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ELA Notes

A quarterly publication by the Education Law Association

President's Message

"I love rock and roll. Put another dime in the jukebox, baby! I love rock and roll. So come and take your time and dance with me!"

With this reminiscence, I am now convinced that all children of the 1980s who are members of the Education Law Association—and many children of other decades—will be even more inspired than they already are to attend ELA's annual conference in Cleveland this November. Cleveland, as you know, is home to the Rock and Roll Hall of Fame, a fantastic place to visit. I strongly encourage it when you are in town. Come early. Attend the conference. Stay late. Be inspired by the work of your colleagues—and continue to rock!

Along with the great experience of spending time with your education law colleagues and friends, if you visit the Rock Hall, you will see a tribute to Joan Jett and the Blackhearts, a 2015 Rock and Roll Hall of Fame inductee. In other words, the rock stars, too, will visit Cleveland this year.

Despite any appearance or personality to the contrary, I really do love rock and roll. In fact, I am certain I performed the previously quoted song many years ago as a member of a basement band of middle-schoolers. Our main performance circuit was an annual neighborhood block party. I am also certain that, in that band, I sang and played auxiliary percussion, which at the time was code for "we don't really have anything else for him to play." Nonetheless, I love rock and roll.

I also love education law—the process, the substance, and especially the people. I believe my work in this field is far more suitable than anything I could have offered long-term in singing and auxiliary percussion.

In November 2014, when I accepted the gavel as your president, I offered several goals for the year. The first two highlight the process, substance, and people of ELA:

• *In fulfillment of ELA's vision and mission, continue our great work in education law, sharing our practice, discoveries, and expertise with one another inside ELA and beyond.*

• *Increase visibility of the ELA and truly become the go-to organization for education law knowledge and research.*

For me, these goals represent who we are as professionals—individually, and most especially, collectively, in ELA. We fulfill these goals each year at our conference. We also do so in other forums—webinars, ELA publications, regional seminars and workshops, and in all the professional work we do. It's our knowledge base, which is great for the mind. It's also our calling, which is great for the heart (and does not obligate me to dust off the auxiliary percussion).

Look through the annual conference program; browse the website and Facebook page; and read the periodic email updates. We share what we know, because that's what educators and other professionals do. We're inspired by what we don't know, because that's who question-asking explorers are. And when there are developments in education law, we're present, both individually and collectively.

Consider recent developments: Kansas school funding and the relationship between state legislatures and courts; congressional debates over the rewrites to No Child Left Behind; legal challenges to PARCC (*Partnership for Assessment of Readiness for College and Careers)* testing; higher education, Title IX, and sexual assault; alleged fraternity misconduct and renewed campus conversations about community, race, and free speech. Are we the go-to professionals for the current conversations on these matters? Is the Education Law Association the go-to organization for the current knowledge and research? I hope so. We should be. It's our calling.

I'm always thrilled to discuss my affiliation with ELA with anyone I meet. Auxiliary percussion aside, of course, ELA is where my head and heart find most of their consistent friendship, exploration, and discovery.

Patrick Pauken
President

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Welcome to New and Rejoining ELA Members

Walter Davie - Tuscaloosa, AL
David Patrick - Tuscaloosa, AL
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John Graves - Jackson, MI
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Kimberly Payne - Warrenton, VA
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From the Executive Director

Spring is normally a time to coast, to some extent, in the ELA office and catch up on or start some of the bigger or more tedious projects that have been waiting for multiple hours of uninterrupted work. This year, like 2014, seems to be another exception. I started writing this column several times, but could not get a rhythm going in a flowing editorial format. I finally determined to write this column piecemeal, with headings, in order for it to make sense.

Volunteers Needed

We performed a comparison of cases summarized for the *School Law Reporter* in 2014 and have a list of those missed by our reporters. In order to provide the best and most up-to-date information possible, we do not wish to see gaps in our service. If you are able to summarize a few cases for us during these spring months, we will certainly appreciate it. This is a great opportunity for anyone interested in becoming an SLR reporter, or for a student member who wants the practice of summarizing cases.

Annual Conference

The proposals for concurrent sessions are out for review and we will have the initial program organized before the end of the month. The feature sessions are already set, too, and the preconference sessions are nearly set. See page 20 of this issue for more information. Cynthia Dieterich, conference chair, met with me to review the notes from conference evaluations and from the board of directors for the purpose of making adjustments to this year's program to better meet your needs. Registration will be open (and the form posted) before the end of April, so if you have any travel or professional development funds remaining for the end of the fiscal year, you can register soon.

Publications

Two new monographs have arrived in our office in recent weeks, **Education Finance Law: Constitutional Challenges to State Aid Plans – An analysis of strategies (4th Ed.)**, and **Research Methods for Studying Legal Issues in Education (2nd Ed.)**. If you are on the standing order you have already received your copies. If you are not already on the standing order, you could be receiving every new K-12 title automatically with an invoice.

The next book now under way is **Contemporary Issues in Higher Education Law (3rd Ed.)**, due this summer, which will be supplemented with study and discussion questions to aid instructors who use this title as a course text.

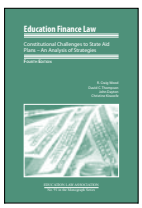
The other title, expected in October, will be **Sexual Harassment and Bullying: Similar but not the same**, a new publication by Eric Mondschein and Rick Miller, who are two of your favorite conference presenters. This monograph will also be accompanied by a teaching supplement to be used in human resources workshops and other professional development.

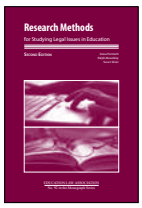
Get a head start on next year's taxes: make a donation to ELA now

This is the time of year when you are likely working on your taxes, or recently sent them in. If you are looking for an additional deduction to prepare for the next year, please consider donating to your ELA. The Education Law Association is a 501(c)(3) organization. Many of you know us well and understand that we stretch every dollar gained through donation, membership, and purchases as far as we possibly can. The spring months are when we need you the most! To donate, you'll find the form under the "contact" button on the home page of our website.

As always, please don't hesitate to reach out to me if you would like to discuss any of these items further, or to volunteer.

Cate K. Smith, J.D., M.P.A.
Executive Director





Publication sales are an important source of revenue for ELA. Our practical, economical books and monographs are ideal for use as textbooks, as well as providing affordable legal reference tools for libraries, school administrators, or law offices.

Members save on admission to 2015 ELA webinars

Several informative webinars remain on ELA's schedule for the year, following the March 19 presentation on **Special Education Vouchers and Accountability for FAPE**, by Julie F. Mead, Ph.D. Watch your email for confirmation of dates and times.

Members pay the discounted price of $69 per computer for each webinar, compared with the nonmember price of $129. Gather with your colleagues to participate and ask questions.

Certificates of attendance will be sent after each session. Call ELA at 216-523-7377 to register using a purchase order.

Not Dead Yet: Recent Legal Decisions Supporting Faculty First Amendment Rights

April 16, 2015 - Noon Eastern Daylight Time

This session examines the continuing judicial responses to the applicability (or not) to faculty speech of the legal standards announced in *Garcetti v. Ceballos*.

