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Legal Update for District School Administrators December 2009 – January 2010

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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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Legal Update for District School Administrators February 2010 – March 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
- Administrators
- Athletics
- Charter Schools
- Civil Rights
- Disabled Students
- Educational Malpractice
- Labor and Employment
- Security
- Student Discipline
- Terroristic Threats
- Torts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"Principal Not Entitled to Immunity In Regard to Sexual Harassment of Student by Teacher"
C. C. ex rel. Andrews v. Monroe County Bd. of Educ. (C. A. 11 [Ala.], 299 Fed. App. 937, November 10, 2008.

Under Alabama law, a middle school principal was **not** entitled to state-agent immunity where *policy imposed affirmative duties* on him to investigate complaints of sexual harassment of students and to submit a completed investigation to his superintendent or designee for review. The principal *failed to do so*; therefore *he acted beyond his authority* by failing to comply with the requirements of the policy. The court further stated that the principal **failed** to act within the *"scope of his discretionary authority"*. **Note:** The facts of the case focused on the alleged sexual molestation of two middle school female students by a male teacher on or about January 21, 2000. The principal met with the students, their parents, and the teacher. The teacher denied the allegation. Thereafter, the principal looked-in on the teacher from time to time and monitored his interaction with students in the school's hallways. Sometimes during May 2000, the teacher again sexually molested the same two students. After the students' parents found out about the May 2000, incident, they went to the police.

"Principal's Visit To Classroom to Discuss His Military Service During The Gulf War Did Not Create A Hostile Educational Environment"
Kamal v. Hopmayer (C. A. 2 [N. Y.], 300 Fed. App. 37), November 12, 2008.

High school principal's frequent visits to an Iranian student's (plaintiff) English class to discuss his Gulf War military service **were insufficient** to state a claim for a hostile educational environment. Plaintiff did *not* allege that the principal expressed an prejudice or negative sentiments about Iranians, Muslims, or any other group during his discussions with the class. In addition, the Iranian student's suspension from school for his role in a physical altercation with a Caucasian student did **not** suggest discrimination on the part of the high school principal. The principal punished the Caucasian student less severely than he punished the plaintiff. However, based on a teacher's eyewitness report pertaining to the altercation, the Iranian student was the clear aggressor due to the fact he was the first student to strike the other student with a closed fist.

"United States Government Entitled to Documents Related to Child Sexual Abuse on School Buses"
Lopez v. Metropolitan Government of Nashville and Davison County (M. D. Tenn., 594 F. Supp. 2d 862), January 15, 2009.

The United States Department of Justice (DOJ) moved to intervene in tort action brought against the city of Nashville, and Davidson County, Tennessee (e. g. Metro Police Department and Metropolitan Nashville Public School System) on behalf of a special needs student who alleged sexual abuse on school buses. The United States District Court, M. D. Tennessee, Nashville Division, held that the DOJ **was** a law enforcement agency **entitled to an exception** to Tennessee statute that prohibited the release of information concerning reports or investigations which pertained to child abuse. Therefore, the DOJ **was entitled** to documents relating to complaints or investigations of alleged sexual misconduct, harassment, or assault which allegedly occurred on school buses that transported students to and from city schools to determine the extent to which the city's policies and practices may have fostered an environment conducive to sexual harassment in violation of Title IX.

Administrators:

"Superintendent Appointee Showed Probability of Proving Malice in Regard to Accusation She Was a Communist"
Nguyen-Lam v. Cao (Cal. App. 4 Dist., 90 Cal. Rptr. 3d 205), February 26, 2009.

Vietnamese former appointee (plaintiff) for a school superintendent's position **showed a probability of proving** by clear and convincing evidence that a person who allegedly told school board members that she was a Communist did so with **actual malice**; thus **supporting** the trial court's decision to grant leave for the plaintiff to amend her defamation complaint upon defendant's motion to strike as a "strategic lawsuit against public participation (SLAPP). Even if the plaintiff's original complaint did not allege actual malice, where the plaintiff presented evidence that defendant *held himself-out as having inside knowledge about her*, and the defendant admitted he had never met plaintiff and knew her only through media reports that did not hit that she was a Communist. Therefore, a jury **could reasonably determine** that the defendant ***lied*** in leveling the charge because he had **no** basis for his claim. Based on such, a jury ***could infer malice*** from the lie. **Note:** On May 23, 2006, the school board of the Westminster School District (WSD) voted 4-1 in favor of the plaintiff to be its next superintendent. The next day, the plaintiff resigned her administrative position at California State University, Long Beach. On May 27, 2006, one of the board members who voted for the plaintiff called board president and told her that she "knew someone who knows all about Dr. Nguyen-Lam". The board member placed the defendant on the line and he accused "Dr. Nguyen-Lam of being a Communist, inexperienced, and unqualified for the position of superintendent". Less than a week after the board had appointed the plaintiff as their superintendent, the board voted 3-2 to terminate her as the school district's superintendent.

Athletics:

"Negligent Supervision Was Not the Cause of Student's Injuries during a Touch Football Game"
Bellinger v. Ballston Spa Cent. School Dist. (N. Y. A. D. 3 Dept., 871 N. Y. S. 2d 432), December 24, 2008.

Plaintiff's daughter, a fifth grader, was playing one-hand touch football at recess when she and a fellow teammate, both running toward the same opponent collided. The teammate's head hit plaintiff's daughter in the mouth, knocking out three of her teeth and fracturing a fourth. The court held that, even if the school's playground supervision was inadequate at the time of the incident, *such negligent supervision* was **not** the proximate cause of the student's injuries. There was **no** history of disciplinary problems or rough play among any of the children involved, and the collision at issue *was spontaneous and accidental*.

"School District Not Liable for Cheerleader's Injuries"
Williams v. Clinton Cent. School Dist. (N. Y. A. D. 4 Dept., 872 N. Y. S. 2d 262), February 6, 2009.

Student (plaintiff) brought action against a school district to recover damages for personal injuries sustained in a fall while performing a routine on a bare wood gym floor (no padded mats were present) during high school cheerleading practice. The court held that the school district was **not** liable for the plaintiff's injuries. The court went on to state that although a school district *has a duty to exercise ordinary reasonable care* to protect student athletes involved in extracurricular sports from *unreasonable increased risks*; **risks that are known and fully comprehended, open and obvious, inherent in the activity, and reasonably foreseeable *are assumed by the student athlete***.

"Both High School Cheerleader and Cheerleader Coach *Were Immune* from Liability In Regard to Cheerleader's Injuries"
Noffke ex rel. Swenson v. Bakke (Wis., 760 N. W. 2d 156), January 27, 2009.

High school cheerleader (plaintiff), who received a head injury when she fell while practicing a cheerleading stunt before a basketball game, brought suit against fellow cheerleader for negligently failing to spot her and the cheerleader coach for failing to provide safety precautions. The Supreme Court of Wisconsin stated that: (1) Fellow cheerleader was **not** reckless in regard to his failure to spot and prevent plaintiff from falling on her head while practicing a cheerleading stunt before a basketball game. Defendant cheerleader positioned himself in front of the plaintiff rather than behind; when people yelled at him to move in back of the plaintiff to catch her, he could not move fast enough to be in a position to catch her. Furthermore, there **was no evidence** that the defendant cheerleader *consciously disregarded* the risk of possible serious bodily harm to the plaintiff. (2) Cheerleading coach did **not** violate a *mistrial duty* in failing to provide safety precautions for plaintiff who was practicing a "post-to-hands" cheerleading stunt before a basketball game. Therefore, **neither** the coach nor school district **was liable** due to governmental immunity. The coach **had discretion** to determine appropriate safety precautions due to the fact that the cheerleaders were performing a stunt that was less difficult that others and they had performed the stunt many times in the past. In addition, the coach provided trained spotters and the stunt would intimately be performed without mats during the basketball game.

Charter Schools:

"State Legislature Could Direct Comptroller to Conduct Audit of Charter Schools"
New York Charter School Ass'n, Inc.. v. DiNapoli (N. Y. A. D. 3 Dept., 871 N. Y. S. 2d 497), January 15, 2009.

Charter schools and not-for-profit associations brought suit against the state of New York and the State's Comptroller's Office seeking a declaratory judgment that the Comptroller lacked the authority to audit the plaintiffs' accounts and other financial matters. The Supreme Court of New York, Appellate Division, Third Department, held that the state of New York **had the authority** to audit charter schools' books and that such audits **were within** the state's constitutional authority.

Civil Rights:

"Principal's Decision to Question and Search a Student Was <u>Not</u> Based on Impermissible Considerations"

Vassallo v. Lando (E. D. N. Y., 591 F. Supp. 2d 172), October 31, 2008.

A parent (plaintiff) on behalf of her child filed a civil rights action against a school district, principal, and superintendent alleging a violation of her son's Fourth Amendment rights against unlawful search and seizure and equal protection clause violations under the Fourteenth Amendment following the student's questioning and search after a fire in his high school's restroom. In regard to the case against the 11th grader, the following were undisputed facts: (1) Student was in the hallway on the third floor in the vicinity of the fire very shortly after the fire alarm sounded; (2) Upon making eye contact with his teacher in the hallway, the student said nothing, put up the hood of his sweatshirt, quickened his pace, and covered the lower part of his face; (3) Upon searching the student's backpack for evidence related to the fire (such as matches, lighters, or an accelerant), the principal found marijuana seeds; (4) At the direction of the high school principal and a police officer, the student's sweatshirt, shoes, and socks were removed and his shirt and pants legs lifted, but his pants and shirt were never removed; and (5) Upon observing a bulge in his waistband, the student was directed to remove the object and he removed a bag containing a small amount of marijuana from his waistband. A United States District Court in New York held that: (1) For a plaintiff to successfully prevail on an equal protection claim under the 14th Amendment the plaintiff must demonstrate that he was treated differently from other individuals who were similarly situated in all material respects -- he **was not treated differently** and (2) The search of the student's belongs, including his backpack, for evidence of his involvement in the restroom fire **was supported by reasonable suspicion** and did **<u>not</u>** violate the student's 4th Amendment civil rights. Furthermore the principal's search of the student was **<u>not</u>** an un-particularized suspicion or hunch. As a further **<u>note</u>**, the principal and the school's administration was unable to determine who started the fire in the school's third floor men's restroom.

"Alleged Football Workout resulting in a Student's Death Did Not Violate His Fourteenth Amendment"
Davis v. Carter (C. A. 11 [Ga.], 555 F. 3d 979), January 23, 2009.

The United States Court of Appeals, Eleventh Circuit, held that football coaches' alleged conduct in subjecting a high school student to vigorous voluntary football practice session, which allegedly caused the student's death during the early morning hours of the following day, **did not rise to the conscience-shocking level required** for a civil rights claim alleging a Fourteenth Amendment substantive due process violation. The student voluntarily participated in the extracurricular after-school activity, so **no** custodial relationship existed between the youngster and the school. Furthermore, the coaches did **not** engage in corporal punishment or physically abuse the student. The parents (plaintiffs) of the student alleged that the coaches failed to provide enough water to keep their son hydrated, ignored signs of dehydration, and their son complained to them that he was becoming dehydrated. In addition, the plaintiffs alleged that the coaches failed to attend to their child until after a team meeting, even though he had collapsed in the middle of the two-hour practice.

Disabled Students:

"School's Failure to Conduct a Functional Behavioral Assessment (FBA) Did Not Violate IDEA"
A. C. ex rel. M. C. v. Board of Educ. of The Chappaqua Cent. School Dist. (C. A. 2 [N. Y.], 553 F. 3d 165), January 16, 2009.

A public school district's failure to conduct a functional behavioral assessment (FBA), in accordance with New York State regulations, in developing the IEP for a student diagnosed with "pervasive developmental disorder and autism" was **not** a procedural violation of IDEA. The student's IEP provided strategies to address the student's behavioral problems by requiring a personal aide to prompt the student to focus during class, along with providing psychiatric and psychological assessments and related services. As a **note** to this case, the parents of the student claimed that the IEP promoted learned helplessness by providing the student with a personal aide. However, the student's IEP provided for decreasing the level of prompting from the aide where it was no longer needed.

"School District's Proposed IEP for Autistic Child Was Procedurally Appropriate"
T. P. ex rel S. P. v. Mamaroneck Union Free School Dist. (C. A. 2 [N. Y.], 554 F. 3d 247), February 3, 2009.

Parents (plaintiffs) and minor child brought action against a school district alleging failure to reimburse for educational expenses under IDEA. The United States Court of Appeals, Second Circuit, held that parents of minor child (kindergarten) seeking reimbursement for educational expenses under IDEA **failed** to establish that school district's proposed IEP was substantively inappropriate (Note: The student had attempted to bite a number of individuals.). The school district's IEP **included** *numerous supports and services* to assist the plaintiffs' autistic child with his transition from primarily a home-based educational program to a school-based program

"High School Student <u>Not</u> Emotionally Disturbed"
Mr. N. C. v. Bedford Cent. School Dist. (C. A. 2 [N. Y.], 300 Fed. App. 11), November 12, 2008.

High school student was **<u>not</u>** emotionally disturbed. Therefore, the student did **<u>not</u>** qualify as a "child with a disability" that would entitled him to a FAPE under IDEA; despite a therapist's diagnosis of major depression, which consisted of only a single episode, plus some evidence of inappropriate behavior within the school setting. A therapist who had the most familiarity with the student found that he did *not* suffer from depression, but rather *his decline was attributable to his acknowledged drug use*. Furthermore, the student had *not* failed any classes and had suffered a GPA decline of only nine points.

<u>Educational Malpractice:</u>

"Student Precluded From Bringing Claim Regarding Alleged Failure to Provide a FAPE"
Sturm v. Board of Kanawha County (W. Va., 672 S. E. 2d 606), December 2, 2008.

Former student (plaintiff), who was in a special education program and, after he graduated from high school, was awarded Social Security Income benefits after a finding that he was functionally illiterate, unable to perform activities within a schedule, unable to maintain regular attendance, and had no vocationally relevant work. The Supreme Court of Appeals of West Virginia held that plaintiff **failed** *to exhaust their administrative remedies* under Regulations for the Education of Students with Exceptionalities. Furthermore, the plaintiff **failed** to meet the burden of providing an exception to the exhaustion of administrative remedies; accordingly, the student **was precluded** from bringing a claim under the Regulations for the Education of Students with Exceptionalities against the County Board of Education for the alleged failure to provide him with a FAPE. **Neither** student nor his parents *ever took any affirmative steps via administrative process to address the perceived inadequacies in his education* prior to his graduation, *despite* having 12 years in which to utilize the administrative remedies available to them.

Labor and Employment:

"Former Teacher Did Not State a Claim Befitting a First Amendment Retaliation Claim"

Porr v. Daman (C. A. 2 [N. Y.], 299 Fed. App. 84), November 7, 2008.

Former school teacher's letters, telephone calls, and complaints regarding his ongoing dispute with another teacher were **not** constitutionally protected speech. Therefore, the teacher's constructive discharge (due to teacher's resignation) did **not** state claim for First Amendment retaliation due to the fact that the substance of the letters, telephone calls, and complaints were *not* matters of public concern, but *were* administrative matters. **Note:** The plaintiff had an ongoing dispute with another teacher who had allegedly assaulted him on numerous occasions. Furthermore, the alleged abusive teacher did not prevent his students from assaulting the plaintiff.

"Assistant Principal Terminated Due to Reporting Superintendent's Sexual Misconduct with a Minor"

Moore v. Middletown Enlarged City School Dist. (N. Y. A. D. 2 Dept., 871 N. Y. S. 2d 211), December 16, 2008.

The plaintiff (assistant principal) reported his concerns of sexual misconduct between the then superintendent of the school district and a minor student to school district officials and later to the press. Thereafter, school officials *retaliated* against him by eliminating his position as high school principal, which he had had for five years. Furthermore, school district officials refused to hire him in the newly named identical position entitled "house principal". In addition, the plaintiff was transferred to an assistant principal's position in another school within the district and assigned secretarial duties. The Supreme Court of New York, Appellate Division, Second Department, held that transferring the plaintiff to another school within the school district to perform secretarial work **was sufficient to state a retaliation claim** against the school district.

"Credentials of Plaintiff Were Not So Superior to Person Chosen over Plaintiff"

Barry v. New Britain Bd. of Educ. (C. A. 2 (C. A. 2 [Conn.], 300 Fed. App. 113), November 24, 2008.

Credentials of disappointed applicant, as plaintiff, **were not so superior** to credentials of person selected for the job of director of human resources for the board of education that ***no reasonable person*** *could have chosen that individual over the plaintiff,* ***as required*** *for the plaintiff to establish a pretext for his claims of age discrimination and retaliation under* Age Discrimination in Employment Act (ADEA). The former director of human resources and the newly hired director each had a law degree, which was the characteristic that the board desired to save money and increase office efficiency. The plaintiff was an experienced human resource manager, but was not a lawyer.

"Custodian Who Pled Nolo Contendere to Misdemeanor Controlled Substance Offense Could Not be Terminated"
Cahoon v. Governing Bd. of Ventura Unified School Dist. (Cal. App. 2 Dist., 89 Cal. Rptr. 3d 783), February 23, 2009.

Section of the California Education Code defining "conviction" to include nolo contendere pleas did **not implicitly amend** the section of the code prohibiting a school district from employing any person convicted of a controlled substance offense. The section of the code defining "conviction" was part of the legislation enacted to prohibit school districts from employing any person convicted of a sex offense based on a nolo contendere plea and was **not** intended to change the law on misdemeanor substance abuse offense convictions.

"Teacher's Low Back Injury and Psychological Disorder Were Not Caused By Prior Work Incident"
Bartley v. Allendale County School Dist. (S. C. App., 672 S. E. 2d 809), February 25, 2009.

Findings of Workers' Compensation Commission in denying an elementary teacher (plaintiff) permanent total disability benefits that allegedly related to injuries related to her buttocks, low back, right leg, dizziness, ear ringing, and psychological disorder were **not** caused or aggravated by prior work-related upper back injury; **was supported by substantial evidence**. The teacher was doing well and returned to work after her initial surgery and treating physician indicated that the teacher's new symptoms were likely related to another incident or unrelated condition. The teacher also has a long history of suffering from depression and headaches, and the teacher had no longer experienced such problems until she lifted some heavy books and began to work long hours. **Note:** On September 26, 2002, the plaintiff was supervising recess when a fifth-grade student with cerebral palsy ran toward her to give her a hug. The student inadvertently knocked her down onto some tree roots and fell on top of her. The plaintiff did not go to the emergency room for treatment, but had cervical fusion surgery on May 14, 2003. On July 18, 2003, the plaintiff alleged that the aforementioned incident caused injury to her right shoulder, neck, right arm and hand, left knee, and she began to have migraine headaches due to the incident. On or about October 2003, the plaintiff was confronted by a student who threatened to throw a student desk at her, which caused her to feel fearful and brought back memories of being physical hurt by the fifth-grade student inadvertently knocking her down.

"Notice Regarding Teacher's Injury Fulfilled Requirement of Workers' Compensation Law"

Swifton Public Schools v. Shields (Ark. App., 272 S. W. 3d 851), January 30, 2008.

