employment status; (4) Plaintiff **was required** to show that a rational jury would be able to find that his workplace was permeated with discriminatory intimidation; and (5) Plaintiff **was required** to show that working conditions at his school were such that a reasonable employee would have felt no other choice but to quit. Therefore, the Tenth Circuit **dismissed** the plaintiff's adverse employment claims and **upheld** the principal's actions.

"Teacher's Failure to Report to Work was known to the Board"
Diggins v. Honeoye Falls-Lima Cent. School Dist. (N. Y. A. D. 4 Dept. 856 N. Y. S. 2d 396), April 25, 2008.

Tenured teacher's reason for failing to report to work ***was known*** to the board of education and ***it was reasonable***. Thus, teacher's absence and his failure to notify the board of his reason for not returning to work did **not constitute abandonment of his position**. Therefore, the board **was required to reinstate** him back pay and benefits retroactive to September 1, 2006. Furthermore, the teacher was absent because the board assigned him to work at a location to which they knew he could not legally report, and the teacher actively sought reinstatement at all times.

"Teacher's Complaint Not a Matter of Public Concern – Statements Not Protected by the First Amendment"
Myles v. Richmond County Bd. of Educ. (C. A. 11 [Ga.], 267 Fed. App. 898), March 6, 2008.

Although the school district employee's (plaintiff) complaints that unqualified persons were being appointed to positions in the school district touched on an important matter of public interest, her speech, which centered predominantly around, and was driven by, her displeasure with having been denied promotions she thought she deserved; was **not a matter of public concern**. Therefore, plaintiff's speech was **not protected** by the First Amendment's free speech clause. Plaintiff did **not** address her complaints to the public. Rather, she *voiced her concerns as a disgruntled employee* ***rather than as a citizen concerned about corruption*** so alleged against the superintendent for alleged ethical violations.

"Employee's Due Process Rights Violated When Denied Pre-Termination Hearing"
Wheeler v. Parker (N. D. N. Y., 546 F. Supp. 2d 7), May 7, 2008.

In 1989, the school district hired the plaintiff as a teacher's aide. Several years later, the district appointed him to the position of an intervention worker. In 2000, the district notified the plaintiff that it proposed to terminate his employment for misconduct and that a hearing officer had been appointed to determine if there were adequate grounds for termination. However, the district went ahead and terminated the plaintiff prior to the proposed hearing. Thus, the district denied the plaintiff a per-termination hearing. A New York court determined that the plaintiff's due process rights **were violated** when he was terminated without a pre-termination hearing that *was required* by state statute.

"School Principal Failed to Establish First Amendment Retaliation Claim"
Sanders v. Leake County School Dist. (S. D. Miss., 546 F. Supp. 2d 351), March 7, 2008.

An African-American school principal (plaintiff) filed civil rights action, claiming that the school district's (defendant) decision not to renew her contract violated her First Amendment free speech rights. The United States District Court, S. D. Mississippi, Eastern Division, held that even if the plaintiff established that the decision not to renew her contract was influenced by an EEOC charge, she **failed** to establish a First Amendment free speech retaliation claim in view of the defendant's evidence that the non-renewal decision ***was based on performance issues and would have been made irrespective of her EEOC charge***. Plaintiff's non-renewal *was based* on performance problems akin to the following: (1) Violated district policy pertaining to student retention when she promoted 27 students who have been retained the previous year; (2) Continued to submit revised class schedules well after the deadline and after the school year began; (3) Submitted final personnel report well after the established district's deadline, which caused the district's report to be late to the Mississippi Department of Education; (4) Failed to submit a single teacher evaluation report for the 2004-2005 school year; and (5) Repeatedly failed to obtain prior approval for fund raisers, field trips, and personnel meetings.

"School District Did <u>Not</u> Treat Assistant Principal in an Unfavorable Manner"
Vicari v. Ysleta Independent School Dist. (W. D. Tex., 546 F. Supp. 2d 387), February 4, 2008.

School district did **<u>not</u>** treat assistant principal (plaintiff) less favorably than similarly situated employee when it suspended her with pay pending outcome of investigation into her alleged romantic relationship with the school's registrar; and she thus **failed** to establish a prima facie (production of enough evidence) case (gender discrimination and retaliation) under Title VII, inasmuch as district also suspended male co-employee whom she accused of misconduct on the same day and under the same conditions. Another co-employee who admitted to a romantic relationship with the district's personnel director was not investigated. However, the district received no complaints about that particular relationship.

"Teacher Claimed Job Was Driving Her Crazy"
Hassell v. Onslow County Bd. of Educ. (N. C., 661 S. E. 2d 709), June 12, 2008.

Workers compensation claimant (plaintiff-teacher) **failed** to prove that her position as a sixth-grade teacher placed her at an increased risk of developing an anxiety disorder (GAD – generalized anxiety disorder). Therefore, plaintiff's anxiety disorder did **not** constitute a compensable occupational disease because plaintiff's employment did **not** expose her to unusual and stressful conditions, and the school did **not** require plaintiff to perform any extraordinary tasks associated with her teaching position.

Religion:

"Football Coach Violated Establishment Clause by Participating In Team Prayers"
Borden v. School Dist. of Tp. Of East Brunswick (C. A. 3 [N. J.], 523 F. 3d 153), April 15, 2008.

Head football coach at East Brunswick High School engaged in the silent acts of bowing his head during his team's pre-game meal and taking a knee with his team during locker-room prayer prior to game time. The United States Court of Appeals, Third Circuit, held that *school district's guidelines prohibiting school officials from participating in student-initiated prayer* were **not** unconstitutionally overboard under the First Amendment over-breadth doctrine. Guidelines *had valid application* in avoiding Establishment Clause violations of the First Amendment and any concern about over-breadth could be cured through case-by-case analysis of the fact situations.

School Boards:

"School Board Can Establish Year-Around Schools and Assign Students"
Wake Cares, Inc. v. Wake County Bd. of Educ. (N. C. App., 660 S. E. 2d 217), May 6, 2008.

In recent years the Wake County Public Schools System (WCPSS) increased its student population from 98,000 in 2000 to over 128,000 students in school year 2006-2007. In the school year 2006-2007 there were approximately 147 schools in the WCPSS. In September 2006, the school board voted to convert 19 elementary and three middle schools to a year-around calendar, starting in the 2007-2008 school year. The Court of Appeals of North Carolina held that a local school board **was authorized** by the General Assembly of the state of North Carolina to establish year-around public schools and to assign students to attend those schools, instead of traditional calendar schools, without obtaining their parents' prior consent.

"Third Grader Sexually Assaulted by Fifth Grader on School Bus"
Doe v. East Baton Rouge Parish School Bd. (La. App. 1 Cir., 978 So. 2d 426), March 28, 2008.

School board **was independently liable**, under the doctrine of respondent superior, for the fifth-grade student's sexual assault of a third-grade student that occurred on a school bus. The bus driver, a school board employee, acknowledged that she violated the rules established by her supervisors when she got off the bus at a transfer point, which was when the assault occurred. The driver further acknowledged that she could have prevented the assault if she had been on the bus as required directives from her superiors. Furthermore, evidence in the record indicated that there had been numerous assaults (more than 1,000 physical and sexual altercations) at the school bus transfer point in the five years immediately preceding the incident.

School Districts:

"School District Obligated to Defend Baseball Coach"
Matyas v. Board of Educ. (N. Y. Sup., 855 N. Y. S. 2d 339), March 31, 2008.

In late May 2006, plaintiff (guidance counselor and baseball coach) was involved in an altercation with a parent of one of players on the baseball team. The parent approached the coach, talked to him in a threatening manner and either grabbed or tapped coach on his shoulder. Parent was charged with harassment, acquitted, and filed a civil suit against the coach for malicious prosecution. The Supreme Court, Broome County, held that civil action for malicious prosecution brought by a parent of a student on the school's baseball team against coach *arose out of performance of coach's employment duties*. Therefore, the school district **was obligated to defend and indemnify** (secure against hurt, loss, or damages) coach in the civil action against him. Although coach registered his complaint against the offending parent at his own home, outside of school hours, and without being told to do so by his superiors; however, *the coach's interaction with the parent occurred at a baseball game, on school property, and involved the coach fulfilling his coaching duties*.

State Funding:

"Oregon's State Constitution Not Require Funding of Schools to Meet Quality Goals"
Pendleton School Dist. 16 R v. State (Or. App., 185 P. 3d 471), May 14, 2008.

The Court of Appeals of Oregon stated that the constitutional provision adopted by a voter initiative, stating that the legislature "shall" appropriate in each biennium a sum of money sufficient to ensure that the state's system of public education meets quality goals established by law, along with publishing a report that either demonstrates that the appropriation is sufficient, or identified the reasons for the insufficiency; does **not** require that the legislature provide sufficient funding to meet the quality goals established by the Quality Education Commission (QEC). The Court went on to state that the constitutional provision offers the legislature *the option of providing less than full funding*, along with an explanatory report.

Student Discipline:

"School Board Can Ban Possession of Cell Phones"
Price v. New York City Bd. of Educ. (N. Y. A. D. 1 Dept., 855 N. Y. S. 2d 530), April 22, 2008.

The decision of Chancellor of New York City Department of Education to "*ban the possession of cellular telephones"* by students in the public schools of New York **was rationally related to legitimate goal of government**. Therefore, the banning of cell phones **did not** violate parents' Fourteenth Amendment due process rights as pertaining to their liberty interest in the care, custody, and control of their children or the due process clause of the state of New York's Constitution. The Chancellor and his staff *reasonably determined* that a ban on cell phone possession ***was necessary to maintain order in schools and the goal of maintaining student discipline was a legitimate educational priority.*** The Supreme Court of New York, Appellate Division, First Department, went on to state that the Department of Education **demonstrated a proper basis** for the cell phone policy and concluded that if the schools were required to enforce a ban on "*cell phone use"*, the pedagogical mission ***would be undermined*** by the time spent confronting and disciplining students. As a footnote to this case, on April 13, 2006, the Department announced that students at certain middle and high schools would be scanned by mobile metal detectors prior to entering the school. The intended target of the scan was "weapons and dangerous instruments such as firearms, knives, and box cutters." A small number of weapons were found; however, thousands of cell phones were detected.

"Middle School Student Guilty of Harassing Principal"
A. B. v. State (Ind., 885 N. E. 2d 1223), May 13, 2008.

Evidence **was sufficient** to prove that juvenile *had requisite intent* to harass, annoy, or alarm her former middle school principal, with *no* intent of legitimate communication, when she posted profanity-laced statements on social networking site (My-Space) on internet as would support delinquency adjudication based on six counts of harassment. Evidence did *not* establish that juvenile, when making postings on private profile site, had *subjective expectation* that her conduct would come to principal's attention. Student *intended* publicly accessible "group page" as legitimate communication of her criticism of principal's disciplinary action. As a **footnote** to the case, the student's message on My-Space was transmitted as follows: "hey you piece of greencastle s**t. what the f**k do you think of me know (sic) that you cant (sic) control me? Huh? ha ha ha guess what ill (sic) wear my f**king piercings all day long and to school and you cant (sic) do s**t about it! ha ha ha f**king stupid b*tard!

"Student Assigned to Alternative School Due to Mother's Beer"
Langley v. Monroe County School Dist. (C. A. 5 [Miss.], 264 Fed. App. 366), January 31, 2008.

On a Sunday afternoon in September 2004, Charles and Kathy Langley drove their Ford Mustang to a cookout at a friend's home. Kathy drank part of a beer and left it in the vehicle. Laura (Charles and Kathy's daughter), an honor roll student who held leadership positions in several organizations at her high school drove the Mustang to school the following Tuesday because her own vehicle would not start. She did not see the partially-full beer can in the console cup holder. Later that day, the assistant principal noticed the Mustang did not have a parking decal. In the course of inspecting the car to determine its owner, he discovered the beer and called the principal. After consulting with the superintendent the high school administration assigned Laura to 30 days at an alternative school due to her violation of the school district's "zero tolerance" policy. Laura withdrew from the school and obtained her GED. The United States Court of Appeals, Fifth Circuit, held that the student's temporary transfer to an alternative school implicated **no** constitutionally-protected property interest.

"Student Hits another Student with a Cafeteria Tray"
In re Expulsion of N. Y. B. (Minn. App., 750 N. W. 2d 318), June 10, 2008.

Before being expelled, N. Y. B. (plaintiff) was a freshman at Coon Rapids High School (CRHS). Sometimes in late November or early December 2006, C. S. who also attended CRHS, made comments to other students about N. Y. B.'s racial heritage. During lunch in the school cafeteria on December 13, 2006, N. Y. B. confronted C. S. about rumors that she believed C. S. was spreading. A fight ensued, during which N. Y. B. broke a cafeteria tray over C. S.'s head. School staff promptly broke up the fight. While being escorted to the main office by a school official, N. Y. B. turned and ran toward C. S., who was being escorted in the opposite direction. As a result, an assistant principal physically restrained N. Y. B. to prevent the resumption of the fight. The school board voted 5 to 1 to expel N. Y. B. until December 12, 2007. The Court of Appeals of Minnesota ruled that in order to support an expulsion of a student for one calendar year, the school board **was required** to explain the basis for determining *relative egregiousness* of student's behavior as compared to other students, provide *factual context* of any incidents resulting in expulsion with which student's conduct was compared, explain how student's conduct *compared with other incidents*, and explain how the board *reached its conclusion* about relative seriousness of student's conduct with consideration of *mitigating circumstances* presented by the student.

Torts:

"No Obligation to 'Mat the Floor' or Continuously Mop-Up the Floor"
Gonzalez-Jarrin v. New York City Dept. of Educ. (N. Y. A. D. 1 Dept., 855 N. Y. S. 2d 87), April 8, 2008.

Defendants had **no obligation** to *cover* an entire floor with mats and to *continuously* mop up all tracked in water. Thus, ***precluding imposition of liability*** in premises liability suit where, at the time of the plaintiff's accident, it had been raining or snowing for several hours. The custodial staff had placed a mat on the floor of the vestibule where the accident occurred. Furthermore, they *had neither actual nor constructive notice* of the particular wet condition that allegedly caused the plaintiff to slip and fall.

"Cheerleader Injured During Practice"
DiGiose v. Bellmore-Merrick Cent. High School Dist. (N. Y. A. D. 2 Dept., 855 N. Y. S. 2d 199), April 1, 2008.

A high school student (plaintiff) with extensive cheerleading experience was injured during cheerleading practice in her high school gym when the cheerleader that she was "spotting" fell without warning and knocked her to the floor. Shortly thereafter, she brought action against high school and other defendants, alleging that the defendants were negligent. Defendant (school district) **established** their entitlement to judgment that the plaintiff engaged in the activity of cheerleading *knowing the risks inherent to that activity*. Furthermore, by engaging in a sport or recreational activity, participants ***consent to those commonly appreciated risks*** which are inherent in and arise out of the nature of the sport and participation therein.

"School Officials Not Liable for a Student's Spontaneous Act"
Strnad v. Floral Park-Bellerose Union Free School Dist. (N. Y. A. D. 2 Dept., 855 N. Y. S. 2d 609), April 8, 2008.

High school student that was injured by another student sued the student, the high school, and the school district to recover damages for personal injuries. The Supreme Court of New York, Appellate Division, Second Department, held that the high school and school district had **no** actual or constructive knowledge of any prior similar conduct by the offending student. Furthermore, the offending student's *spontaneous act* could *not* have been reasonably anticipated; thus, **precluding** the imposition of liability in regard to the victim's personal injuries. The offending student's disciplinary record showed lateness to classes, cutting classes, and a highly disrespectful attitude towards the school's teachers and administration, but *no* violence against any students. Thus, the evidence **was insufficient** to place school officials on notice of the possibility of violent conduct by the offending student.

"Student Injured in Fight: School Board Had Knowledge of Previous Victimization"
S. K. ex rel. Philip K v. City of New York (N. Y. Sup., 856 N. Y. S. 2d 448), February 26, 2008.

On October 20, 1999, plaintiff SK, a seventh-grade student, was injured during a fight with LC, a fellow student at the end of gym class. LC struck plaintiff in the head causing the hemorrhage of a latent congenital vascular malformation which necessitated approximately ten brain surgeries. Plaintiff alleges that school officials were aware that plaintiff had previously and repeatedly been harassed and assaulted by fellow students, including LC. The Supreme Court, Kings County, New York, stated that *genuine issues of material fact* **existed** as to whether the school board, in light of the alleged specific knowledge it had that plaintiff had previously been targeted and victimized by other students, should have provided closer supervision of plaintiff or taken other action to protect plaintiff's safety during school hours. As to whether the student was a voluntary participant in the fight with another student **precluded summary judgment** on the plaintiff's negligent action against school officials and the board. Therefore, *summary judgment for the board* **was denied**.

"Propane Delivery Man Slips and Falls at School"
Reid v. Schalmont School Dist. (N. Y. A. D. 3 Dept., 856 N. Y. S. 2d 691), April 17, 2008.