Neal Hutchens, J.D., Ph.D. - Associate Professor of Higher Education, Penn State University, Port Matilda, PA

After *Plyler v. Doe*: Barriers to Higher Education for Undocumented Students

April 23, 2015 - 3:00 p.m. EDT

Notwithstanding the guarantee of a K-12 education in *Plyler v. Doe*, some states have created barriers of access to higher education for undocumented students. The presenter reviews this guarantee and varying state efforts.

David H.K. Nguyen, MBA, J.D., LL.M. Adv. - Ph.D. Candidate and Associate Instructor, Department of Educational Leadership and Policy Studies, Indiana University, Bloomington, IN

Jailbait: A Not So "Minor" Issue on Campus

Date & Time TBA

A look at students between the ages of fifteen and eighteen on college campuses and the duties of K-12 and higher education institutions in regard to Title IX and FERPA.

Mercy Roberg, J.D., M.Ed. - Coordinator, Center for Higher Education Law & Policy, Stetson University College of Law, Gulfport, FL

ELA Notes is a publication by and for ELA members. **Please send items for publication in *ELA Notes* by the first of the month preceding the publication date.** Manuscripts, correspondence, announcements, advertisements, and current events should be sent to:

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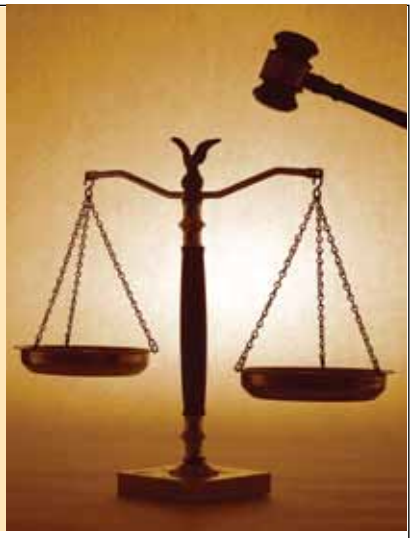

ELA Member Profile: Elizabeth Shaver

Taking on the new role of assistant editor of ELA's Yearbook of Education Law for 2015 is Elizabeth A. Shaver, Assistant Professor of Legal Writing at The University of Akron School of Law in Akron, Ohio.

Shaver, who has been a member of ELA for three years and has served as a presenter at the ELA Annual Conference, teaches courses in education law and special education law. She joined Akron Law in 2009, after working as a senior attorney with Genesis Professional Liability Managers, in the general litigation department of Jones Day, and serving two years as a judicial clerk to the Hon. Alexander Harvey II of the U.S. District Court for the District of Maryland.

She received her B.A. from Vanderbilt University and J.D. from Cornell Law School, where she was a member of the *Cornell Law Review*.

Outside of work, Elizabeth is president of the board of directors for the Ardmore Foundation, an Akron nonprofit dedicated to improving the quality of life of adults and children with developmental delays and other disabilities.

"I was happy to take on the position of assistant editor for three main reasons," she said. "First, the position allows me to work with various authors who are well-respected in the field of education law. Second, I appreciate the opportunity that ELA has given me to present my own work, and I consider the assistant editor position as a way of providing service to an organization that has supported me professionally. Third, I believe that my work will inform and improve my teaching in my education law courses."

Longtime editor of the Yearbook is Charles J. Russo, chair, director, and professor with the schools of education and law at the University of Dayton.

Expert Witnesses in Impartial Hearings Under the Individuals with Disabilities Education Act*

Perry A. Zirkel, Ph.D., J.D., LL.M.**

Education Law Into Practice
A Special Section of West's Education Law Reporter Sponsored by the Education Law Association

The Individuals with Disabilities Education Act (IDEA) provides parents and local education agencies the right to an impartial hearing as the first adjudicative level of dispute resolution.[1] As these IDEA impartial hearings become more and more legalized,[2] the procedural, including evidentiary, rules become increasingly significant for not only the impartial hearing officers (IHOs) but also the immediate parties and the larger special education community. One of these potentially influential, but previously ignored, issues concerns the testimony of witnesses proffered as experts. Where the expert's testimony is deemed admissible and weighty, it may be outcome determinative in IDEA cases, starting at the IHO level.[3]

This article provides an annotated overview of a multi-step analysis for dealing with the expert witness issue in IHO proceedings under the IDEA. Due to the statute's structure of "cooperative federalism,"[4] which allows states to heighten and broaden, not subtract from, the IDEA floor, such analyses warrant consideration of not only the IDEA foundation but also the variable additions of state laws.[5] Using the state of Illinois—one of the most active states for impartial hearings under the IDEA[6]—as an example, this analysis includes citations to its additional state authority in **bold font**.[7] The primary target readership consists of IHOs, although other interested individuals, such as parent and district representatives, are welcome to benefit from this information.

Experts can have a weighty role because, unlike other witnesses, they may provide opinions based on specialized knowledge, not just facts or other opinions.[8] Given its potential significance in litigation, expert witness evidence has been a significant issue in the courts. The two competing approaches are 1) the traditional, relatively restrictive standard of *Frye v. United States*,[9] requiring general acceptance of reliability in the relevant scientific community; and 2) the modern, broader standard in Federal Rules of Evidence 702 that the Supreme Court upheld in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*[10] The focus here is the legal requirements and recommendations for expert evidence at the IHO level under the IDEA, including the extent of applicability of these judicial standards to this specialized administrative proceeding.

The *Daubert* approach applies in federal courts, but not necessarily in state courts or IDEA impartial hearings.[11] Indeed, Illinois state courts continue to follow the *Frye* standard.[12] Which of these approaches applies to IDEA impartial hearings appears to be an open question in Illinois.[13] Unless and until the courts clearly settle this matter, it seems that Illinois IHOs have the discretion to use "the spirit of *Daubert*."[14] This latitude fits with the generally recognized wide discretion that IHOs have in conducting IDEA hearings.[15] For example, in the commentary accompanying the IDEA regulations, OSEP's illustrations of IHO's broad procedural discretion expressly include determining appropriate expert witness testimony.[16]

Equally important, the *Daubert-Frye* question, being largely limited to admissibility, is only one aspect of expert testimony in IDEA hearings. This annotated outline, which is largely based on case law,[17] provides a flowchart-like framework of the three overlapping but sequentially separable categories for the IHO's application for carefully considering questions concerning expert witnesses. The final, catch-all category provides miscellaneous additional legal considerations related to this topic.

I. Does the witness qualify as an expert?

- The answer, according to Fed. R. Evid. 702 (by way of analogy), is based on "knowledge, skill, experience, training, or education"[18]

  - overlapping with Step II,[19] courts apply rule 702 via a two-part inquiry[20]: 1) whether the proffered expert has minimal qualifications in the specifically identified field, and 2) whether the particular expertise/opinion will be helpful (or, conversely, whether it would be superfluous and a waste of time)[21]

  - with the burden on the proffering party by a preponderance of the evidence[22]

- Given the informal nature of IDEA impartial hearings, the IHO may not directly face the qualifying-expert issue at the hearing, but, as Step III *infra* shows,[23] it will recur in terms of explaining the weighting of the expert's testimony and, if any, exhibits (i.e., reports). Thus, proactive attention is warranted.