Plaintiff was injured on August 14, 2003, while preparing her classroom for the new school year when she slipped on a piece of cardboard, fell forward and landed on her right knee. As a note, the teacher had been previously diagnosed with osteoarthritis in both knees. The plaintiff reported the injury to her principal about one and one-half hours later, but at the time she thought her knee was just badly bruised and it would get better. After several weeks with continued pain and swelling, she sought medical treatment from her primary care physician. On February 2, 2004, she underwent a total right arthroplasty. The Court of Appeals of Arkansas held that because her employing school district *was informed* of the plaintiff's injury *on the date that it occurred*, **the statutory notice requirement *was fulfilled***, regardless of when the actual form was filed. Plaintiff's testimony established that, not only did she *inform* her employer of the injury on the date it occurred but that her employer *was aware* that she had undergone medical treatment due to the fact that she missed work due to medical appointment and her two surgeries. Furthermore, she *informed* her employer of her *reasons for missing work*.

"Suspicionless and Random Drug Testing of Employees Was <u>Not</u> Justified as a Special Need"

American Federation of Teachers-West Virginia, AFL-CIO v. Kanawha County Bd. of Educ. (S. D. W. Va., 592 F. Supp. 2d 883), January 8, 2009.

A teacher union brought state court action against a school board, seeking to enjoin the implementation of a revised drug testing policy, which mandated the random testing of teachers and other public school employees on both constitutional and privacy grounds. The United States District Court, S. D. West Virginia, held that there was **<u>no</u>** evidence that teachers or other public school employees performed duties that *were so fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences, as required to deem their positions "safety sensitive"* ;and to justify school district's proposed implementation of a suspicionless drug test policy as a special need. Furthermore, there was **<u>no</u>** evidence that teachers and other employees had a pervasive drug problem or occupied positions for which observation would *not* detect the impairment. **<u>Note:</u>** "Safety sensitive positions" were defined as those which involve the care and supervision of students or where a single mistake by such employee can create an immediate threat of serious harm to students, to himself or herself or to fellow employee. Several of the "47 – safety sensitive positions" included within the policy were the following: superintendent, principal and assistant principal, teacher, coach, bus operator, chief mechanic, custodian, plumber, truck driver, and carpenter.

Security:

"Teacher Cannot Be Criminally Convicted For Sexual Intercourse with an Eighteen-Year-Old Student"

State v. Hirschfelder (Wash. App. Div. 2, 199 P. 3d 1017), January 13, 2009.

High school choir teacher (60 months older than his victim), allegedly had sexual intercourse with one of his 18-year-old female students who was a member of his high school choir. The incident occurred shortly before the student graduated from high school. The state of Washington charged the teacher with one count of first degree of sexual misconduct with a minor. The Court of Appeals of Washington, Division 2, held that the state legislature intended to criminalize only the behavior of school employees who had sexual intercourse with minor students who were under the age of 18 *and* who were at least 60 months older than the employee's victim. Therefore, the charges against the teacher **had to be dismissed**.

"Suspension of Student (Jane Doe) Created a *State Created Danger Theory for Liability*"

Wilson v. Columbus Bd. of Educ. (S. D. Ohio, 589 F. Supp. 2d 952), December 11, 2008.

Plaintiff (Jane Doe) was an eighth grade student at a middle school. Jane Doe lived with her mother and stepfather, with whom she had lived with almost all of her life. Beginning when Jane Doe was in the sixth grade, the stepfather sexually molested her and his molestation continued for approximately two years, until February 2005. On January 25, 2005, plaintiff was placed on a 10-day out-of-school suspension for shoving another student. While serving her suspension, with no one else around the house, her stepfather vaginally raped her for the first time during school hours on February 7, 2005. The plaintiff claimed that she had told her basketball coach/computer teacher that she was being sexually abused by her stepfather. While waiting to meet with the school's assistant principal she overheard a boy respond (according to Jane Doe's words), after learning of his out-of-school suspension by the assistant principal, "You don't know what will happen to me if I get suspended or if – something is going to happen cause I'm he's like – he said he's in a foster home and that he would get abused or something like that. I don't remember his exact words, but that's what he said." Regardless of what was said, Jane Doe jumped in the conversation and said something like, "I understand how you feel." Then she started to sob. Thereupon the assistant principal asked the school's counselor to talk with her. Jane Doe told the counselor that her basketball coach/computer teacher knew why she was unhappy. Afterward, the counselor observed that the plaintiff was upset, crying, and then non-responsive. An United States district court in Ohio held that **genuine issues of material fact existed**, as to whether an assistant principal who imposed a 10-day out-of-school disciplinary suspension on the plaintiff that was being sexually abused at home by her stepfather *was aware of the facts which **inferences** ("red flags") could be drawn* that that the youngster would be at home with her abuser during the administrative imposed suspension. Therefore, the court concluded whether assistant principal actually drew such an inference, **precluded summary judgment** for the assistant principal and school district under the **"state-created danger" theory** that is based on **"deliberate indifference to a known risk of danger"**. The imposing of the suspension on the plaintiff actually *resulted in an increase of harm* in regard to the student's liberty interests **which are protected** by the Fourteenth Amendment of the United States Constitution.

Student Discipline:

"Ban on Student's Wearing Confederate Flag on Clothing Did Not Violate Free Speech Rights of Students"
B. W. A. v. Farmington R-7 School Dis. (C. A. 8 [Mo.], 554 F. 3d 734), January 30, 2009.

A group of high school students brought legal action against a school district and school officials after they were sent home for refusing to remove items of clothing depicting the Confederate flag symbol. The United States Court of Appeals, Eighth Circuit, held that school officials at a high school of approximately 1,200 students **could reasonably forecast** a substantial disruption resulting from any display of the Confederate flag due to *substantial race-related events* occurring in both the school and in the community. Therefore, the ban pertaining to high school students wearing of clothing depicting the Confederate flag and accompanying discipline *did **not** amount to viewpoint discrimination* in violation of free speech under the First Amendment of the United States Constitution. School officials decided to issue the ban after the following events occurred: (1) a skirmish occurred between the high school that the plaintiffs attended and another high school during a basketball tournament when two students allegedly used racial slurs against two black players; (2) a white student urinated on a black student causing the black student to withdraw from the school district; (3) a fight occurred between a black student and a white student at the black student's home, leading to a later confrontation at the high school and; (4) numerous racial slurs were uttered by students at the high school, along with offensive symbols (e. g. swastikas and "white power song lyrics") being drawn on notebooks and chalkboards.

"Probable Cause Was Required for School Authorities to Search a Student's Person If the Items Seized In The Search Are to Be Used in Juvenile Proceedings"
State ex rel. Juvenile Dept. of Clackamas County v. M. A. D. (Or. App., 202 P. 3d 249), February 18, 2009.

The state of Oregon filed a petition for adjudication of a delinquent juvenile, based upon the charge that the juvenile committed what would be, if committed by an adult, a felony and misdemeanor crimes of possession and delivery of less than an ounce of marijuana within a 1,000 feet of a school. The juvenile moved to suppress the evidence. The Court of Appeals of Oregon held that in order for the state to use in a delinquency proceeding under the state's current juvenile code, evidence derived from the actions of school officials in lawfully confronting a juvenile based on information they had acquired, in lawfully searching the juvenile, and in lawfully seizing the contraband in the possession of the juvenile that could pose a risk to the safety of other students or that could interfere with the school's educational mission; the state's current constitution constitutionally **prohibits such a search** of a student and/or associated seizure of contraband ***unless it is based on nothing less than probable cause***.

Terroristic Threats:

"Evidence Did Not Support Delinquency Adjudication of Student for Making an Alleged Terroristic Threat"
P. J. B. v. State (Ala. Crim. App., 999 So. 2d 581), February 1, 2008.

The fact that a school principal had to meet with the juvenile as a result of the juvenile's threat to burn a corn field (While riding a school bus, the student told his school bus driver, "I want to set that field on fire.") did **not** amount to a "disruption of school activities" so as to be necessary to sustain a juvenile's delinquency adjudication for making a terroristic threat. The principal's meeting with the student did **not** disrupt any activity associated with the normal functionally of the school. There was **no** evidence presented indicating that any classes or extracurricular activities were disrupted as a result of the student's threat. Furthermore, the school bus driver who reported the threat stated that she waited until after she completed her bus route to report the threat; thus, school bus transportation activities were **not** disrupted due to the student's threat.

Torts:

"School Board Assumed Duty to Protect Teacher from Aggressive Student"
Dinardo v. City of New York (N. Y. A. D. 1 Dept., 871 N. Y. S. 2d 15), December 23, 2008.

Board of education **assumed affirmative duty** to act on a special education teacher' behalf when the board knew about an overly aggressive 10-year-old special education student. Thus, the board was **not** entitled to an affirmative judgment on its behalf at the close of the teacher's case to recover damages for injuries sustained when she attempted to protect one of her students from being attacked by another student who had a history of aggressive and disruptive behaviors. Even thought the board made *no* explicit promise to protect the plaintiff, evidence demonstrated that the board *initiated a referral to have the aggressive student transferred* from the teacher's classroom to another program. Therefore, the board and its agents *had knowledge that the overly aggressive student* ***could lead to harm***. Furthermore, the teacher ***justifiably relied*** on the board's affirmative undertaking to remove the overly aggressive student from her classroom.

"School's Negligence *Was Not the Substantial Factor* in Child's fall from Monkey Bars"
Mata v. Huntington Union Free School Dist. (N. Y. A. D. 2 Dept., 871 N. Y. S. 2d 194), December 16, 2008.

Jury's finding that school district *was negligent* in having only two playground aides supervising two kindergarten classes at recess, but that it **was not the substantial factor** in causing the child's fall from the monkey bars. It **was reasonable to conclude** that the child's gaining of immediate access to the school's monkey bars, with pizza grease still on her hands from eating lunch, and falling after successfully negotiating only two bars ***happened so quickly that greater supervision would not have prevented*** the child's fall.

"School Did Not Owe a Duty of Care to Student Struck by a Car on Road Outside of the School While Riding Bicycle to School"
Molina v. Conklin (N. Y. A. D. 2 Dept., 871 N. Y. S. 2d 230), December 23, 2008.

School district did **not** owe duty of care to seventh grade student who was injured when she was struck by an automobile on a road outside school while riding her bicycle back to school to get her soccer uniform that she had left at school after soccer practice. [Note: On the day of the incident, the plaintiff stayed after school to participate in soccer practice, after which she walked home. Upon arriving home and realizing that she had forgotten her soccer uniform at school, she rode her bicycle back to school to get it.] Therefore, the court ruled that judgment for the plaintiff **precluded** any recovery damages for the student's injuries because the student was *not* on school property *or under* the school's physical control and supervision at the time of the accident.

"Student Injured in School's Locker Room"
Flanagan v. Canton Cent. School Dist. (N. Y. A. D. 3 Dept., 871 N. Y. S. 2d 775), January 22, 2009.

In October 2004, Brendan Flanagan (plaintiff), then in the fifth grade, was pushed from behind by another fifth grade student while in the boy's locker room of the defendant's middle school. The incident caused the plaintiff to hit his head and abdomen on a nearby locker and bench and to sustain personal injuries that ultimately necessitated an emergency *splenectomy*. The New York Supreme Court, Appellate Division, Third Department, held that questions of fact as to whether the school district *could have reasonably anticipated* pushing incident in middle school locker room that resulted in student's injury and whether lack of supervision in locker room *was a substantial factor* in bringing about the injury. Therefore, *questions of fact* **precluded summary judgment** for the school district in parent's negligent supervision action against the district.

"School Bus Driver Negligent"
Turner v. North Panola School Dist. (C. A. 5 [Miss.], 299 Fed. App. 330), November 7, 2008.

Parents and students sued a school district because a school bus driver repeatedly and arbitrarily suspended three minor children from riding the bus only because the children allegedly had a bad odor. The Untied States Court of Appeals, Fifth Circuit, held that **evidence supported** trial court's finding that the bus driver ***acted preemptively and offensively*** rather than to control or discipline the children. Therefore the evidence **supported claim against** the school district. Evidence **supported the fact** that bus driver trapped a student's hand in the school bus door while driving off and that he sprayed deodorizer directly on another student. Furthermore, the bus driver **arbitrarily** suspended the children from school bus privileges.

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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April 2010 (#'s 598 & 599)

Legal Update for District School Administrators April 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
- Alternative Education
- Civil Rights
- Evidence
- Disabled Students
- Dress Code
- Labor and Employment
- Property and Contracts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"School Not Liable for Snow Being Thrown or Rubbed In Student's Face"
Halladay ex rel. A. H. v. Wenatchee School Dist. (E. D. Wash., 598 F. Supp. 2d 1169), February 13, 2009.

On December 6, 2005, a fifth-grade student (plaintiff) either had snowballs either thrown or rubbed in his face during lunch recess at an elementary school. The plaintiff responded by chasing the other student and saying, "I'll kill you!" Upon returning to class, the student who had thrown or rubbed the snowball in the plaintiff's face told his teacher what the plaintiff had said to him. The next day, the teacher told the principal, and the principal "emergency expelled" the student; however, about an hour or two later, she reduced the emergency expulsion to a one day suspension for the rest of the school day (Student missed between four and five hours of school.). A Untied States district court in the state of Washington held that school district did **not** violate plaintiff's procedural due process rights (Fourteenth Amendment) by failing to provide him with notice of his behavioral infraction and opportunity to be heard regarding the infraction before the principal's emergency expulsion of the plaintiff, which was reduced to a one day suspension for the rest of the school day. The student's parents *were notified* of their right to appeal the emergency expulsion and the one day suspension.

Alternative Education:

"Change in Child's School Did Not Change Custodian Environment"
Parent v. Parent (Mich. App., 762 N. W. 2d 553), January 22, 2009.

Mother (defendant) sought a review of an order from the Circuit Court, Oakland County, which granted the father's (plaintiff) motion to enroll the parties' minor daughter in public schools. Defendant began home-schooling the daughter (Emily) after the parties separated in December 2005, and continued to do so through the daughter's kindergarten year. As a note, the parties shared joint legal custody of their two children, and defendant received sole physical custody of the children. Plaintiff then filed a motion to enroll the parties' daughter in public school. The trial court granted the plaintiff's motion and from that grant the defendant appealed to the Court of Appeals of Michigan. The Michigan Court of Appeals held that: (1) **Remand was necessary** (refer back to the Circuit Court, Oakland County) for the trial court to make a finding regarding the best interest of the child or conduct a hearing if deemed necessary and (2) The changing of the child's school did **not** constitute a change of custodial environment as to require the father to demonstrate clear and convincing evidence that the change was in the child's best interest; rather, the burden of proof was a preponderance of the evidence that the change was in the child's best interest.

Civil Rights:

"No Evidence That School Employees Touched Student"
Workman v. District 13 Tanque Verde Unified School Dist. (C. A. 9 [Ariz.], 304 Fed. App. 595), December 23, 2008.

Student (plaintiff) brought action against school district, district superintendent, county sheriff's department, and county deputy sheriffs, alleging the use of excessive force, due process violation, and various other state law claims. The United States Court of Appeals, Ninth Circuit, held that there was **no** evidence that school district employees touched the plaintiff, or that they had any control over police officers who allegedly touched him, so as to support plaintiff's excessive force claim. **Note:** The plaintiff was suspended from school, and because of such, he claimed that he was falsely imprisoned, maliciously prosecuted, and wrongly arrest without probable cause by law enforcement officers.

"Teacher's Speech Was Personal and Private – Not Protected Under the 1st Amendment"
Wilbourne v. Forsyth County School Dist. (C. A. 11 [Ga.], 306 Fed. App. 473), January 5, 2009.

Classroom teacher sued county school district, its human resource director, a professional standards commission, and one of its investigators, claiming retaliation in violation of ADA and Section 504 of the Rehabilitation Act. The United States Court of Appeals, Eleventh Circuit, held that: (1) Teacher's motives in reporting the alleged abuse of her disabled son (A teacher disciplined the youngster.) to a public body and reporting the refusal of a principal to report the alleged abuse **were entirely personal**, and the **context of her speech was private**; thus, **defeating** her First Amendment retaliation claims and (2) The school district, its human resources director, a professional standards commission, and one of its investigators did **not** have any agreement to violate the teacher's civil rights, thus defeating her conspiracy claim. **Note:** Due to the incident associated with verbally confronting the principal of her school, a "letter of directive" was placed in her personnel file and a complaint was filed against her with Georgia's Professional Standards Commission for "unprofessional conduct."

"Fact Issue Remains as to Whether Instructor With Asthma is Under ADA"
Moran v. Premier Educ. Group, LP (D. Conn., 599 F. Supp. 2d 263), February 13, 2009.

Former employee (plaintiff), an instructor in an educational institute's professional medical assistant program, brought action against her former employer (defendant) for damages under the Americans with Disabilities Act (ADA). The plaintiff's employment had been terminated due to her allowing students to take home company equipment (e. g. needles and syringes), which was prohibited under company policy. Thereupon, the plaintiff alleged that the defendant discriminated against her based on the perception that she had a disability (asthma). Thereupon, she filed a motion for summary judgment. A United States District Court, D. Connecticut, held that: (1) Plaintiff's own statements **were insufficient to support a claim** of a disability under ADA without supporting medical testimony; (2) Genuine issue of material fact as to whether plaintiff *was qualified for her job* as an instructor in an educational institute's professional medical assistant program **precluded summary judgment** on employee's claim that the defendant illegally discriminated against her based on a disability; and (3) Genuine issue of material fact as to whether defendant had knowledge of the plaintiff's asthma **precluded summary judgment** on behalf of the plaintiff.

Civil Rights:

"Bus Driver Should Have Been Allowed to Offer Her Opinion in Regard to Student's Accident"
Petit-Dos v. School Bd. of Broward County (Fla. App. 4 Dist., 2 So 3d 1022), January 7, 2009.

An 18-year-old deaf student (plaintiff) who was injured when, upon exiting her school bus, was struck by a pick-up truck driven by a driver (received a five year prison sentence) who was fleeing police after a drug sale. A jury found *apportioning comparative negligence* and found the school board 20%, driver of the truck 70%, and the plaintiff 10% at fault. Thereupon, the plaintiff appealed the lower court's decision to a Florida district court of appeals. The appeals court ***affirmed*** the lower court's decision in stating that: (1) The truck driver did *not* cross the line from being negligent, or even grossly negligent, to one of an intentional tort exception to the comparative fault Florida statutes and (2) The lower court's prohibiting the school bus driver from offering her opinion on whether she took responsibility for the accident *was harmless* because the lower court *apportioned* some liability to the school board.

Disabled Students:

"Plaintiff's Failed to Exhaust Administrative Remedies in IDEA Suit"
Woodruff v. Hamilton Tp. Public Schools (C. A. 3 [N. J.], 305 Fed. App. 833), January 15, 2009.