On January 26, 2001, an employee (plaintiff) of the Tri-County Bottle and Gas Company delivered propane to an elementary school's outdoor tank while there was "a lot of snow on the ground". After filling the school's propane tank, plaintiff walked inside the school to have the invoice for the propane signed. At that time, he asked the school custodian for directions to a restroom. He was told to cross the gym, go up a small set of wooden stairs, and proceed drown the hallway to the lavatory. On his return, he slipped and fell while descending the wooden stairs. When the custodian went to assist the plaintiff he noticed that the plaintiff had snow on his boots and was wearing "very dark sunglasses". He also saw some water and slush on the floor at the bottom of the stairs and melting snow that resembled footsteps leading from the stairs to the restroom. The New York Supreme Court, Appellate Division, Third Department held that the school district **demonstrated** that it did **not** create an allegedly dangerous condition, namely, a defective staircase. Furthermore the school district did **not** have actual or constructive notice of any type of defect regarding the school's stairs, and could **not** be held liable for plaintiff's alleged injuries. In addition, there was ***no*** record of any prior accidents or problems with the stairs, and the stairs ***were in compliance*** with applicable building codes established at the time of their construction.

"Student Looses Two Teeth in a Fight"
MacCormack v. Hudson City School Dist. Bd. of Educ. (N. Y. A. D. 3 Dept., 856 N. Y. S. 2d 721, May 1, 2008.

Board of education and school district did **not** have sufficient notice to be able to have anticipated the actions of a student who struck a fellow student (plaintiff), knocking out two of his teeth; thus, ***precluding*** the imposition of liability. School administrators **were unaware** of any serious problems between the two students and had *not* experienced any significant disciplinary problems with the offending student or plaintiff prior to the incident. The offending student struck the plaintiff in the face, causing him to lose two teeth, as they ascended the school's stairs.

"School Nurse Did Not Act With Reasonable Care"
Hilts v. Board of Gloversville Enlarged School Dist. (N. Y. A. D. 3 Dept., 857 N. Y. S. 2d 292), April 24, 2008.

On January 9, 2002, then 10-year-old Misty Hilts (child) slipped and fell on her elementary school's playground allegedly due to slushy conditions. The child's mother, a teacher's aide at the school, and Carol Edwards, the school nurse, responded to the scene and assisted the student to the nurse's office. Thereafter, the student's mother decided to take her child to the emergency room and both she and the school nurse helped the youngster walk outside to the parking lot. When they got outside, the child's mother went to get her car and the nurse stood with the student helping to support her weight. When the student's mother pulled the car around, the nurse allegedly released the child and told her she could walk, causing the student to fall again and to sustain injuries to her right ankle. Plaintiff, the student's father, subsequently commenced negligence action against the nurse and the school district. The court held that *it is well settled law* that once a person *voluntarily* undertakes acts for which s/he has ***no*** legal obligation, that person **must act with reasonable care or be subject to liability** for negligent performance of the assumed acts.

"Student Hit by Vehicle After Being Dismissed From School"
Vernali v. Harrison Cent. School Dist. (N. Y. A. D. 2 Dept., 857 N. Y. S. 2d 699), May 13, 2008.

The infant plaintiff, a 12-year-old boy, allegedly sustained injuries when he was struck by a car while running across the street, in the rain, after being dismissed from school. The plaintiff called his mother on his cell phone when he was released from school. His mother told him that she was parked on the street across from the school. Thereupon, his mother waved to her son and directed him to her vehicle. At one corner of the street there was a stop sign, crossing guard, and a crosswalk. At the other corner there was a traffic signal and a crosswalk. The plaintiff chose to cross in the middle of the street at the direction of and under the supervision of his mother, rather than at the supervised area located on school property designated by the school district for the pick-up and discharge of students. The court held that the plaintiff was **not** on school property and **was under the control** of his mother. Thus, **neither** the school district nor the school **owed *custodial duty* to the student**.

"Student Injured While Playing Dodge-Ball"
Knightner v. William Floyd Union Free School Dist. (N. Y. A. D. 2 Dept., 857 N. Y. S. 2d 726), May 20, 2008.

School district was **not** liable for injuries student suffered while playing dodge-ball in gym class. Injury occurred when student stepped backwards and tripped over another student's foot during the course of the game. The incident occurred so quickly that even the most intense supervision could **not** have averted the accident.

Commentary:

No commentary this month.

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).

Special Note:

The "Legal Update for District School Administrators" is dedicated to the memory of **Dr. Wm. (Bill) Leewer** (November 17, 1950 – May 26, 2008) and **Dr. Jack Klotz** (February 26, 1943 – May 20, 2008). Dr. Leewer was a professor at Mississippi State University-Meridian, Mississippi and editor of the Legal Update for District School Administrators. Dr. Klotz was a professor in the Department of Leadership Studies at the University of Central Arkansas and a former professor of educational administration at the University of Southern Mississippi. Both of these gentlemen and educators will be greatly missed by their families, friends, and their students. They were not just colleagues of mine, but very dear friends. Their memory and legacy will live on through their students and their writings. Strength and honor

April May 2009 (#'s 579, 580, & 581)

Legal Update for District School Administrators April - May 2009

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
- Admission
- Civil Rights
- Crime
- Defamation
- Desegregation
- Disabled Students
- Extracurricular Activities
- Injunction
- Labor and Employment
- Records
- Search and Seizure
- Security
- Torts
- Transportation

Commentary:

- No commentary this month.

Topics

Abuse and Harassment:

"Male Student Not Subjected to a Hostile Environment after Telling a Male Classmate That He Loved Him"

Levarge v. Preston Bd. of Educ. (D. Conn., 552 F. Supp. 2d 248), March 11, 2008.

On March 4, 2004, T. L. (plaintiff) then 9 years old, said to another boy at his lunch table "Do you love me? I love you." According to the principal, she learned that T. L. said this repeatedly and refused to stop at the other child's request. In response, the child threw food at T. L. According to the principal, T. L. reported the food-throwing to teachers who moved the offended student to another table. The principal maintains that T. L. began laughing and boasting that he had gotten the other student in trouble. Furthermore, the principal reported that the offended student responded by calling T. L. "gay" and encouraged other students to do the same. After the incident, both students went to principal's office and were punished by being "sent to the fence" during recess. A United States District Court in Connecticut held that the plaintiff was **not** subjected to a sexually hostile educational environment in violation of Title IX when he was subjected to thrown food and homophobic teasing in the school cafeteria after he asked another male student if he loved him. The other student's conduct was not so severe, pervasive, and objectively offensive that student was effectively denied equal access to the school.

"Grabbing, Twisting, and Hitting Student's Testicles *Supported* Claim under Title IX for Gender Stereotyping"

Doe v. Brimfield Grade School (C. D. Ill., 552 F. Supp. 2d 816), April 10, 2008.

Plaintiff alleged that her grade school son was sexually harassed by six other male students from November 2004 through November 2005. The harassment consisted of verbal and physical abuse, the physical "sexual misconduct consisted predominantly of grabbing, twisting, and hitting the youngster's testicles. Both his principal and basketball coach were aware of the ongoing practice of male students hitting each other in the testicles, also known as "sac stabbing." The student and his parents (plaintiff) repeatedly objected to this abuse, tried to impress upon school officials the seriousness of the situation, but their efforts fell on deaf ears and school officials did not take reasonable steps to prevent or intervene in the matter. The plaintiff's son eventually suffered severe swelling, pain, and damage to his testicles and had to have surgery. After his surgery and his return to school, he was teased and intentionally struck in his testicles. His stitches popped and his surgical incision broke open. The school principal still did nothing to correct the situation. In fact, the only thing that the coach did was tell the youngster that "he needed to stick up for himself." Because of the school's repeated refusal to take reasonable steps to protect their son, John's parents removed him from school in December 2005. A United States District Court in Illinois held that (1) the allegations **were sufficient to support** claim against school officials under Title IX for gender stereotyping and (2) the complaint described behavior which **rose to a level of harassment that was severe, pervasive, and objectively offensive** that student **was denied equal access** to his education.

"Teacher's Discharge for Irresponsible and Inappropriate Misconduct Was Appropriate"

Lackow v. Department of Educ. (or "Board") of the City of New York (N. Y. A. D. 1 Dept., 859 N. Y. S. 2d 52), May 27, 2008.

On December 3, 2004, plaintiff (Lackow), then a tenured biology teacher became the subject of an investigation based on an incident in which a student reported to an assistant principal that she had yelled out "Lackow sucks". Thereupon, the plaintiff responded to the student by saying, "No, you suck, well that's what it says in the boys' bathroom." In response to the incident, along with interviewing seven students and a teacher, it was discovered that the teacher had used a number of sexual innuendoes in his high school classes. The New York Supreme Court, Appellate Division, First Department, held that plaintiff's penalty of discharge upon determination that he had engaged in insubordination, sexual harassment, used inappropriate language, and engaged in conduct unbecoming a teacher did **not** shock the conscience, given the teacher's proven misconduct. The plaintiff had been previously warned three (3) times in writing about his inappropriate behavior. Furthermore, **the repetitive nature** of the teacher's misconduct having **continued a pattern of conduct** that **was clearly irresponsible and inappropriate** within the classroom setting.

"School Exercised Ordinary Care While Investigating Claims of Harassment"

Beacham v. City of Starkville School System (Miss App., 984 So. 2d 1073), June 17, 2008.

On July 5, 2002, plaintiff's daughter (Ashley) attended a pool party at a male student's home. The pool party was not a school-related event. Boys attending the party secretly videotaped Ashley changing into her swimsuit and Ashley found out about the videotape two weeks later. One month after the incident, Ashley began her freshman year at Starkville High School where she served as a cheerleader. Plaintiff called the high school principal and informed him about the incident, pending court proceedings, and a restraining order against the boys. During the subsequent trail the plaintiff alleged that on at least three instances her daughter was harassed by one or more of the boys who did the videotaping. The Court of Appeals of Mississippi held that **there was substantial evidence to support** the circuit court's finding that the school district **exercised ordinary care** in investigating the plaintiff's claims of harassment at school when it was brought to the high school administration attention. Thus, the school district **was immune from liability**. The school district was **not** responsible for any harassment student suffered outside of the school that was linked to the videotaping incident. Furthermore, the school system could **not** be held responsible for its students' failure to respect their peers' boundaries.

Admission:

"Student Allowed To Enroll in School District of Grandmother's Residence"
Velazquez ex rel. Speaks-Velazquez v. East Stroudsburg Area School Dist. (Pa. Cmwlth., 949 A. 2d 354), May 19, 2008.

The student (Jose) had lived in and out of the school district since 1979 when he was a second grader. From January 2005 through February 2006 he was enrolled in another school district where he lived with the plaintiff (grandmother) and his father, who has been incarcerated since September 2005. The student's mother resides in North Carolina or in Florida. In March 2006, the plaintiff moved back to East Stroudsburg with the student and began the re-enrollment process. He was allowed to re-enroll but was subsequently found guilty of disorderly conduct after an altercation with a school police office in May 2006, for which he attended an alternative school. After a review of the student's enrollment records it was discovered that he was ineligible for both free lunch (due to child support being paid by the youngster's mother – she owed a very large sum due to back payments) and to enroll due to plaintiff receiving child support (Pennsylvania law stated in part that "a nonresident child is entitled to attend the district's public schools if that child is fully maintained and supported in the home of a resident and receives no personal compensation for maintaining the student.") The Commonwealth Court of Pennsylvania held that the plaintiff supported the student **"gratis"**, as if he were her own, such that he **was eligible to enroll** in the school district in which she resided and **receive free school privileges** under state statute. The plaintiff was the child's sole caregiver and provided all of his daily needs, she continuously supported the child throughout the year, not merely during the school term, and she assumed all responsibilities for meeting school requirements and making education related decisions in absence of the child's parents.

Civil Rights:

"School Officials May Have Created a Hostile Work Environment"
Whitright v. Hartford Public Schools (D. Conn., 547 F. Supp. 2d 171), April 16, 2008.

A Caucasian pre-kindergarten teacher (now retired) brought action against school district alleging race discrimination, hostile work environment, retaliation, in violation of Title VII and Connecticut law. A United States District court in Connecticut held that: (1) Genuine issues of material fact as to whether Caucasian teacher's working environment was hostile due to allegedly insubordinate, rude, and harassing behavior of her non-Caucasian classroom assistants, and as to whether that hostility was based on teacher's race; and as to whether school officials knew of the harassment but did nothing about, **precluded summary judgment** for the school district and (2) School principal and vice principal did **not** deliberately and discriminatorily create work conditions so intolerable that a reasonable person in the plaintiff's position would have felt compelled to resign so as to establish a Title VII claim and a violation of Connecticut law based upon race discrimination.

"Strong Possibility of Age Discrimination Associated With Assistant Principals' Hiring"
Framularo v. Board of Educ. of the City of Bridgeport (D. Conn., 549 F. Supp. 2d 181), April 30, 2008).

White male teacher (elementary school teacher, 57 years-of-age at the time of the issue, bachelor's degree, a master's degree, a six-year advanced degree, and a certified elementary school teacher and a certified school administrator) **established a prima facie case** (produced enough evidence to favor plaintiff's case) under the Age Discrimination in Employment Act (ADEA) that he was not promoted to any of five assistant principal position openings because of his age. Plaintiff, who was one of the 29 applicants in the second round of the employment process, was between seven and 23 years older than the five selected applicants, ***giving rise to inference of age discrimination***.

"Detective Had Probable Cause to Arrest Music Teacher"
Fronczak v. Pinellas County, Florida (C. A. 11 [Fla.], 270 Fed. App. 855), March 24, 2008.

During November 2003, M. L. noticed drops of blood in the underwear of her seven-year-old daughter, C. L. M. L. took her daughter to her pediatrician for an examination. C. L. denied any sexual abuse. In January 2004, M. L. noticed a recurrence of vaginal bleeding by C. L., who again denied any abuse. In April 2004, when C. L.'s mother noticed a third episode of bleeding, C. L. underwent a gynecological examination by the Child Protection Team at Help A Child that revealed scarring and damage to C. L.'s hymen that was consistent with sexual abuse. After this examination, C. L. spontaneously disclosed to her mother that she had been fondled and digitally penetrated by her music teacher, Fronczak. The teacher was interviewed by a detective from the Pinellas County Sherriff's Office and he denied any wrongdoing. In addition the detective and three other officers interviewed 280 students at the school; 71 said that they had seen other children sitting on the teacher's lap and 20 stated that they sat on the teacher's lap. The teacher was suspended from his teaching position. He turned himself in to law enforcement authorities without an arrest warrant on April 28, 2004. He was later acquitted (Found <u>not</u> guilty) of the capital sexual abuse charges. The United States Court of Appeals, Eleventh Circuit, held that detective **had probable cause** to arrest the music teacher, **precluding liability** of detective and sheriff's office for false arrest. Detective **possessed physical evidence** that the seven-year-old student had been sexually abused and she **unequivocally identified** the music teacher as her assailant. In addition, **other evidence also suggested the teacher's guilt**, including statements from other students, one of whom also identified teacher as her abuser.

Crime:

"Evidence Sufficient to Support Conviction of Sex Offender Living Within 1,000 Feet of a School"

State v. Gonzales (Mo. App. E. D., 253 S. W. 3d 86), April 22, 2008.

Even if the state was required to prove that the defendant acted knowingly, **there was sufficient evidence to permit an inference** that the sex offender (defendant) had knowledge of the location and distance of the school (A Catholic elementary school for student from pre-kindergarten through eighth grade.) when he established residency. Thus, **evidence was sufficient to support** defendant's conviction (four years of imprisonment) for violating state statue requiring certain offenders, including those convicted of statutory sodomy in the second degree, not to establish residency within 1,000 feet of a school.

Defamation:

"Principal's Letter Recommending Teacher Not Be Placed at High School Had <u>No</u> Defamatory Statements"

Tatum v. Orleans Parish School Bd. (La. App. 4th Cir., 982 So. 2d 923), April 9, 2008.

Teacher (plaintiff) was employed as a temporary teacher at a New Orleans high school. At the end of the year, the principal sent a memorandum to an administrator in the Orleans Parish School Board's human resource department concerning the plaintiff's assignment. The memorandum read as follows: "Mr. Vernon Tatum was assigned to Cohen School during the 1988-89 and 1989-90 school sessions. He served as a school site substitute teacher in 1988-89 and a science teacher in 1989-90. It is recommended that Mr. Tatum not be returned to Cohen School. Thank you for your consideration." A Louisiana appeals court stated that the principal's letter contained **<u>no</u>** defamatory statements.

Desegregation:

"School District Failed to Make a Good Faith Effort to Implement Desegregation Agreement"
Fisher v. U. S. (D. Ariz., 549 F. Supp. 2d 1132), April 24, 2008.

In a school desegregation case, the school district petitioned for finding that it had attained *unitary status*. The United States District Court, D. Arizona, held that: (1) By failing to assess the effectiveness of the school district's recruitment, hiring, promotion, and placement of minority faculty, as required to satisfy settlement agreement provisions requiring regular review to guard against discrimination or inequities; school district **failed to make a good faith commitment to the entirety of its desegregation plan** so that parents, students, and the public had assurance against further injuries or stigma, as required to attain unitary status. Even though school district had adopted a statement of non-discrimination, minority teachers remained underrepresented in relation to minority student population. Hispanic faculty comprised 26.2 percent of the teachers and Hispanic students made up 53.4 percent of the student enrollment. African-American teachers comprise 5.4 percent of the faculty and African-American students comprise a total 6.8 percent of the student population. On the other hand, 64.6 percent of the teachers are Anglo and Anglo students comprise 33 percent of the student body. and (2) the school district, which had failed to make *a good faith effort* to implement program changes expressly required under terms of desegregation agreement, **could attain unitary status only upon adoption of post-unitary plan that ensured transparency and accountability to the public regarding the operation of a non-discriminatory school system**.