  - The **ASP** for Illinois hearing officers provides that 1) the IHO "shall require the parties to provide curriculum vitae for each proposed expert witness in their five-day disclosures or . . . [to stipulate] that the proposed expert's, including professional staff, credentials are accepted";[24] and 2) upon qualifying a witness as an expert, the IHO "shall state on the record the area(s) of expertise in which the witness is being qualified."[25]

  - Beekman has observed, "if any objection is raised, it is within the discretion of the IHO to allow

> the [challenging] party to 'voir dire' the witness in this regard [and then] rule on whether the witness was 'qualified' as an appropriate expert [in one or more specific areas]."[26]

- As made more clear at the weighing stage of Step III,[27] the child's teachers—not just doctoral-level private practitioners and university professors—may meet the requisite two-part test.
- Indeed, given the alternative criteria for qualifying (e.g., experience), the IHO may accord, with due weight at Step III, expert status to the parent as to the individual strengths and needs of the child.[28]

II. If the witness qualifies as an expert, is his/her testimony admissible?

- The basic criteria are reliability and relevance (i.e., fit).[29]
  - More specifically, according to the Fed. R. Evid. 702 (by way of analogy): if "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."[30]
  - again, with the burden on the proffering party[31]
  - experts may testify within their specialized field, which typically excludes opinions or conclusions about law[32]
- In applying these criteria, be mindful of the need for efficiency in terms of the regulatory timeline for issuance of your decision, which in turn is based on the interests of both the child and the district in terms of timely resource allocation; thus, given their own expertise and related discretion,[33] IHOs should consider whether the expert's evidence is truly necessary.

III. If the witness is allowed to testify as an expert, what are the considerations for explicitly assessing the weight of this testimony?

- Although this question overlaps with Step II, it is not identical; an expert's testimony may be admissible, but may not necessarily be weighty.[34]
- The basic criteria are the relevant specialized expertise[35] and the relevant familiarity with the child[36]
- For a particularly pertinent and potent example, see the Seventh Circuit's finding an abuse of discretion in an IHO's discounting the opinion of the adaptive PE teacher and relying instead on the parents' medical expert as to whether the child met the second prong essential for eligibility under the IDEA:

> [In addition to her] cursory examination . . . [the child's physician] is not a trained educational professional and had no knowledge of the subtle distinctions that affect classifications under the [IDEA] and warrant the designation of a child with a disability and special education. . . . Nor was [the physician] familiar with the curriculum and what [the child] needed to do in gym. In sum, her conclusory testimony and reports making an adamant demand for the "special education" classification are not substantial evidence and do not provide a reasoned basis for finding that [the child] needs special education.[37]

- Similarly, and more recently, in upholding a hearing officer's ruling that was challenged as contrary to the only outside expert, a federal court responded that "[i]ndividuals need not be hired from *outside* a school system to be considered an expert" and, even if there were only one expert witness, neither the hearing officer nor the court is required to accept that witness's view.[38]

IV. Miscellaneous Other Issues:

- The parties' procedure for eliciting expert opinions varies.[39]
- In the proper circumstances an expert witness may express an opinion even when it constitutes the ultimate answer to the issue in the case.[40]
- Sequestration, upon the request of the opposing party, is a matter of the IHO's discretion.[41]
- Prevailing parents are not entitled to district payment of expert witness fees,[42] unless state law provides otherwise.[43]
- An IHO has the discretion to appoint an expert *sua sponte* via the authority to order an independent educational evaluation,[44] but resorting to this option should be minimal based primarily on the time factor.[45]
- Upon judicial appeal, the parties have a limited right, within the court's discretion, to introduce additional evidence, including expert witnesses.[46]
- Overall, IHOs should perform their "gatekeeping role"[47] for expert witnesses more strictly than courts due to their need for efficiency and the court's discretionary right to admit additional evidence.
- Courts accord qualified deference to IHO determinations regarding expert witnesses;[48] indeed, this deference is based in part on the presumed expertise of the IHO.[49]
- Beekman has offered the following additional, practical suggestions to IHOs with regard to taking the testimony of expert witnesses:[50]
  - Look out for jargon problems where the witness comes from a clinical or non-education setting. Intercede gently, if necessary, to insure questions and responses . . . [are] understandable and helpful to you in terms of the issues you must decide.
  - If the expert has submitted an evaluation/report, do not allow the witness to rehash the entire report. Suggest that only matters of clarification or supplementation be addressed.
  - Some experts have a tendency to be very expansive in their responses to question, even to the point of not being responsive! Gently try to focus the witness's responses to the question asked, noting that if further explanation is needed, such will be requested by counsel or by you.
  - In determining the expert's credibility you will need to cite to the record [in your written decision]. So, if questions

[concerning the two key criteria arise],[51] consider doing so to establish the record you'll need to make the credibility findings later.

ENDNOTES

* This article appeared in West's Education Law Reporter, v. 298, pp. 648–655 (January 2, 2014); copyright requires the full citation of the article upon publication. Additions since publication are printed in blue. The views expressed are those of the author and do not necessarily reflect the views of the publisher or the Education Law Association.

** Dr. Zirkel is University Professor of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

1 20 U.S.C. § 1415(f) (2006). For the corresponding regulations, see 34 C.F.R. §§ 300.507–300.515 (2012). For the various state structures for IDEA hearings, see, e.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. Special Educ. Leadership 3 (2010).

2 *See, e.g.*, Perry A. Zirkel, Zorka Karanxtha, & Anastasia D'Angelo, *Creeping Judicialization In Special Education Hearings?: An Exploratory Study, 27* J. Nat'l Ass'n Admin. L. Jud. 27 (2007).

3 For a recent example, see *B.B. v. Catahoula Parish Sch. Dist*., 62 IDELR ¶ 50 (W.D. La. 2013) (upholding IHO's ruling regarding least restrictive transportation based on testimony of special education professor who observed the child on the regular school bus); *see also* M.H. v. New York City Dep't of Educ., 751 F. Supp. 2d 552, 581–82 (S.D.N.Y. 2010) (reversing review officer's decision that failed to properly consider expert evidence), *aff'd*, 486 F. App'x 954 (2d Cir. 2012).

4 See, e.g., *Bay Shore Union Free Sch. Dist. v. Kain*, 485 F.3d 730, 733-734, 220 Ed. Law Rep. 190 (2d Cir. 2007).

5 For other examples of such differentiated, annotated analyses, see Perry A. Zirkel, *"Stay-Put" under the IDEA: An Annotated Overview*, 286 Ed. Law Rep 12 (2013); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed. Law Rep. 785 (2012).

6 *See, e.g.*, Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. Special Educ. Leadership 22 (2008) (finding that Illinois ranked 6th in total number of adjudicated IDEA hearings for the period 1991–2005).

7 This differentiation extends to IDEA decisions of the Seventh Circuit Court of Appeals due to their binding applicability to the impartial hearings in Illinois.