Student's parents (plaintiffs) sued school district and school officials, alleging that the student was denied a FAPE, as required under IDEA. The plaintiff's son suffered from ADHD. While enrolled in the seventh grade the student was observed crossing-out other students' pictures in his yearbook. When ask what he was doing, he said, "This yearbook is the 'book of life'. If your picture is crossed-out you are a mere memory. I hope that you have experienced the pain and agony that I have experienced." For his conduct, the student was suspended the final four days of the school year (2005-2006). In addition, the vice-principal initiated harassment charges against him with county juvenile authorities. Thereafter, the school district served notice to the plaintiffs of its intent to expel their son, but before any hearing could take place, the plaintiffs withdrew their youngster from the school district and enrolled him in the eighth grade at a private school. The plaintiffs attempted to enroll their son in the ninth grade at another public high school in another public school district at the beginning of the 2007-2008 school year, but the school district refused to enroll him because the defendant school district had disclosed the student's file to the enrolling school district. The United States Court of Appeals, Third Circuit, **dismissed** the case because the plaintiffs failed to *exhaust administrative remedies* prior to filing suit against the defending school district.

"Student Provided a FAPE as So Required By IDEA"
B. S. ex rel. R. S. v. Placentia-Yorba Linda Unified School Dist. (C. A. 9 [Cal.], 306 Fed. App. 379), January 5, 2009.

School district **provided** autistic student with a FAPE in a LRE for the 2005-2006 academic school year as so required under IDEA. Although school officials did not place the student in the school's mainstream program, where educational and non-academic benefits to be gained from the mainstream program were minimal at best, they did place the student in a "blended program" which better suited the student's unique abilities and needs.

"School District Must Provide ADHD Student with One-On-One Aide at His Private School"
Board of Educ. of Bay Shore Union Free School Dist. v. Kain (N. Y. A. D. 2 Dept., 875 N. Y. S. 2d 239), March 17, 2009.

A school district **was required** to provide a student with ADHD with a one-on-one aide at his private school. **Note:** The school district proposed to offer the services of a one-on-one aide for three hours per week at a public school which was located very near to the private school in which the student was enrolled as a full-time student.

"Parents Entitled To Expenses During 'Stay-Put Provisions' Under IDEA"
Joshua A. v. Rocklin Unified School Dist. (C. A. 9 [Cal.], 559 F. 3d 1036), March 19, 2009.

The parents of a student affected by autism brought action under IDEA, alleging that the school district failed to provide their youngster with a FAPE. The United States Court of Appeals, Ninth Circuit held that the stay put provision of IDEA, mandating reimbursement from a school district for expenses of a student's current educational placement (The school district co-funded 40 hours a week of in-home educational services administered by Therapeutic Pathways, a nonpublic agency.) pending the resolution of a parents' dispute with a school district, **applied** to educational costs incurred during the appeal process under IDEA by the student's parents. The parents (plaintiffs) appealed to the Ninth Circuit a decision by the United States District Court for the Eastern District of California, which granted summary judgment in favor of the defending school district.

Dress Code:

"State Statute Which Authorized School Boards to Adopt a Uniform Dress Code Was 'Content-Neutral' and Did Not Violate the First Amendment"
Dempsey v. Alston (N. J. Super. A. D., 966 A. 2d 1), March 5, 2009.

Student's parents (plaintiffs) filed a complaint against school superintendent, assistant high school principal, and board of education, seeking an order compelling defendants to permit their son to attend high school without having to comply with the board's dress code policy and challenging the constitutionality of the state statute which authorized board of education to adopt uniform dress codes in public schools. The Superior Court of New Jersey, Appellate Division, held that the state statute which authorized boards of education to adopt uniform dress codes in public schools was **not** unconstitutional as applied to the plaintiffs' son. **No** First Amendment rights ***were implicated*** by applying the statute to student because his non-compliance with the school's dress code policy was ***not*** rooted in any desire *to communicate any particular message*. There was **no** indication that the student was subject to disparate treatment in the board of education's enforcement of its school dress code policy. There was **no** privacy interests implicated, whether such arose in the context of the student's individual privacy rights or the parent-child relationship. Furthermore, there was **no** fundamental right to be exempt from the school dress code policy. The school district stated that the school district's intent for the student dress code was to assist in controlling the environment within its public schools, to facilitate and maintain an effective learning environment, and to keep the focus of the classroom on learning.

Labor and Employment:

"Teacher's Statements Were Made Pursuant to His Official Job Duties"
Panse v. Eastwood (C. A. 2, 303 Fed. App. 933), December 19, 2008.

High school art teacher's statements encouraging his art students to participate in a *for-profit art course* he was considering teaching outside of school that would include the drawing and sketching of nude models *were made pursuant to his official job duties* as a high school art teacher. Therefore, the First Amendment did **not** insulate them from employer discipline. The teacher made statements to his students, at school, during class, and concerning a topic he believed to be of importance to their continuing art education. **Note:** Teacher's speech was not reasonably related to legitimate pedagogical concerns to which he was "charged" to teacher as part of his employment duties and responsibilities.

"Insufficient Medical Evidence to Support Workers' Compensation Benefits"
Norton v. North Syracuse Cent. School Dist. (N. Y. A. D. 3 Dept., 874 N. Y. S. 2d 302), February 26, 2009.

Plaintiff alleged that on December 12, 2005, during the course and scope of her employment as a school bus attendant, she sustained an injury in her left foot when she fell trying to assist a wheelchair-bound student, soon thereafter, she filed for workers' compensation benefits. The Supreme Court of New York, Appellate Division, Third Department, held there **was insufficient medical evidence** to demonstrate a reasonable probability that a school bus attendant's foot fracture was linked to an accident in which she fell while trying to assist a wheelchair-bound student, thus *precluding* an award of workers' compensation benefits against a school district. A board-certified orthopedic surgeon stated that the attendant's report of the injury was "potentially consistent" with the fracture. However, the physician also stated that he had *no* opinion about how it happened, and that it was possible for one who suffered from "osteopenia", as did the plaintiff, to sustain such a fracture "without a specific event over a period of time". The physician went on to say that his records did *not* consistently attribute her injury to a work-related accident.

"Dismissal of School District Employee Was Appropriate"
Roth v. Manhasset Union Free School Dist. (N. Y. A. D. 2 Dept., 875 N. Y. S. 2d 182), March 10, 2009.

Penalty of dismissal of audio-visual technician for school district; who was found guilty in disciplinary proceedings of 14 or 16 charges of misconduct (e. g. making false or misleading statements, physically threatening other employees, making inappropriate comments of a sexual nature to students, failing to perform job responsibilities, attempting to impede the investigation pertaining to his alleged misconduct, and failing to follow lawful directives of his immediate supervisor directing him to refrain from being alone with students). The court concluded that the dismissal of the plaintiff was **not** disproportionate to his offenses *as to be shocking to one sense of fairness or shocking to judicial conscience*.

"Evidence Sufficient to Support Termination of High School Principal"
Simpson v. Holmes County Bd. of Educ. (Miss. App., 2 So. 3d 799), February 10, 2009.

On Friday, February 24, 2006, officials from the Mississippi Department of Education were on the campus of Williams-Sullivan High School in Durant, Mississippi to perform a state audit of the school. During their visit, three incidents occurred on school's campus which caused the principal's (plaintiff) employment termination. The incidents included a fire in a classroom, a shooting with a pellet or BB gun (A teacher and an official from the Department of Education were struck with the pellets as they walked across the school's campus.), and a fight during a black history month program. The plaintiff appealed his termination. The Court of Appeals in Mississippi held that evidence **was sufficient to support** the superintendent's decision to terminate the plaintiff. There *was evidence* of three incidents which occurred on a single day, including a fire in a classroom, a shooting with a pellet or BB gun, and a fight during a black history month school sponsored program, which was witnessed by officials of the Mississippi Department of Education and visiting dignitaries. The principal of the school *knew of the shooting* and *did not report it to county board of education or to the authorities* as required by state statute and the school district's policy manual.

Property and Contracts:

"Release Signed by Participant Was Unenforceable"
Rigney v. Ichabod Crane Cent. School Dist. (N. Y. A. D. 3 Dept., 874 N. Y. S. 2d 280), February 19, 2009.

Participant (plaintiff) in aerobics class offered by a school district's adult education program brought action against the school district, seeking damages for personal injuries she allegedly sustained when several weighted bars fell onto her back and injured her during class. The Supreme Court of New York, Appellate Division, Third Department, held that: (1) Release signed by plaintiff in an aerobics class offered by the school district's adult education program, pursuant to which participant agreed to hold the district harmless for all claims arising in any way out of her participation in class, did not specifically state that plaintiff was agreeing to exempt the district from liability arising out of its own negligence. Therefore, the release **was unenforceable**; and (2) Fact issues *existed* with respect to possible "assumption of risk" and "comparative negligence" in manner in which participant accessed the storage closet (Instructor directed class members to retrieve their exercise equipment from the storage closet.) after becoming aware of its dangerous condition, **precluding summary judgment**.

Commentary:

No commentary this month

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May 2010 (#'s 600 & 601)

Legal Update for District School Administrators May 2010

Johnny R. Purvis*

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Topics:

- Abuse and Harassment
- Administrators
- Athletics
- Civil Rights
- Desegregation
- Disabled Students
- Extracurricular Activities
- Health
- Labor and Employment
- Religion
- Torts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"School District Not Deliberately Indifferent to Sexual Harassment of Female Special Education Student"
Watkins v. La Marque Independent School Dist. (C. A. 5 [Tex.], 308 Fed. App. 781), January 27, 2009.

School district was **not deliberately indifferent** to sexual harassment of female special education student by a male student in her class. Therefore, the school district was **not** subject to liability under Title IX in connection with the incident in which the male student exposed himself to the victim, kissed the victim, and lifted her skirt, even though school officials were aware of the male student's prior disciplinary record. School officials did not immediately remove him from the school; however, they asked the police to investigate the incident and took several remedial action designed to prevent any future incident, including providing the victim with an escort at all times. **Note:** The victim was 16 years of age, in the seventh grade, and functioned at a second-grade level.

Administrators:

"Principal Publishes Online Journal in Local Newspaper"
Moreno v. Hanford Sentinel, Inc. (Cal. App. 5 Dist., 91 Cal. Rptr. 3d 858), April 2, 2009.

The author (Cynthia Moreno-plaintiff) of a journal entry ("An Ode to Coalinga" – "Ode") on a social networking website (Myspace.com) and other members of her family brought legal action against the author's sister's high school principal (defendant), who submitted the journal entry for re-publication in the local newspaper, for invasion of privacy and intentional infliction of emotional distress. The Fifth District Court of Appeals of California held that the journal entry posted on a social networking website disparaging the author's hometown (Coalinga, California) was **not** a private fact; and the defendant's alleged act of submitting the entry to be published in the local newspaper under the plaintiff's full name did **not** constitute the tort of invasion of privacy through public disclosure of a private fact. The plaintiff posted the journal entry to the Myspace.com under her first name only and removed the entry from the website before learning it had been submitted to the town's local newspaper; however, the author's identity ***was readily ascertainable*** from the website. Furthermore, the plaintiff's affirmative act ***made the entry available to anyone with a computer***, and the fact that the defendant obtained a copy demonstrated that it was accessed by others before being removed. **Note:** At the time of the incident, the plaintiff was attending the University of California at Berkeley and her parents and sister were living in Coalinga. The community reacted violently to the publication of "Ode", which included death threats, a shot fired into the family's home; which forced the family to move out of the town. In addition, the family's 20-year-old family business had to be closed due to severe financial losses.

Athletics:

"High School Failed to Accommodate Interest and Abilities of Female Students Under Title IX"
Ollier v. Sweetwater Union High School Dist. (S. D. Cal., 604 F. Supp. 2d 1264), March 30, 2009.

Plaintiffs (female high school students) alleged that defendants (school administration) unlawfully discriminated against female student athletes with respect to practice and competitive facilities, locker rooms, training facilities, equipment and supplies, travel and transportation, coaches and coaching facilities, scheduling of games and practice times, publicity, and funding. Additionally, the plaintiffs alleged that the defendants failed to provide female students with equal athletic participation opportunities, despite their demonstrated athletic interest and abilities to participate in athletics. A United States district court in California held that: (1) The district **failed** to provide plaintiffs with opportunities to participate in athletics in substantially proportionate numbers as male students who attended the same high school; (2) The district **failed** to demonstrate a valid history of effort toward developing and expanding athletic opportunities for female students; and (3) Plaintiffs **were able to demonstrate** that female athletics *were prevented* from playing a number of sports (example – field hockey) because the administration *failed* to find a coach.

Civil Rights:

"Principal Had Expectation of Privacy Regarding Her E-Mail Files"
Brown-Criscuolo v. Wolfe (D. Conn., 601 F. Supp. 2d 441), March 9, 2009.

A middle school principal (plaintiff) bought action against the superintendent (defendant) of her school district, alleging improper search and seizure of her computer records in violation of the First and Fourth Amendment of the United States Constitution. The United States District Court, D. Connecticut, held that plaintiff ***had a reasonable expectation of privacy in her e-mail files*** on her work computer to justify her action against the defendant for allegedly accessing and forwarding her e-mail files and attached letters to his work computer. The files and attached letters informed the plaintiff's lawyer about her concerns about her job, which **comported with** school district policy that pertained to professional use of the school district's computer system. Furthermore, the school district policy permitted routine maintenance/monitoring of the system; however, there was **no** showing that routine monitoring was practiced or that the defendant conducted routine maintenance. **Note:** The court went on to state that whether an employee has an expectation of privacy in electronic mail messages sent or received on an employer's computer system or e-mail system depends on whether: (1) employer maintains a policy banning personal or other objectionable use; (2) employer monitors the use of an employee's computer or e-mail; (3) third parties have a right of access to employee's computer or e-mail; and (4) employer notified employee, or employee was aware, of the employer's monitoring policies and the use of such policies.

"Student's Fake Internet Profiles of Teacher and Administrator Are Not Protected by the First Amendment"

Barnett ex rel. Barnett v. Tipton County Bd. of Educ. (W. D. Tenn., 601 F. Supp. 2d 980), January 26, 2009.

Former high school students (plaintiffs) sued county board of education, director (superintendent), and high school principal for violation of their First Amendment and due process rights (14th Amendment) in regard to disciplinary action taken against them due to their creation of fake internet profiles of a high school assistant principal and a coach. A United States District Court, W. D. Tennessee, Western Division, held that: (1) High school students' fake internet profiles pertaining to a teacher and school administrator on public website, including sexually suggestive comments about female students, were **not** protected by the First Amendment as "parodies" (humorous or satirical imitations) and (2) High school's disciplinary actions (suspensions/in-school suspensions) against the plaintiffs **satisfied procedural due process requirements** due to the fact that both students and their parents received notice of and were present at disciplinary hearings. Furthermore, the plaintiffs had an opportunity to rebut allegations against them and their parents had an opportunity to question school officials during the students' hearing.

"Texas' Moment of Silence Did Not Violate Establishment Clause"

Croft v. Governor of Texas (C. A. 5 [Tex.], 562 F. 3d 735), March 16, 2009.

The United States Court of Appeals, Fifth Circuit, held that the Texas statute which provides for the recitation by public school students of both the pledge of allegiance to the flags of the United States and to the state of Texas, followed by a "minute of silence" for students to "reflect, pray, meditate, or engage in any other silent activity"; did **not** foster an excessive government entanglement with religion. Therefore, the law **complied with** the Establishment Clause of the First Amendment of the United States Constitution. In addition, the law required that teachers regulate student behavior to ensure silence and no distractions during the moment of silence.

"Morning Show Broadcast by Public High School Through Its Internal Television Network Was a Nonpublic Form"

Quatroche v. East Lyme Bd. of Educ. (D. Conn., 604 F. Supp. 2d 403), March 30, 2009.

A United States District Court in Connecticut held that a morning show broadcast by a public high school through its internal television network **was a nonpublic forum** for First Amendment purposes, and therefore restrictions on speech only had to be reasonable and viewpoint-neutral. The program was normally shown daily to the entire student body in each classroom for the first five to 10 minutes of the second period. The program normally consisted of news, sports, weather, and entertainment segments; and was one of the primary ways that students received information about things going on at the school. **Note:** It is interesting to note that the court went on to define "designated public forum", "limited public forum", and "nonpublic forum". "Designated public forum" was defined as a place not traditionally open to the general public, but the state took affirmative steps to open it for general public discourse. A "limited public forum" was defined as being created when the state took upon itself to open a nonpublic forum to certain kind of speakers and to the discussion of certain designated topics. A "nonpublic forum" was defined as neither a designated public forum nor a limited public forum, but restrictions on expression and speech must be reasonable and viewpoint neutral.

"Parents and Daughters Entitled to TRO to Prevent Prosecution Pertaining to 'Sexting' Through the Use of Facebook or MySpace"

Miller v. Skumanick (M. D. Pa., 605 F. Supp. 2d 634), March 30, 2009.

Parents, individually and on behalf of their minor daughters, brought legal action against a county district attorney alleging that potential charges against the plaintiffs' daughters for "sexting", which involved the practice of sending or posting sexually suggestive text messages and images, violated their right to free expression under the First Amendment. The United States District Court, M. D. Pennsylvania, held that *minors* seeking a temporary restraining order (TRO) enjoining a county district attorney from initiating child pornography charges against them for "sexting" unless images at issue depicted sexual activity or exhibited genitals in a lascivious way, **had substantial likelihood of success on merits of their claim** that the government's requirements that minors attend a "re-education" program to avoid prosecution **violated their right to be free from compelled (coerced) speech or expression**. The court went on to state that the plaintiffs' daughters *would have been retaliated against* due to being compelled to write an essay explaining what they did wrong because they contented that they in no way violated any laws. Furthermore, they contended that they in no way violated any laws and as such, a "re-education" requirement would compel them to describe their behavior as being wrong under the threat of felony prosecution. **Note:** School officials confiscated the students' cell phones, examined them, and discovered photographs of "scantily clad, semi-nude and nude teenage girls". Many of the girls were enrolled in the school district. The school officials turned over the phones to the county district attorney who initiated a criminal investigation.

"Sergeant and Captain Not Immune From Officer's First Amendment Claim"
Turner v. Perry (Tex. App.-Hous. [14 Dist.], 278 S. W. 3d 806), January 27, 2009.

Terminated school district police officer (defendant) brought a First Amendment, due process, slander, and infliction of emotional distress action against his sergeant and captain (plaintiffs). A Texas court of appeals held that the sergeant and captain in the school district's police department were **not** entitled to qualified immunity on a claim by a police officer that the sergeant and captain violated his First Amendment rights by disciplining and terminating him after he reported to the county district attorney that they had unlawfully tampered with a government record by entering his office and removed a traffic citation he had written on a teacher (The removal was due to the teacher being well "politically connected".). At the time of the incident, it was well established that a legitimate report of unlawful police conduct was protected by the First Amendment, and the state's whistleblower statute **expressly protected governmental employees, including police officers, from employment actions when employee in good faith reported a violation of law** by an employing governmental entity to an appropriate law enforcement authority.

Desegregation:

"School District Entitled to Unitary Status"
Little Rock School Dist. v. North Little Rock School Dist. (C. A. 8 [Ark.], 561 F. 3d 746), April 2, 2009.

In a school desegregation case, Little Rock School District sought a declaration of unitary status. The United States District Court for the Eastern District of Arkansas held that the Little Rock School District **was entitled** to full unitary status for the purposes of establishing compliance with the *consent decree* governing the school district's desegregation plan. The district had a deeply embedded comprehensive program assessment process in their desegregation plan as a permanent component of its district wide curriculum plan. Furthermore, the district exhibited *complied in good faith* in regard to the court ordered compliance remedy that was designed to ensure that long-range goals ensured that the long range goals of the plan would be accomplished.