Disabled Students:

"IDEA Student's Parents Must Exhaust Administrative Remedies"
A. W. ex rel. Wilson v. Fairfax County School Bd. (E. D. Va., 548 F. Supp. 2d 219), March 13, 2008.

Suspended high school student (18 year-old senior), by his parents and next of friends, sued school board and superintendent, claiming that the student was being singled out for harsh discipline (Used his cell phone camera to take multiple pictures up a female classmate's skirt without her knowledge and sent them to other students.) because of his disability (Asperger's Syndrome). An Untied States District Court in Virginia held that IDEA does not prevent the parents of disabled child from seeking relief under the statute designed for their child's protection. However, IDEA requires a plaintiff **to first exhaust all administrative remedies available** prior filing suit under IDEA.

Extracurricular Activities:

"Student Barred From Running for Class Office Due to Vulgar Comments about Administrators"
Doninger v. Niehoff (C. A. 2 [Conn.], 527 F. 3d 41), May 29, 2008.

Mother (plaintiff) brought state-court suit (sought a preliminary injunction) alleging violations of her daughter's (student) First Amendment and other federal and state rights when the high school student was barred by school officials (Karissa Niehoff-principal and Paula Schwartz-superintendent) from running for senior class secretary based on a derogatory blog the student posted on an independent web site about the principal's and superintendent's cancellation of an upcoming student event ("Jamfest" – an annual battle-of-the-bands concert that was sponsored by the student council. The event was temporarily cancelled due to problems with the school auditorium's sound and lighting equipment. It later was rescheduled.). The student's blog read as follows (direct quote): "Jamfest is cancelled due to douchebags in central office. Here is an email that we sent to a tone of people and asked them to forward to everyone in their address book to help get support for jamfest. Basically, because we sent it out, Paula Schwartz is getting a TON of phone calls and emails and such. We have so much support and we really appreciate it. However, she got pissed off and decided to just cancel the whole thing all together. Anddd so basically we aren't going to have it at all, but in the slightest chance we do it is going to be after the talent show on may 18th. Andd..here is the letter we sent out to parents." The United States Court of Appeals, Second Circuit stated that: (1) Plaintiff did **not** demonstrate substantial likelihood of success on merits of her First Amendment claim; (2) Student's away-from school posting on an independent blog in which she called school administrators "douchebags' and encouraged others to contact the superintendent "to piss her off more" **contained the sort of language that can properly be prohibited in a schools**; and (3) **Nothing** in the First Amendment *prohibits* school authorities *from discouraging inappropriate language* within the school environment.

Injunction:

"Restraining Order Denied Regarding Placement in Alternative Setting"
Scott v. Livingston Parish School Bd. (M. D. La., 548 F. Supp. 2d 265), March 5, 2008.

A student's parents filed suit against school district seeking temporary restrain order (TRO) requiring school officials to cease and desist and to further refrain from denying their child a public education, as well as the student's immediate placement in a alternative educational setting. A Louisiana district court held that plaintiff did **not** demonstrate the likelihood of success on the merits of their claim that student's expulsion from school for alleged misconduct involving the use/possession of a controlled substance violated their youngster's due process property interest in receiving a public education. Furthermore, school officials **afforded** the student **sufficient procedural due process**.

Labor and Employment:

"Attendance Clerk Failed In His First Amendment Rights Claim"
Garcia v. Montenegro (W. D. Tex., 547 F. Supp. 2d 738), April 18, 2008.

A former school district employee, an attendance clerk at a high school who was terminated for making statements to coworkers that were viewed as expressing his support for a student walkout and demonstration concerning proposed changes in federal immigration law, filed suit against school officials which alleged they violated his First Amendment rights when the school district terminated his employment. A United States District Court in Texas held that for purposes of determining whether a Texas high school attendance clerk's interest in speaking as citizen on a public matter pertaining to federal immigration reform outweighed school officials' interests in maintaining an efficient environment and protecting students **was insubordinate and burdened school officials' legitimate interest in maintaining a disciplined work force**. Furthermore, the former attendance clerk's statements contravened instructions given by assistant principal at a staff meeting that pertained to acting in any manner or form that could be interpreted as supporting or inciting students.

"School Bus Driver's Traffic Violations and Insubordination Were Legitimate Nondiscriminatory Reasons for Dismissal"
Bronakowski v. Boulder Valley School Dist. (D. Colo., 549 F. Supp. 2d 1269), February 26, 2008.

Former school bus driver (plaintiff) brought suit alleging hostile work environment and discriminatory discharge based on national origin (Polish) in violation of Title VII. Plaintiff was employed by the school district as a bus driver from September 2001 to February 2004. He had numerous performance problems during the course of his employment, had been placed on improvement plans, and was finally transferred to driving a Chevrolet Suburban that transported less than five special education students. The plaintiff continued to have performance problems that included on the job behaviors such as stopping on a railroad track at a red light while students were in his assigned vehicle, playing with special education students by lifting them over his head or swinging them around, arriving at school early and going to children's classrooms and disrupting class, receiving a photo radar ticked for driving a school vehicle through a red light at an intersection, receiving a speeding ticket while driving a school vehicle 36 mph in a 20 mph school zone, and receiving a ticket for causing a 3-car accident while transporting students. A United States District Court in Colorado stated that the plaintiff's history of traffic violations that endangered the safety of children, his playing with children in an unsafe and inappropriate manner, his insubordination, and his discourteous treatment of superiors and coworkers, **constituted legitimate, non-national origin based reasons under VII for his discharge**.

"Teacher's Former Wife, Not Teacher's Widow Was Entitled to Teacher's Retirement Funds"
Shell v. Teachers Retirement System of Georgia (Ga. App., 662 S. E. 2d 345), May 19, 2008.

In her complaint, plaintiff (Bibiana Riall Shell) stated that she was married to Daniel Shell, Jr. (teacher) until he died on August 20, 2000. Furthermore, she alleged that her husband's former wife ceased being his beneficiary under their divorce judgment. The Court of Appeals of Georgia held that teacher's former wife, *not* teacher's widow, **was entitled** to teacher's funds in the Teachers' Retirements System (TRS), where former wife was beneficiary set forth on last beneficiary designation.

"Teacher's Mold-Induced Allergy Not Work Related"
Henley v. Fair Grove R-10 School Dist. (Mo. App. S. D., 253 S. W. 3d 115), May 20, 2008.

There *was substantial and competent evidence* based upon the whole record to support the Labor and Industrial Relations Commission's conclusion that worker's compensation claimant's mold-induced allergy was not work related and, therefore, **not** compensable. Medical doctor found no evidence that claimant, who was a second grade teacher, was exposed to concentration of mold in school that was even as high as that to which she was exposed to outside or at home. Thus, according to medical evidence there was *nothing* to support the development of sensitization to mold in her classroom or school. Physician attributed causation of claimant's condition to acute inflammatory bronchitis which was most likely viral in nature.

"Dismissed Teacher Did Not Demonstrate Similar Employment Status as Male Teacher with Whom She Had an Affair"
Com. V. Solly (Ky., 253 S. W. 3d 537), May 22, 2008.

The Supreme Court of Kentucky held that a limited status teacher (non-tenured) did **not** demonstrate that she was similarly situated as to male teacher (tenured) with whom she had an affair, as required to support her sex discrimination claim, arising when she was terminated and the male teacher was not similarly terminated. The teacher's *limited status* (non-tenured) meant that she could be dismissed without *cause*. On the other hand, the male teacher had attained *continuing status* (tenured) and could only be terminated for *cause*. Furthermore, the female teacher had violations of law and had been jailed for driving under the influence (DUI).

Records:

"FERPA Did Not Prevent Disclosure of Student Records in Teacher's Discrimination Action against School District"
Ragusa v. Malverne Union Free School Dist. (E. D. N. Y., 549 F. Supp. 2d 288), February 19, 2008.

High school mathematics teacher brought action against school district, board of education, and superintendent, alleging discrimination based upon her disability, age, and national origin. Teacher moved to compel the production of certain student records. A United States District Court held that although student grades and/or evaluations regarding academic performance and behavior in high school teacher's former mathematics department were educational records covered by FERPA, the teacher's need for disclosure of these records in her discrimination action against school district and school officials **outweighed the students' privacy interests**. Therefore, the court **could compel** the school district *to disclose the records*. The requested student records were relevant to whether grounds for denying teacher tenure were valid, namely poor classroom management, inability to engage students from bell to bell, and inability to explain material in a simple manner for students to understand and follow, *were pretext for discrimination*.

Search and Seizure:

"School Administrator's Search of Student Was Reasonable"
Com. Smith (Mass. App. Ct., 889 N. E. 2d 439), July 3, 2008.

Defendant, a student at a public high school was convicted of unlawful possession of a firearm (.380 caliber handgun) and unlawful possession of ammunition. The Appeals Court of Massachusetts, Suffolk, held that the school's assistant headmaster **had reasonable grounds** for searching student. The search **was reasonable at its inception** for the purposes of determining whether the search was reasonable under *the totality of circumstances*. Headmaster was aware that the student had not entered the school building through single entrance (School's front doors are the only authorized entrance.) that is equipped with metal detectors. Student had avoided leaving his school bag in headmaster's office (Student was required to drop his belongings in the assistant headmaster's office at the start of each school day.), which was his usual practice. Defendant had been told on the day before the search not to return to school without his parent. In addition, the student had been in an unauthorized area of the school during class, in violation of school rules.

Security:

"Police Officer Was Engaged in the Execution of His Legal Duties When He Detained Student"

C. M. M. v. State (Fla. App. 5 Dist., 983 So. 2d 704), June 6, 2008.

Police officer who detained a juvenile in school hallway **was engaged in the lawful execution of his legal duties**; and the juvenile **could be convicted** of battery on a law enforcement officer and resisting arrest with violence arising out of her hitting and kicking the officer (Hit officer with her fist and kicked him in the chest, stomach, and neck.). At the time of the incident, the officer **was assigned** as a school resource officer (SRO) and was *attempting to enforce school rules* at the direction of the school administrator. **Note:** The court went on to state that school resource officers perform a unique mission. They are certified law enforcement officers who are assigned to work at schools under the cooperative agreement ("memorandum of understanding") between law enforcement agencies and school boards. They are statutorily bound to "abide by district school board policies" and "consult with and coordinate activities through the school principal." In this capacity, school resource officers are called upon to perform many duties not traditional to the law enforcement function, such as instructing students, serving as mentors and assisting administrators in maintaining decorum, and enforcing school board policy.

Torts:

"School Board Entitled to Summary Judgment on Child's fall from Slide"

Butler ex rel. Butler v. City of Gloversville (N. Y. A. D. 3 Dept., 859 N. Y. S. 2d 284), June 5, 2008.

In June 2001, plaintiff (born in 1991) was playing at a school playground near her home. As she sat at the top of the slide, her older sister gave her a push, causing the plaintiff to fall over the side of the slide and land on the ground. The plaintiff's parent commenced legal action against the defendant to recover for injuries to the child's femur and clavicle which were broken as a result of her fall. The plaintiff alleged that defendant failed to maintain the area in a reasonably safe condition by not providing or installing some type of shock-absorbing surface to replace the sod under the slide. An expert in biomechanical engineering testified that the U. S. Consumer Product Safety Commission's *Handbook for Public Playground Safety* recommended ground cover would not have prevented the injuries that the child sustained. In his opinion, a fall from the top of the slide would have resulted in broken bones regardless of whether the child fell onto sod, pea gravel, or another surface recommended by the guidelines. The New York Supreme Court, Appellate Division, Third Department, held that the school district **establish** *prima* facie (produced enough evidence) **entitlement** to summary judgment on issue of proximate cause.

"Track Athlete Injured When Hit By Shot Put"
Gerry v. Commack Union Free School Dist. (N. Y. A. D. 2 Dept., 860 N. Y. S. 2d 133), June 3, 2008.

Student athlete (plaintiff), who was injured by shot thrown during shot put event at track meet, brought personal injury action against school district and other student athlete who threw shot put. The New York Supreme Court, Appellate Division, Second Department, held that school officials **established** *prima* facie (produced enough evidence) **entitlement** to judgment as a matter of law by presenting undisputed evidence that plaintiff ***assumed risks associated with his voluntary participation*** in the shot put event. The plaintiff was an experienced shot putter who previously had participated in 10 to 15 similar track meets and who previously had thrown a shot put between 100 and 200 times during track meets.

"Student Prank Was Unforeseeable"
Rose e. rel. Ross v. Onteora Cent. School Dist. (N. Y. A. D. 3 Dept., 861 N. Y. S. 2d 442), June 26, 2008.

Injury suffered by ninth-grade student whose thumb was smashed in his homeroom classroom door when he attempted to assist classmate as third student held door shut **was the result of spontaneous and careless prank** among high school students. School officials could **not** have reasonably anticipated its occurrence or prevented it. Therefore, the **school district was not liable for negligent supervision** due to the fact that there was ***no*** history of student disciplinary problems in the homeroom or with any of the involved students.

"Basketball Player Injured While Shooting Baskets Assumed the Risk of Injury"
Lincoln v. Canastota Cent. School Dist., (N. Y. A. D. 3 Dept., 861 N. Y. S. 2d 488), July 10, 2008.

Basketball player (plaintiff) *voluntarily participated* in shooting baskets outside of an elementary school on an outdoor basketball court with *open and obvious uneven areas and cracks*. Thus, the plaintiff **assumed the risk of injury**, ***precluding imposition of liability*** on the school district. The school district *performed its duty by making the conditions as safe as they appeared to be*.

"School District Not Liable for School Nurse's Treatment of Non-Student on The Site of a Field Trip"
McDaniel v. Keck (N. Y. A. D. 3 Dept., 861 N. Y. S. 2d 516), July 17, 2008.

Nurse who was at a private school/working farm to provide nursing services exclusively to visiting elementary school students was at the scene of "accident" or "emergency," **within the meaning of the Good Samaritan statute**, when she examined in farmhouse child, who was not a student of the school after he injured his eye (Poked himself in the right eye with a wire causing the permanent loss of vision in the eye.) while playing in the barn. The accident occurred in the barn; however, the farmhouse is where the child presented himself after the injury.

"Student Shot and Killed By Non-Student"

Gary Community School Corp. v. Boyd (Ind. App., 890 N. E. 2d 794), July 29, 2008.

On March 30, 2001, at approximately 8:15 a. m., 16-year-old Neal Boyd (Neal) was dropped off by his mother at Lew Wallace High School (LWHS), where he attended high school. After he arrived, Neal went to the area where students generally congregated prior to classes beginning. While he waited for classes to start, Neal was shot and killed by Donald Burt, who at that time was not a student at LWHS. Burt had been expelled the previous school year and had withdrawn for the 2000-2001 school year. A behavioral assessment had been completed on Burt which indicated that he exhibited aggressive behavior with homicidal ideations (ideas). Neal's parents (plaintiffs) brought a negligent law suit against the school district. The Superior Court, Lake County, Indiana, ruled in the plaintiffs favor and the school district appealed. The Court of Appeals of Indiana affirmed in part, reversed in part, and remanded the case back to the lower court for a new trial. In so ruling, the Court of Appeals stated that *prior incidents of violence at or around* the high school were **not** sufficiently similar to incident in which plaintiffs' son was shot and killed. Prior incidents were *not admissible* as evidence to show that the shooting of the plaintiffs' son was reasonably foreseeable. The three prior incidents occurred four to eight years before the shooting of Neal. One prior incident involved a student being hit by a stray bullet at a football game. The other two prior incidents involved students either being shot or struck by stray bullets while walking home from school and not being on campus.

"Kindergarten Student Sexually Assaulted by Classmate"
Nelson v. Turner (Ky. App., 256 S. W. 3d 37), June 6, 2008.

In November 2005, five-year-old F. B. was registered as a kindergarten student in Diane Turner's (Turner) class at a public elementary school in Fayette County Public School District, Kentucky. On November 16 of that same year, F. B. was sexually assaulted in the classroom during regular school hours by a female classmate (C. Y.). F. B. described the incident to her mother two days after the incident occurred. The student's mother (Nelson) telephoned Turner and reported that F. B. had complained that C. Y. had "put her finger up my butt" at school. The teacher assured Nelson that she would separate the children. On the morning of Monday, November 21st, Turner advised her teaching assistant that F. B. and C. Y. would no longer be allowed to be close to one another. In addition, Turner also admonished C. Y. that touching someone's bottom was wrong. In an effort to keep the children apart, Turner assigned them specific seats and forbade them from attending the restroom at the same time. After the lunch period on November 21, 2005, F. B. told Turner that C. Y. had been "up my butt. On November 22nd, 2005, F. B. told her mother that C. Y. pushed her into a table, had rubbed and pinched her nipples, and has touched her anus and vagina, all while they were in the classroom together. Nelson had F. B. examined and the medical team noted that there was "some small irritation of the vagina" and brought in a social worker to advise and counsel both the child and her mother. F. B. did not return to the Fayette County Public School District. The Appeals Court of Kentucky vacated in part and remanded the case back to the lower court. In so ruling the Appeals Court stated: (1) The case was **remanded back** to trial court to determine the applicability of the state's statutory abuse reporting requirement and whether the teacher was required to make a report of the alleged abuse that occurred in her classroom to local law enforcement officials for determining if teacher was entitled to qualified official immunity and (2) While the student's mother was not satisfied with the teacher's reaction to the alleged incident, the teacher's behavior could **not** be regarded as so extreme or outrageous as to support recovery for outrage.