8 By way of analogy, the rules in federal courts and—for the various states that follow the federal model—in state courts, is to allow restricted opinion evidence from lay, or non-expert, witnesses. The restrictions are for a basis that is not only rational and clarifying, but also not "scientific, technical, or other specialized knowledge." Fed. R. Evid. 701; **Ill. R. Evid. 701**.

9 293 F. 1013 (D.C. Cir. 1923).

10 509 U.S. 579 (1993). In a subsequent decision, the Court clarified that *Daubert*'s interpretation of Rule 702 did not distinguish between "scientific" and "technical" or "other specialized knowledge, thus applying to expert witnesses in general. *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137 (1999). For the relevant criteria in Fed. R. Evid. 702, see steps I and II *infra*.

11 *See, e.g.*, *H.C. v. Katonah-Lewisboro Union Free Sch. Dist*., 528 F. App'x 64, 68 (2d Cir. 2013) ("Whether *Daubert* applies to IDEA hearings before state administrative agencies is highly questionable").

12 *See, e.g.*, ***People v. Basler*, 710 N.E.2d 431 (Ill. Ct. App. 1999)**.

13 The Illinois Administrative Procedures Act (APA) generally, but not strictly, supports *Frye*. **5 Ill. Comp. Stat. 100/10-40 (2012)** ("The rules of evidence . . . as applied in civil cases in the circuit courts of this State shall be followed. Evidence not admissible under those rules of evidence may be admitted, however, (except where precluded by statute) if it is of a type commonly relied upon by reasonably prudent men in the conduct of their affairs"). The APA arguably applies to impartial hearings under the IDEA. *Id*. 100/1-5 and 100/1-20. However, this proposition is not clearly settled. Indeed, ISBE's **Appropriate Standard Practices (ASP) (2013)**, at IX-C, provides: "Hearing Officers shall not apply the federal or state rules of evidence used by courts except by analogy and in the discretion of the [IHO]."

14 ***Pasha v. Gonzales*, 433 F.3d 530, 535 (7th Cir. 2005)** ("Although the *Daubert* filter against unreliable expert testimony is not strictly applicable to proceedings before administrative agencies, such as the Immigration Court, the 'spirit of *Daubert*' is applicable to them"). One reason is that on review, federal courts will use *Daubert* to review the admissibility of the expert. *See, e.g.*, *Richland Sch. Dist. v. Thomas P.*, 32 IDELR ¶ 233 (W.D. Wis. 2000).

15 *See, e.g.*, Letter to Anonymous, 23 IDELR 1073 (OSEP 1994).

16 71 Fed. Reg. 46,691 (Aug. 14, 2006).

17 The author acknowledges, with appreciation, the additional contributions of Michigan attorney (and IHO trainer) Lyn Beekman for the suggestions for best practice and Illinois attorney Joe Selbka for the nuances of Illinois law.

18 Illinois courts follow the same approach. *See, e.g.*, ***Valiulis v. Scheffels*, 547 N.E.2d 1289, 1296 (Ill. Ct. App. 1989)** ("In order to lay a proper foundation for expert testimony, a party must show that the expert has specialized knowledge or experience in the area about which the expert expresses his or her opinion [citation omitted]. The expert's knowledge may be based upon practical experience as well as scientific or academic training [citation omitted]").

19 See *infra* note 29 and accompanying text.

20 *See, e.g.*, *Poust v. Huntleigh Healthcare, Inc*., 998 F. Supp. 478, 491 (D.N.J. 1998) (citing Federal Judicial Center, Reference Manual on Scientific Evidence 55 (1994)).

21 *Compare D.L. v. Dist. of Columbia*, 55 IDELR ¶ 7 (D.D.C. 2010) (concluding that the expert did meet the second criterion), *with C.G. v. Commonwealth*, 57 IDELR ¶ 98 (M.D. Pa. 2011) (concluding that expert did not meet the second criterion).

22 *See, e.g.*, *C.G. v. Commonwealth*, 57 IDELR ¶ 98 (M.D. Pa. 2011) (citing *Daubert,* 509 U.S. at 592-93 and Fed. R. Evid. 104(a)).

23 See *infra* note 34 and accompanying text.

24 **ASP,** *supra* note 13, at VII-B-5.

25 *Id*. at IX-B.

26 Lyn Beekman, Dealing with Expert Witnesses (undated outline – on file with author). His additional suggestions at this stage include:

- Require that vitas for experts be made an exhibit.
- [For voir dire,] if necessary, take over the questioning to avoid spending a great deal of time on a matter that is ultimately within your discretion.

27 See *infra* note 37 and accompanying text.

28 The due weight at the next step—as with other witnesses—includes the relevance in terms of context (e.g., home, community, or school) and reliability in terms of cogency (e.g., skew).

29 *Richland Sch. Dist. v. Thomas P.*, 32 IDELR ¶ 233 (W.D. Wis. 2000):

Courts in the Seventh Circuit employ a two-step inquiry for evaluating the admissibility of expert testimony under Fed. R. Evid. 702. *See* ***Ancho v. Pentek,* 157 F.3d 512, 515 (7th Cir. 1998)** . . . . First, they examine the expert's testimony to determine whether it is scientifically reliable; if it is, they determine whether the testimony would assist the trier of fact (that is, whether the evidence is relevant).

30 *Compare D.L. v. Dist. of Columbia*, 55 IDELR ¶ 7 (D.D.C. 2010) (concluding that the plaintiff's statistical expert met these criteria); *cf. I.D. v. Cumberland Valley Sch. Dist*., 2005 WL 6782653 (M.D. Pa. Oct. 5, 2005) (concluding that plaintiff's expert meet these criteria except for a legal conclusion), *with R.L. v. Miami Dade Cnty. Sch. Bd*., 55 IDELR ¶ 259 (S.D. Fla. 2010) (concluding that the testimony of the parents' expert did not meet these criteria with regard to compensatory education); *Kropp v. Sch. Admin. Unit No. 44*, 471 F. Supp. 2d 175 (D. Me. 2007) (concluding that the testimony of the parents' medical expert was too speculative to be reliable); *cf.* ***Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 881, 266 Ed. Law Rep. 62 (7th Cir. 2011)** ("Dr. Russell is an expert, but fails to indicate, however sketchily, how he used his expertise to generate his conclusion"); *A.A. v. Raymond*, 61 IDELR ¶ 197 (E.D. Cal. 2013); *Miller v. Bd. of Educ. of Albuquerque Pub. Sch*., 455 F. Supp. 2d 1286, 214 Ed. Law Rep. 1046 (D.N.M. 2006) (excluding part of expert's testimony as not meeting the reliability criteria).

31 *See, e.g.*, *C.G. v. Commonwealth*, 57 IDELR ¶ 98 (M.D. Pa. 2011) (citing *Daubert,* 509 U.S. at 592-93 and Fed. R. Evid. 104(a)). However, the burden for reliability is less than that for correctness. *See, e.g.*, *Wiles v. Dep't of Educ., State of Hawaii*, 109 LRP 60390 (D. Hawaii 2008) (citing the Advisory Committee Notes to Rule 702).