Disabled Students:

"Out-of-State Placement of Child Over Mother's Objection Was Proper"
In re R. W. (Cal. App. 4 Dist., 91 Cal. Rptr. 3d 785), March 26, 2009.

A California court of appeals held that a trail court **acted within its discretion** in limiting a mother's right to make educational decisions for her disabled-dependent child. The court authorized an IEP that required the child to be placed in a residential treatment center (RTC) in Wyoming. The child had severe emotional and behavioral problems, including very violent outbursts ("intensive aggressive behaviors" – defiance, death threats, and destruction of property), and the child's mother was inconsistent in her visits and interaction with the child. Furthermore, there was no placement with a suitable structured and contained environment available in the state of California.

"IEP Reasonably Designed to Confer Meaningful Educational Benefit"
G. N. v. Board of Educ. of Tp. of Livingston (C. A. 3 [N. J.], 309 Fed. App. 542), February 4, 2009.

IEP for student who was diagnosed with Developmental Reading Disorder (dyslexia) and ADHD **was reasonably designed** to confer meaningful educational benefit to student's specific needs as required under IDEA. Although the student's IEP did not contain homework modification and provision of supplemental reading requested by the student's parents; the IEP ***was a product of collaboration*** between the student's study team and the youngster's parents.

Extracurricular Activities:

"Gay-Straight Alliance Was Entitled to Preliminary Injunction"
Gay-Straight Alliance of Yulee High School v. School Bd. of Nassau County (M. D. Fla., 602 F. Supp. 2d 1233), March 11, 2009.

High school students **were likely** to succeed on merits of their claims that school board's denial of their application to form an organization focusing on combating antigay harassment and discrimination and educating the school-community about those issues **violated** the Equal Access Act (EAA) and the First Amendment. Therefore, the plaintiffs **were entitled** to a preliminary injunction requiring the defendant to grant their organization official recognition, despite the board's contention that the organization would be disruptive.

Health:

"Tuberculosis Test for School Children Did Not Infringe on Parents' Free Exercise of Religion"
Huffman v. State (Alaska, 204 P. 3d 339), April 3, 2009.

Plaintiffs (parents) sued an Alaskan school district and the state of Alaska, alleging that their children were entitled to a waiver from the purified protein derivative (PPD) skin test which was used to test for tuberculosis and alternatively that the test requirement violated their religious and liberty interests. The Supreme Court of Alaska held that the regulation, which required that all students new to a public school district in Alaska take the PPD skin test for tuberculosis, which allowed an exemption for any child who provided an affidavit from a physician who was lawfully entitled to practice medicine or osteopathy in the state of Alaska **was in fact legal**. Furthermore, the requirement did **not** infringe on the plaintiffs' free exercise of religion; parents did *not* profess to subscribe to any particular religion.

Labor and Employment:

"Mexican-American Failed to Establish a Hostile Work Environment Claim"
Garza v. Laredo Independent School Dist. (C. A. 5 [Tex.], 309 Fed. App. 806), January 30, 2009.

Although Mexican-American school teacher *demonstrated* he was subject to unwelcome harassment, he **failed** to establish prima facie (produced enough evidence) hostile work environment claim since he did **not** prove that the harassment was based on his race or national origin. Furthermore, the harassment did **not** affect a term, condition, or privilege associated with his employment. The incidents that were illustrated in the complaint by the plaintiff occurred over several years, were not severe, were not physically threatening or humiliating, and there was no evidence that the harassment interfered with his work performance. **Note:** Examples of unwelcome harassment cited by the plaintiff included the following: when new computer and printers were issued, Garza was not provided one and he only had access to a computer and printer purchased in 1993; the school stopped purchasing cartridges for the school purchased printer and he bought his own; the number of students in the plaintiff's classes was probably the largest in the school; and his classroom was not cleaned for days at a time and was not cleaned over school breaks.

"Evidence Supported Termination of School Librarian's Disability-Retirement Benefits"
State ex rel. Morgan v. State Teachers Retirement Bd. of Ohio (Ohio, 904 N. E. 2d 506), February 18, 2009.

Sufficient evidence supported State Teachers Retirement Board decision to terminate disability retirement benefits (been retired since 1988 – retirement board requested a report on her medical status in 2005) of former school librarian who had been diagnosed with chronic fatigue syndrome and fibromyalgia. The physician who conducted an independent examination of the plaintiff found that the plaintiff's subjective symptoms would not prevent her from working. In addition, a neuropsychologist examined the librarian and found that here cognitive functioning *was normal*.

Religion:

"Words 'Under God' In Pledge of Allegiance to Texas State Flag Did Not Serve to Endorse Religion"
Croft v. Perry (N. D. Tex., 604 F. Supp. 2d 932), March 26, 2009.

The words "under God" in the Pledge of Allegiance to the Texas State Flag did **not** officially prefer one religion over another as would violate the Establishment Clause of the First Amendment of the United States Constitution. The phrase "under God" *included only* a broad acknowledgement of a divine being.

Torts:

"School Officials Lacked Notice of the Condition That Allegedly Caused Student's Fall"

Barrera v. City of New York (N. Y. A. D. 2 Dept., 876 N. Y. S. 2d 150), March 31, 2009.

Defendants (school officials) **lacked** actual or constructive notice of the condition (cake frosting left on the staircase) which allegedly caused an elementary school age student to slip and fall while descending a staircase at her elementary school; thus, **precluding the imposition of liability** in a premises liability suit. Evidence did **not** demonstrate that the condition the student allegedly saw earlier in the day of her accident was the same condition which allegedly caused her to fall. Furthermore, defendants' general awareness that bake-sale items might fall on the school's premises **was insufficient** to establish constructive notice of the particular condition which allegedly caused the student's accident.

"Evidence Was Sufficient To Demonstrate That Juvenile Committed Second-Degree Trespass When He Entered the Girls' Locker Room"

In re S. M. S. (N. C. App., 675 S. E. 2d 44), April 7, 2009.

Evidence **was sufficient** to demonstrate that 15-year-old student **committed second-degree trespass** when he entered the girls' locker room (two 14-year-old girls were changing clothes at the time of the entrance) at his high school so as to support adjudication of delinquency. The sign marked "Girls' Locker Room" on the entrance door to the girls' locker room **was reasonably likely** to provide plaintiff *sufficient notice* that he was *not* authorized to enter into the locker room.

"Board of Education Was Immune From Liability When Child Was Injured at Football Game"

Ex. parte Jackson County Bd. of Educ. (Ala., 4 So. 3d 1099), August 22, 2008.

High school football playoff game was sponsored and controlled by the state high school athletic association and *not* county board of education. Therefore, the county board of education **was immune** under the Alabama state constitution against tort actions brought against the state and its agencies. Furthermore the board was **not** a party to any *implied contract* created by the purchase of a ticket to the game because the Alabama High School Athletic Association set the rules, regulations, controlled the game, and the ticket prices for the game. **Note:** A five-year-old girl fell through an opening between the footboard and the seat of the bleachers while attending the game with her uncle and aunt. She suffered a cut on her head and two broken wrists.

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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June July 2010 (#'s 602 & 603)

Legal Update for District School Administrators

June-July 2010

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West's Education Law Reporter

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

Topics:

- Abuse and Harassment
- Administrators
- Athletics
- Attendance
- Civil Rights
- Compensation and Benefits
- Criminal Offenses
- Criminal Restitution
- Disabled Students
- Labor and Employment
- School Districts
- Torts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"Student's Title IX Claim Regarding Teacher Harassment Not Valid Because *No* School Official Knew"
Plamp v. Mitchell School Dist. No. 17-2 (C. A. 8 [S. D.], 565 F. 3d 450), May 11, 2009.

High school counselor, teachers, and principal were **not** "appropriate persons" with actual knowledge of male teacher's alleged sexual harassment of a female student; thus, **precluding** Title IX claim against the school district for deliberate indifference to known acts of discrimination occurring under the school district's control. The counselor and teachers *lacked sufficient authority* to address the alleged harassment and institute corrective measures. On the other hand, the principal ***lacked actual knowledge*** *of the alleged harassment until he was informed by the student's mother, at which time he* ***took immediate action***. **Note:** The teacher had been employed at the school since 1988, and in addition to teaching an American government course he was the boys wrestling and golf coach. The teacher's harassment of the student began while she was a student in his class. He knew that the plaintiff suffered from "anorexia nervosa" and used that information as a pretext to engage in inappropriate behavior with the student. Some of the alleged sexual harassment activities committed by the teacher included the following: call her to his desk to discuss her eating disorder and her treatments for the disorder, requested that she bring him a photograph of herself with few clothes on so that he could see signs of her anorexia, caress her shoulders and made statements about her "knock-out body", told her she should eat more so that her breasts were not so disproportionate to her "skinny" body, attempted to engage her into discussing her sex life and sexual preferences, and asked her to come to his classroom early one morning so he could weigh her without any clothing.

"Evidence Supported Teacher's Sexual Abuse of Student"
Ellis v. State (Md. App., 971 A. 2d 379), May 11, 2009.

Evidence **was sufficient** to support a finding *beyond a reasonable doubt* that defendant (a 25-year-old high school history and American government teacher) had responsibility for the supervision of a minor and did sexually abuse the minor child when he allegedly grabbed her hand in an attempt to get her to touch his penis. **Note:** During the fall of 2006, the defendant and the victim (a 17-year-old senior) began an increasingly friendly relationship. Just prior to the school's winter break, the defendant sent the victim several "sexual related" photographs of himself. After the break, the defendant invited the victim to visit his classroom after school; it was during this visit that he showed his penis to the victim and attempted to get her to touch it, she immediately left his classroom. Upon learning of the event, the school's administration reported the incident to the police. The "pervert" was sentenced to three years of incarceration for indecent exposure, a consecutive one year term for telephone misuse, a consecutive one year for display of obscene material to a minor, and 10 years for the sexual abuse of a minor.

Administrators:

"Board Had a Duty to Provide a Defense For Vice Principal"
Board of Education of Worcester County v. Horace Mann Ins. Co. (Md., 969 A. 2d 305), April 10, 2009.

Board of education **had a duty** to provide vice principal with a defense, in civil action by high school student alleging that vice principal assaulted him by brandishing a knife (six to seven inch blade) that was confiscated from another student who was afraid after being "picked on" by another student in the school. Furthermore, the board had a duty to provide school district employees' legal counsel when they committed actions **within the scope of their employment and without malice**. Vice principal *was required to address disciplinary matters pursuant to his duties*. In this particular situation, he called a student to his office in an effort to resolve a potential disciplinary issue and a knife was shown in the context of a asking the student "how he would feel if someone that he had picked on had brought a knife to school."

Athletics:

"Student Kicked While Playing 'Speed Soccer' In PE Class"
Scarito v. St. Joseph Hill Academy (N. Y. A. D. 2 Dept., 878 N. Y. S. 2d 460), May 12, 2009.

Plaintiff's son was playing "speed soccer" during his physical education class. The youngster was in possession of the ball, and he was attempting to kick the ball when another student, who also was attempting to kick the ball, kicked the plaintiff's son right shin instead. Thereupon the plaintiff brought action against the school, seeking to recover damages due to her son's injuries. The New York Supreme Court, Appellate Division, Second Department, held that an expert's summary judgment affidavit submitted by the plaintiff **was insufficient** to raise triable issue of fact (liable to a judicial trial) as to whether the school was negligent in failing to provide shin guards to student during "speed soccer" due to an absence of any citation to any state statutes, regulations, or guidelines, or the International Federation of Association Football (FIFA) or United States Soccer Federation (USSF) regulations, which stated that shin guards were necessary.

Attendance:

"Excessive Unexcused Absences Not Educational Neglect"
In re Jamol F. (N. Y. Fam. Ct., 878 N. Y. S. 2d 581), April 21, 2009.

Child's excessive unexcused absences (missed 44 days of school during one school year and 18 days during a subsequent school year) from school and failure to consistently attend alternative school or to receive home schooling did **not** constitute educational neglect. Mother of the student exercised a minimum degree of care by talking to the child, setting an example by attending college herself, maintaining ongoing contact with school officials, driving the youngster to school, making reasonable efforts to discipline him for not attending school, attempting to obtain appropriate alternate placement, and enrolling him in a private school. However, the child was beyond the child's mother's abilility to control him.

Civil Rights:

"School Administration Could Bar Teacher from Communicating With a Colleague"
Baar v. Jefferson County Bd. Of Educ. (C. A. 6 [Ky.], 311 Fed. App. 817), February 18, 2009.

On February 7, 2002, the plaintiff (Robert Baar), a public school teacher, sent a letter to one of his colleagues (Missy Payne), which spoke of increasing "danger" to her and her family. Prior to this particular letter Payne had received several "inappropriate letters" from Baar; however, upon receiving this particular letter, she told her principal about the letters she had been receiving from Baar. After conferring with the school board, the principal held a meeting with Baar, who agreed to sign a "Memorandum of Understanding" requiring him to discontinue communicating in any form (verbal or written) with Missy Payne. In June 2002, after further investigation, the principal issued a written reprimand to Baar for his repeated "inappropriate communications" with Payne. In addition, the reprimand informed Baar that he would be transferred to another school in the district and he was to have no further contact with Payne. In September 2005, Baar sent Payne an e-mail indicating that he would attend an area chemistry teacher association meeting. Thereupon, Baar received additional discipline for violating the "Memorandum of Understanding", including permanent prohibition from attending the area chemistry teacher association meetings. The plaintiff filed suit against the school district stating that the defendant violated his due process rights (14th Amendment) and his First Amendment rights as pertaining to freedom of association and speech/expression. The United Stated Court of Appeals, Sixth Circuit, held that the school board did **not** violate the free speech rights (1st Amendment) of a public school teacher when it prohibited the teacher from communicating with a certain colleague. The teacher's comments to his colleague *were of a private nature* and such comments deeply upset and disturbed her. Furthermore, the school board *had a critical interest in protecting its employees from harassment*; however, the board's restriction *did allow* the teacher to speak freely on any mater of a *public concern* to other colleagues.

"Student Denied TRO and Preliminary Injunction Against School's Ban on 'Free A-Train' Slogan"
Brown ex rel. Brown v. Cabell County Bd. of Educ. (S. D. W. Va., 605 F. Supp. 2d 788), March 30, 2009.

Student (plaintiff), a high school freshman, wrote the words "Free A-Train" on both of his hands with a felt tipped marker. The message was an obvious reference to the detention of another student (Anthony Jennings), commonly known as "A-Train", who was facing criminal charges (two counts of armed robbery)—including the shooting (attempted murder) of a police officer. The high school assistant principal gave the plaintiff the option of washing the message from his hands or serving a 10 day suspension. The student initially did wash the message from his hands, but later elected to re-write it. He was warned against the consequences, but declined to remove "Free A-Train" and was placed on a 10 day suspension. His father was given a notice of the suspension, which stated that the grounds for the suspension were "disruption of the educational process". A United States District Court in West Virginia held that the plaintiff **had no substantial likelihood of success on the merits of his claim** that his words "Free A-Train" was protected speech under the First Amendment within the halls of his high school. **Note:** The high school and community had a serious gang problem and "A-Train" was a known member of one of the gangs (Black East Thugs – "BET") within the school-community.

"Assistant Principal's Wife Tapes His Explicit Telephone Conversation to School's Secretary"
Castillo v. Hobbs Mun. School Bd. (C. A. 10 [N. M.], 315 Fed. App. 693), March 2, 2009.

An assistant principal's liberty interest in his good name and reputation, as it related to his employment as a junior high principal, was **not** infringed upon when his wife tape-recorded (She had installed on their home phone a device to record phone calls.) sexually-explicit telephone conversations he had with his secretary. The plaintiff's employment was not terminated, he was allowed to fulfill his one-year contract, and he was offered a first-grade teaching position; he later secured a position as a school administrator in another school district. **Note:** Assistant principal's wife played the type to a school board member; who gave the tape to the superintendent, who played the tape to others within the school district's administration, including the plaintiff's immediate supervisor.

Compensation and Benefits:

"School District Required to Reinstate Teacher Who Retired on Disability But Recovered"
Klumb v. Board of Educ. Of Manalapan-Englishtown Regional High School Dist., Monmouth County (N. J., 970 A. 2d 354), May 11, 2009.

In 1968, plaintiff was hired as an elementary teacher in the defendant school district; however, in 1985, the plaintiff requested and was granted several leaves of absence in order to obtain treatment for alcoholism and mental health issues. Although plaintiff returned to her teaching duties after each leave, she continued to struggle with her recovery. On April 11, 1988, plaintiff requested and was approved by the Teachers' Pension and Annuity Fund (TPAF) for full retirement on her disability claim. However, in early 1994, plaintiff believed that she had been rehabilitated and requested that the TPAF reconsider its finding that she was disabled from teaching. The TPAF found that the plaintiff's "disability had disappeared or substantially diminished to the point that she may resume her former duties as a teacher without restriction." The TPAF notified the school district that the district had a duty to "reinstate the plaintiff to her former position or any other comparable position which may be assigned to her." The Supreme Court of New Jersey held that the school district was not required to bump another employee or create a new position for the plaintiff, but the district **was required** to reinstate her to the next opening in the position from which she was retired, so long as her credentials for that position remained in effect. Furthermore, if the district failed to abide by the preceding, the district **will be required** *to make her whole for the losses she would sustain if it refused to do its duty*.

Criminal Offenses:

"Person May Be Found Guilty of Criminal Possession of a Firearm on School Property, Even When the School is Not in Session"
State v. Toler (Kan. App., 206 P. 3d 548), May 1, 2009.

On August 21, 2006, at approximately 4:25 a. m., Kristin Toler (plaintiff) parked her car in the parking lot of a high school and allowed her dog to run loose on school grounds as she placed her athletic bag in the trunk of her car. While she was placing the athletic bag and some other items in the trunk of her car a police officer approached her about the fact that her dog was not on a leash. While talking to the plaintiff, he observed a handgun case in her athletic bag, which contained a Beretta 9 mm handgun. Thereupon, the officer informed the plaintiff that it was illegal to have a firearm on school property. The plaintiff was charged with one count of criminal possession of a firearm on school property, which was a class B misdemeanor. The Court of Appeals of Kansas ruled that a person **may be found guilty** of criminal possession of a firearm on school property, even when the school is *not* in session or when children are *not* present on school property at the time the offense was committed.

Criminal Restitution:

"School is Entitled to Restitution Due to Bomb Threat"
State v. Vanbeek (Wis. App., 765 N. W. 2d 834), February 11, 2009.