Transportation:

"School District Owed Students the Highest Degree of Care that is Akin to a Common Public Carrier"

Green v. Carlinville Community Unit School Dist No. 1 (Ill. App. 4 Dist., 320 Ill. Dec. 307, 887 N. E. 2d 451), March 28, 2008.

Student (attended kindergarten from August 1991 through May 1992) sued school bus driver (Convicted of three counts of child abuse and sentenced to four years in prison.), who allegedly sexually abused student (six other families had children abused by the same bus driver), and school district, alleging that district engaged in intentional infliction of emotional distress, committed assault and battery, was negligent per se, and negligently hired bus driver. An appeals court in Illinois held that a school district that operates school buses to transport its students is *not* a "common carrier," but it is performing the same basic function, transporting individuals; and like a passenger on a common carrier, a student on a school bus *cannot ensure* his or her own personal safety, but, rather, ***must rely*** *on the school district to provide fit employees to do so*. Therefore, a school district that operates school buses **owes** their students the highest degree of care that is equivalent to the same extent that common carriers owe their passengers in regard to the highest degree of care.

Commentary:

No commentary this month.

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).

Special Note:

The "Legal Update for District School Administrators" is dedicated to the memory of **Dr. Wm. (Bill) Leewer** (November 17, 1950 – May 26, 2008) and **Dr. Jack Klotz** (February 26, 1943 – May 20, 2008). Dr. Leewer was a professor at Mississippi State University-Meridian, Mississippi and editor of the Legal Update for District School Administrators. Dr. Klotz was a professor in the Department of Leadership Studies at the University of Central Arkansas and a former professor of educational administration at the University of Southern Mississippi. Both of these gentlemen and educators will be greatly missed by their families, friends, and their students. They were not just colleagues of mine, but very dear friends. Their memory and legacy will live on through their students and their writings. Strength and honor

June July 2009 (#'s 582, 583, & 584)

Legal Update for District School Administrators June - July 2009

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
- Damages
- Disabled Students
- Labor and Employment
- Religion
- School Districts
- Security
- Student Discipline
- Torts

Commentary:

- No commentary this month.

Topics

Abuse and Harassment:

"Identity of Accused Teachers Regarding Allegations of Sexual Misconduct May Be Disclosed Only If The Misconduct is Substantiated or The Conduct Results in Some Form of Discipline"
Bellevue John Does 1-11 v Bellevue School Dist. # 405 (Wash., 189 P. 3d 139), July 31, 2008.

The Seattle Times Company (Times) filed public disclosure requests with the Bellevue and Federal Way school districts seeking copies of all records to allegations of teacher sexual misconduct in the last 10 years. The school districts notified 55 current and former teachers that their records were gathered in response to the Times Requests. Thirty-seven of the teachers filed a lawsuit to enjoin the school districts from releasing their records, arguing that disclose of records identifying them as subjects of sexual misconduct allegations violated their right to privacy. After considering documentary evidence as to each plaintiff, the trial court concluded that the identities of 15 of the original plaintiffs were exempt from disclosure, while the identities of the 22 remaining teachers were open for disclosure to the public. The Supreme Court of Washington, En Banc (With all judges participating-full court heard the case.), held that: (1) Identities of public school teachers alleged to have committed sexual misconduct against students **were "personal information"**, under public disclosure act provisions that exempts personal information from disclosure to the extent that such disclosure **violates** a public employee's right to privacy, because those identities related to particular people; (2) Public school teachers against whom unsubstantiated or false accusations of sexual misconduct are made have a right to privacy in their identities, as protected under the public disclosure act, because the unsubstantiated or false accusations are matters concerning the teacher's private lives and are ***not*** *specific incidents of misconduct during the course of their employment*; and (3) When there is an allegation of sexual misconduct against a public school teacher, the identity of the accused teacher *may be disclosed* to the public pursuant to public disclosure act (PDA) ***only*** if the misconduct **is substantiated** or teacher's conduct results in **some form of discipline**.

Civil Rights:

"Strip Search of Middle School Student Was Unconstitutional"
Redding v. Safford Unified School Dist. No. 1 (C. A. 9 [Ariz], 531 F. 3d 1071), July 11, 2008.

Thirteen-year-old middle school honor student (plaintiff), by her mother and legal guardian, brought Section 1983 action against school district, school vice principal, administrative assistant, and school nurse, alleging that a strip search violated her Fourth Amendment rights. On October 8, 2003, plaintiff was attending a math class when the assistant principal walked into her classroom and instructed her to pack up her belongings and accompany him to his office. Another female student had been caught with several white ibuprofen pills and blamed her possession of the pills on the plaintiff in an attempt "to save her own hide". By the way, this was the only possible link between the plaintiff and the ibuprofen pills. Upon arrival to his office the assistant principal directed plaintiff's attention to a few white ibuprofen pills sitting on his desk. He asked plaintiff if she had anything to do with the pills. She stated that she had never seen the pills before entering the assistant principal's office. Dissatisfied with her answer, he asked plaintiff if he could search her belongings, she agreed. Thereupon he and his administrative assistant (female) search all of plaintiff's belongings and found nothing. Despite plaintiff's discipline-free history at the school, the assistant principal asked his administrative assistant to take the plaintiff to the nurse's office for a second and more thorough search. There, at the assistant principal's request, his administrative assistant and the school nurse conducted a strip search of the plaintiff. Plaintiff was required to remove all of her clothing and sat in her bra and underwear while the two adults examined her clothing, they found nothing. Plaintiff was then required to pull her bra out to the side and shake it, no pills. Afterward, she was required to pull out her underwear at the crotch and shake it, no pills. The United States Court of Appeals, Ninth Circuit, held that school officials' strip search of a middle school student to find ibuprofen was ***not*** *reasonably related in scope to the circumstances which justified the inference in the first place*, as required to comply with *reasonableness standard* under the Fourth Amendment. Even though student's search took place in a nurse's office in front of two women, *the most logical places where the pills might have been found had already been searched to* ***no*** *avail*. ***No*** information pointed toward the conclusion that the pills were hidden under student's bra or panties. Furthermore, there was ***no*** immediate danger posed by the possession of prescription-strength ibuprofen pills by the student or other students.

"Teacher Injured When Another Teacher Attempted to Break-Up a Fight Between Two Middle School Students"

Moore v. Dallas Independent School Dist. (N. D. Tex., 557 F. Supp. 2d 755), March 14, 2008.

Plaintiff, a full-time math teacher at a middle school in the Dallas Independent School District (DISD) was monitoring student as they moved in the school's hallways between classes when a fight broke-out near her between two eighth grade boys. Another teacher (Marvin Lane or "Lane") attempted to separate the two students. He was unable to do so, and his unsuccessful efforts caused him to lose his balance and start to fall. Plaintiff attempted to keep her distance from the fight, but as Lane fell to the floor he kicked plaintiff's feet out from under her, causing her to fall hard on her knees. Once on the floor, the force of the three falling bodies (Lane and the two students) shoved plaintiff up against the wall, injuring her neck and shoulders. Plaintiff filed suit against DISD, alleging the violation of her Fourteenth Amendment right to due process due to the failure of DISD to curb the growing problem of student violence, its failure to supervise and train teachers on how to respond to student violence, and the deprivation of her substantive due process rights to her bodily integrity. A United States District Court in Texas held that: (1) Plaintiff's allegations that school district under-reported occurrences of student violence and discouraged teachers from reporting such occurrences, so as not to lose funding from state and federal government, did **not** constitute allegation of affirmative actions by school district rendering her more vulnerable to danger of being injured by student violence; (2) Assuming that school district's actions in under-reporting student violence and discouraging teachers from reporting student violence increased the risk of harm to teachers posed by student violence, such actions did **not** increase teacher's vulnerability to danger, as a required element of her due process claim; and (3) Teacher **failed** to plead facts that established that the school district acted with deliberate indifference to her substantive due process right to bodily integrity, as an essential element of her claim against the school district in regard to the theory of "a state-created danger.

"State Department of Education's License Renewal of Teacher Who Molested Student Did Not Violate Student's Equal Protection Rights"
B. T. v. Davis (D. N. M., 557 F. Supp. 2d 1262), July 31, 2007.

The New Mexico State Department of Education and associated officials who had conducted an earlier investigation into previous allegations that a male teacher had inappropriately touched male students, did **not** *act with deliberate indifference* in renewal of the teacher's license despite his failure to disclose the prior investigation on his sworn application for license renewal. Therefore, **no** substantive due process violation occurred with respect to student who allegedly was subsequently molested by the teacher. **None** of the defendants *assisted the teacher in his alleged effort to cover up his history of abusing young male students or were deliberately indifferent* to students' safety. At the most, defendants knew of the allegations against the teacher and about the State Department attorney's investigation, which concluded that there was *insufficient evidence* to revoke the teacher's license. **Note:** From September 1998 through March 1999, the teacher was investigated by the Department of Education for alleged inappropriate touching of several male students while teaching at Granger Elementary School (Granger). The report concluded that while such allegations were possible and did generate the immediate concern for students' safety, the inability to corroborate any allegation coupled with the numerous contradictions made it difficult to formulate a case sufficient to support licensure charges against the teacher. In November of 1998, the teacher resigned from his position at Granger and began teaching at Salazar Elementary School (Salazar) in the fall of 1999. The alleged injuries which formed constituted the basis for the lawsuit involved allegations that the teacher inappropriately touched B. T. in 2001 through 2003 while B. T. was a student at Salazar.

"Fifth Grader Threatens to Blow-Up the School House"
Cuff ex rel. B. C. v. Valley Cent. School Dist. (S. D. N. Y., 559 F. Supp. 2d 415), May 5, 2008.

At the time of the incident, the student (plaintiff) was 10-years-old and in the fifth grade. On September 12, 2007, a science teacher asked her students to fill in a picture of an astronaut with statements about their personalities. Plaintiff listed his birthday, his teacher's name, his favorite sports, and wrote the following: "Blow up the school with all the teachers in it." He then turned the assignment in to his teacher without showing it to any of his classmates. As a result of the incident, plaintiff was suspended from school for five days and served one day of internal suspension. After plaintiff served his suspension, his parents requested that the Board of Education expunge the incident from his files. The Board refused, and litigation followed. The United States District Court, S. D. New York, stated that student's threat to "blow up the school with all the teachers in it" **had potential to materially and substantially disrupt class work and discipline in the school**, so that it was **not** protected speech under the First Amendment; although none of the student's classmates saw the threat. However, the written threat was communicated directly to his teacher and it was judged a violent threat.

"Student Denied Essential Services"
James S. ex. rel. Thelma S. v. School Dist. of Philadelphia (E. D. Pa., 559 F. Supp. 2d 600), June 10, 2008.

Student, by and through his parent (plaintiff), filed complaint against school district and four school district employees, as well as multiple school officials, asserting claims under IDEA, Section 504 of the Rehabilitation Act, ADA, and Title VI of the Civil Rights Act. At the time of the action that was filed by the plaintiff, the student was in the seventh grade; however, he had been attending school within the school district since he enrolled in kindergarten. The youngster had a history of problems associated with being developmental delayed, significant academic and behavioral difficulties, and functioning at a second grade level upon his entrance into the seventh grade. During the seventh grade, the student became fearful of attending school because he was attacked by older students, including being hit in the head by a rock (required several days of hospitalization). On or about January 12, 2005, he brought a kitchen knife to school, resulting in him receiving a 10-day suspension. In addition, he was arrested and taken to a police station for the incident. On or about March 15, 2005, the student was hospitalized at a psychiatric facility after becoming a danger to himself. The United States District Court, E. D. Pennsylvania, held that: (1) Plaintiff was **not** required to exhaust IDEA administrative remedies before pursuing claims seeking damages under the Rehabilitation Act and ADA; (2) Parent and student **sufficiently alleged facts** which, if proven would establish a violation of both Section 504 of the Rehabilitation Act and ADA; (3) Parent and student **alleged sufficient facts**, if proved, to establish that the school district intentionally denied the student essential services on *account of his race*, as required for a Title VI claim; and (4) Plaintiff **stated** a claim against his school's principal and assistant principal for deprivation of equal access to education that was granted to children without disabilities.

"Student Not Allowed to Participate In Graduation"
Khan v. Fort Bend Independent School Dist. (S. D. Tex., 561 F. Supp. 2d 760), June 6, 2008.

Student (plaintiff) would **not suffer irreparable injury** in absence of preliminary injunction preventing school district from preventing him from participating in high school graduation ceremony and delivering his valedictorian address, due to his failure to exhibit good conduct (Plaintiff hacked into the Fort Bend Independent School District's computer system and altered students' grades. In addition, a grand jury indicted him for stealing computers from the school district.) while enrolled in school district's alternative education center. The plaintiff *would graduate* from high school regardless of whether he donned a graduation gown, crossed the stage, or delivered the address. Furthermore, the plaintiff *would retain* the honored distinction of graduating valedictorian. There were *no* scholarships or other opportunities that would be revoked if student did not participate in the graduation exercises and there was *no* evidence that his academic record would indicate that he was preventing from attending or participating in the exercises.

"Students Must Have Their Parents' Permission to be Excused from Reciting Pledge"
Frazier ex rel. Frazier v. Winn (C. A. 11 [Fla.], 535 F. 3d 1279), July 23, 2008.

Florida statute, to the extent that it required public school students to obtain parental permission to be excused from reciting the pledge of allegiance, did **not** violate the First Amendment's freedom of expression. Students' parents *had the fundamental right to control* their children's upbringing. Furthermore, the statute ***was neutral*** in regard to the pledge in that it deferred to students parents' expressed wishes.

"Student Received Adequate Notice and Meaningful Opportunity to be Heard at Expulsion Hearing"
Coronado v. Valleyview Public School Dist. 365-U (C. A. 7 [Ill.], 537 F. 3d 791), August 12, 2008.

During the lunch hour on February 4, 2008, several boys – some of them Latin Kings – sat down at the plaintiff's table in the school cafeteria. Within a few minutes, a member of a second gang, the Gangster Disciples, approached the table and began to taunt the group. The other boys, including the 15-year-old plaintiff rose to confront their rival, which attracted more Gangster Disciples. Both sides started shouting and making gang signs. But before the situation could escalate further, the bell rang and the group dispersed at the urging of a security guard. Shortly thereafter another security guard filed an incident report that included the plaintiff and 12 to 14 other students involved in the confrontation. Thereupon, the plaintiff, along with other involved students, received a two-semester expulsion from school. The plaintiff sued the school district, a police officer, and various school officials, claiming that his expulsion hearing deprived him of his procedural due process rights under the Fourteenth Amendment of the United States Constitution. The United Stated Court of Appeals, Seventh Circuit, held that plaintiff **received adequate notice and a meaningful opportunity to be heard** at his disciplinary hearing before his expulsion from school. Therefore, he was *not* denied his due process rights.

Damages:

"Jury Awarded $6 Million to Motorist Rear-Ended By School Bus"
Donnellan v. First Student, Inc. (Ill. App. 1 Dist., 322 Ill. Dec. 448, 891 N. E. 2d 463), June 19, 2008.

While $6 million was a large sum, jury's damages award of $6 million to motorist, who sustained brain injury when his van was rear-ended by school bus, **was by *no* means so large as to shock the conscience as compensation for a lifetime of consequences** that motorist and his family faced due to physical and mental limitations posed by his injuries. In addition to brain injury, the doctor diagnosed motorist with fourth nerve palsy, dystonia, myofascial pain, allodynia, occipital neuralgia, and depression. As a result of these ailments were hypersensitivity to pain, cognitive dysfunctions, double vision, headaches, sleeping and mood problems and decreased ability to walk, and doctor opined that motorist's symptoms would all naturally worsen as he aged.

Disabled Students:

"Paintball Incident Not A Manifestation of Student's Disability"

Fitzgerald v. Fairfax County School Bd. (E. D. Va., 556 F. Supp. 2d 543), May 23, 2008.

On December 16, 2006, Kevin (plaintiff) and some friends decided to drive by Falls Church High School (FCHS) [on three different occasions the same day] and shoot at the their school, school owned vehicles, and school buses with paintball guns. The boys were in Kevin's vehicle during the entire episode. In fact, during the episode, Kevin drove the group in an establishment that sold paintball gun supplies and purchased additional supplies, including CO2 cartridges and more paintballs. Kevin, an eleventh grader at the time, was classified under IDEA as a student with an emotional disability. However, the school board suspended Kevin for the remainder of his eleventh-grade year. He was allowed to enroll in a computer enhanced instructional program which enabled him to successfully complete the remainder of that year's course work. He did attend a regular Fairfax County public school other than FCHS for his senior year. His parents challenged the school district's procedures and finding of manifestation determination review (MDR) held by the school board which upheld his suspension. A United States District Court in Virginia held that the school board: (1) Did **not violate** IDEA's procedural requirements by choosing people to serve on plaintiff's MDR committee who were not "relevant members" of his IEP team. Plaintiff's parents **believed incorrectly** that "relevant members" were a limited class of persons who could only be individuals to serve on the plaintiff's MDR and if she or he knew the plaintiff personally and had served on the student's IEP team; (2) Did **not violate** the right of parents to "fundamentally fair" MDR process when MDR committee met informally to discuss the student's MDR before formal MRD hearing. Furthermore, the board did **not** unlawfully predetermine the outcome MDR; and (3) **Correctly determined** that the student's conduct was *not* caused by, and did not have a direct relationship to his disability and his suspension was **not** *impermissible* punishment under IDEA.