32 *See, e.g.*, *A.B. v. Seminole Cnty. Sch. Bd*., 47 IDELR ¶ 7 (M.D. Fla. 2006) (allowing the parents' three autism experts to comment on mistreatment but not whether this mistreatment was a legal violation).

33 See *infra* notes 48–49 and accompanying text.

34 For a case showing the separability of the two steps, although the court ultimately deferred to the IHO's determination that the parents' expert testimony was not only admissible but also

"Experts can have a weighty role because, unlike other witnesses, they may provide opinions based on specialized knowledge, not just facts or other opinions"

persuasive, see *Richland Sch. Dist. v. Thomas P.*, 32 IDELR ¶ 233 (W.D. Wis. 2000).

[35] *See, e.g.*, ***Heather S. v. State of Wisconsin*, 125 F.3d 1045, 1058, 121 Ed. Law Rep. 493 (7th Cir. 1997)** (noting that "the deference [for the FAPE issue] is to trained educators, not necessarily psychologists").

[36] *See, e.g.*, ***Bd. of Educ. v. Michael R.*, 44 IDELR ¶ 36 (N.D. Ill. 2005)** (upholding IHO's crediting of "witnesses who had specific experiences working with [the child]"), *aff'd sub nom Bd. of Educ. v. Ross*, 486 F.3d 267, 220 Ed. Law Rep. 482 (7th Cir. 2007). The direct-experience factor often but far from always favors the testimony of the child's teachers and other district service personnel. *See, e.g.*, *Sebastian M. v. King Phillip Reg'l Sch. Dist.*, 685 F.3d 79, 282 Ed. Law Rep. 28 (1st Cir. 2012) (upholding IHO's crediting of educators who worked directly with the child rather than the private experts, who did not observe the child in the classroom or consult with the child's teachers); *cf.* ***Casey K. v. St. Anne Cmty. High Sch. Dist. No. 302*, 46 IDELR ¶ 102 (C.D. Ill. 2006)** (deferring to district when battle of experts was relatively equal). *But cf. K.S. v. Fremont Unified Sch. Dist.*, 545 F. Supp. 2d 995, 232 Ed. Law Rep. 738 (N.D. Cal. 2008) (rejecting IHO's one-sided reliance on district's expert over parents' experts).

[37] ***Marshall Joint Sch. Dist. No. 2 v. C.D.*, 616 F.3d 632, 641, 260 Ed. Law Rep. 46 (7th Cir. 2010)**; *cf.* F.O v. New York City Dep't of Educ., 976 F. Supp. 2d 499, 526 (S.D.N.Y. 2013) (requiring special weighting for "non-hired," i.e., internal, experts); Jefferson Cnty. Bd. of Educ. v. Lolita S., 62 IDELR ¶ 2 (N.D. Ala. 2013).

[38] Jefferson Cnty. Sch. Dist. v. Lolita S., 977 F. Supp. 2d 1091, 1112 (N.D. Ala. 2013), *aff'd on other grounds*, 581 F. App'x 760 (11th Cir. 2014)

[39] Beekman, *supra* note 26:

There are basically three ways: a hypothetical question, question-by-question, or narrative. If the hypothetical approach is used and the facts included in it are not yet in evidence, the opinion can be given subject to such evidence being put in the record later. If the evidence is not thereafter provided, the hypothetical question would fall.

[40] See, e.g., Murphy v. Commonwealth Dep't of Educ., 504 A.2d 382, 386 (Pa. Commw. Ct. 1986).

[41] Beekman, *supra* note 26: Whether the presence of the witness is required for the preparation of the parties' case, would expedite the hearing, or [would] taint the witness's objectivity are all factors that [the IHO] might consider.

[42] *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291 (2006); *cf. Bd. of Educ. of City of Chicago v. Illinois State Bd. of Educ.*, 62 IDELR ¶ 53 (N.D. Ill. 2013) (related services do not include expert witness testimony at IDEA impartial hearings). However, as the Court subsequently recognized, parents have the qualified right to an IEE at public expense as an IDEA avenue to a district-paid expert witness. *Schaffer v. Weast*, 546 U.S. 49, 60-61, 203 Ed. Law Rep. 29 (2005); *cf. M.M. v. Lafayette Sch. Dist.*, 58 IDELR ¶ 132 (N.D. Cal. 2012) (right to IEE at public expense extends to evaluator's attendance at IEP meeting). Moreover, a federal district court recently required a district to pay for the parent's expert in determining the appropriate amount of compensatory education, distinguishing *Arlington Central*, characterizing it as "part of the appropriate compensatory relief ordered by a court." *Gibson v. Forest Hills Sch. Dist. Bd. of Educ.*, 62 IDELR ¶ 261 (S.D. Ohio 2014).

[43] See, e.g., 14 Del. Code Ann. § 3138(g) (2012) (authorizing prevailing parents to receive, along with attorney fees, "reasonable fees of expert witnesses and the reasonable costs of any tests or evaluations necessary for the preparation of the parent's hearings").

[44] 34 C.F.R. § 300.502(d) (2013); *see also* 105 Ill. Comp. Stat. 5/14-8.02a (g)(55) (2013) (IHO authority for additional information before completion of hearing).

[45] Another significant consideration is whether the IHO should be an activist in the adjudicatory process.

[46] *See, e.g.*, ***Monticello Sch. Dist. No. 25 v. George L.*, 102 F.3d 895, 114 Ed. Law Rep. 1042 (7th Cir. 1996)**; *Susan N. v. Wilson Sch. Dist.*, 70 F.3d 751, 760, 105 Ed. Law Rep. 23 (3d Cir. 1995); *Ojai United Sch. Dist. v. Jackson*, 4 F.3d 1467, 1472–73, 85 Ed. Law Rep. 724 (9th Cir. 1993); *Town of Burlington v. Dep't of Educ.*, 736 F.2d 773, 790-91, 18 Ed. Law Rep. 278 (1st Cir. 1984). One of the reasons for limiting this opportunity is that it undermines the expertise of the IHO. *See, e.g.*, ***B.H. v. Joliet Sch. Dist.*, 52 IDELR ¶ 193 (N.D. Ill. 2009)**.

[47] *See, e.g.*, *Kumho Tire Co., Ltd. v. Carmichael,* 536 U.S. at 141.

[48] *See, e.g.*, *Sebastian M. v. King Phillip Reg'l Sch. Dist.*, 685 F.3d 79, 282 Ed. Law Rep 28 (1st Cir. 2012); *A.E. v. Westport Bd. of Educ.*, 251 F. App'x 685, 229 Ed. Law Rep. 106 (2d Cir 2007); *Bd. of Educ. of Montgomery Cnty. v. S.G.*, 230 F. App'x 330, 222 Ed. Law Rep. 119 (4th Cir. 2007); *Richland Sch. Dist. v. Thomas P.*, 32 IDELR ¶ 233 (W.D. Wis. 2000). However, this deference is not at all absolute. *See, e.g.*, *W. Windsor-Plainsboro Reg'l Sch. Dist. Bd. of Educ.*, 44 IDELR ¶ 159 (D.N.J. 2005) (ruling that exclusive reliance on parents' experts as "utterly persuasive" was unsupported in the record and, thus, not entitled to any deference); *Arlington Cnty. Sch. Bd. v. Smith*, 230 F. Supp. 2d 704, 730, 172 Ed. Law Rep 162 (E.D. Va. 2002) (overruling the IHO because his "findings lack support in the record, and he failed to defer to the considered judgment of the educational experts, who uniformly and consistently testified that [the child] would receive educational benefit from [the district's proposed] placement").