Derick G. Vanbeek was convicted of making a bomb scare at his high school, which violated Wisconsin law that pertained to "intentionally conveying a false threat to destroy any property by the means of explosives." Thereupon, the court required that he reimburse the school district $15,796.89 for salaries and benefits paid to teachers and other school personnel during the resulting evacuation. The Court of Appeals of Wisconsin held that: (1) The school district **was a direct "victim"** of the defendant's conduct of making a false bomb scare for purposes of restitution due to the fact that the false threat conveyed the intent to destroy school property, resulted in the total evacuation of school facilities, and disrupted the delivery of school district services and (2) During the four and one-half hours that the students and staff were evacuated from school district property, **as a direct result of the defendant's false bomb scare**, the school district paid its employees, but received no services from them. **Note:** On November 27, 2006, a note containing a bomb threat was found in the middle school lunch room at Markesan High School at approximately 10:15 a.m. After being interviewed by law enforcement, the defendant admitted to writing the threat, but stated that he had been coerced into doing so by two other students.

Disabled Students:

"Disabled Preschool Student's IEP and Placement Were Appropriate Under IDEA"
Anderson v. District of Columbia (D. D. C., 606 F. Supp. 2d 86), March 30, 2009.

Developmentally disabled four-year old student's IEP and placement in a self-contained preschool **were appropriate and reasonably calculated to confer educational benefits**; thus, **precluding reimbursement** of private school tuition. There was **no** evidence that the placement of the student was the source of the student's lack of progress due to the self-contained pre-school placement and its structured environment with low noise level and smaller class size.

"Autistic Student Not Denied FAPE"
E. G. v. City School Dist. Of New Rochelle (S. D. N. Y., 606 F. Supp. 2d 384), March 16, 2009.

IEP was **not substantively deficient** for purposes of parents' request for reimbursement for the cost of private school placement of their autistic son. The IEP was not procedurally defective insofar as it gave parents adequate opportunity to participate in its development and it provided 10 hours per week of at-home behavior therapy for the young child.

"Student Not Denied a FAPE When School District Declined to Change Student's IEP"
M. M. ex rel. Matthews v. Government of Dist. Of Columbia (D. D. C., 607 F. Supp. 2d 168), April 13, 2009.

Student (low-average math skills, low reading skills, low written language skills, and ADHD) was **not** denied a FAPE, so as to violate IDEA, when a school district declined to change her IEP even though the student had failed to make any progress in two years. The school district did agree to conduct further evaluation of the student in occupational therapy and speech/language.

Labor and Employment:

"Teacher Failed to Establish a Title VII Retaliation Claim"
Polite v. Dougherty County School System (C. A. 11 [Ga.], 314 Fed. App. 180), August 11, 2008.

African-American public school teacher brought action against a school district and its superintendent alleging racial and sexual discrimination and retaliation in violation of Title VII because the school district did not hire him for a number of assistant principal and principal positions for which he applied and was not hired. Furthermore, he claimed that he was retaliated against during his employment with the district because he complained to the superintendent about her "discriminatory hiring practices"; shortly thereafter he was transferred to another school within the school district. The United States Court of Appeals, Eleventh Circuit, held that plaintiff did **not** suffer "adverse employment action" as required to establish a Title VII retaliation claim against either the school district or the district's superintendent. The teacher's job after the transfer involved the same responsibilities, and he was paid the same as he was prior to the transfer.

"Employment Termination Supported by the Evidence"
Halpin v. Klein (N. Y. A. D. 1 Dept., 878 N. Y. S. 2d 45), May 5, 2009.

Penalty of employment termination of an employee imposed by the chancellor of a city department of education **was supported by substantial evidence**. The evidence used in the employee's termination included software records, the employee's time cards, and witness testimony, which established that he left work early on 63 occasions over a four-month period. In addition, the employee submitted falsified time cards for his work on those dates.

"Denial of Application for Employment Based on Robbery Conviction Was Arbitrary and Capricious"
Acosta v. New York City Dept. of Educ. (N. Y. A. D. 1 Dept., 878 N. Y. S. 2d 337), May 7, 2009.

City department of education's denial of plaintiff's application for employment as an administrative assistant at a nonprofit organization that provided special education services to disabled preschoolers, based on the applicant's (plaintiff) convictions for armed robberies committed when she was a 17-year-old high school student more than 13 years earlier, **was arbitrary and capricious**. The plaintiff's duties would *not* involve or require any contact with young children, there was *no* showing that the nature of her crimes for which applicant was convicted was relevant to the job duties or posed an unreasonable risk of danger to those in the preschool program, and there *was overwhelming evidence* of the plaintiff's rehabilitation. **Note:** The plaintiff was a 31-year-old, college educated, wife, and mother of a two-year-old boy. There was undisputed evidence that her duties did not involve or require any contact with young children. However, the department of education stated that the specific reason for the plaintiff's denial of employment was her 13-year-old criminal record and that she "would pose an unreasonable risk to the safety and welfare of the school-community."

School Districts:

"School Did Not Violate Copyright Law"
Brooks-Ngwenya v. Indianapolis Public Schools (C. A. 7 [Ind.], 564 F. 3d 804), April 15, 2009.

Copyright owner of an educational program **failed** to show that a school system copied any of the materials protected by her copyright, as required to succeed in her infringement suit against the school district. The plaintiff's complaint alleged that the school system copied her ideas rather than her original expression of the ideas. **Note:** Plaintiff was promoted in October 2002 to a classroom assistant in a middle school. During that school year she developed "TIRS" (Transitioning Into Responsible Students) to assist underachieving students. According to the plaintiff, the school district promised to buy TIRS and hire her as a permanent classroom coordinator if the program proved successful. However, the school district did not buy TIRS or give the plaintiff a permanent job, and yet, she says, the school district continued to use the program after she was terminated in October 2003.

Torts:

"School Provided Adequate Supervision During Recess Period"
Calcagno v. John F. Kennedy Intermediate School (N. Y. A. D. 2 Dept., 877 N. Y. S. 2d 455), April 28, 2009.

The school fulfilled its duty to provide adequate supervision to a fourth-grade student who fell from a set of horizontal gymnastic bars on the school's playground during recess. There were at least three teachers in the recess area supervising 10 classes of students, along with a supervisor standing just outside the playground area. Furthermore, the student was engaged in normal play rather than a dangerous activity. **Note:** According to the student, she was attempting to spin forward around the lowest of three bars, which were about as high as her waist, when in the middle of her spin, she intentionally let go of the bar in order to stop, and fell. She was on the bar during this movement for somewhere between 5 and 10 seconds.

"Third Grader Injured During Fire Drill"
Esponda v. City of New York (N. Y. A. D. 1 Dept., 878 N. Y. S. 2d 330), May 7, 2009.

Teacher's alleged lack of supervision of his third grade students during a fire drill was **not** the proximate cause of wrist injury sustained by one student when two larger students bumped into her from behind, causing her to fall. The student's fall was the *result of her actions and of those students directly behind* her, and supervision would **not** have prevented the larger students from coming into contact with her. **Note:** The student did not tell her teacher that she had hurt her wrist until the fire drill ended and the entire class and teacher had returned to their classroom.

"Football Coach-Athletic Director Was Not a School Administrator"
Ex parte Yancey (Ala., 8 So. 3d 299), October 31, 2008.

Public high school football coach and athletic director was **not** a school "administrator" under the school's student handbook provision prohibiting students from returning to their vehicles until the end of the school day without permission from a school administrator. Therefore, the coach ***acted beyond his authority*** and was ***not*** covered by state-agent immunity when he allowed a student to return to his vehicle during the school day to remove trash barrels from the school's field house. **Note:** The coach directed a student to retrieve his pick-up truck from a campus parking lot, and along with several other students, take the filled trash barrels from the field house to dumpsters located in back of the school's cafeteria. While travel from the field house to the cafeteria, the truck hit a "dip" and a student fell from the truck's tailgate and was serious injured.

"School Bus Driver Sideswiped a Pedestrian's Wheelbarrow"
Lee v. Carson (La. App., 5 Cir., 8 So. 3d 640), January 27, 2009.

Evidence **was sufficient** to support finding that defendant school bus driver negligently sideswiped the wheelbarrow being pushed by a pedestrian at the time of the accident. The pedestrian was awarded $125,000 in general damages, $5,535.01 in special damages, plus costs. Evidence ***included*** the uncontested fact that the bus did indeed strike the wheelbarrow. Furthermore, the injured party's boss at the worksite observed the individual's injuries and the injuries were fully diagnosed the following day by a physician.

Commentary:
No commentary this month

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August September 2010 (604 & 605)

Legal Update for District School Administrators
August-September 2010

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

Topics:

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

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"School Resource Officer Sexually Molested Student"
Doe v. Dickenson (D. Ariz., 615 F. Supp. 2d 1002), April 30, 2009.

Bill Dickerson, a former school resource officer (SRO), sexually molested elementary school male student while assigned to the student's school. Plaintiff stated that she believes that her son will never be normal again; furthermore, both she and her husband continue to suffer emotional distress and all are in therapy. A United States District Court in Arizona held that the SRO alleged molestation of an elementary school student **inflicted sufficiently severe damage *to support*** mother's claim that SRO **violated her due process right to familial association**, even if alleged injuries were *not* both permanent and total. Additionally, there was *no* evidence that SRO actually intended to harm the parent-child relationship.

"School District's Failure to Report Substitute Teacher's Sexual Abuse Did Not Breach Duty to Future Victims"
P. S. v. San Bernardino City Unified School Dist. (Cal. App. 4 Dist., 94 Cal. Rptr. 3d 788), June 5, 2009.

Plaintiffs were first-grade students in the Central School District (CSD) when they were sexually molested by a substitute teacher (Eric Norman Olsen). In addition to filing a suit against the CSD, the plaintiffs also filed a suit against the defendant school (San Bernardino City Unified School District [SBCUSD]) district were the "molester" had previously sexually molested students while working as a substitute teacher. A California appeals court stated that school officials who employed the former substitute teacher who later molested students in another school district owed **no** duty to those students who are under the umbrella of California's Child Abuse and Neglect Reporting Act to report incidents of child abuse to authorities in the CSD; therefore, the defending school district is **not** liable. Furthermore, the legislative intent of California's Child Abuse and Neglect Reporting Act was **not** intended to create negligence liability to all future children who might be harmed by a suspected abuser.

Administration:

"Elementary School Principals Liable for Religious Viewpoint Discrimination"
Morgan v. Plano Independent School Dist. (E. D. Tex., 612 F. Supp. 2d 750), March 31, 2009.

Principals of two elementary schools prohibited the distribution of religious items at various "winter break" parties. The offending items included candy cane-shaped pens with an attached message regarding the religious origin of the candy cane and pencils with the message "Jesus is the reason for the season". Plaintiffs, parents of offended students, sued the principals alleging that they practiced viewpoint discrimination by prohibiting the distribution of religious items in their schools. The United States District Court, E. D. Texas Sherman Division, held that the elementary principals were **not entitled** to qualified immunity from liability for engaging in viewpoint discrimination when they prohibited the distribution of pencils and candy cane-shaped pens on school property after class hours. Furthermore, it **has been clearly established** that students have a right to free speech and the principals' actions ***were unreasonable***.

Attorney Fees:

"Parents Entitled to Attorney Fees as Prevailing Parties under IDEA"
John M. v. Board of Educ. of City of Chicago, Dist. 299 (N. D. Ill., 612 F. Supp. 2d 981), May 4, 2009.

An 11-year-old student with learning disabilities (mild cognitive impairment and speech-language impairment) and his parents brought legal action against a school district, seeking to recover attorney fees under IDEA as prevailing parties in administrative proceedings against a school district. A United States District Court in Illinois held that plaintiffs **were entitled** to recover $44,647.54 in attorney fees as prevailing parties under IDEA. The school district failed to provide the student with a FAPE, although plaintiffs did not prevail on several forms of requested relief. However, the plaintiffs did achieve their main objective of enhancing the student's educational experience and prevailed on a significant number of their requests for relief. Furthermore, the awarded attorney fees were reduced by 15%, rather than the total amount of $52,526.52.

Civil Rights:

"School's Restriction of Mother's Efforts to Read Bible Passages in Kindergarten Class Did Not Violate Free Speech"
Busch v. Marple Newtown School Dist. (C. A. 3 [Pa.], 567 F. 3d 89), June 5, 2009.

Elementary school's restriction of mother's effort to read Bible passages aloud to students in her son's kindergarten classroom as part of a curricular "show and tell" type activity **did not violate** mother's or son's free speech rights. It must be noted that school officials did allow students to discuss religious holidays and read from certain holiday-oriented religious materials; however, school officials **did act reasonably** in disallowing the reading of the religious text because they believed it would have proselytized a specific religious point of view. Furthermore, it **would have appeared** to be an endorsement by school officials of a particular religion which could have implicated the Establishment Clause.

"Middle School Students Were Not Disciplined in Retaliation for The Exercise of Their First Amendment Rights"

Corales v. Bennett (C. A. 9 [Cal.], 567 F. 3d 554), June 1, 2009.

Middle school students brought action against principal, vice principal and school district, claiming they were wrongfully disciplined after they left campus without authorization in order to participate in a protest pertaining to immigration reform measures. Two days after the incident. the vice principal (Gene Bennett), disciplined each participating student by taking away one of their year-end activities and lectured them harshly regarding the possible legal consequences of truancy, including police involvement, along with a $250 fine and a juvenile hall sentence. One of the students (Anthony Soltero) went home and committed suicide. Anthony left a note that stated, "I just want to tell you that I love you [guys] and I'll miss you, [and] tell this to all my family. I killed myself because [I] have to[o] many problems… Tell my teachers [they're] the best and tell Mr. [Bennett] he is a mother#@(-)ker." The United States Court of Appeals, Ninth Circuit, held that: (1) Vice principal's statements to students did not constitute a true threat of corporal punishment; (2) Students were not engaged in a protected activity; (3) Vice principal **lacked retaliatory motive** in imposing discipline on the students; (4) Students' equal protection rights were not violated; (5) There was **no** supervisory liability on behalf of school officials; (6) Vice principal did not engage in extreme and outrageous conduct; and (7) The student's suicide **was unforeseen intervening cause precluding** negligence claim.

"Random, Suspicionless, Drug and Alcohol Testing of School District Employees Violated State Constitution"

Jones v. Graham County Bd. of Educ. (N. C. App., 677 S. E. 2d 171), June 2, 2009.

County board of education's policy, mandating the random, suspicionless drug and alcohol testing of all school district employees **violated** the state of North Carolina's constitutional guarantee against unreasonable searches. Furthermore, the board's policy provided that any employee who was found through drug or alcohol testing to have in his or her body a detectable amount of illegal drug or of alcohol would be automatically suspended from their employment with the school district. Based thereupon, the policy **was remarkably intrusive** and there was **no** established existence of "concrete problems" for which the policy was designed to prevent. So, the court went on to state that the district's employees did **not *have a reduction in their expectation of privacy*** by virtue of their employment with the school district.

Disabled Students:

"Parents Not Prevailing Parties and Not Entitled To Attorney Fees under IDEA"

In re Educational Assignment of Joseph R. (C. A. 3 [Pa.], 318 Fed. App. 113), March 24, 209.

Settlement that plaintiffs reached with a school district on their claims raised in a federal lawsuit that district had denied their child a FAPE during two school years did not materially alter the legal relationship between the parties; therefore, the settlement **was insufficient** to confer "prevailing party" status on parents. Thus, the plaintiffs would not be awarded attorney fees under IDEA, even after four years of litigation. The plaintiffs *agreed* to a settlement that did not provide them with any relief beyond that which they had already achieved in "administrative proceedings".

Labor and Employment:

"Hispanic Female Teacher Reassigned to Teach Seventh Grade English"
Lucero v. Nettle Creek School Corp. (C. A. 7 [Ind.], 566 F. 3d 720), May 29, 2009.

Hispanic female public school teacher, who was reassigned to teach English primarily to seventh grade student, instead of 12th grade students, brought legal action against school district. The United States Court of Appeals, Seventh Circuit, held that plaintiff's reassignment to teach English primarily to seventh graders, instead of 12th graders, was **not** materially an adverse employment action. Therefore, the plaintiff's claims of retaliation under Title VII and Title IX were **not** legally valid. The teacher did **not** suffer a cut in pay, benefits, or other privileges associated with her employment.

Religion:

"School District Did Not Substantially Burden Student's Religious Practices"
Corder v. Lewis Palmer School Dist. No. 38 (C. A. 10 [Col.], 566 F. 3d 1219), May 29, 2009.

Former public high school student brought action against school district, alleging that the district violated her rights under the First Amendment and Equal Protection Clause by requiring her, as a condition of receiving her diploma, to publicly apologize for making a valedictory speech at graduation discussing her religious views without the principal's approval. The United States Court of Appeals, Tenth Circuit, held that the plaintiff's claims for declaratory and injunctive relief that school district's unwritten policy of requiring prior approval of graduation speeches impinged on her rights under the First Amendment and Equal Protection Clause **were moot**. According to the court, the reason for the case being moot was due to the fact that the plaintiff had graduated from high school, there was *no* longer a live controversy, and since the student had already graduated from high school officials *no* longer had the power or opportunity to screen her speech.

Student Discipline:

"Female Student Entering Male Student Restroom Did Not Support a Sexual Offense"
Doe v. Richland County School Dist. Two (S. C. App., 677 S. E. 2d 610), March 25, 2009.

The plaintiff, a 14-year-old high school student was suspended for two school days in August for two days after she engaged in a verbal altercation with another student. Less than a month later a school surveillance camera captured the plaintiff following a male student into the boys' restroom. According to the plaintiff, she entered the boys' restroom to retrieve a comb the student had taken from her. The plaintiff remained in the boys' restroom for about a minute until another male student entered the restroom; then, she exited the restroom. The Court of Appeals of South Carolina held that substantial evidence did **not** support the school board's finding that the plaintiff committed a sexual offense in violation of the school's student disciplinary code. Thus, evidence did **not** support student's expulsion from school. Evidence indicated that the plaintiff did enter a boys' restroom in an effort to retrieve a comb that a male student took from her; however, **no** statement from the offending male student or any other student indicated that anything sexually occurred.

Torts:

"Governmental Immunity Barred Tort Claims Against School District Regarding Teacher's Relationship with a Student"

Frye v. Brunswick County Bd. of Educ. (E. D. N. C., 612 F. Supp. 2d 694), March 9, 2009.

Plaintiffs' (daughter [Kylee] and her parents) alleged that a male teacher engaged in an inappropriate sexual relationship with Kylee from October 2005 through April 2006, culminating in his marriage proposal. According to the complaint the relationship progressed from e-mails, gifts, touching, and multiple sexual acts. Eventually, school officials become aware of the situation and reported it to law enforcement. The teacher was charged with five felonies. He retired from teaching, pleaded guilty to all counts and was sentenced to 90 days in custody and five years of probation. In addition, as part of the plea agreement, he agreed not to teach at any school. Parents and their daughter brought civil action against the school district seeking monetary damages. A United States District Court in North Carolina held that allegations by parents and their daughter that school district officials violated their equal protection rights under both the United States and North Carolina Constitutions by raising a defense of governmental immunity in response to their claims arising from the offending teacher's sexual relationship with daughter when she was a high school senior; **failed** in their efforts to state such a claim. Plaintiffs were **not** able to sufficiently demonstrate that they were treated differently from other similarly situated persons. Furthermore, they **failed** to show that the school district' treatment of their claim was the result of intentional or purposeful discrimination.