"A Functional Behavioral Assessment (FBA) is An 'Educational Evaluation' Under IDEA"

Harris v. District of Columbia (D. D. C., 561 F. Supp. 2d 63), June 23, 2008.

Student's parents sued the District of Columbia under IDEA seeking relief for the District's alleged failure to provide a FAE for their child (11-year-old with multiple disabilities). The Untied States District Court, District of Columbia, held that lapse of two years between evaluations **was sufficient** to confer on student's parent ***a right to seek*** an independent functional behavioral assessment (FBA), despite claim that school had already developed an effective IEP for the student. The IDEA act **was stuffed** provisions emphasizing the necessity of monitoring the IEP for revision purposes.

Labor and Employment:

"Employee Violated University's Use of E-mail Account Policy"
Bowers v. Scurry (C. A. 4 [Va.], 276 Fed. App. 278), May 2, 2008.

State university Human Resource employee, who was terminated for using her university e-mail account to send documents from private organization to which she belonged, opposed proposed legislation which the university support; brought state court action against university for violating her First Amendment rights. The plaintiff claimed the university terminated her employment in retaliation for exercising her freedom of speech and her association with the organization in which she had membership. The United States Court of Appeals, Fourth Circuit, held that the state university's interest in providing effective and efficient services to the public **strongly outweighed** plaintiff's interest in her expression, in the form of compensation and benefits documents that were prepared by a private organization to which she belonged and which she forward on her university e-mail account. Furthermore, the plaintiff's speech was **not** entitled to First Amendment protection within the framework of the United States Constitution because of the state's policy limiting the sending of personal e-mails from state accounts and computers bolstered the university's attempts to manage the dissemination of information from its accounts and providing effective and efficient services to the public that it serves.

"School District Did Not Violate FMLA"
Lyons v. North East Independent School Dist. (C. A. 5 [Tex.], 277 Fed. App. 455), May 7, 2008.

Plaintiff was employed as a clinic assistant at a middle school in the school district. She requested and was granted FMLA leave to begin on September 19, 2005, to care for her daughter, who had been injured in a car accident. Plaintiff returned to work on October 24, 2005. She requested and was granted additional FMLA leave beginning on February 27, 2006, for her own medical condition. She returned to work on March 21, 2006.

In August 2006, plaintiff requested FMLA leave for gallbladder surgery. The district denied her request on the grounds that she was not eligible for FMLA leave because she had not worked for the requisite 1,250 hours during the 12-month period preceding her request. The district placed her on leave under its temporary disability policy. She returned to work on September 5, 2006. Because the district had filled the clinic assistant position while plaintiff was on temporary disability leave, the district offered, and plaintiff accepted, a position as a special education assistant. That position had different duties and the pay was less than the pay for the clinic assistant position.

Plaintiff filed suit against the district. She claimed that the district violated the FMLA when it allowed her only seven weeks of FMLA leave rather than the 12 weeks to which she was entitled, and then demoted her and reduced her pay when she was absent for three more weeks as a result of gallbladder surgery.

The United States Court of Appeals, Fifth Circuit held that school district did **not** violate FMLA which provides a total of 12 work-weeks of leave during any 12-month period. In denying subsequent request of plaintiff who had qualified for leave within preceding 12 months and had not expended 12-week limit or leave, where school district began new FMLA leave year in period between plaintiff's previous qualifications for FMLA leave and plaintiff's subsequent request for additional leave, plaintiff had **not** accumulated 1250 hours of service in the 12 months immediately preceding her requested leave as required to support request in new FMLA year.

"Thirteen Felony Convictions Kept Substitute Teacher from Becoming a Permanent Teacher in School District"
Crook v. El Paso Independent School Dist. (C. A. 5 [Tex.], 277 Fed. App. 477), May 8, 2008.

Plaintiff, who had been convicted of 13 felonies, brought civil rights action against school district alleging employment discrimination, fraud, and equal protection and substantive due process violations for the district's refusal to hire him as a social studies teacher. *Note:* Plaintiff had been convicted of 13 counts of *felony barratry* (soliciting potential legal clients). Shortly thereafter, his license to practice law in the state of Texas was suspended for "disciplinary reasons". The United States Court of Appeals, Fifth Circuit, held that the school board's policy of *not* hiring convicted felons as permanent teachers (Plaintiff had worked for the school district as a substitute teacher.) **was reasonable** to further legitimate interest of protecting students from both physical harm and corrupt influences. Therefore, the district's policy did **not** violate the due process rights of the plaintiff.

Religion:

"Student Entitled to Preliminary Injunction Requiring School to Allow Religious Club to Show Video during School Announcements"
Krestan v. Deer Valley Unified School Dist. No. 97 of Maricopa County (D. Ariz., 561 F. Supp. 2d 1078), May 9, 2008.

Student member (plaintiff) of a student religious club (Common Cause) brought suit seeking injunctive relief to require school officials to allow her club to show a religious video (The video consisted of numerous photographs of students participating in their weekly prayer activity, including photographs of students holding hands and bowing their heads. The audio portion of the video consisted of music played by a Christian rock band. A United States District Court, D. Arizona, held that plaintiff **showed likelihood of success** on merits of her claim that the display of the video ***was required*** by the Equal Access Act, which provided equal access to limited public forms for student religious organizations absent an Establishment Clause violation.

School Districts:

"School District Did Not Create an Open Forum by Linking Its Websites to Other Websites It Did *Not* Control"
Page v. Lexington County School Dist. One (C. A. 4 [S. C.], 531 F. 3d 275), June 23, 2008.

County resident (plaintiff) brought First Amendment action against county school district, seeking equal access to the school district's website and other information distribution channels in order to register support for pending state legislative action. The United States Court of Appeals, Fourth Circuit, stated that the school district's advocacy via e-mail for the defeat of pending state legislation that would institute tax credits for private and parochial school tuition and home-schooling expenses did **not** create a limited public forum in its e-mail facility, so as to prohibit exclusion of opposing point of view under the First Amendment of the United States Constitution. Furthermore, the school district **maintained complete control** of its website, **retaining right and ability to exclude any link at any time**.

Security:

"Student's School Records Were Admissible in Student Rape Case"
Doe v. Department of Education of City of New York (N. Y. A. D. 2 Dept., 862 N. Y. S. 2d 598), August 12, 2008.

The plaintiff, along with her father, sought to recover damages for injuries she allegedly received when she was sexually assaulted by a fellow student in a stairwell at her high school. Plaintiff sought evidence from school officials which consisted of her attacker's prior school records, as well as records of prior assaults by students at the school, including a rape that was initiated in the same stairwell in which she was raped. Such records *were necessary* to demonstrate that the sexual assault on the plaintiff *was foreseeable*. The New York Supreme Court, Appellate Division, Second Department, held that evidence of alleged student attacker's prior school records, as well as records of prior assaults by students at high school, including the rape that was initiated in stairwell, was probative (necessary to prove or disprove) with respect to issue of whether alleged attack on student was foreseeable. Thus, the offending student's records, along with school records related to prior incidents, **were admissible** in plaintiff's action to recover damages for injuries she allegedly sustained when she was sexually assaulted by a fellow student.

"Security Guards Were *Not* School Employees and Defendant Could Not Be Charged With Battery Upon a School Employee"
State v. Johnson (N. M. App., 190 P. 3d 350), August 6, 2008.

Defendant and his cousin went to Gallup High school during regular school hours, although neither was a student there. During the process of trying to ascertain the identity and status of the two students, the cousin physically attacked two of the school's security guards. Thereupon, the defendant attempted to intervene in the fracas. During the confrontation, three of the security guards suffered head and facial injuries and the defendant was charged with three counts of battery upon school employees. The Court of Appeals of New Mexico stated that security guards at the high school who were employed by an independent security contractor were **not** "school employees". Therefore, the defendant or his cousin could **not** be charged with battery upon a school employee. Although the school district set the hours worked by the guards, supervised them on a daily basis, and required the guards to adhere to the policies and procedures of the school district; contractor *maintained conspicuous and superseding control over the guards, retained the ability to hire, fire, and discipline guards, was required to insure the guards, assigned to schools or elsewhere, and was the entity that paid the guards*.

Student Discipline:

"Admission of Hearsay Evidence Did Not Deny Student of His Due Process Rights His Expulsion Hearing"
E. K. v. Stamford Bd. of Educ. (D. Conn., 557 F. Supp. 2d 272), May 28, 2008.

Plaintiff was a senior in a Connecticut high school when he engaged in a verbal altercation at school (February 1, 2007) with a female student for which he was suspended from school. On February 3, 2007, the same female student received racist and threatening voice mail messages (off campus) from the plaintiff. On February 27, 2007, plaintiff engaged in an on campus fight with a male student. The school board expelled plaintiff for engaging in conduct, both on and off school grounds, which endangers persons or property and is a serious disruption to the educational process; plus, is a violation of school district policy pertaining to student conduct on and off the school's campus. A United District Court, D. Connecticut, held that the admission of hearsay evidence at high school student's expulsion hearing without allowing him to confront student witnesses and the limitation of student's cross-examination of the board of education's witnesses did **not** violate student's right to due process. The risk of deprivation of student's rights associated with due process **was low** and school officials **had a strong interest in protecting student witnesses**. Furthermore, the due procedures associated with the student's expulsion **complied with the board's administrative policies and procedures and corresponding state law**.

"Time-Out Room Right Place for Six-Year-Old"
Couture v. Board of Educ. of Albuquerque Public Schools (C. A. 10 [N. M.], 535 F. 3d 1243), August 3, 2008.

The United States Court of Appeals, Tenth Circuit, held that repeated placement of six-year-old public school student in an empty timeout room, as punishment for and as a method for controlling student's disruptive behavior in the classroom, did **not** implicate procedural due process requirements (Fourteenth Amendment). Although the student was placed in the timeout room 21 times for a total of approximately 12 hours during a period of approximately two and one-half months, *the timeouts were designed to settle down the student while keeping him within close proximity to the classroom*. The timeouts *balanced* the need for punishment and discipline with a goal of preserving access to public education. Furthermore, the timeouts *were provided for in the student IEP*, and any loss of student's due process property right to a FAE ***was trifling*** *(minimal)*.
Note: A number of the *problematic behaviors* displayed by the student including the following: defiance, uncooperativeness, argumentativeness, and aggressiveness. Teachers stated that the youngster throws things, does not do what is asked of him, sits under tables, plays with inappropriate things, isolates himself, and cuts up things. In addition, the other children stay away from him with some children being scared of him. He cannot sit at tables with other children because he talks, bothers them, and threatens other children.

"Threat of Blowing-Up School Not a Terroristic Threat"
C. G. M. II v. Juvenile Officer (Mo. App. W. D., 258 S. W. 3d 879), June 10, 2008.

Juvenile officer filed petition seeking determination that juvenile (12-year-old) was in need of the care and treatment of the Juvenile Court because he had committed an act, which if committed by an adult, would have constituted an offense of making a terroristic threat. The Missouri Court of Appeals, Western District, held that evidence **was insufficient** to establish that juvenile's statement to classmate, in which juvenile stated that he might receive dynamite from his father for his birthday, and inquired of his classmate whether he wanted to help blow-up the school, constituted an expression of the juvenile's intent to cause an incident involving danger to life or an unjustifiable risk to support a terroristic threat. Juvenile's statement *did make a listener question* whether he was making a serious expression to cause an incident involving danger to life. School principal testified that he would *not* have considered ordering any type of evacuation or closure of the school based on the student's statement.

Torts:

"Elementary Student Injured During 'Backward' Relay Race"
Smith v. J. H. West Elementary School (N. Y. A. D. 2 Dept., 861 N. Y. S. 2d 690), June 17, 2008.

In June 2005, a 10-year-old fifth grader (plaintiff), who was participating in a "backward" relay race organized by his school as part of a field day, allegedly was injured when he slipped or tripped, and fell. At his deposition, the plaintiff explained that while the relay race originally was to be a "forward" one, two school employees who were supervising the race turned it into a "backward" one, and *"told"* the students to start running backward. In addition, the plaintiff stated that before the field day began, his teachers *"told"* him that he would be participating in the race and he *"presumed that he had no choice but to participate."* The Supreme Court of New York, Appellate Division, Second Department, held that *genuine issue of material fact remained* as to whether elementary school teachers *compelled* fifth grade student to participate in backward relay race **precluded summary judgment** on the basis of *assumption of risk* in action to recover for injuries sustained by student during race. Therefore, the case would be referred back for retrial on the basis as to whether the plaintiff was "compelled" or "not compelled" to participate in the race, along with the associated circumstances.

"School Officials Did Not Have Notice or Knowledge of Alleged Misconduct That Was Associated With Student's Injuries"
Hallock v. Riverhead Cent. School Dist. (N. Y. A. D. 2 Dept., 861 N. Y. S. 2d 753), July 8, 2008.

Plaintiff, on behalf of her child, brought legal action against a school district to recover damages for personal injuries inflicted on plaintiff's child by a fellow student during school attendance. The Supreme Court of New York, Appellate Division, Second Department, held that school authorities **lacked sufficiently specific knowledge or notice** of the dangerous conduct by students which caused injury to another student to support imposition of liability in a personal injury suit. School officials **had no actual or constructive notice or knowledge** of the alleged misconduct on a school bus or at the school. **Note:** In so ruling, the court relied on the following legal concepts: "In determining whether the duty to provide adequate supervision has been breached in the context of injuries caused by the acts of fellow students, it must be established that school authorities had sufficiently specific knowledge or notice of the dangerous conduct which caused the individual's injury. That is, the third-party (offending perpetrator [student]) acts could reasonably have been anticipated."

"Water Bottle Delivery Man Slipped and Fell in School's Cafeteria"
Salerno v. North Colonie Cent. School Dist. (N. Y. A. D. 3 Dept., 861 N. Y. S. 2d 811), June 26, 2008.

Employee (plaintiff) of a water bottle distribution company brought action against a school district, seeking to recover damages for personal injuries he allegedly sustained while delivering bottled water to a high school. The Supreme Court of New York, Appellate Division, Third Department, ruled that the school district **established its entitlement to a positive judgment by the court** by demonstrating that **it did not create a dangerous condition** which caused employee to fall, namely, wet and greasy condition on the floor of cooler and/or kitchen, **nor had notice of it**. School employees testified at their depositions that the floor was clean and they did not see any puddles or greasy substance in cooler or kitchen either before or after the employee fell. Two cafeteria workers further explained that the kitchen was cleaned and mopped each night and only they were present in the kitchen the morning of the mishap. Furthermore, neither employee had entered the cooler nor cooked any food before the plaintiff arrived. Even the plaintiff himself testified that he did not see any greasy substance or water prior to his fall.

"Door Bracket Fell on Parent's Head"
Poston v. Unified School Dist. No. 387, Altoona-Midway, Wilson County (Kan., 189 P. 3d 517), August 1, 2008.

School district **was immune** from liability under the recreational use exception to Kansas' Tort Claims Act for an injury (A door bracket came loose and fell on plaintiff's head as he exited the school.) a parent (plaintiff) sustained in school's commons while his stepson participated in basketball practice in the school's gym. Even though the commons' primary use may have been non-recreational in that it was used daily as a cafeteria and provided access to various areas of the school. However, the commons was an integral part of the recreational use of the school's gymnasium and was connected to the gym by plan as the principal means for the public to gain access to the gym, purchase tickets, and buy concessions during sporting events in the gym.

Commentary:

No commentary this month.

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 October - November 2009

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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
- Religion
- Security
- Student Discipline
- Tort

Commentary:

- No commentary this month.

Topics

Civil Rights:

"Middle School Leaflet Distribution Policy Was Reasonable"
M. A. L. ex rel. M. L. v. Kinsland (C. A. 6 (Mich.), 543 F. 3d 841), October 7, 2008.

Middle school student through his parents, brought action against a school district, principal, and others alleging his First Amendment free speech rights were violated by a school regulation preventing him from handing-out leaflets in the school's hallways between classes. The United States Court of Appeals, Sixth Circuit, held that middle school's leaflet distribution policy which allowed students to post leaflets on bulletin boards in hallways and to distribute them in cafeteria during lunch **was reasonable restriction on time, place, and manner of communicating** non-school speech and did **not** violate the First Amendment of the United States Constitution.

"Assistant Principal Did Not Act on Behalf of Law Enforcement When Student Was Asked to Write a Statement"
S. E. v. Grant County Bd. of Educ. (C. A. 6 [Ky.], 544 F. 3d 633), October 24, 2008.

Plaintiff (parents) brought suit against school board, school officials, and school nurse alleging that administrative investigation that led to seventh grade student's placement in juvenile diversion program (six month probation) violated her constitutional rights (Fourth and Fifth Amendments). The United States Court of Appeals, Sixth Circuit, held that assistant the principal was **not** acting on behalf of law enforcement when he asked student to write a statement or her "side of the story" concerning events (Student was bi-polar and ADHD and took Adderall for her condition. She gave another student one of her Adderall pills.) that occurred on the last day of the previous school year. Also, the assistant principal was **not** required to administer Miranda warnings. Nothing was done over the summer break; however, the assistant principal called the two students into his office once school resumed after the summer break and asked them to write statements regarding the events that took place on the last day of school.