[49] *See, e.g.*, ***Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186 v. Illinois State Bd. of Educ.*, 41 F.3d 1162, 1167, 96 Ed. Law Rep. 90 (7th Cir. 1994)** (recognizing IHO's "special expertise in special education law"); *see also* ***T.G. v. Midland Sch. Dist.*, 848 F. Supp. 2d 902, 282 Ed. Law Rep. 425 (C.D. Ill. 2012); *James D. v. Bd. of Educ.*, 642 F. Supp. 2d 804, 250 Ed. Law Rep. 194 (N.D. Ill. 2009)**. The other primary underpinning, at least for credibility determinations, is the IHO's direct observation of the witness. *See, e.g.*, ***A.L. v. Chicago Pub. Sch. Dist. No. 299*, 57 IDELR ¶ 276 (N.D. Ill. 2011)** (deferring to IHO's credibility determination between competing experts). For the combination along with the thorough-writing criterion, see, e.g., *Richland Sch. Dist. v. Thomas P.*, 32 IDELR ¶ 233 (W.D. Wis. 2000):

The [IHO], who has more experience in these matters than this court and who had the opportunity to observe the witnesses, wrote a thoughtful, well-reasoned opinion in which he explained his reasons for rejecting the district's challenges to Dr. Eisemann's testimony. Notwithstanding the unique standard of review called for by the IDEA, it would violate judicial economy and common sense to overturn such a credibility determination without a compelling reason.

[50] Beekman, *supra* note 26.

[51] See *supra* text accompanying notes 35–36. **ELA**

Collegiality As a Factor in Promotion and Tenure Decisions*

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Education Law Into Practice
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Introduction

Faculty promotion and tenure (P&T) decisions in higher education have been predominantly based on three major criteria: teaching, research, and service. A key element, collegiality, typically alluded to in the context of these three major categories, has had substantial influence in P&T decisions. In fact, the courts have repeatedly affirmed university decisions to consider a lack of collegiality as a factor for denying tenure.[1] Moreover, the literature on organizational behavior highlights the connection between collegiality and the effectiveness of a group or organization.[2] A 2006 research study with junior faculty participants from over fifty higher education institutions (i.e., colleges and universities) found that faculty had a stronger penchant for collegiality than for the clarity of tenure procedures, level of workload, and compensation.[3] Thus, it can be argued that collegiality should be a factor in promotion and tenure decisions; if so, P&T guidelines should clearly delineate this expectation.

This paper will (1) describe what has been found to constitute collegiality, and its value in the higher education community; (2) discuss the legal basis for the inclusion of collegiality in faculty promotion and tenure decisions, based on case law analysis; (3) provide sample policies and procedures in faculty handbooks that address collegiality in the P&T process; and (4) recommend policies and procedures that higher education organizations can follow to address the value of collegiality and its use in the P&T process.

Collegiality in Higher Education

Collegiality among faculty members has been found to be a critical element in the effective operations of colleges and universities.[4] The American Association of University Professors (AAUP) position paper states: "Few, if any, responsible faculty members would deny that collegiality, in the sense of collaboration and constructive cooperation, identifies important aspects of a faculty member's overall performance."[5] While the concept of "collegiality" may be difficult to define and to measure because of its subjective nature, it can be observed in behaviors.[6] Collegiality is "the capacity to relate well and constructively to the comparatively small bank of scholars on whom the ultimate fate of the university rests."[7] Collegiality is manifested in activities such as getting along with colleagues, participating in committee work, carrying a full teaching load, mentoring faculty members and students, and attending meetings.[8] Courts have noted what is considered uncollegial behavior;[9] examples include the chastising of colleagues and being absent at mandatory meetings,[10] as well as lacking the ability to interact amicably with others (uncooperative) and not being disposed to accept criticism for professional improvement.[11]

Johnston, Schimmel, and O'Hara (2012) have added specificity to the understanding and to the assessment of collegiality by delineating a list of twenty-seven indicators arranged in five major categories, including altruism, consciousness, sportsmanship, courtesy, and civic virtue.[12] Examples of these indicators include (1) demonstrating a willingness to do their share in handling extra assignments, (2) acting respectfully toward coworkers, (3) attending departmental meetings on a regular basis, and (4) offering constructive advice to or improvements for the department. Since the assessment of collegiality can be viewed as subjective in nature, Cipriano and Buller (2012) have developed an instrument, entitled the "Collegiality Assessment Matrix (CAM)," to assess and document collegiality.[13] The matrices in this tool are related to observable behavioral actions, instead of the interpretations of a person's attitude.[14] There is a concern about the use of an assessment instrument in looking at faculty interactions, since the instrument may fail to account for the context of the interaction.[15]

While collegiality has been considered in promotion and tenure reviews, as well as contract renewal decisions, there is disagreement as to whether collegiality should be considered as a part of teaching, research,

and service, or assessed as a separate fourth category.[16] The AAUP position statement contends that collegiality should not be a separate category.[17] Rather, collegiality is "a quality whose value is expressed in the successful execution of these three functions."[18] By not considering collegiality as a separate category, the AAUP purports that collegiality should never be the sole reason for denying tenure or reappointment.[19]

The AAUP contends that the designation of collegiality as a separate criterion could pose certain risks to the professorate.[20] For instance, it could negatively impact the academic freedom of faculty in curriculum development and in the hiring of faculty, leading to a situation where the free speech of individuals may be minimized, or even prevented, in the deliberation of key academic and personnel decisions. The AAUP maintains that faculty professional malfeasance or misconduct be handled as "an independently relevant matter for faculty evaluation."[21]

Case Law Analysis

The courts have long upheld college and university decisions to deny promotion and tenure (P&T) to faculty for a lack of collegiality.[22] In the 1981 case *Mayberry v. Dees,*[23] the U.S. Court of Appeals, Fourth Circuit, upheld East Carolina University's decision to deny tenure to Mayberry, introducing into case law collegiality as a factor in determining tenure.[24] The case includes an extensive discussion of collegiality, even though it was not necessary to the holding and thus was dictum.[25]

Over the past 32 years, the courts have ruled in favor of colleges and universities in the overwhelming majority of cases in their use of collegiality as a factor in tenure decisions,[26] even when collegiality had not been explicitly stated in the tenure requirements.[27] In the majority of court decisions, collegiality was not the sole reason, but

only one factor in the denial of tenure.[28] In some cases, collegiality was found to be a determining factor in the denial of P&T, even though the cases were filed for other reasons including retaliation for free speech, breach of contract, or discrimination.[29]

Promotion and Tenure Policies and Procedures on Collegiality

As of 2011, twenty-five higher education institutions were found to have included at least some reference to collegiality in their internal policies.[30] Thus, only a small percentage of universities in the United States have included collegiality as an expressed criterion or factor in the promotion and tenure (P&T) process. One university, Northern Illinois University (NIU), provides a policy on collegiality at the academic affairs level, approved by the faculty senate and the university council, to serve as guidance for employee behavior.[31] The expectation of collegiality at NIU was also found in the P&T guidelines of the Department of Operations Management and Information Systems in the College of Business,[32] where the demonstration of collegiality (e.g., participating in departmental meetings, being respectful to others) was discussed in the context of service.