"Student Sexually Assaulted on School Bus"

Brandy B. v. Eden Cent. School Dist. (N. Y. A. D. 4 Dept., 880 N. Y. S. 2d 431), June 5, 2009.

Student's mother brought action against school district, board of education, and county child protection agency, seeking to recover damages for injuries student allegedly sustained when she was sexually assaulted on a school bus by another foster child of student's foster parents. The New York Supreme Court, Appellate Division, Fourth Department, held that defendants **lacked** knowledge or notice of the dangerous conduct that the offending student exhibited toward the plaintiff, and thus, was **not** liable for damages. School records did **not** indicated any previous relevant dangerous conduct by the offending student and the assailant had *not* been disciplined for any conduct of any kind during the year in which he attended school within the school district.

"Student Lost an Eye While Participating in a Lacrosse Game During Physical Education"
Larchick v. Diocese of Great Falls-Billings (Mont., 208 P. 3d 836), May 19, 2009.

On February 6, 2004, plaintiff was injured while participating in a lacrosse game during P.E. class as a freshman at Billings Central Catholic High School (Central). While the facts leading up to the plaintiff's injuries are somewhat disputed, it is undisputed that the youngster sustained immediate and permanent vision loss in his right eye when he was hit with a lacrosse stick by another student. A lower court entered judgment for the diocese and denied the plaintiff a new trial based on newly discovered evidence. The Supreme Court of Montana held that newly discovered evidence, which was obtained from one of the student's attorneys after the end of the civil proceedings, showed that the PE teacher was not in the gym when the plaintiff was struck in the eye with a lacrosse stick while participating in a lacrosse game during a PE class, The caller stated that the PE teacher was pressured to testify falsely during the court's proceedings. Therefore, the phone call **was material to the issues** raised at the trial; thus, the plaintiff **was entitled** to a new trial. **The significant issue** at the new trial will focus on whether the school provided adequate supervision during the PE class in which the student was injured and was the PE teacher in fact present when the plaintiff's injury actually occurred.

"Student Runs Over Jogger So He Could Have Sex With Her Corpse"
Emanuel v. Great Falls School Dist. (Mont., 209 P. 3d 244), May 27, 2009.

Plaintiff, who was injured when a high school student purposely ran over her as she was jogging past a high school, brought civil action against school district, alleging that school officials were negligent in their handling of the student subsequent to their discovery of student's resolution list, which included a resolution to get a drivers' license so he could do horrible things to people. The passenger in the offending student's vehicle told police that Robbins (offending student) spotted the plaintiff jogging and he stated that he planned to run her over so that he could engage in necrophilia with her corpse. The Supreme Court of Montana held that it was **not foreseeable** on the part of school officials that, after 17 months after school district became aware of the student's New Year's resolution list, which included resolution to get drivers' license so he could do horrible things to people, that student would deliberately run over a pedestrian after school hours and off school grounds. Thus, school district as a matter of law, owed **no** duty to plaintiff.

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October 2010 (606 & 607)

Legal Update for District School Administrators
October 2010

Johnny R. Purvis*
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- Abuse and harassment
- Athletics
- Civil Rights
- Damages
- Disabled Students
- Education
- Labor and Employment
- Religion
- Security
- Student Discipline
- Torts

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"Special Education Teacher's Alleged Abuse of Student Not Caused By Lack of Certification"
Roe v. Nevada (D. Nev., 621 F. Supp. 2d 1039), December 10, 2007.

Parent (plaintiff) brought civil action on behalf of herself and child under IDEA, ADA, Section 504 of Rehabilitation Act, and state law against school officials and special education teacher alleging that the four-year-old autistic youngster's special education teacher physically and verbally abused (e. g. slapped, hit, slammed, force-fed, and forced him to walk barefoot from his school bus to his classroom) him. A United States District Court in Nevada held that: (1) Genuine issues of material fact as to whether school officials had knowledge of the teacher's abuse of the autistic student and whether they failed to report abuse **precluded summary judgment** for the defendants and (2) Special education teacher's alleged abuse of the plaintiff's child was **not** caused by her lack of certification because the teacher had both an undergraduate and master's degree in special education, including a focus on autism.

Athletics:

"School Officials Not Liable for High School Wrestler's Injuries During Practice"
Musante v. Oceanside Union Free School Dist. (N. Y. A. D. 2 Dept., 881 N. Y. S. 2d 446), June 9, 2009.

Doctrine of primary **"*assumption of risk*" precluded imposition of liability** on school district for injuries sustained by a high school wrestler injured during a wrestling practice when he stepped on the edge of a wrestling mat and collided with a nearby wall. The risk of colliding with the wall *was inherent* in the activity and the condition of the wall *was open and obvious*. In addition, the height differential between the floor and the wrestling mat *was open and obvious*.

Civil Rights:

"Forcing Students to Remain On a Football Field Was Not a Fourth Amendment Seizure"
Doran v. Contoocook Valley School Dist. (D. N. H., 616 F. Supp. 2d 184), March 25, 2009.

High school students' parents sued their school district, school board, school principal, town and town's police chief, challenging the constitutionality of a school-wide search (Police and state troopers used dogs to search the entire school for illegal drugs and alcohol.) for illegal drugs while all students were retained on the school's football field. A United States district court in New Hampshire held that forcing high school students to remain on a football field while police moved through the school with drug detection dogs was **not a "seizure"** for purposes for a Fourth Amendment analysis. Relocating the students to the school's football field, where they remained under constant adult supervision, *allowed the search to be conducted in a way that was both efficient and minimally intrusive*. **Note**: The plaintiffs' children complained that they "felt trapped" on the field because the gates were locked and one of the students was not allowed to eat some food that was in his pocket.

"Evidence Pertaining to Principal's Propensity for Sexual Harassment Would Have Been Unduly Prejudicial"
Lawson-Brewster v. River Valley School Dist. (W. D. Mich., 617 F. Supp. 2d 589), March 25, 2008.

Former school district employee (female custodian) brought legal action against school district and for co-worker (principal), alleging gender discrimination and other related claims. Plaintiff alleged that she was sexually harassed by the principal in the high school in which she worked. Furthermore, her employment with the school district was ultimately terminated, and according to the plaintiff it was due to the fact that she refused to date him and complained about his treatment of her. The plaintiff desired to admit evidence to the court that the defendant had sexually harassed other females both at his current place of employment and at a previous school district while employed as a school principal. However, the defendant sought an order from the court to exclude the past claims of sexual harassment because such was not relevant to the case at issue. A United States District Court in Michigan held that the evidence pertaining to principal's alleged propensity for sexual harassment **would be unduly prejudicial**, for purposes of plaintiff's gender discrimination claim against the defendants (school district and principal). The court went on to state that there was **no direct evidence** that the plaintiff was fired for rejecting the principal's advances. In addition, submitted evidence, along with hearsay evidence pertaining to the principal's past sexual harassment claims **were unrelated** and would have **a tendency to confuse the issues** by focusing the fact-finder's attention on unrelated events pertaining to the plaintiff's employment termination.

Damages:

"Damages Awarded to Worker Were Excessive"
Keaney v. City of New York (N. Y. A. D. 2 Dept., 881 N. Y. S. 2d 143), June 9, 2009.

A construction worker was injured while working on a school renovation project when he was struck on the right shoulder by two planks that fell from a 30-foot scaffold. He sued the city, city board of education, and the city school construction authority in an attempt to recover damages for his injuries. The New York Supreme Court, Appellate Division, Second Department, held that the jury's award of $700,000 for past pain and suffering and $900,000 for future pain and suffering ***deviated materially from what would be reasonable compensation***; therefore, an award of $200,000 for past pain and suffering and $300,000 for future pain and suffering ***would be much more reasonable***. Witnesses on both side agreed that the worker could benefit from arthroscopic surgery on the affected shoulder and the arthritis in his shoulder was *not* caused by the accident.

Disabled Students:

"IEP Team Meeting Procedurally Correct With Past Teacher on Team"
A. G. ex rel. Groves v. Placentia-Yorba Linda Unified School Dist. (C. A. 9 [Cal.], 320 Fed. App. 519), March 20, 2009.

IEP team meeting **was procedurally valid** under IDEA where it included a special education teacher *who had "actually taught"* the student, despite the claim that Congress intended to require the presence of the student's current special education teacher. The meeting did include an adaptive physical education teacher who had previously taught the student and was familiar with the student's situation, and given the student's disabilities, adaptive physical education was one of the most significant components of his IEP.

"Student Provided a FAPE Under IDEA"
K. C. ex rel. M. C. v. Mansfield Independent School Dist. (N. D. Tex., 618 F. Supp. 2d 568), March 26, 2009.

An IEP that was developed by a Texas school district for a student with "Williams syndrome" (A genetic disorder which typically results in some degree of mental retardation as related to cognitive and learning difficulties.) **was individualized** on the basis of the student's assessment and performance despite the student's parents contention that the school district did not focus on her interest in music and did not provide her with adequate transition services. Therefore, the school district **did provide** the student with a FAPE.

"Students IEP Was <u>Not</u> Arbitrary or Unreasonable"
T. H. v. District of Columbia (D. D. C., 620 F. Supp. 2d 86), June 1, 2009.

Hearing officer's determination that a student's IEP was **not arbitrary or unreasonable**, so as to deny him the FAPE required by IDEA despite evidence of the student's regression. There was *no* evidence or logical reason why it was more probable than not that the IEP, as opposed to other valid reasons, caused the student's lack of progress. Furthermore, a multi-disciplinary team, in recognition of the student's underachievement, had increased the intensity of the services being provided.

Education:

"High School Student's Parents Entitled to Private School Special Education Expenses"
Forest Grove School District v. T. A. (U. S., 129 S. Ct. 2484), June 22, 2009.

The Forest Grove School District sought a judicial review of a hearing officer's decision that required the school district, pursuant to IDEA, to reimburse private-school tuition of the student who had been diagnosed with learning disabilities. From kindergarten through the eighth grade the student's teachers had observed that he had trouble paying attention in class and completing his assignments. During his junior year in high school the student's parents sought private professional advice and the eleventh grader was diagnosed with ADHD and a number of learning disabilities. Thereafter, the student's parents enrolled him in a private school. The court stated that IDEA **authorized the reimbursement** of the costs of private special-education services to children with learning disabilities when a school district *failed* to provide a student with a FAPE and when private school placement **was appropriate**, even when the child has not previously received special education or related services through a public school. In this particular case the school district **failed** to find the child eligible for special education services, **declined** to offer him an IEP, and **failed** to provide him with a FAPE.

"Assistant Principal's Reasonable Suspicion of Drug Distribution Did Not Justify Strip Search of Student"
Safford United School Dist. #1 v. Redding (U. S., 129 S. Ct. 2633), June 25, 2009.

Assistant principal's reasonable suspicion that a 13-year-old middle school student was distributing contraband drugs did **not** justify a strip search in which the student was directed to pull out her bra and the elastic band of her underpants. The principal knew the pills in question were prescription strength pain relievers, the nature of the drugs were of *limited threat*, there was *no* reason to suspect that a large amount of drugs were being passed around or that individual students were receiving a great number of pills, and *nothing suggested* that the student was hiding common pain killers in her underwear. **Note:** The assistant principal had a female administrative assistant and a female school nurse search the student's clothing, required the student remove her outer clothing, told her to pull her bra out and shake it, and had her to pull out the elastic on her underpants; thus exposing her breasts and pelvic area to some degree.

Labor and Employment:

"School Janitor Was Performing Employment Services When He Was Injured"
Texarkana School Dist. v. Conner (Ark., 284 S. W. 3d 57), May 8, 2008.

On September 21, 2004, a school janitor (Conner and defendant) left his school's premises during his lunch break to perform a personal errand. Upon his return, Conner went to park in his usual parking lot but discovered a disabled truck blocking the main entrance to the lot. Conner then went to the back entrance of the lot that is secured by a locked gate. While attempting to unlock the gate, Conner was struck by the gate and pinned under it. As a result, Conner's leg was broken in two places. His injury left him unable to work for seven months. An administrative law judge (ALJ) held that Conner's injury was not a compensable injury. The Arkansas Workers' Compensation Commission reversed and the school district appealed. The Supreme Court of Arkansas held that substantial evidence **supported** Workers' Compensation Commission's decision that school janitor *was performing employment services* when he was injured while attempting to unlock a gate. The defendant was attempting to return to work but was only able to access his normal parking area by unlocking the gates at the back entrance, and at the time of his injury, janitor was headed to the school's cafeteria where he typically ate lunch. Furthermore, any time he would eat lunch in the cafeteria he considered himself to be on call because he was required to attend to his job duties immediately, even if they arose during his lunch break. Therefore, in attempting to unlock the gate, Conner *was advancing his employer's interests* by allowing other employees to enter or exit the school's parking lot.

"School Officials Did <u>Not</u> Regard Employee as Impaired"
Milholland v. Summer County Bd. of Educ. (C. A. 6 [Tenn.], 569 F. 3d 562), July 2, 2009.

Former employee, a teacher, brought action against her former employee, a school district, alleging discrimination in violation of ADA. The plaintiff had been an assistant principal at a middle school and was transferred to a classroom teaching position in a high school due to her job performance and working relationship with the school's teachers. The United States Court of Appeals, Sixth Circuit, held that **nothing indicated** that school officials *regarded* employee, who had been diagnosed with inflammatory arthritis, *as impaired* or *thought* that employee's impairment substantially limited her life or employment responsibilities. Thus, the plaintiff **failed** to establish a case of discrimination against the defending school district. Furthermore, the plaintiff's principal knew generally that the former employee was ill, but the plaintiff never mentioned the specifics of her illness to him or other school officials.

"Failure to Renew Lesbian Coach's Contract Was Pre-textual Regarding Discrimination Claim"

Cookson v. Brewer School Dept. (Me., 974 A. 2d 276), June 2, 2009.

Genuine issue of material fact as to whether school's stated non-discriminatory reason for failing to renew contract of former high school softball coach, namely that she had been involved in a number of verbal abuse and hazing incidents toward her players; plus, while visiting a farm required players to touch and walk through sheep feces. The court examined the aforementioned reasons for nonrenewal of the coach's contract and concluded that the so stated reasons ***were probably employed as a pretext*** for improper discrimination on the basis of the coach's sexual orientation; thus, **precluding summary judgment** in favor of the school district. The plaintiff *presented evidence* to support *a reasonable inference* that the articulated reasons for failing to renew her contract were in fact untrue.

"Teacher <u>Not</u> Entitled to Unemployment Benefits Because She Voluntarily Left Her Employment"

In re Ruggiero (N. Y. A. D. 3 Dept., 881 N. Y. S. 2d 552), June 25, 2009.

Evidence supported a finding that a teacher who resigned *had voluntarily left her employment* ***without good cause***, **precluding** an award of unemployment insurance benefits. The teacher had been informed that the program in which she had been teaching would not be offered during the next academic year; however, her employer's representative testified that the teacher could have exercised "bumping rights" over the positions of other teachers in the same tenure area. Furthermore, school officials had planned to transfer her to another teaching position and had advised her that she would be teaching something, but she nevertheless submitted her resignation.

"Termination Notice to Outdated and Incorrect Address Did <u>Not</u> Satisfy Due Process"

Norgrove v. Board of Educ. of City School Dist. of City of New York (N. Y. Sup., 881 N. Y. S. 2d 802), January 13, 2009.

Notice that was sent by certified mail to a teacher's outdated and incorrect mailing address, but that otherwise satisfied substantive requirements of state statute governing disciplinary procedures and penalties by providing details as to 12 separate incidents, did **<u>not</u>** satisfy the teacher due process rights. The school board had become aware that its attempt at notice had *failed* when notice was returned marked "unclaimed" and there were additional reasonable and practicable steps for notification readily available.

Religion:

"Preliminary Injunction Was Warranted to Bar Religious Time Release Program on School Grounds"
H. S. v. Huntington County Community School Corp. (N. D. Ind., 616 F. Supp. 2d 863), March 19, 2009.

Parent (plaintiff) filed suit on behalf of herself and her child, seeking declaration that elementary school violated the Establishment Clause of the First Amendment by allowing a church association to place a trailer on school property for voluntary instruction in religion on a time release arrangement during school hours. A United States District Court in Indiana held that a balance of hardship **favored** granting a preliminary injunction barring elementary school from allowing a religious association to park a trailer on school grounds during regular school hours for voluntary religious instruction to third and fourth grade students. Since irreparable harm to parent, students, and public interest from Establishment Clause violation **outweighed** the school's safety concerns pertaining to students leaving school grounds to attend religious instruction off school grounds.

Security:

"Evidence Supported Conviction for Disturbance of a Public School"
State v. Maki (N. D., 767 N. W. 2d 852), July 9, 2009.

Norma Breimeier has a bachelor's degree in elementary education and is licensed to teach in the state of North Dakota. In May 2008, she was employed as a teacher's aide in the special education room at New Salem High School. After the final bell rang for the start of the school day Breimeier in her assigned classroom with five students when one of the student's mother walked into the classroom, put her hands right up on the table were the teacher was sitting, leaned forward, and said something similar to the following: "You had better not f--- with my son again." In addition, the student's mother told her that if she was not scared now, she would take her across the street and beat her up. The teacher thinks that the student's mother was referring to an incident that occurred on May 2, 2008, when she and another co-worker put the mother's child in a chair and held him in the chair because he was running around the classroom and crawling under tables. The Supreme Court of North Dakota held that evidence **was sufficient** that defendant (student's mother) insulted or threatened a teacher in the presence of students, **so as to support conviction** of disturbance of a public school. Although the threatened person was officially employed as a teacher's aide, she was a licensed teacher and she was the only figure of authority present in the classroom at the time of the incident.

Student Discipline:

"Parent Had No Right to Appeal School Board's Decision to Suspend Student From Football Team"
Mather v. Loveland City School Dist. Bd. of Educ. (Ohio App. 1 Dist., 908 N. E. 2d 1039), March 13, 2009.

High school student's mother brought suit against a school board, seeking declaratory and injunctive relief, challenging the board's decision to prohibit her son from playing in 40% of the high school football games due to student's alcohol possession arrest and violation of the school's code of conduct. An Ohio court of appeals held that the high school student did **not** have a constitutionally protected due process right to play on his high school's football team, or to participate in any of the school's sport activities. Therefore, **neither** the student **nor** his mother ***had the right*** to appeal the school board's decision to prohibit the student from participating in 40% of the school's football games.

"Expelled Middle School Student Not Deprived of Due Process"
Hinds County School Dist. Bd. of Trustees v. R. B. ex rel. D. L. B. (Miss., 10 So. 3d 387), December 11, 2008.

Middle school student was summoned to the principal's office due to another student reporting that the aforementioned student was selling drugs on campus. While searching the student's backpack, the principal discovered an instrument that could be described as both a nail file and a knife, which was in violation of Mississippi code (97-37-17[4]). Thereupon, the school board expelled the offending student from the middle school for the remainder of the 2004 school year and placed him in an alternative school for the rest of the 2004 school year and the first nine weeks of the following 2004-2005 school year. The Supreme Court of Mississippi held that the school board's failure to give the student charged with a disciplinary violation notice of a school board meeting at which the recommendation of the appeals committee was reviewed, or an opportunity to speak on his own behalf at such meeting, did **not** constitute deprivation of due process. Student *had been given notice* of appeals committee meeting and had spoken on his own behalf at such meeting, and *neither principles of due process nor anything in school district policy entitled student to more than one hearing*.