"Student's Desire to Wear 'Non-Otic jewelry' Was Not Protected Speech Under the First Amendment"

Bar-Navon v. Brevard County School Bd. ex rel. DiPatri (C. A. 11 [Fla.], 290 Fed. App. 273), August 15, 2008.

Sixteen-year-old high school student through her legal parent brought legal action against school board because the school district's student dress/grooming policy prohibited her from wearing to school her body pierceings located on her tongue, nasal septum, lip, navel, and chest. Plaintiff filed action alleging that the school board violated the student's First Amendment right to free speech by prohibiting her from wearing jewelry in her "non-otic" (pertaining to the ear) body piercings at school. Plaintiff asserted that her piercings were an expression of her individuality, a way of expressing her non-conformity and wild side, an expression of her openness to new ideas, and her readiness to take on challenges in life. Plaintiff stated expressly that the student non-compliant piercings were intended to make no religious or political statement. The Untied States Court of Appeals, Eleventh Circuit, held that school board's content and viewpoint neutral dress code dress/grooming policy, which prohibited the wearing of non-otic pierced jewelry, **was promulgated in furtherance of legitimate educational objectives, so as to survive intermediate level of free speech scrutiny**. Board sought to avoid extreme dress or appearance which *could have created* a school disturbance or which *could have been hazardous* to the student or to others. **Note:** The school district policy read as follows: "Pierced jewelry shall be limited to the ear. Dog collars, tongue rings, wallet chains, large hair picks, chains that connect one part of the body to another, or other jewelry/accessories that pose a safety concern for the student or other shall be prohibited."

"Coaches Failed to State Claim Against Newspaper"

Walters v. Seattle School Dist. No. 1 (W. D. Wash., 578 F. Supp. 2d 1310), September 15, 2008.

Plaintiffs were assistant coaches of the girl's basketball team at a Seattle, Washington high school. The Seattle Times conducted an investigation of the allegations pertaining to a recruiting scandal involving the plaintiffs and their high school girl's basketball program. After the publication of articles pertaining to the allegations and an investigation by the Seattle School District, the plaintiffs' contracts were not renewed. Thereupon, the plaintiffs filed legal action against the newspaper claiming that their procedural and substantive due process rights under the Fourteen Amendment of the United States Constitution were violated. The United States District Court, W. D. Washington, at Seattle held that the coaches **failed** to state a claim against the newspaper, absent any allegations that the newspaper had advocated for the coaches' dismissal.

"Hearing Impaired School Employee Was Not Substantially Limited In Her Ability to Perform Her Job"
Townsend v. Walla Walla School Dist. (Wash. App. Div. 3, 196 P. 3d 748), December 2, 2008.

Former school district employee's (part-time assistant cook and dishwasher) hearing impairment was **not** a sensory, mental, or physical abnormality that substantially limited her ability to perform her job at school *as required to establish* a prima facie case of discrimination, retaliation, and constructive discharge. Plaintiff's hearing impairment did **not** substantially limit her ability to assist in the middle school's kitchen or wash dishes. **Note:** The school district hired the plaintiff knowing that she wore a hearing aid and was clinically deaf. Plaintiff's primary responsibility was washing dishes. She had difficulty hearing while washing dishes because of dishwasher noise and her inability to read lips with her back turned to her co-workers. In addition, the plaintiff did not get along well with her supervisors. She quit her job with the school district on December 9, 2004.

Disabled Students:

"Hearing Officer Exceeded His Authority Under IDEA"
District of Columbia v. Doe (D. D. C., 573 F. Supp. 2d 57), August 28, 2008.

Hearing officer of the District of Columbia Public Schools (DCPS) **exceeded the scope of his authority** under IDEA when he reduced a 45-day suspension of a sixth grade student to 11 days. The 45 days suspension was issued by a DCPS Assistant Superintendent due to the fact that the student's misconduct was not a manifestation of his disabilities and that the discipline imposed would not constitute a denial of a FAPE.

"Student With Diabetes Mellitus and Adjustment Disorder Did Not Qualify for Benefits Under IDEA"
Loch v. Board of Educ. of Edwardsville Community School Dist. No. 7 (S. D. Ill., 573 F. Supp. 2d 1072), July 15, 2008.

High school student with diabetes mellitus, adjustment disorder, and social anxiety disorder was **not** a "child with a disability" under federal and state law, as would qualify her for special education and related benefits under IDEA. Although the student was being treated for diabetes and had been treated at times for emotional problems, these conditions did not affect her educational performance to the extent that she required special services and programs. The student was achieving well and did not need specialized instruction until she stopped attending classes and making-up her work.

"Graduated High School Student Not Entitled to Compensatory Education Services"

Gregory-Rivas v. District of Columbia (D. D. C, 577 F. Supp. 2d 4), September 8, 2008.

United States District Court, District of Columbia, held that graduated high school special education student was **not** denied a FAPE and was **not** entitled to compensatory education services. Plaintiff **failed** to make a showing of educational benefits denied to student as a result of the school's failure to comply with IDEA. Thus, any award of compensatory education services *would be arbitrary*.

"Student's IEP Was Appropriate"

Hinson ex rel. N. H. v. Merritt Educational Center (D. D. C., 579 F. Supp. 2d 89), September 29, 2008.

Student's (Thirteen-year-old male diagnosed with "ADHD".) IEP **was appropriate**, as required by IDEA, despite the claim by the student's mother that the IEP was not appropriate to address her son's "deficits in expressive and receptive language", which impacted his "ability to access the general curriculum". The plaintiff fully participated in her son's IEP development process, fully agreed with the substance of the IEP as drafted at the meeting, and signed the IEP indicating her agreement. **Note:** Included on the Multi-Disciplinary Team ("MDT") were the following: student, student's mother, a special education teacher, a general education teacher, an occupational therapist, a social worker, a speech therapist, a psychologist, and a representative from the Local Educational Agency ("LEA").

"Special Needs Student's Safety Was Not Disregarded When He Choked"

Mitchell v. Special Educ. Joint Agreement School Dist. No. 208 (Ill. App. 1 Dist., 325 Ill. Dec. 104, 897 N. E. 2d 352), October 22, 2008.

School personnel who monitored a special need student (Student suffers from Downs Syndrome, is profoundly mentally delayed, is not able to speak, and is severely hearing impaired. He also requires assistance with all of his daily functions, including meals.) during breakfast did **not** consciously disregard student's safety with respect to the incident in which the student choked on food he took from other students. Therefore, school personnel did **not** engage in willful or wanton conduct *so as to deprive* school district and related employees of *immunity* under Illinois' Tort Immunity Act. Student's professional aid stepped back a few feet from the student to a sink in order to clean up a small mess that the student has caused and did not turn her back on the plaintiff's child. Both aide and the student's teacher acted to intercede as soon as the youngster left his seat and began moving toward the other students. **Note:** Plaintiff had sought $50,000 for injuries he received as a result of his choking at breakfast.

Extra-Curricular Activities:

"Bible Club Entitled to Injunction"
Bible Club v. Placentia-Yorba Linda School Dist. (C. D. Cal., 573 F. Supp. 2d 1291), August 28, 2008.

A bible club sought preliminary injunction against a California school district and high school requiring the school district to grant it the same access to high school facilities and resources enjoyed by other clubs. The United States District Court, C. D. California, Southern Division, stated that the plaintiff who sought a preliminary injunction that would require a California school district to grant it the same access to high school's facilities and resources **was likely to succeed on the merits of its case** because the school district had likely violated the club's rights under the First Amendment and the Equal access Act (EAA). It **was extremely likely** that the school district had created a limited open forum by admitting at least one non-curriculum-related student group onto campus.

Labor and Employment:

"Teacher's Complaint About Missing Textbooks Was Not Protected Speech"
Carone v. Mascolo (D. Conn., 573 F. Supp. 2d 575), August 7, 2008.

Prior to the start of the 2005-2006 school year, construction was taking place at Seymour High School which cause some instructional materials used by a number of teachers to be misplaced. Among the misplaced materials were "Introduction to Business" textbooks used by Carone (plaintiff), a teacher in the high school. An assertive attempt by the plaintiff and the school's administration did not locate the missing textbooks prior to the beginning of the 2005-2006 school year. Thereupon the plaintiff took it upon herself to notify her ninth grade students' parents that "their public school was not providing textbooks for their students." In addition, she stated that she "would assign her students to a study hall until the textbooks arrived. The plaintiff received a written reprimand from her superiors for her unauthorized statements about the missing textbooks. She did not lose any pay or benefits as a result of her September 19, 2005, reprimand. The textbooks did arrive in October 2005. A United States District Court, D. Connecticut, held that the high school teacher's speech, in the form of communication to her immediate superiors complaining about missing textbooks and stating that because her students lacked textbooks; she would give students study hall and send a letter home to their parents that the school was not providing textbooks to her students was made pursuant to her official duties. Therefore, her speech was **not** protected under the First Amendment and her due process rights under the Fourteenth Amendment were **not** violated.

"Teacher's Misconduct Disqualified Her From Receiving Unemployment Benefits"
Schmidt v. Job Service North Dakota (N. D., 756 N. W. 2d 794), October 22, 2008.

Record **supported** a finding that claimant, who was a public school teacher, *deliberately disregarded* the school district's interests and *deliberately violated* the standards of behavior that the school district had a right to expect from her. Therefore, the conduct of the plaintiff ***supported the conclusions*** that the plaintiff's conduct constituted misconduct that ***disqualified*** her from receiving unemployment benefits after her teaching contract was *not* renewed. The teacher was told repeatedly to teach the prescribed curriculum for her classes. Instead the plaintiff took it upon herself to repeatedly and deliberately refuse to follow the school administrator's directive and continued to discuss Native American issues that were not part of her prescribed curriculum. Furthermore, a number of students had dropped her class because they were uncomfortable with the topic of her discussions.

"Teacher's Contract Non-Renewed 'My-Space' Activity"
Spanierman v. Hughes (D. Conn., 576 F. Supp. 2d 292), September 16, 2008.

Non-tenured high school teacher (plaintiff) brought legal action against school superintendent, assistant superintendent, and principal after his employment contract was not renewed following the discovery of his profile and activity on an Internet networking site (My-Space), alleging violation of his constitutional rights under the First and Fourteenth Amendments. The plaintiff's profile included a picture of himself when he was 10 years younger, pictures of naked men with "inappropriate comments" under them, and very peer-to-peer like conversations between the plaintiff and students. The United States District Court, D. Connecticut, held that the non-tenured teacher whose employment contract was not renewed after his profile and activity on an Internet networking site were discovered, **failed** to compare himself to two coworkers who had profiles on the same networking site due to the fact that he **failed** to submit any evidence with regard to the coworkers' activities on the networking site. Furthermore, the plaintiff **failed** to demonstrate causation between protected speech and adverse employment action, as would be required on a First Amendment retaliation claim.

"Swim Coach Not Reappointed"
Dorman v. Webster Cent. School Dist. (W. D. N. Y., 576 F. Supp. 2d 426), September 12, 2008.

High School swimming coach brought gender discrimination action against school district under Title VII. The school district contended that the coach failed to communicate effectively with players, parents, and other coaches; was the subject of a number of complaints, made no effort to visit other swim coaching programs or to establish an intramural program as she had promised to do in her third season, and exhibited "behavior unbecoming a varsity coach" by refusing to attend one swim meet and threatening not to attend the team's year-end banquet. The United States District Court, W. D. New York, held that school district's reasons for not renewing plaintiff's contract, including complaints against her and her failure to honor commitments, were **not pretexts** for gender discrimination in violation of Title VII.

"Teacher Not Subjected to Disability-Based Discrimination"
Ruane-Wilkens v. Board of Educ. of City of New York (N. Y. A. D. 2 Dept., 868 N. Y. S. 2d 112), November 18, 2008.

High school physical education teacher, who suffered from depression which included suicidal tendencies and the loss of touch with reality, was denied a transfer to another school due to not having enough seniority. The following fall her swim class was briefly increased from 25 to 40 and she was assigned to teach a weight-training class. Thereupon, the plaintiff alleged that these actions were taken against her in retaliation for her filing a transfer request. The Supreme Court of New York, Appellate Division, Second Department, held that the teacher's transfer request was **not** denied due to her disability. In fact, she herself *conceded* that the transfer was denied because she did *not* have enough seniority.

"School Bus Driver's Mental and Adjustment Disorders After Asthma Attack Were Compensable Psychic Injuries"
DeKalb Bd. Educ. v. Singleton (Ga. App., 668 S. E. 2d 767), October 17, 2008.

Plaintiff's depression, anxiety, and adjustment disorder, which followed an asthma attack after exposure to *fire*-extinguisher residue and cleaning products on plaintiff's school bus **were compensable** psychic injuries. Plaintiff psychic problems *contributed to a real fear* of her own death from further asthma attacks and *concern for* special needs children who she would have been transporting. A clinical psychologist *presented some evidence* that plaintiff's psychic condition originated from her job-related accident and that plaintiff's physical injury *contributed* to the continuation of her condition. **Note:** The school district parked its school buses in a lot over the summer months when school was not in session. Upon returning to work on August 8, 2005, all bus drivers report to the parking lot to pick up their buses and drive them to a designated parking spot for the coming school year. Upon finding her bus, the plaintiff discovered that the interior was covered with a white power, which she believed was fire extinguisher residue and mold. After cleaning the bus as much as possible, she drove the bus to her designated parking location. She parked the bus and got into her car and began to feel weak and drowsy. He son drove her to a medical center were she was diagnosed with an asthma attack, and was given a breathing treatment and medication.

Religion:

"Banning Religious Music in School Sponsored Programs Did Not Violate Establishment Clause"
Stratechuk v. Board of Educ., South Orange-Maplewood School Dist. (D. N. J., 577 F. Supp. 2d 731, August 29, 2008.

Father and legal guardian of two minor children brought legal action against a New Jersey school district alleging unconstitutional policy banning religious music in school district's public schools. A United States District Court in New Jersey, held that the school district interpretation of its "Religion in the Schools" policy with regard to the performance of holiday music did **not** violate students' First Amendment rights to receive information and ideas to learn and to academic freedom. December concerts were *not* a public forum and the district's interpretation of the policy **was reasonably related** to legitimate pedagogical concerns.

Security:

"Reasonable Suspicion Standard Satisfied When Students' Vehicles Was Searched"
State v. Best (N. J. Super. A. D., 959 A. 2d 243), November 10, 2008.

School principal **had reasonable suspicion** to search student's car parked on school grounds. The questioning of the student and search of his person **were justified** by the principal's knowledge that the student had sold green pills to another classmate in violation of school policy. However, when that search yielded several white capsules, but none of the green pills described by classmate, principal **was justified** in searching the student's locker. After searching the student's locker and finding no green pills, the principal **reasonably believed** that additional green pills were likely stashed in the student's car that was parked on campus. Therefore, the search **was narrowly focused** on the student's car because logically it was the only remaining place the green pills could have been hidden. As a note, school officials found both pills and marijuana in the student's car.

Student Discipline:

"Student Provided Notice and Hearing Prior to Emergency Expulsion"
Doe v. Mercer Island School Dist. No. 400 (C. A. 9 [Wash.], 288 Fed. App. 426), August 5, 2008.

Student brought action against a school district and superintendent, challenging his emergency expulsion and seeking expungement of his records. The United States Court of Appeals, Ninth Circuit, held that: (1) School district's emergency expulsion of student **was consistent** with Washington state's administrative code and did **not** violate student's substantive due process rights, where superintendent made the decision to expel the student based on his knowledge of the student's assault on two sisters who attended the same school and the possible threat of violence within the school; and (2) Student was **not** entitled to expungement of his records related to the assault incident, which consisted of a letter of the initial decision to expel the student and a letter of reinstatement, neither would be a part of his permanent record and both would be destroyed upon his graduation from high school.

"Middle School Special Education Student's Paddling Was Not Excessive"
C. A. ex rel. G. A. v. Morgan County Bd. of Educ. (E. D. Ky., 577 F. Supp. 2d 886), September 22, 2008.

Middle school special education student (I.Q. 42) **failed to demonstrate** that paddling by principal amounted to "excessive force" which would have violated her Fourteenth Amendment substantive due process rights. The plaintiff did **not prove that force applied** caused severe injury, was disproportionate to need presented, was inspired by malice or sadism, and was careless or unwise excess of zeal that amounted to brutal and inhuman abuse of official power that shocked the conscience. The only evidence of injury was "blood red whelp across both cheeks of her butt". Student admitted that she *was "out of control"* and was *not* responding to her teacher's other attempts to control her. Furthermore the student was paddled *as a last resort* and then *only at the command of her father*. **Note:** On the morning of the incident the student tore off some of her clothes, exhibited self-injuring behavior, kicked off her shoes, and was meowing like a cat.

Torts:

"Principal Not Deliberately Indifferent Toward Student's Sexual Abuse by Soccer Coach"
King v. Conroe Independent School Dist. (C. A. 5 [Tex.], 289 Fed. App. 1), May 27, 2007.

Junior high school student sued school district and a principal, asserting claims arising out of sexual abuse committed against her by a volleyball coach employed by the district. The United States Court of Appeals, Fifth Circuit, held that high school principal *did **not** act with deliberate indifference* toward the constitutional rights of the plaintiff who claimed sexual abuse by her female volleyball coach. Therefore, the principal's actions pertaining to the student's alleged sexual abuse **precluding an imposition** of liability in regard to the student's liability litigation against him. After hearing a rumor pertaining to a possible relationship between the coach and student, the principal met with the coach, questioned her about the alleged relationship, and upon receiving a denial, warned her to keep her relationship with students professional at all times.