Another example where collegiality is required in promotion and tenure of faculty is in the School of Physical Therapy at Texas Woman's University.[33]

> 4. The candidate must demonstrate collegiality within the School, as exhibited by the ability to share ideas, work cooperatively, and participate in shared decision making with: (a) faculty in departmental meetings and committees, (b) committee members on student advising and research committees, and (c) other faculty. Collegiality also includes providing professional support to other faculty members as they attempt to carry out their work and develop themselves professionally.

Likewise, Auburn University and the College of Arts and Sciences at St. Louis University have included collegiality in their P&T policies.[34] Moreover, Auburn University policies contain language that concerns about the collegiality of a faculty member should be addressed when they occur, and surely discussed in the annual review and third-year appraisal process.[35]

Recommended Policies and Procedures

Since the courts have upheld the decisions of colleges and universities to deny promotion and tenure to faculty for a lack of collegiality,[36] higher education administration has the latitude to take a comprehensive approach to address collegial behavior in established college and university documents so that all staff, particularly faculty, are well-informed. Recommendations to such approaches can include the following, subject to any appropriate university legal department review:

1. Higher education mission and goal statements, as well as long-term strategic plans, should include the practice of collegiality in describing the culture, climate, and operations of the organization. It is anticipated these public acknowledgements on the benefits of collegiality in an educational community will attract applicants who value this disposition.

2. College and university policy manuals should clearly define and describe collegiality and explain its purpose and benefits, so as to guide all administrators, faculty, and staff in their everyday duties.

3. Higher education faculty employment postings, as well as interview and reference questions, should ask applicants to clearly address their practices of collegiality in current and former jobs.

4. Faculty contracts should include language addressing the demonstration of collegiality toward earning P&T, to help avoid or minimize the legal grounds for litigation (e.g., breach of contract) by faculty.

5. Higher education faculty handbooks should clearly highlight the value of collegiality and the requisite need for collegial practice to support, not to infringe upon, academic freedom or independent work, in the P&T process.

6. Higher education schools and departments should establish mentoring programs for new faculty members to provide opportunities for guidance and discussions regarding the practice of collegiality in the context of teaching, research, and service, or collegiality if it is a separate criterion.

7. Higher education schools and departments should establish a system of recordkeeping that documents faculty members' actions in meeting requisite levels of collegiality, similar to documentation for teaching, research, and service. These technical reports (e.g., annual reviews, third-year reports) allow faculty to self-assess their collegial disposition based on defined activities and experiences, and permit supervisorial feedback on strengths or possible development in addressing collegiality expectations for P&T.

8. Higher education administration should support and reinforce collegial behavior of faculty and staff by encouraging and funding relevant professional development on collegiality, as well as providing tangible compensations and awards for sound practices of this behavior.

9. Higher education institutions need to ensure that faculty review committees (e.g., university faculty grievance panels) knowledgeable of the tenure and promotion criteria are established to ensure that faculty are accorded due process.[37]

Summary

It can be argued that collegial behavior should be an assessed competence in the context of teaching, research, and service, or possibly be a fourth criterion for promotion and tenure (P&T) and for the renewal of faculty contracts. Collegiality has been found to be a valued practice to support organizational effectiveness in higher education communities.[38] The AAUP has acknowledged the value of collegiality in faculty performance; however, the AAUP has also urged that collegiality should not constitute the sole basis for denying tenure.[39] Concerns have been raised that using collegiality as a criterion for P&T may inhibit academic freedom (free speech) among faculty in curriculum and personnel deliberations.[40]

The courts have demonstrated that they are "willing to continue to find collegiality as a valid factor in the tenure decision."[41] Moreover, "it appears that the courts are more than willing to fold it into the other generally accepted criteria"[42] for supporting university decisions to deny tenure, even when P&T policies have not directly stated the requirement of collegiality. While the expressed inclusion of collegiality may be unnecessary in policy documents,[43] college and university major documents (e.g., mission statements, rules of conduct, P&T policies) should clearly address the value, expectations, and support of collegiality, especially if collegiality will be used as the basis for promotion and tenure.

ENDNOTES

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1 Mary Ann Connell, Kerry Brian Melear, & Frederick G. Savage, *Collegiality in Higher Education Employment Decisions: The Evolving Law*, 37 J.C. & U.L., 532 (2011).

2 Pattie C. Johnston, Tammy Schimmel, & Hunter O'Hara, *Revisiting the AAUP Recommendation: The Viability of Collegiality as a Fourth Criterion for University Faculty Evaluation*, 15 C.Q. 1 (2012). *Retrieved from http://www.collegequarterly.ca/2012-vol15-num01-winter/index.html.*

3 *Id.*

4 Johnston et al., *supra* note 2.

5 American Association of University Professors, *On Collegiality as a Criterion for Faculty Evaluation,* 39-40 (1999). *Retrieved from http://www.aaup.org/AAUP/pubsres/policydocs/contents/collegiality.htm.*

6 Ann H. Franke, *The Courts Assess Faculty Collegiality*, 82 Academe 72 (1996).

7 *Mayberry v. Dees*, 663 F.2d 502, 514, 1 Ed. Law Rep. 493 (4th Cir.1981). The court's definition of collegiality was based on a 1971 report partially sponsored by the American Association of University Professors, and "became a standard, though it was not determinative of the outcome and was mentioned only in passing in the dictum." Edgar Dyer, *Collegiality as a Factor in Faculty Employment Decisions at Public Colleges and Universities: A Selective Review of the Caselaw,* 152 Ed. Law Rep. 455, at 456 (2001).

8 Leonard Pertnoy, *The "C" Word: Collegiality Real or Imaginary, and Should It Matter in a Tenure Process*, 7 St. Thomas L. Rev. 201 (2004).

9 Connell et al., *supra* note 1.

10 *Ward v. Midwestern State Univ.*, 217 Fed. App'x. 325, 219 Ed. Law Rep. 479 (5th Cir. 2007).

11 *Slatkin v. Univ. of Redlands*, 106 Cal. Rptr. 2d 480, 153 Ed. Law Rep. 329 (Cal. Ct. App. 2001).