Torts:

"Student's Decision to Commit Suicide Was Not Caused By School Officials' Actions"
Mikell v. School Administrative Unit No. 33 (N. H., 972 A. 2d 1050), March 18, 2009.

On January 18, 2005, a middle school special education teacher reported to the vice-principal that Joshua (student) had referred to two mints on his desk as medicine. The student's mother (plaintiff) alleged that the teacher did so "falsely and knowingly" in an attempt to affect her son's disciplinary record, and winked at Joshua while reporting the incident as "an acknowledgement of her lie." The following day, Joshua was again reported to the vice-principal for tipping his desk in class, being rude, and calling a teacher a "bitch". Due to his actions, Joshua was suspended from school and his mother was called to pick him up. Upon arriving at his home, Joshua went immediately to his room. Soon thereafter, the plaintiff left to take Joshua's grandfather, who had accompanied her to the school, to his residence. When she returned home, she found Joshua had hanged himself. The Supreme Court of New Hampshire held that the alleged false accusation by the special education teacher, stating that Joshua had referred to two mints on his desk as medicine, even coupled with the teacher's position of authority and teacher's allegedly 'winking" at the student, did **not** rise to the level of extreme and outrageous conduct *as required* in order for the plaintiff to establish a cause of action for Joshua's suicide. Furthermore, there was **no** evidence that the teacher's conduct was extreme or outrageous with an intentional intent to cause the student severe emotional distress that would be a substantial factor in bringing about his suicide.

"Student Injured While Learning to Play Golf"
Teodoro v. Longwood Cent. School Dist. (N. Y. A. D. 2 Dept., 881 N. Y. S. 2d 468), June 16, 2009.

There **was adequate supervision** in the school's gym at the time a student was injured while learning to play golf in gym class; thus, **precluding imposition of liability** on school district. The students were instructed early in the class by their teacher not to step forward to take their turn until the student who was taking a swing was finished and had put his/her club down. The plaintiff's injury occurred when he stepped forward after the student in front of him had taken a swing, but before the student had put his club down, at which time the other student suddenly swung the golf club backward and struck the plaintiff in the face with it.

"Additional Surfacing Material Beneath Monkey Bars Would Not Have Prevented or Reduced Student's Injury"
Grandeau v. South Colonie Cent. School Dist. (N. Y. A. D. 3 Dept., 881 N. Y. S. 2d 549), June 25, 2009.

Additional surfacing material on the ground beneath the monkey bars at a school's playground would **not** have prevented or reduced the severity of the injury sustained by an eight-year-old student when he fell from the monkey bars. Therefore, the school district was **not** liable in premise liability suit. The force applied to the child's arm when he struck the ground was more than twice what it would have been if the bars would have been used properly by the student.

"School District Did Not Owe Duty of Constant Supervision of Student Who Drowned While On a ROTC Camping Trip"
Robinson v. Jefferson Parish School Bd. (La. App. 5 Cir., 9 So. 3d 1035), April 7, 2009.

On March 17, 2006, Rayvon Robinson (deceased student) attended a high school sponsored ROTC camping trip; however, the next morning (March 18, 2006) he was discovered missing. Approximately 10 days later, his body was found in the lake near their camp site. He was clothed and his boots were on. Approximately one year later, his cell phone and wallet were discovered near the lake. At the time of the student's death, he was 20-years-old. A Louisiana appeals court held that the school board and its employees did **not** *owe a duty of constant supervision* to the deceased youngster while attending a ROTC camping trip. Furthermore, the school district did **not** *owe a duty to ensure* that the student *obeyed* the sponsor's instructions that the lake was off limits.

"Student Injured While Riding In Back of Pickup Truck to Football Practice"
Strange ex rel. Strange v. Itawamba County School Dist. (Miss. App. 9 So. 3d 1187), April 28, 2009.

The Court of Appeals of Mississippi held that a school district, in allowing students to ride in the back of a pickup truck to football practice, **was a discretionary act**; thus, rendered the school district immune from liability under the discretionary function exemption of Mississippi's Torts Claim Act. The plaintiff's son, a ninth grader, was injured (He sustained several cuts and bruises, as well as a fractured skull.) when he fell from the bed of a pickup truck while being transported on school grounds by another student to football practice.

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
November 2010

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

Topics:

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

Commentary:

- No commentary this month

Topics

Abuse and Harassment:

"School District Not Deliberately Indifferent to Teacher's Alleged Abuse and Harassment of Student"
Garcia ex rel. Marin v. Clovis Unified School Dist. (E. D. Cal., 627 F. Supp. 2d 1187), April 16, 2009.

A middle school student who was allegedly subjected to abuse and harassing behavior by her math teacher filed suit against a school district and individual school district employees alleging such charges as assault, battery, false imprisonment, intentional infliction of emotional distress, sexual harassment, violation of California Education Code, negligence per se, negligent supervision, negligent training, negligent hiring/retention, violation of Title IX, and two violations of Section 1983 by both the teacher and school district. The United States District Court, E. D. California, held that the school district **was not deliberately indifferent** to male middle school teacher's harassment of a female student so as to incur damages under Title IX. School officials *took immediate action* to end the harassment once officials were informed of it. First, school officials granting the student's request to be removed from the teacher's class, thereby eliminating regular and prolonged contact she would have with him. Second, the teacher was immediately removed from the classroom altogether. **Note**: In early November 2007, the plaintiff was walking back to her desk when she was approached from behind by her math teacher who lifted the young lady upside down and completely off the classroom floor. The teacher then held the victim, including on or about her buttocks, 'feeling her', positioning her head directly in his groin area, and proceeded to shake her up and down several times, in front of the entire class. Once class was dismissed the victim's classmates encouraged her to report the incident to the school's administration.

Attorney Fees:

"Parents of Autistic Child Awarded Attorney Fees"
J. D. Ex Rel. Davis v. Kanawha County Bd. of Educ. (C. A. 4 [W. Va.], 571 F. 3d 381), July 9, 2009.

Parents of a disabled (autistic) child **were a "prevailing party"** within meaning of provision of IDEA authorizing an award of attorney fees to a prevailing party, even though plaintiffs did not prevail on claim that student's IEP did not provide sufficient individual instruction. It is interesting to note that the father of the child testified that this was the primary reason that they filed their law suit. However, the plaintiffs did *prevail* on the other claims they raised such as providing additional assistance to the child, holding additional IEP meetings using an independent facilitator, and providing the student with over 13 hours of speech and language therapy.

Civil Rights:

"Student Sexually Abused By School Contractor"
Howell v. Austin Indep. School Dist. (C. A. 5 [Tex.], 323 Fed. App. 294), March 25, 2009.

A former student brought action against school district, alleging that he was sexually abused by a school contractor. Furthermore, the plaintiff alleged that the contractor's supervisor, the school's band director, had knowledge of the sexual abuse. The United States Court of Appeals, Fifth Circuit, held that evidence that a school contractor told a band director that he believed that plaintiff was both divulging his homosexuality to him and "coming-out"; however, the band director responded that the contractor should stay away from the student or be dismissed. Based on the aforementioned, evidence **did not establish** that the school district had actual knowledge of the student's sexual abuse by contractor **or** that the band director **was deliberately indifferent** to establish monetary damages under Title IX.

"Preliminary Injunction Preventing Implementation of Period of Silence Was Warranted"
Sherman v. Township High School Dist. 214 (N. D. Ill., 624 F. Supp. 2d 907), June 2, 2008.

Public school student seeking a preliminary injunction preventing the implementation of Illinois' Silent Reflection and Student Prayer Act, which mandated a period of silence for silent prayer or reflection at the start of each school day, *had likelihood of success* on merits of her claim that the Act was unconstitutionally vague and would have a chilling effect on First Amendment rights. The Act provided no direction whatsoever as to how the period of silence was to be implemented, what time of day the period of silence would occur, how long the period of silence should last, and whether students would be permitted to move about the classroom during the period of silence or whether they would be required to stand at or sit in their seats. Furthermore, the Act *failed* to delineate what penalties existed for students who did not remain silent, teachers who refused to hold a period of silence in their classroom, and schools or school districts that refused to implement the statute in whole or in part. Therefore, based upon the aforementioned, the plaintiff's **grounds are sufficient to support a grant of a preliminary injunction preventing** the implementation of Illinois' Silent Reflection and Student Prayer Act.

"Former Assistant Superintendent Stated a First Amendment Retaliation Claim"
Spang v. Katonah-Lewisboro Union Free School Dist. (S. D. N. Y., 626 F. Supp. 2d 389), May 18, 2009.

School district's superintendent was **not** entitled to qualified immunity on a First Amendment retaliation claim by a former assistant superintendent for business asserting that, in response to the assistant superintendent's expressed intention to file a lawsuit regarding his termination, the superintendent *caused to be published demonstrably false statements* about the assistant superintendent. Such statements *had the intent directly or indirectly* to tarnish the assistant superintendent's reputation and *cast aspersions on his character for the purpose of dissuading him from filing a lawsuit*. Furthermore, such retaliatory actions by government officials **violated** the First Amendment.

Disabled Students:

Ellenberg v. New Mexico Military Institute (C. A. 10 [N. M.], 572 F. 3d 815), July 10, 2009.

Parents (plaintiffs) of a disabled child brought action against a state military-style educational institution and its board of regents asserting claims under Individuals with Disabilities Education Act (IDEA), the Rehabilitation Act (Section 504), and the Americans with Disabilities Act (ADA), alleging that denial of the child's application for admission violated all three federal statutes. The New Mexico Military Institute (defendant) based their denial for admission of the plaintiffs' child on the child's behavioral problems manifested in her presence at a residential treatment facility, admitted past drug use, level of medication requirements, and a need for continued counseling. At the time the defendant denied the plaintiff's child admission, she was eligible for special education services under IDEA and had an IEP. The United States Court of Appeals, Tenth Circuit, held that: (1) The child's eligibility for receiving special education and having an IEP under IDEA did **not** automatically make her a qualified handicapped person eligible for protection under Section 504 and (2) Disabled child's eligibility for receipt of special education services under IDEA and having an IEP did **not** make a child a qualified individual with a disability under ADA. Thus, summary judgment **was granted** to the defendant.

"Behavioral Plan Allowed School to Administer Medication to a Disabled Student"
S. J. ex rel. S. H. J. v. Issaquah School Dist. No. 411 (C. A. 9 [Wash.], 326 Fed. App. 423), May 1, 2009.

Provision in student's behavioral plan which allowed school officials to administer medication to a student due to his learning disability and his explosive behavior did not violate the student's rights under IDEA. The child's parents admitted that they were having difficulty getting their child to take his medication; and agreed to allow the school district to administer the child's medication due to his violent and explosive behavior. Furthermore, the child's physician adjusted the child's dosage and granted the school district permission to administer the youngster's medication.

"School's IEP Provided a Meaningful Education Benefit to Disabled Student"
Stanley C. v. M. S. D. of Southwest Allen County Schools (N. D. Ind., 628 F. Supp. 2d 902), December 29, 2008.

Evidence supported independent hearing officer's determination that school district supplied an IEP ***reasonably calculated to provide a meaningful educational benefit*** to student with cerebral palsy, speech disorders, and visual processing delays. Thus, the student's IEP **was in compliance** with IDEA requirements to provide a FAPE. Furthermore, gains the student had made over a two-year period in language arts, math, story writing, visual processing, speech, and independence *were attributable in part* to her education in a public school; along with instruction and therapy she received part-time at a private school.

Labor and Employment:

"Principal Did Not Establish a "Stigma Component" As Pertaining to His Liberty-Interest Due Process Claim"
Herrera v. Union No. 39 School Dist. (Vt., 975 A. 2d 619), April 17, 2009.

Former high school principal brought action against a school district and its superintendent, asserting breach of contract, defamation, and violation of the state's Fair Employment Practices Act, and a Section 1983 civil rights claim. The Supreme Court of Vermont held that evidence **failed to establish** that the school board and superintendent stigmatized a former high school principal in the constitutional sense of depriving him of employment opportunities beyond the act of declaring that his termination was for performance reasons. Therefore, neither the school board nor superintendent "stigmatized" him from future employment opportunities because neither the board nor superintendent made comments went any further than making vague allegations related to unspecified in-competencies that were insufficient to establish stigma.

Religion:

"Permanent Injunction Against Distribution of Bibles Not Invalid"
Roark v. South Iron R-1 School Dist. (C. A. 8 [Mo.], 573 F. 3d 556), July 16, 2009.

Parents of several elementary school students brought action against a school district, members of its board of education, and school officials, alleging that the district's practice of allowing the distribution of Bibles to fifth grade students in the classrooms and during the school day; violated the Establishment Clause of the First Amendment of the United States Constitution. The United States Court of Appeals, Eighth Circuit, held plaintiffs were **not** entitled to declaratory judgment that school district's policy, which had not yet been implemented and which provided that an organization wishing to distribute "any printed material" must submit the material to the superintendent for approval in advance of any distribution. However, the new policy **facially violated** the Establishment Clause based on the school district's past conduct in allowing the distribution of Bibles by a private group during the school day and on school property. Furthermore, a *permanent injunction* against such conduct **already existed**, but the new policy did make the school a limited public forum for the distribution of a wide variety of literature.

Searches:

"Search of a Student's Car Was Justified"
State v. Schloegel (Wis. App., 769 N. W. 2d 130), May 13, 2009.

Search of a high school student's car **was justified and reasonable** at its inception because school officials had received an anonymous tip that student was in possession of drugs, including pill, and possibly some other illegal substances. Approximately three years prior to this particular incident, the student had been arrested for possession of marijuana on school grounds. **Note:** School officials and the school's liaison officer searched the student's book bag, his person, and his locker, but no drugs were found. However, the search of the student's vehicle yielded a container of marijuana, a pipe, Oxycontin, and cash.

Student Discipline:

"Student's Questioning by School's Dean of Students Not Subject to a Custodian Interrogation for Miranda Purposes"
In re Tateana R. (N. Y. A. D. 1 Dept., 883 N. Y. S. 2d 476), July 14, 2009.

Evidence supported Family Court's finding that a student was **not** subjected to a custodial interrogation for Miranda purposes when she was called into the school dean's office and questioned regarding an allegation that she refused to return another student's property, notwithstanding the presence of a uniformed police officer during the questioning. Questioning was **not** initiated by the officer and officer provided minimal input to the dean during her interview with the school's dean. **Note:** The 13-year-old female student was called into the dean's office in an attempt to secure another student's iPod. The student informed the dean that she was not going to return the student's IPod; thereupon she was placed under arrest.

Torts:

"Monkey Bars Not Defective"
Trolani v. White Plains City School Dist. (N. Y. A. D. 2 Dept., 882 N. Y. S. 2d 519), July 21, 2009.

Monkey bars from which a kindergarten student fell during recess were **not** defective in either design or installation, even if the equipment did *not* comply with safety guidelines issued by the American Society for Testing and Materials. **Note:** At the time of the incident, there were approximately 100 students in the schoolyard with six teacher-assistants to supervise them. One teacher-assistant was specially assigned to supervise the monkey bars upon which the student was playing at the time of the accident.

"School Officials Had Statutory Immunity Regarding Student's Arrest, Prosecution, and Conviction"
Jones v. Maloney (Mass. App. Ct., 910 N. E. 2d 412), August 3, 2009.

Regional school district and its administration **had statutory immunity** from suit, as to claims of negligence and negligent infliction of emotional distress brought by a high school student and his mother alleging that high school's assistant principal failed to notify the student's mother of a police investigation that led to the student's arrest and conviction for indecent assault and battery on a classmate. In addition, the plaintiff claimed that the school's administration failed to act in loco parentis to prevent the student from being interview by police and prevent the student from criminal prosecution and conviction. **Note:** While one student held a female student's arms the plaintiff's son, then age 18, grabbed and squeezed the young lady's breasts.

"School Receptionist's Not Entitled to Immunity Due to Releasing First-Grader to Non-Custodial Father"
McDowell v. Smith (Ga., 678 S. E. 2d 922), June 29, 2009.

School receptionist's release of a first-grade student from school to non-custodial father, who was not authorized to pick-up child, **was a ministerial duty** for which the receptionist was **not** entitled to official immunity from liability. School policy provided that, before releasing a student, receptionist was required to check student's information card to verify that person picking-up the child was authorized to do so, policy also required receptionist to consult with the school's administration about facsimile or telephone call request for early release, and the receptionist had *no* discretion with respect to compliance with the policy. **Note:** The receptionist received both a telephone call and a facsimile note from a woman claiming to be the child's mother. The woman requested that the biological father of the first-grader be allowed to pick-up the child from school on that particular day. The receptionist did check the father's driver's license to confirm his identity, but she failed to check the student's information card.

"Student Injured in a Floor Hockey Game in a Physical Education Class Assumed the Risk of Injury"
Mayer v. Gulmi (N. Y. A. D. 2 Dept., 883 N. Y. S. 2d 579), July 28, 2009.

Student injured in a floor hockey game in a high school physical education class **assumed the risk of the injury**, thus ***precluding*** the imposition of liability on a player for the other team in the plaintiff's personal injury suit. The plaintiff was controlling the ball when he allegedly tripped and fell over the hockey stick of the defendant, a player on the opposing team. The plaintiff alleged that the defendant intentionally or recklessly threw the hockey stick between his legs. The player's conduct was **not** a flagrant infraction unrelated to the normal method of playing the game and the act was done without any competitive purpose.

"Student Falls From Monkey Bars"
Gray v. South Colonie Cent. School Dist. (N. Y. A. D. 3 Dept., 883 N. Y. S. 2d 647), July 30, 2009.

Summary judgment of a school safety consultant and an emergency room physician **were insufficient** to raise a triable (subject or liable to judicial examination) issue of act as to whether the depth of the ground cover beneath the monkey bars on an elementary school's playground was adequate in a personal injury suit brought by the parents of a student injured in a fall from the monkey bars. Neither expert inspected the playground or the ground cover; instead both based their views solely on documentary evidence, including measurements taken by the student's father and medical records. **Note:** The father found that the monkey bars were about 6 and ½ feet high, and he measured a six-inch-deep layer of loose wood chips in the area where the child fell, lying on top of a layer of packed-down chips that he did not measure.

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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December 2010 (#s 610 & 611)

Legal Update for District School Administrators
December 2010

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

Topics:

- Athletics
- Civil Rights
- Disabled Students
- Labor and Employment
- Religion
- School Districts
- Standards and Competency
- Torts

Commentary:

- No commentary this month

Topics

Athletics:

"High School Wrestler Contracts Herpes"
Farrell v. Hochhauser (N. Y. A. D. 2 Dept., 884 N. Y. S. 2d 261), August 25, 2009.

High school wrestler allegedly contracted herpes simplex I (Often referred to as fever blisters or cold sores) while participating in a wrestling match. If proven, the plaintiff could **not** use such evidence to form a basis for a liability suit against the school district. School officials, including the wrestling coach, informed the plaintiff of specific risks of contracting herpes, and not just the risk of contracting skin diseases in general through participating in the sport of wrestling. Furthermore, the wrestling coach distributed to all wrestlers and their parents a packet of information including an article stating that herpes was among the skin diseases most commonly seen in wrestling. **Note**: An expert witness on behalf of the plaintiff stated that herpes "may exist in 29.8% of high school wrestlers and that herpes is a long standing skin disease associated with wrestling."