"Student Coerced and Coached Into Writing Statements Alleging Sexual Misconduct By Teacher"
Palmer v. Bartosh (Pa. Cmwlth., 959 A. 2d 508), October 23, 2008.

Junior high/high school teacher and his spouse **pled sufficient facts to establish or raise the inference** that assistant superintendent of a school district and teacher's school principal, in their *individual capacities*, acted under the color of state law and with ***personal animus*** (deep-seated resentment and hostility), **to *deprive*** teacher of a property right to employment and his reputation in violation of the teacher's due process rights under both federal and state constitutions. Teacher alleged that assistant superintendent and principal engaged in a secret investigation of a student's accusations (student complained that teacher inappropriately touched her – proved to be false) raised against him, coerced statements against him, ***failed*** to advise him of specific accusations against him, and did *not* provide an opportunity for a rebuttal. By employing the preceding administrative process the previously mentioned administrators obtained the discharge of the accused teacher, which *proved to be unconstitutional*.

"Any Lack of Supervision Was Not Proximate Cause of Student's Injury"
Carey v. Commack Union Free School Dist. No. 10 (N. Y. A. D. 2 Dept., 867 N. Y. S. 2d 525), November 12, 2008.

Any lack of supervision on an elementary school's playground and related equipment was **not** the proximate cause of a student's injury that occurred when he lost his grip on a metal ring apparatus and fell. The student was engaged in approved use of the playground equipment and the accident occurred in so short of a span of time that even *closer supervision could not have prevented it*.

"Principal Injured When Arrested For Refusing to Allow Police to Speak With A Student"

Doyle v. City of Buffalo (N. Y. A. D. 4 Dept., 867 N. Y. S. 2d 614), November 14, 2008.

Jury award of $1.2 million for school principal's future pain and suffering, covering a period of 32.6 years, **deviated materially from reasonable compensation**, in action against city, police department, and arresting officers for personal injuries sustained when officers placed her under arrest for refusing to allow them to speak to a student. The plaintiff did sustain back injuries that would require future surgery, suffered from post-traumatic stress disorder that kept her from returning to work for three months, and had not been able to resume activities that she had previously enjoyed. **Note:** The award was reduced from $1.2 million to $825,000 for future pain and suffering.

"Fact Issue Existed Regarding Whether A School District Could Be Charged With Notice of Condition of Chair When a Leg Broke Cutting Off Part of Student's Finger"

Thomas v. Hempstead Union Free School Dist. (N. Y. A. D. 2 Dept., 868 N. Y. S. 2d 142), November 25, 2008.

The plaintiff, a seventh grade student in a middle school, was allegedly injured when the broken leg of the chair on which he was sitting in a classroom came down on his finger and sliced off the tip of his finger. The chair allegedly was *not* properly bolted to the floor. The Supreme Court of New York, Appellate Division, Second Department, held that *fact issue* **existed** as to whether the school district could be charged with *constructive notice of the condition of the chair*.

Commentary:

No commentary this month.

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

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

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Legal Update for District School Administrators December 2009 – January 2010

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
- Athletics
- Attorney Fees
- Civil Rights
- Criminal Justice
- Disabled Students
- Labor and Employment
- School Districts
- Security
- Standard and Competency
- Student Discipline
- Torts

Commentary:

- No commentary this month.

Topics

Abuse and Harassment:

"Student Subjected to Abusive Educational Environment Violated Title VI"
Howard v. Feliciano (D. Puerto Rico, 583 F. Supp. 2d 252), October 31, 2008.

Student's parents brought action against the Puerto Rico Department of Education, alleging discrimination based on race and national origin under Title VI of the Civil Rights Act. The student suffered from ADHD and Asperger's Syndrome and was in the seventh grade. There was un-contradicted evidence presented that the student was exposed to the following, especially by his seventh grade math teacher by the name of Gregorio Feliciano: posters in Feliciano's classroom with derogatory comments against "gringos"; Feliciano would make derogatory anti-American remarks in the classroom and would look "meanly" at the plaintiff; Feliciano would follow the plaintiff and call him a "son of a bitch American", "asshole", and "American jerk"; and when the plaintiff made a "C" on his Grade Report in math, Feliciano announced to the class "I am going to give gringo Robert a C because he is an American. The Untied States District Court, D. Puerto Rico held that (1) **Evidence supported** jury's verdict that student was subjected to discrimination based upon his national origin, and that the discrimination was sufficiently severe and pervasive as to create an abusive educational environment in violation of Title VI and (2) Jury's award of damages in the amount of $1,000,000 **was adequately supported** by the evidence.

"School District Liable for an Eleven Year Old Student's Harassment by an Older Student"

Dawn L. v. Greater Johnstown School Dist. (W. D. Pa., 586 F. Supp. 2d 332), November 13, 2008.

Parents of minor high school student with psychological problems (e. g. social phobia, selective mutism, and intellectual snobbery), on their behalf and on behalf of their daughter, brought Title IX action against a Pennsylvania school district for the district's unreasonable response in regard to the sexual harassment of their daughter by a female student who was at least two years older than their daughter. An United States District Count in Pennsylvania held that: (1) School district's response to suspected student-on-student sexual harassment **was unreasonable and indicated deliberate indifference**, despite repeated notices. School officials conducted *no* investigation until almost four weeks after the original complaint by victim's mother and its actual responses ***were patently unreasonable*** (e. g. principal advised one of the victim's teachers to "keep an eye out" for the two students, no notice was given to other teachers who taught the victim, assistant superintendent failed to institute an immediate investigation even after far more detailed information was learned about the victim's harassment, no practical choice [except remove victim from school and place in homebound instruction] was given to the victim's mother, and the superintend did not inquire into the victim's harassment which was contrary to school district policy) and (2) Under Title IX the plaintiff's daughter **was deprived of access to educational opportunities and benefits** as a direct result of her removal from school and placement on homebound instruction for almost two months.

"School District <u>Not</u> Entitled to Summary Judgment Regarding Student-On-Student Harassment"

Patterson v. Hudson Area Schools (C. A. 6 [Mich.], 551 F. 3d 438), January 6, 2009.

Genuine issue of material fact, as to whether officials in a school district were *deliberately indifferent* to student-on-student sexual harassment of student, **precluded summary judgment** for school district on parents' Title IX claim. School officials *had knowledge* that its methods for dealing with the overall student-on-student sexual harassment of the victim *were ineffective, but continued to employ only those methods*. **<u>Note:</u>** Beginning in the sixth grade, with continuation into high school, students teased and mistreated the male student in ways similar to the following: pushed and shoved him in the hallways, called him names (e. g. pig, queer, faggot, fat, man boobs, "Mr. Clean" [due to supposed lack of pubic hair], and gay), and he was sexually assaulted by a student after baseball practice in the locker room.

"School District <u>Not</u> Liable for Teacher's Sexual Misconduct with Student"
Hansen v. Board of Trustees of Hamilton Southeastern School Corp. (C. A. 7 [Ind.], 551 F. 3d 599), December 23, 2008.

Parents of a high school student brought both Section 1983 and Title IX actions against a school district's board of trustees (negligent hiring and supervision) and against a teacher/assistant band director after the teacher had engaged in an improper sexual relationship with a high school student. While in therapy for substance abuse the victim admitted to a therapist that she had engaged in a sexual relationship with the teacher. During the investigation of the teacher it was learned that he had engaged in at least two other sexual relationships with female students, the first relationship was with a former student who is now his wife, in another school district. The United States Court of Appeals, Seventh Circuit held that: (1) There was **no** evidence that any school official of the school district with authority to institute corrective measures had been aware of the teacher's misconduct prior to the time that one student revealed the existence of a relationship to a therapist, after which school officials *took prompt disciplinary action against the teacher* and (2) There was **no** evidence that school officials knew or should have known of the teacher's past improper sexual relationship with former students at the time in which the teacher was hired. Therefore, the school district did **<u>not</u>** violate Title IX, nor was there sufficient evidence to support the district being negligent in regard to its personnel hiring/retention policies and procedures.

Athletics:

"Release Form Did Not Release School from Negligent Acts"
Clay City Consol. School Corp. v. Timberman (Ind. App., 896 N. E. 2d 1229), December 2, 2008.

Parents brought wrongful death action against school district following the death of their son during basketball practice. The Clay Superior Court entered judgment on a jury verdict in favor of the student's parents. The mother received $176,470.57 and the father received $123,529.43. The school district appealed the decision of the lower court. The Court of Appeals of Indiana held that: (1) The school's release form did **not** release the school district form any alleged negligent acts; (2) School officials **were required** to exercise reasonable care in the supervision of students during basketball practice and to anticipate and guard against conduct of students by which the student might harm himself or others; and (3) The trial court **erred** in instructing the jury that it "may" find for the school if the student was negligent. **Note:** The 13-year-old youngster had asthma and used an inhaler. On Monday, November 17, 2003, while practicing with his eighth-grade basketball team he complained of dizziness, along with stating that he had not eaten that day. The coach did not allow the student to continue practice, but allowed him to shoot free throws. After practice, the coach told the younger's mother what happened. They agreed that he would not participate in running or strenuous activity until he was checked by a physician. On Wednesday night, the youngster showed-up for basketball practice, the coach assumed he was all right, and allowed him to participate in basketball practice without restrictions. Toward the end of practice, while performing running drills, the student collapsed and did not recover despite the efforts of the coaches performing CPR and the EMTs efforts upon their arrival. The youngster died from a malignant type of heart rhythm abnormality known as "ventricular fibrillation".

"Junior High Wrestler Mismatched With Much Heaver Teammate"
Patrick v. Great Valley School Dist. (C. A. 3 [Pa.], 296 Fed. App. 258), October 9, 2008.

Genuine issues of material fact as to whether a junior high wrestling coach's *conduct* in matching a student (152 pounds) with a much heavier teammate (240 pounds) for live wrestling (a simulation of an actual competitive match conditions) *exhibited a level of culpability that shocked the conscience* **precluded summary judgment** for the coach as to his personal liability in a suit that was brought by the injured student and his mother in connection with injuries (injuries to victim's right leg when heavier wrestler collapsed on top of him) sustained by the student in the match.

Attorney Fees:

"Parents of Student Not Entitled to Attorney Fees under IDEA"
Bingham v. New Berlin School Dist. (C. A. 7 [Wis.], 550 F. 3d 601), December 4, 2008.

Parents of high school student brought suit pursuant to IDEA against a school district alleging that district personnel failed to evaluate student, implement an IEP, or notify them of their rights. At a point in time during the process the plaintiffs removed their son from the school district and enrolled him at a private school where he remained until he graduated from high school. The United States Court of Appeals, Seventh Circuit, held that parents of high school student were **not** *"prevailing parties"* under IDEA for purposes of recovering attorney fees, given that the school district voluntarily issued a check ($15,638) to the plaintiffs in the full amount requested and parents accepted the check *prior to* any due process hearing.

Civil Rights:

"Security Guard Used Excessive Force"
Pinkney v. Thomas (N. D. Ind., 583 F. Supp. 2d 970), September 17, 2008.

A full-time firefighter was working as a part-time security guard for the Fort Wayne Community schools when he received a call on his two-way radio that there were two kids were fighting in front of the school. The situation turned out to be a student (plaintiff) who was arguing, along with some grappling (wrestling), with an adult male over some money that the student had given the adult male for a ride to school. When the adult male saw the security guard, he got in his vehicle and drove off. Thereupon, the security guard sought to question the student to find out what was going on. As the security guard approached the student, he started walking away, and almost immediately started running away from the security guard. The guard gave chase, along with a police officer who was some distance behind the security guard. As the plaintiff attempted to jump a fence, the security guard grabbed the student's left arm with both hands and seized him. Almost instantaneously, the police officer arrived and hit the student three times in the face as the security guard held his left arm. The student was then ordered to his knees and was hand-cuffed. The plaintiff brought action against both the security guard and the police officer. Plaintiff claimed that the security guard used unreasonable force in concert with the officer and he should have stopped the officer from hitting him. The security guard moved for summary judgment and to strike the case. A United States appeals court in Indiana held that: (1) Guard was **not** entitled to summary judgment on the plaintiff's battery's claim; (2) The guard's grabbing of the arrestee was **not** unreasonable force under the Fourth Amendment; (3) Guard was **not** liable on plaintiff's excessive force claim; and (4) The security guard was **not** entitled to summary judgment on the plaintiff's excessive force claim to the extent that the guard allegedly *failed* to take *reasonable steps to stop the officer's alleged assault* on the student.

"Evidence Supported Jury Verdict for School District in Title VII Action"
Stover v. Hattiesburg Public School Dist. (C. A. 5 [Miss.], 549 F. 3d 985), November 18, 2008.

African American female employee, who was the superintendent's secretary and not a licensed educator, brought action against the Hattiesburg Public School District asserting Title VII claims associated with race and sex discrimination, retaliation, and violation of the Equal Pay Act. The plaintiff claimed that she had assumed the duties associated with "a high cabinet level administrator" after that particular individual resigned to take a superintendent's position in another school district. Approximately two years after the aforementioned resignation, the school district decided to hire an individual (white male with a bachelor's degree in English and a master's degree in Educational Administration) to fill the vacated position. Thereupon, the plaintiff claimed that the "new hire" and she were "Administrative Assistants", performed equal work, and should be paid the same. Therefore, she filed a charge of discrimination based on race and sex with the Equal Employment Opportunity Commission (EEOC) and a violation of the Equal Pay Act (EPA). The plaintiff later resigned, but prior to her resignation, she allegedly destroyed or deleted computer information from a district owned computer. The United States Court of Appeals, Fifth Circuit, held that **evidence was sufficient to support** jury finding that the school district did **not** discriminate against plaintiff, who worked as a secretary to the superintendent, on the basis of race or sex in violation of Title VII.

"Fired Teachers Who Protested School Closings Were Entitled to Preliminary Relief in Their First Amendment Suit"
Conn v. Board of Educ. of City of Detroit (E. D. Mich., 586 F. Supp. 2d 852), November 6, 2008.

Tenured classroom teachers brought a civil rights suit against the Board of Education for the City of Detroit for placing them on administrative leave and later terminating their employment in retaliation for the exercise of their First Amendment rights and assembly in opposing the closing of 38 schools due to budget difficulties. The teachers had participated (They received advanced permission to be off from work for the demonstration.) in a march and a rally in opposition of the district's school closing plan. After receiving notice of their termination, the teachers sought preliminary relief to restore them to their teaching positions. A United States District Court in Michigan held that the plaintiffs who sought a preliminary injunction to restore them to their positions **had the strong likelihood for success** on the merits of their claim that they were terminated in violation of their Fist Amendment rights associated with protected activities related to protesting school closings.

"Response to a Racially-Charged Incident Was Not Deliberately Indifferent"
D. T. Somers Cent. School Dist. (S. D. N. Y., 588 F. Supp. 2d 485), November 24, 2008.

School district's response to allegedly racially-charged incident that occurred against plaintiff student in the high school's cafeteria, wherein the plaintiff was hit in the back of the head approximately 12 times and accused of not being a "good nigger," was **not** *so deliberately indifferent* as to be clearly unreasonable. Furthermore, the incident did **not** *support* a claim of hostile educational environment claim under title VI. Acting principal of the high school did engage in "some forms of investigation" into the incident, even though the victim's parents and the student may have been disappointed with the outcome. However, the student *was never again subjected to harassment* by the students involved in the incident. **Note:** No disciplinary action was taken against the offending students; however, the acting principal did observe the plaintiff's youngster on a very regular basis. In fact, during such observations, she saw him seated at the same lunch table with the same group of students involved in the cafeteria incident.

"Student Not Entitled to Preliminary Injunction Barring Disciplinary Action for Wearing T-Shirt"
Miller ex rel. Miller v. Penn Manor School Dist. (E. D. Pa., 588 F. Supp. 2d 606), September 30, 2008.

A 14-year-old ninth grader, wore a T-shirt to school that his uncle purchased for him at the Fort Benning Post Exchange. The T-shirt prominently displays images of an automatic handgun on the front pocket area and back of the T-shirt. The front pocket of the T-shirt is also imprinted with the statement "Volunteer Homeland Security" with the image of an automatic handgun placed between the word "Volunteer" above the handgun and the words "Homeland Security" below the handgun. The back of the T-shirt is imprinted with the statement "Special Issue-Resident-Lifetime License, United States Terrorist Hunting Permit, Permit No. 91101, Gun Owner-No Bag Limit" in block letters superimposed over a larger automatic handgun. The plaintiffs (student's parents) sought a preliminary injunction on behalf of the son challenging the constitutionally of the school district's student expression policy and baring any disciplinary action by school officials in regard to their son. A United States district court in Pennsylvania held that: (1) The First Amendment does not prohibit schools from restricting speech that is vulgar, lewd, or obscene, or that promotes illegal behavior and (2) Student was **not** *likely to succeed on merits of his claim* that high school's refusal to permit him to wear T-shirt displaying images of automatic handgun and purporting to be a hunting license for terrorists violated his First Amendment free speech rights. Thus, the student was **not entitled** to a preliminary injunction barring school from enforcing the ban pertaining to his T-shirt, despite the student's contentions that the T-shirt was intended to show his support for the United States troops serving in Iraq.

"Private Day School Constituted 'School Property' Even If It Reverted to Church Property"
King v. Com. (Va. App., 670 S. E. 2d 767), January 13, 2009.

On or around 8:00 p. m. on Friday, August 25, 2006, plaintiff discharged a firearm in the City of Hopewell, hitting an individual in her throat. The discharge occurred approximately 795 feet from the property line of the premises leased by The LEAD Center, a private day school. The plaintiff was convicted in circuit court of willfully discharging a firearm within 1,000 feet of the property line of school property, and he appealed. The Court of Appeals of Virginia, Richmond, held that for purposes of statute making it unlawful to willfully discharge a firearm upon any public property within 1,000 feet of the property line of any public school, private school, religious school or private day school for students with disabilities **constituted "school property"**. The aforementioned is legally valid even though, based on the terms of the lease the premises reverted from school property to church property at 6:00 p. m. on Friday and did not revert back to school property until 7:00 a. m. the following Monday morning. There was **no** distinction between schools that leased their facilities and those that did not, nor did it distinguish between schools *based on how or by whom* they were used after hours.

Disabled Students:

"Parents of Disabled Student Not Entitled to Reimbursement"
Matrejek v. Brewster Cent. School Dist. (C. A. 2 [N. Y.], 293 Fed. App. 20), August 19, 2008.

Finding of state review officer (SRO) in parents' action for tuition reimbursement under IDEA that disabled student, failed to make progress at private educational institution, **was entitled to deference** (yielding to the judgment of the SRO) **on judicial review**. This was due to the fact that the SRO's *findings were detailed, administrative proceedings were thorough, and conclusions arrived at were supported by preponderance of evidence*. The plaintiffs child's (8th grader) grades and progress reports during his first two years in private placement showed inconsistent and worsening academic performance, his standardized test scores fell further behind those of his peers, and he did not improve his reading level beyond what he had attainted during his last year of public school three years earlier.

"Learning Disabled Student Was Provided a FAPE"
Patskin v. Board of Educ. of Webster Cent. School Dist. (W. D. N. Y., 583 F. Supp. 2d 422), October 30, 2008.

School district offered learning-disabled child a FAPE in a LRE, **comporting** (in accordance) **with IDEA requirements**, pursuant to IEP declining to place child in a school exclusively providing full-day special education to learning-disabled students. The student was performing satisfactorily in pubic school placement with supplemental special educational services *that were more than trivial*, and the student's placement was part of the district's *reasonable effort to accommodate* the student in a regular classroom for all subjects not requiring specialized instruction from a special education teacher.

"IEP Offered Autistic Student a FAPE as Required Under IDEA"
M. M. ex rel. A. M. v. New York City Dept. of Educ. Region 9 (Dist. 2) (S. D. N. Y., 583 F. Supp. 2d 498), October 21, 2008.

IEP offered to a six-year-old autistic student by a school district **complied** with IDEA and **offered** student a FAPE. The IEP **reflected** evaluations submitted to the school district's committee on pre-school education and **accurately** reported student's levels of performance and the IEP **properly included** measurable annual goals, which **provided a framework** for further refinement by classroom personnel responsible for overseeing the youngster's program. The student's educational program **provided** *short term objectives* written with requisite specificity to enable the child's teachers and parents to understand expectations with respect to *each annual goal* and what the child would be working on over the course of the school year.

"Failure to Provide Extended School Year Services Constituted Failure to Implement IEP"
S. S. ex. rel. Shank v. Howard Road Academy (D. D. C., 585 F. Supp. 2d 56), November 12, 2008.

Failure of *charter school* to provide learning-disabled student with extended school year (ESY) services **constituted material failure** to implement IEP in violation of IDEA. The IEP team **had acknowledged** that due to *prior regressions* following periods of school closures, the student had a critical need for *program continuity* in order to facilitate achieving educational benefits.

"Placement of ADHD Student in Residential Program Was Not Necessary"
Ashland School Dist. v. Parents of Student R. J. (D. Or., 585 F. Supp. 2d 1208), October 6, 2008.

Placement of high school student diagnosed with ADHD in a private behavioral modification program was **not** necessary to meet student's educational needs, so as to require that the school district cover parents' cost of the program under IDEA. The student's placement in the private program **stemmed** from issues apart from the learning process **which manifested themselves** away from school grounds. Thus, the main reasons the student's mother withdrew her daughter from school ***had little to do with the quality of education*** that the student was receiving, but rather was due to the student's sneaking out of the house to carry on a relationship with a 28-year-old man and one or more teenage boys.

"Student Dies after Jumping from a Moving School Bus"
Hill v. Bradley County Bd. of Educ. (C. A. 6 [Tenn.], 295 Fed. App. 740), September 30, 2008.

School board did **not** intentionally discriminate in violation of Section 504 of the Rehabilitation Act against high school freshman who had been diagnosed with ADHD, bipolar disorder, schizophrenia, depression, and who died when he jumped out of the window of a moving school bus. Furthermore, school officials were **not** deliberately indifferent in their treatment of the student in spite of the plaintiff's charges that included allegations such as promoting the student for non-academic reasons, failure to expedite evaluation and accommodations, forcing the student to reduce his medications, suspending student, failure to respond to suicide notes, and to stop harassment by other students. **None** of the aforementioned charges were supported by sufficient evidence to support "deliberate indifference" by school authorities. **Note:** Approximately 20 minutes after the student's bus left his school he approached his bus driver and asked her to let him off at a location that was *not* designated as a bus stop. When the bus driver refused, Rocky yelled, "Fuck it … I'll jump!" He then climbed out a passenger window while the bus was sill moving. Unable to maintain his grip on the outside of the moving bus, Rocky fell, suffering severe injuries. He died the next day after being removed from life support.

"Proposed IEP That Removed Student from History Course Provided FAPE"
J. S. ex rel. Y. S. v. North Colonie Cent. School Dist. (N. D. N. Y., 586 F. Supp. 2d 74), November 18, 2008.

Proposed IEP that removed disabled student with autism from a language-intensive mainstream history course in favor of a special education program **was reasonably calculated** to provide student with a FAPE in a least restrictive environment. The student had failed the regent's examination despite repeated enrollment in a general education history course and despite being provided with extensive support services, including a one-on-one aide. Furthermore, the student had difficulty with and tended to mentally withdraw from language-intensive coursework, and received greater benefit from attending self-contained special education classes.

"IEP for Learning and Emotionally Disabled Student Was Sufficient Under IDEA"
Kasenia R. ex rel. M. R. v. Brookline School Dist. (D. N. H., 588 F. Supp. 2d 175), December 5, 2008.

In 1998, plaintiffs' adopted six-year-old Kasey (student) and her two sisters from Russia. Plaintiffs alternated between home-schooling and enrolling Kasey in the Brookline Public School District. By the fourth grade the plaintiffs became concerned about Kasey and requested that she be evaluated. The evaluation of the youngster revealed that she had a learning disability in math (mathematical reasoning and calculation) and suffered from Reactive Attachment Disorder (an emotional disability negatively affecting her relationship with her caretakers). Kasey's parents were not dissatisfied with the school district's IEP for her and filed legal action against the school district. A United States District court in New Hampshire held that: (1) The IEP proposed by the school district for the plaintiff's youngster with an emotional disability and a learning disability in math **was reasonably calculated** to provide the student with a FAPE as required under IDEA. Even though the IEP did not provide for pull-out services in math, organization, and study skills (student's parents previously objected to the implementation of pull-out services), IEP did contain many services that were not contained in the earlier IEP. However, under the earlier IEP, the student had made marked academic and social progress, including obtaining a grade of "average" in math and grade of "above average" in her other academic subjects. Therefore, the plaintiffs' were **not** entitled to reimbursement under IDEA for their unilateral placement of their child at a private out-of-state school specializing in treating disabled children. The selected private school was **not** the least restrictive environment for Kasey to receive a FAPE under IDEA because the youngster had previously made educational progress in her educational placement in her assigned public school setting.

Labor and Employment:

"Teacher Entitled to Workers' Compensation Benefits Based on Average Weekly Wage Earned, Not Amount Paid"
Eaton v. Pinellas County School Bd. (Fla. App. 1 Dist., 995 So. 2d 1075), November 21, 2008.

Workers' compensation claimant **was entitled** to an average weekly wage calculation that was based on the amount she earned during the 13-week period preceding her work-related accident, rather than the amount she was paid during such period. Furthermore, regardless of the fact that as a school teacher, she opted to have her pay ($31,400.00) for 10 months of wages ($740.57-weekly rate) paid over 12 months of wages ($599.24-weekly rate – This was the amount she was paid each week during the 13-week period preceding her accident.).

"Director of Personnel Services Not Protected Under Title VII In Regard to Claim of Retaliation"
Coleman v. Loudoun County School Bd. (C. A. 4 [Va.], 294 Fed. App. 778), September 29, 2008.

Legitimate and non-discriminatory reasons **existed** for the termination of a female African-American Director of Personnel Services that had been employed in the aforementioned position for approximately two and one-half months. There were legitimate complaints about her job performance and **none were a pretext** for any type of retaliation against her for any protected conduct. **Note:** Some of the reasons associated with the plaintiff's termination included not working long enough hours to fulfill requirements associated with her responsibilities; failure to complete assigned duties and assignments; concerns about leadership abilities, lack of promptness in responding to requests from superiors; unable to provide updates regarding personnel hires, remaining vacancies, and outstanding job offer letters; and her expression to a hiring panel (on which she served) that they were lining up against two African American candidates for Director of Elementary Schools.

"School District Proffered Non-Discriminatory Reasons For Superintendent's Dismissal"
Hasson v. Glendale School Dist. (C. A. 3 [Pa.], 296 Fed. App. 226), October 10, 2008.

School district's proffered explanations for the dismissal of an Arab-American Muslim superintendent of Lebanese descent were **not** pretext for national origin discrimination in violation of Title VII. The school board came to a decision after a lengthy process involving detailed investigations and hearings on charges including in-competency, intemperance, neglect of duty, willful violation of and immorality in the performance of his duties, misuse of the district's funds, inappropriate discipline of staff, insubordination, and misrepresentation to the board that resulted in financial repercussions to the district.

"Sufficient Nexus Existed Between Sexual Relationship between Former Student and Teacher to Warrant Teacher's Termination on Immorality"
Lehto v. Board of Educ. of Caesar Rodney School Dist. (Del. Supr., 962 A. 2d 222), December 2, 2008.

Record **demonstrated *sufficient nexus*** between the sexual relationship between an elementary school teacher and his 17-year-old former student and the teacher's fitness to teach *so as to warrant teacher's termination* **on grounds of immorality**. The teacher had a sexual relationship with the student that began in the school environment. The relationship began when the student started to come to the elementary school to pick-up her younger sibling. Public controversy followed the teacher's arrest and the disclosure of the relationship, which compounded the teacher's job responsibilities associated with requiring teachers to serve as role models for their students. **Note:** The teacher was charged with fourth degree rape based on the student's age and his position as a person "in apposition of trust, authority or supervision" over her. The criminal charges were later dropped; however, the termination of the teacher was upheld.

School Districts:

"School District Did Not Owe Duty to Motorist Who Left School Parking Lot and Was Killed on Public Roadway"
Gammel v. Tate County School Dist. (Miss. App., 995 So. 2d 853), November 25, 2008.

In February 2005, Anthony Gammel (decedent) planned on attending a winter carnival at an elementary school, but was tragically struck by an oncoming motorist (Vehicle was traveling at a rate in excess of 50-miles-per-hour in a speed zone that was limited to 20-miles-per-hour.) while crossing the street that ran between the school's school bus parking lot and the elementary school. The Court of Appeals of Mississippi held that the school district did **not** owe a duty to the pedestrian who had parked in the school's bus parking lot, and was then struck and killed by a vehicle as he walked across a public roadway. The pedestrian was a trespasser when he parked his vehicle in a parking lot limited to school bus parking only, but lost that status when he stepped off that property and onto a roadway.

Security:

"Alcove on Campus Made Assault of "Special Needs" Student Foreseeable"
Jennifer C. v. Los Angeles Unified School Dist. (Cal. App. 2 Dist., 86 Cal. Rptr. 3d 274), December 8, 2008.

A 14-year-old student with special needs (e. g. hearing disability, aphasia, behavior problems, emotional difficulties, and cognitive difficulties.) brought action against school district for negligent supervision and maintaining a dangerous condition of public property, after being sexually assaulted by another "special needs" student. A California appeals court held: One, Maintenance of a hiding place on a school campus where a "special needs" child can be victimized **satisfies the foreseeability factor of the duty analysis, in determining a school district's liability for negligent supervision**, ***even in the absence of prior similar occurrences of victimization***. Two, "Special needs" student's sexual assault by another student **was foreseeable**, as would support finding that school district **had a duty** to student in her action for negligent supervision since as a "special needs' student she **was particularly vulnerable** to sexual assault. Therefore, an alcove beneath a concrete stairway on the school's border **was a foreseeable** hiding place; although the alcove was visible from a public sidewalk on the other side of a chain-link fence, it was *not* visible from elsewhere on the campus.

Standard and Competency:

"Teacher's Stress Was Not a Valid Excuse for Untimely Request for a Disciplinary Hearing"
Siegel v. Board of Educ. of City School Dist. of City of New York (N. Y. A. D. 1 Dept., 870 N. Y. S. 2d 341), January 13, 2009.

City board of education **had a rational basis** for concluding that a tenured teacher's explanation that his mental condition upon being served with a notice of charges against him did **not** constitute a valid excuse for failing to timely request a disciplinary hearing. The record revealed that the teacher was served with the charges personally and by mail. He had been represented by counsel during the investigation and had been told that charges were forthcoming. Furthermore, during the period in which he claimed that he was too stressed to properly function, he was able to function by managing his day-to-day activities, including reporting to his assigned work location and signing time sheets so he could be paid.

Student Discipline:

"Statute under Which Juvenile Was Adjudicated a Delinquent Was Not Vague"
In re D. B. (Ga. App., 669 S. E. 2d 480), November 10, 2008.

State statute making it unlawful for *any person* to disrupt or interfere with the operation of any public school was **not** ***void for vagueness***. The statute *contained words of ordinary meaning that provided fair notice* as to its application.

"Principal's Search of A Student for A Gun Was Legal"
In re. William P. (N. Y. A. D. 4 Dept., 870 N. Y. S. 2d 664), December 31, 2008.

Juvenile was adjudicated a delinquent based on a finding that he committed the crime of "unlawful possession of weapons by persons under the age of 16-years-of-age". The juvenile appealed the judgment based on the allegation that he was illegally searched by a school principal based on information received by another student that the plaintiff had a gun in his book bag. The Supreme Court of New York, Appellate Division, Fourth Department, held that the plaintiff **failed to lay out** a factual scenario which, if credited, would have warranted the suppression of evidence. Thus, a suppression hearing pertaining to the evidence discovered by the principal **was not warranted**.

Torts:

"Teacher Was Reasonably Supervising Students When Student Tripped Over a Book Bag"
Smith v. Roman Catholic Church of Archdiocese of New Orleans (La. App. 4 Cir., 995 So. 2d 1257), December 17, 2008.

Parochial school teacher's supervision of students, including an 11-year-old fifth grader, who was injured in a trip and fall over a wheeled book bag while carrying equipment for the teacher, **was reasonable**. Therefore, liability could **not** be imposed on the school for failure to provide adequate supervision. The teacher was walking beside the plaintiff's child when another student walked in front of him with a wheeled book bag. The teacher could ***not*** *have reasonably foreseen or prevented the accident because it happened suddenly and without warning*.

"Teacher Liable for Student's Injury during Rocket Launch Experiment"
Dollar v. Grammens (Ga. App., 670 S. E. 2d 555), November 26, 2008.

Compliance with school district policy that required students to wear protective eye gear when conducting experiments or involved in instruction involving caustic or explosive materials *was a ministerial act*. Thus, a teacher was **not** entitled to official immunity from a law suit that was based on the teacher's noncompliance with the policy that resulted in a middle school student sustaining an eye injury when a metal pin used to "launch" a bottle struck the student's eye. Furthermore, instructions for the experiment specifically warned the teacher of the risk of an explosion.

"Vice-Principal Did Not Suffer Emotional Distress Due to Students' Offensive Website"
Draker v. Schreiber (Tex. App.-San Antonio, 271 S. W. 3d 318), August 13, 2008.

Vice principal's claims, which included the intentional infliction of emotional distress, civil conspiracy, and negligence against two high school students who published an offensive website ostensibly belonging to the vice-principal **failed** to demonstrate the claims sought by the plaintiff. Thus, the claims sought by the vice principal were **not** viable. **Note:** The website created by the students contained the name of the vice principal, plus a photo, place of employment, and explicit and graphic sexual references.

"Alleged Absence of Traction Tape on Bleachers Did Not Establish Defect That Created an Unreasonable Risk of Harm"

Mason v. Monroe City School Bd. (La. App. 2 Cir., 996 So. 2d 377), September 17, 2008.

Alleged absence of traction tape on the bleachers at a high school football field and fact that a child fell through the rail at the bottom of bleachers, *standing alone*, did **not** establish that any defect that created an unreasonable risk of harm existed as so required for child's parents to prevail on premises liability claim against school board for the injuries the child suffered when she lost her footing and fell while attending a youth football game. **Note:** The high school custodian observed the plaintiffs' child running down the steps of the football stadium, while playing and being chased by another child, at the time in which the fall occurred. Prior to the fall, the custodian asked the child to stop running and he observed that her parents did nothing to stop her from running and playing.

Commentary:

No commentary this month.

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

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

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