Civil Rights:

"School Board Entitled to Immunity Regarding Reporter's First Amendment Claims"
Cole v. Buchanan County School Bd. (C. A. 4 [Va.], 328 Fed. App. 204), May 14, 2009.

A newspaper reporter, who was banned from all school property, brought civil action against defending school board and four of its individual members, alleging retaliation for the exercise of his First Amendment rights. The United States Court of Appeals, Fourth Circuit, held that both the school board and its members **were entitled to qualified immunity** regarding the plaintiff's First Amendment retaliation claim. A reasonable school board member ***could have*** believed that banning "critical reporter" from school grounds *would not have violated* the reporter's First Amendment. **Note**: The board's decision to ban the reporter from all school properties was based on events such as the following: (1) Reporter entered an elementary school building and took photos during the school day without reporting to the principal's office; (2) While taking photos at the aforementioned school, the reporter interviewed students without school administrative or students' parents approval; and (3) On October 20, 2006, the reporter published an article questioning why a board member sent his child to a school outside of the school district.

"School District <u>Not</u> Entitled to Summary Judgment for Failing to Protect Student"
Doe ex rel. Doe v. Coventry Bd. of Educ. (D. Conn., 630 F. Supp. 2d 226), April 23, 2009.

Parent, on behalf of her daughter (a high school student) who had been sexually assaulted by a fellow male student off school grounds, brought Title IX legal action alleging that school officials knowingly failed and refused to protect her daughter from discrimination stemming from student-on-student sexual harassment; thus, depriving plaintiff's daughter of educational opportunities and benefits. The United States District Court, D. Connecticut, held that genuine issue of material fact as to the severity of harassment experienced by female student who had been sexually assaulted by a male student off school ground **precluded summary judgment** on plaintiff's Title IX claim against defending school district. The ***mere fact*** that the plaintiff's daughter and male student who had raped her attended the same school together ***could be found to constitute pervasive, sever, and objectively offensive harassment so as to deny her equal access to school resources and opportunities***. In addition to potential interaction, the victim and her assailant shared a lunch period and a class during their sophomore year and a class together the first day of classes their junior year; thus, ***a reasonable jury could further conclude that harassment of victim by assailant's friends on and off school grounds created a hostile environment that interfered with her educational opportunities***. The court went on to ***precluded summary judgment*** for the school district on the plaintiff's Title IX claim due to the fact that the school district ***could be liable for deliberate indifference*** to post-assault harassment and once school officials became aware of the sexual assault and the related student harassment ***a reasonable jury could find that schools officials were given adequate notice of both assault and harassment***. **<u>Note</u>**: The plaintiff's daughter received harassing name calling, voice-mails, and harassing letters from the friends of the male student who raped her. Furthermore, she was victimized by both taunts and name-calling that included such insults as "slut", "cow", "whore", "liar" and "bitch".

"Student Unsuccessful In His Claim That School Board Violated His First Amendment Rights for Terminating Junior ROTC Program"
Esquivel v. San Francisco Unified School Dist. (N. D. Cal., 630 F. Supp. 2d 1055), May 16, 2008.

Students enrolled in Junior Reserve Officer's Training Crops (JROTC) program and their parents/guardians brought action claiming that their school board violated their First Amendment rights by deciding to terminate their high school's JROTC program at the end of the school year. The United States District Court, N. D. California, held that the school's elimination of the JROTC program was **<u>not</u>** a funding decision that discriminated on the basis of viewpoint (military's "Don't ask, don't tell" policy) due to the fact that the school district has a stated policy designed to eradicate discrimination based on sexual orientation. Furthermore, the Court went on to state that public school districts had the right and responsibility to make changes to courses and educational programs offered by the school district.

"Teacher Awarded $244,000 on Disability Claim"
Olian v. Board of Educ. of City of Chicago (N. D. Ill., 631 F. Supp. 2d 953), February 12, 2009.

Jury's award of $244,000 in employee's discrimination action under ADA **was rationally connected** to evidence adduced at trial and was not an extreme outlier of awards in similar cases, and thus the school board was **not** entitled to a reduction in the damages so awarded. The plaintiff, a middle school counselor and teacher, who suffered from a speaking disability presented evidence of both emotional and physical injury she suffered as a result of the board's *failure* to reasonably accommodate her so that she could fulfill her duties as an employee of the school district. The plaintiff suffered agitation, stress, an emotional breakdown, and increased pain in her throat and exacerbation of her preexisting disability. **Note**: The counselor/teacher suffered from a disability that was caused by aggressive radiation therapy she endured in the 1960s to treat lymphoma, and as a result, her breathing and speaking systems were substantially impaired. Plaintiff served as a counselor at a middle school until she was reassigned to teach five sections of a class entitled "Guidance" to middle school students. She served notice to the school's administration that her physician warned her that she could not teach five classes each day due to causing too much strain on her voice. Soon thereafter she was assigned to teach four classes and the board provided her with a microphone and speaker system to use in her classroom. The microphone and speaker system broke within a few weeks and the school district never repaired the system, plus the school's administration increased her teaching load to five classes. Thereafter, she suffered additional strain on her voice along with students becoming more disruptive and several students assaulted her by throwing objects at her. In fact, police were called to her classroom four times over a four-month period. The plaintiff resigned at the end of the 2002 school year.

"Student Sexually Assaulted Fellow Students While Teacher in Classroom"
T. Z. City of New York (E. D. N. Y., 634 F. Supp. 2d 263), June 23, 2009.

On November 9, 2004, plaintiff (A junior high female student.) left her classroom to speak to her guidance counselor. Upon her return to her class a number of students were standing around her teacher and talking loudly as he worked on his computer. With her teacher's permission, the plaintiff sat down in the back corner of the classroom to talk to two friends. Thereupon, two students started sexually harassing her by touching her breasts and hugging her from behind. She yelled for her teacher while kicking and biting her attackers. Her two attackers pulled down the plaintiff's pants, touched her vagina, and caressed her buttocks. After her attack, the plaintiff's teacher simply told her to get up and go to her seat. One of the plaintiff's friends told another teacher and the school's administration moved forward with an investigation and punishment for the offenders. Following an adverse summary judgment ruling, the plaintiff moved for reconsideration regarding her claim against the city of New York and the city's school district under Title IX. The United States District Court, E. D. New York held that reconsideration of a lower court's ruling denying plaintiff's summary judgment motion **was warranted** due to the fact that the lower court overlooked the fact that the plaintiff had cited cases in support of her position that a one-time incident ***could be "pervasive" for purposes of a Title IX claim of student-on-student harassment*** and ***such material would reasonably be expected to alter the court's conclusion***.

Disabled Students:

"*Rowley* Continues to Set the Free Appropriate Public Education (FAPE) Standard"
J. L. Mercer Island School Dist. (C. A. 9 [Wash.], 575 F. 3d 1025), August 6, 2009.

Parents of a high school learning disabled student (within the average IQ range, but at the low end – IEP specifically designed for instruction in reading, writing, and mathematics) sued the defending school district alleging that it failed to provide their daughter with a FAPE as required under IDEA. An administrative law judge (ALJ) concluded that the student's placement at a private residential school where her parents had enrolled her was appropriate and awarded reimbursement for tuition and related expenses under the *Rowley* standard pertaining to a FAPE. Thereafter, a Untied States District Court in the state of Washington entered judgment for the parents. The school district appealed. The United States Court of Appeals, Ninth Circuit, held that Congress did **not** seek to supersede the Supreme Court's 1982 *Rowley* decision, requiring school districts to provide services reasonably calculated to enable children to receive educational benefits, or to otherwise change the FAPE standard.

"School District Entitled to Attorney Fees Under IDEA"
District of Columbia v. Ijeabuonwu (D. D. C., 631 F. Supp. 2d 101), July 8, 2009.

In due process proceeding commenced by parent and special needs student, claiming that the District of Columbia Public Schools (DCPS) failed to conduct evaluations recommended by a multidisciplinary evaluation team (MDT) in student's evaluation plan (SEP). The DCPS **was the "prevailing party"** within the meaning of IDEA's provision authorizing attorney fees. The hearing officer dismissed the plaintiff's due process complaint and ruled in favor of DCPS by finding that the issue of evaluations ***was mooted*** by DCPS's letter authorizing the parent to obtain independent evaluations at the expense of the school district. Furthermore, the court held that the plaintiff **failed** to establish that DCPS was notified of SEP and knowingly ignored the MDT's recommendation for evaluations; and that student suffered ***no*** educational harm due to the lack of additional evaluations.

Labor and Employment:

"School Board Did Not Violate Computer Technician's Due Process Rights In Termination"
Biliski v. Red Clay Consol. School Dist. Bd. of Educ. (C. A. 3 [Del.], 574 F. 3d 214), July 29, 2009.

Even if plaintiff had a property interest in his job as a computer technician, the school board **did not violate his right to procedural due process** in terminating his employment. Employee was issued five (5) disciplinary memos prior to his termination and each memo specifically outlined instances of poor performance or inappropriate behavior and warned that failure to improve could result in disciplinary action. Furthermore, the employee's supervisors gave him the memos during face-to-face meetings and orally explained them to him. In addition, the plaintiff submitted a letter to the board after his termination in which he responded to the charges against him; the board did consider his letter in a subsequent meeting.

"Teacher's Discharge Based on Her Union Activity Was Discriminatory"
Speed Dist. 802 v. Warning (Ill. App. 1 Dist., 911 N. E. 2d 425), June 8, 2009.

The weight of the evidence **supported** the Educational Labor Relations Board's finding that a teacher established discriminatory discharge based on her union activity. The teacher **was engaged in a protected activity** when she requested a union representative during her remedial meeting with her school's principal and having a union representative accompany her to remedial meetings with her principal ***was the motivating factor in the school district's decision to non-renew her teaching contract***. In addition, her principal ***expressed hostility*** toward the teacher's participation in her protective activity and the school district ***offered shifting explanations for non-renewing the teacher's contract***.

"District Refused to Rescind Teacher's Notice of Retirement"
Smith v. Atlanta Independent School Dist. (N. D. Ga., 633 F. Supp. 2d 1364), May 4, 2009.

Classroom teacher who had allegedly spoken on controversial issues at numerous school board meetings while serving as the president of a local educators' association filed a Section 1983 suit against school district claiming it violated her First Amendment rights of speech and association and Fourteenth Amendment right to equal protection by refusing to allow her to rescind her notice of retirement. The school district moved for summary judgment. A United States District Court in Georgia held that genuine issue of material fact, as to whether the teacher's speech and association activity *was causally connected* to her adverse employment action taken against her. **Summary judgment** on behalf of the school district **was precluded** due to both of the teacher's First and Fourteenth Amendments retaliation claims because the board's action *closely followed* the teacher's protected activities as president of the local education association at the time that the school board both approved her retirement and subsequent refusal to rescind her retirement. Therefore, the board's reasons for refusing to rescind the teacher's retirement ***could be considered pre-textual and circumstantial evidence of causation*** of hostility toward the teacher's speech. **Note:** The plaintiff was a classroom teacher in the school district from 1975 until February 8, 2005. After submitting her resignation, plaintiff learned that the Teacher Retirement System of Georgia (TRS) incorrectly calculated her retirement date that she would not be eligible to retire with full retirement until January 2006. Thus, the teacher would lose more than $20,000 in income if she retired in December 2005.

Religion:

"School Board Prayer Policy Fell Within Legislative Prayer Exception"
Doe v. Tangipahoa Parish School Bd. (E. D. La., 631 F. Supp. 2d 823), June 24, 2009.

Public school students and their parents (plaintiffs) brought action against school board and others, challenging the school board's policy of opening their board meetings with a Christian prayer delivered by a member of the local clergy. A United States District Court in Louisiana held that: (1) Plaintiffs, all of whom had attended or planned to attend school board meetings **had standing** to challenge the board's policy of opening each board meeting with a prayer delivered by a member of the local clergy; (2) Board's policy of opening school board meetings with a prayer delivered by a member of the local clergy *fell within the legislative prayer exception to traditional Establishment Clause analysis*, **requiring an examination as to whether the prayer opportunity had been exploited to advance Christianity**; and (3) Genuine issues of material fact **existed** as to whether school board's prayer policy exploited prayer opportunity to proselytize or advance Christianity, violated its own speaker selection policy, and thereupon **precluding summary judgment** on behalf of the board.

"Plaintiffs Entitled to Preliminary Injunctive Relief That Prohibited Them From Placing Religious Speech on Posters in School's Lobby and Corridor Leading to the School's Cafeteria"
Gold v. Wilson County School Bd. of Educ. (M. D. Tenn., 632 F. Supp. 2d 771), May 1, 2009.

Parents of elementary school children **were entitled to preliminary injunctive relief** against the enforcement of a school board policy which they claimed unconstitutionally restricted their religious speech on posters they wished to display in a lobby and hallway leading to a school cafeteria to describe and announce non-curricular religious events. The board *had intentionally opened a limited public forum* reserved to groups who wished to advertise events pertinent to students' interests. The prayer events were of interest to some students and school officials essentially *conceded* that they objected to the content of the posters precisely because of the Christian viewpoint expressed in them.

"Plaintiffs Established Likelihood of Success on Merits That a Song Violated the Establishment Clause"

S. D. v. St. Johns County School Dist. (M. D. Fla., 632 F. Supp. 2d 1085), April 15, 2009.

Parents of third grade public school students **established the likelihood of success** on the merits of their claim that rehearsal and performance at a school assembly of a country music song about God in America ("In God We Still Trust") would violate the Established Clause of the First Amendment. Therefore, the plaintiffs were **entitled to a preliminary injunction** preventing the performance of the song even though students were told they could be excused from the performance if they objected to the song. The song **was religious and proselytizing** because its lyrics endorsed a preference for religious sectarianism and degraded those with different beliefs. Furthermore, students who objected would be removed from any participation in the assembly; thus, they might feel penalized for objecting.

<u>School Districts</u>:

"State Statute Requiring the Consolidation of Small School Districts Did <u>Not</u> Violate the Fourteenth Amendment"

Friends of Lake View School Dist. Incorporation No. 25 of Phillips County v. Beebe (C. A. 8 [Ark.], 578 F. 3d 753), August 25, 2009.

The United States Court of Appeals, Eighth Circuit, held that the Arkansas doctrine of claim preclusion **did <u>not</u> bar** claim in federal action raising a Fourteenth Amendment challenge to an Arkansas statute requiring school districts with fewer than 350 students to be annexed by another school district. Although the Arkansas Supreme Court had addressed the constitutionality of the statute in prior state action, there was an overriding question as to whether the state was in compliance with its obligation to provide an adequate and substantially equal education under the Arkansas Constitution and the Arkansas Supreme Court *declined* to consider the constitutionality of the statute under the Fourteenth Amendment.

Standards and Competency:

"Teacher's Unethical Conduct Supported License Revocation"
Richardson v. N. C. Dept. of Public Instruction Licensure Section (N. C. App., 681 S. E. 2d 479), August 18, 2009.

Plaintiff was a teacher for 22 years and held a teaching license issued by the North Carolina State Board of Education (SBOE). In 1994, the plaintiff brought suit against his school district alleging that the board had unlawfully denied him a promotion due to his race and had given him low evaluations because he had filed discrimination charges with The Equal Employment Opportunity Commission (EEOC). A federal magistrate dismissed all of the claims except that which alleged discrimination by the board in failing to promote him to an assistant principal position. At trial, jury was unable to render a verdict, and the federal magistrate declared a mistrial. A retrial was scheduled, but before it was held, the parties reached a settlement. A few weeks after the mistrial, Jessie Blackwelder, Assistant Superintendent for the Cabarrus County Schools (school district in which plaintiff was employed) and a designated witness against the plaintiff received an anonymous letter. The letter referred to Blackwelder's "lies", noted that it was time "to get her back," and referred to "incriminating evidences" which would be revealed "to Mr. Richardson's (plaintiff) attorney… and to Judge Horn, too" unless Richardson received an administrative position "immediately." The letter also "promised" Blackwelder jail, fines, and "sudden retirement" if she did not cooperate with the demands made by the anonymous author. Thereafter, Blackwelder received at least two other anonymous threatening letters. A federal magistrate concluded that the plaintiff typed and mailed the three anonymous letters or caused them to be typed and mailed. The magistrate further concluded that the plaintiff's conduct was intentional, egregious, sent in bad faith, and that the letters threatened Blackwelder. Furthermore, the letters "most likely" violated federal laws dealing with perjury and intimidating witnesses. The Court of Appeals of North Carolina held that the plaintiff, and former teacher, **failed** to establish that the decision by the SBOE to deny reinstatement of his teaching license was arbitrary, capricious, or an abuse of discretion under the "whole record" test, where there was **no** evidence that anything presented to or considered by the Ethics Advisory Committee panel or the state superintendent was improper, irrelevant, or tainted by the decision-making process.

Torts:

"Graduating Students Who Furnished Beer Lacked Duty of Care to Victim of Criminal Assault"

Cameron v. Murray (Wash. App. Dist. 1, 214 P. 3d 150), August 17, 2009.

Mother of a non-graduating (11th grader) high school student brought wrongful death and negligence claims against non-assailant graduating students, alleged assailant graduating students, sales representative for wholesale beer distributor, and distributor's successor corporation for the alleged high school junior's death that was caused by a head injury from criminal assault at a keg party. A group of high school graduating seniors planned a keg party (May 1998) for approximately 100 graduating seniors in a remote section of a state park. The planners of the party purchased six kegs of beer, each containing 15.5 gallons of beer, which provided the 100 attendees almost one gallon of beer apiece. During the party a graduating senior allegedly hit the plaintiff's son on the forehead with a heavy glass beer mug. The wound initially appeared to be minor and was stitched in an emergency room, but four months later he collapsed in a coma. The plaintiff's son died in 2004 after surviving for more than four years in a persistent vegetative state. An autopsy revealed that the case of death was the head wound at the keg party, and the death was determined to be a homicide. A Court of Appeals of Washington, Division I, held that: (1) Non-assailant graduating high school students who planned the keg party were **not** liable and (2) Even if non-assailant graduating high school students who planned the keg party to celebrate students' graduation violated state statute forbidding the purchase of alcohol by minors, statute was **not** intended to protect against the particular hazard of a subsequent criminal assault by a consumer of the illegally purchased alcohol.

"Factual Issues Precluded Summary Judgment On Behalf of a School District Due Student Injured in a Fight"

Coleman v. St. Tammany Parish School Bd. (La. App. 1 Cir., 13 So. 3d 644), May 8, 2009.

Genuine issues as to whether a middle school student's injuries that were caused by a fight with a fellow student was foreseeable and if teachers and principal provided adequate supervision **precluded summary judgment** in suit to recover for student's injuries. The injured student's mother had contacted school officials several times about threats made against her fourth grader and she was assured that they would take care of it. However, on March 19, 2003 the plaintiff's son was attacked by a student on the school's playground during lunchtime.

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