12 Johnston et al., *supra* note 2, at 9.

13 Robert E. Cipriano, & Jeffrey L. Buller, *Rating Faculty Collegiality,* 44 Change: Mag. High. Learn. 45 (2012).

14 *Id.*

15 Peter Schmidt, *New Test to Measure Faculty Collegiality Produces Some Dissension Itself*, 59 Chron. High. Educ. A8 (June 10, 2013). *Retrieved from http://chronicle.com/article/New-Test-to-Measure-Faculty/139695./*

16 Johnston et al., *supra* note 2; Leonard Pertnoy, *supra* note 8.

17 American Association of University Professors, *supra* note 5.

18 *Id.*

19 *Id.*

20 *Id.*

21 *Id.*

22 Connell et al., *supra* note 1.

23 *Mayberry v. Dees*, 663 F.2d 502, 514, 1 Ed. Law Rep. 493 (4th Cir.1981), *cert. denied*, 459 U.S. 830 (1982).

24 University decisions have also been affirmed by court rulings regarding a lack of collegiality as a reason for the termination of tenured professors. *Bernhold v. Bd. of Governors of the Univ. of North Carolina*, 683 S.E.2d 428, 249 Ed. Law Rep. 908 (N.C. App. 2009) (a tenured professor's behavior and conduct toward colleagues was disruptive to the point that his department's function and operation were impaired.)

25 *Mayberry*, *supra* note 23. The basic holding in *Mayberry* was that the professor failed to establish that he was denied tenure in retaliation for his exercise of protected rights of free expression. The university's handbook expressly stated that a factor to be considered for tenure was "constructive relationship with colleagues," (663 F.2d at 514) and Mayberry had in effect not contested the issue. *Also, see* Edgar Dyer, *supra* note 7.

26 Connell et al., *supra* note 1.

27 For instance, in two cases, *Univ. of Baltimore v. Iz*, 716 A.2d 1107, 129 Ed. Law Rep. 377 (Md. App. 1998) and *Bresnick v. Manhattanville Coll.*, 864 F. Supp. 327, 95 Ed. Law Rep. 121 (S.D.N.Y. 1994) faculty accused the university administration of breach of contract, where the lack of collegiality was used for denying tenure, although collegiality was not specifically listed as a criterion for being awarded tenure.

28 Only one case was found in which collegiality clearly was the sole factor in a denial of tenure to a college or university faculty member, *Schalow v. Loyola Univ. of New Orleans*, 646 So. 2d 502, 96 Ed. Law Rep. 864 (La. Ct. App. 1994) "No one was calling into question Dr. Schalow's competence as a philosopher. All admit that he is very good. All admit that he is a popular teacher…. The problem is one of collegiality." In another (more recent) case, *Jensen v. Western Carolina Univ.*, 2012 WL 672860 (W.D.N.C.), the court states that the university's decision "was based solely on Jensen's lack of collegiality," but also indicates it was influenced by a fear for personal safety based on Jensen's behavior. A third case involved denial of "voting membership" (akin to tenure) to a medical doctor whose position included an appointment to the staff of both a hospital and medical school, apparently for the sole reason of a lack of collegiality. *Kirk v. Hitchcock Clinic*, 261 F.3d 75 (1st Cir. 2001).

29 The following are a few examples. In *Scallet v. Rosenblum*, 911 F. Supp. 999, 106 Ed. Law Rep. 644 (W.D.Va.1996), *aff'd*, 106 F.3d 391, 116 Ed. Law Rep. 38 (4th Cir. 1997). Scallet contended that he was terminated for his views on diversity and multiculturalism. The University of Virginia countered that faculty members were unable to work with him, particularly female faculty members; that he sabotaged colleagues' classes; and that he deviated from the agreed-upon curriculum. A breach of contract claim was the basis for *McGill v. Regents of the Univ. of California*, 52 Cal.Rptr.2d 466, 108 Ed. Law Rep. 1228 (Cal. App. 1996). McGill was denied tenure in part for a lack of collegiality and claimed that since it was not specifically stated in tenure requirements, it was not sufficient reason to deny him tenure. While the trial court ruled in his favor, the appellate court ruled against him, contending that the ability to work with colleagues was an important consideration. Discrimination on account of sex, nationality, and religion was the basis of the claim in *Babbar v. Ebadi*, 216 F.3d 1086, 146 Ed. Law Rep. 627 (10th Cir. 2000). While Babbar's teaching was acceptable, his research and collegiality were deemed not acceptable.

30 Connell et al., *supra* note 1.

31 Northern Illinois University, Division of Academic Affairs, *Statement on Professional Behavior of Employees University Collegiality Policy* (Feb. 11, 2011). Retrieved from http://www.niu.edu/provost/policies/appm/II22.shtml.

32 OM&IS Faculty Handbook, College of Business, Northern Illinois University, (Jan. 1, 2007). Retrieved from http://www.cob.niu.edu/faculty/m10nlr1/handbook/.

33 Texas Woman's University School of Physical Therapy Tenure and Promotion Policies and Criteria. Retrieved from http://www.twu.edu/downloads/academic-affairs/p-t-criteria-CHS-pt-2008.pdf.

34 Connell et al., *supra* note 1.

35 *Id.*

36 Cipriano, & Buller, *supra* note 13.

37 The following is an example of an appeal process: East Tennessee State University. *Tenure and Promotion Appeals Process*. Retrieved from http://www.etsu.edu/senate/res/tenure.aspx.

38 Johnston et al., *supra* note 2.

39 American Association of University Professors, *supra* note 5.

40 *Id.*

41 Pertnoy, *supra* note 8 at 222.

42 Dyer, *supra* note 7 at 466.

43 Mary Ann Connell & Frederick G. Savage, *The Role of Collegiality in Higher Education Tenure, Promotion,* 27 J. COLL. & UNIV. L. 833 (2001); Connell et al., *supra* note 1.

ELA

Legal Issues Regarding Student Cell Phones in Schools*

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Introduction

Case law regarding the seizure of student cell phones in schools is surprisingly limited, considering the devices' widespread possession and use by school-age students. As the Third Circuit observed in *J.S. ex rel. Snyder v. Blue Mountain School District* (*J.S.*),[1] "approximately 66 percent of students receive a cell phone before the age of 14, and slightly less than 75 percent of high school students have cell phones."[2] Most school districts in the U.S. have a policy addressing the possession and use of cell phones on school premises. In many cases, the school district policies reflect state statutes prohibiting or limiting the presence and/or use of cell phones on school property. In effect, these policies approach the possession and use of cell phones from the perspective of contraband, which means that students who violate the school district's policy can have their cell phones seized in much the same way as school officials seize illegal drugs, weapons, or alcohol.[3]

However, the extent to which cell phones are contraband depends on the language of the school district's policy. Thus, a policy that permits the possession of cell phones, but not their use on school premises, would not arguably support seizure of a cell phone where all that is known is that a student has a cell phone in his/her possession. The case law is limited, but implicates legal issues as to whether a school district rule prohibits possession but not use, or both possession and use, of cell phones on school premises; whether examination of the content of cell phones constitutes a violation of constitutional rights; and whether school officials conducting or authorizing seizure of cell phones can be individually liable.

State Legislatures

State legislatures have taken different approaches to prohibiting or restricting cell phones at schools or school activities. In New Jersey, unless a school district grants written permission for the possession and/or use of cell phones, no student in New Jersey "shall bring or possess any remotely activated paging device on any property used for school purposes at any time, regardless of whether school is in session or other persons are present."[4] California leaves the responsibility to school districts to regulate cell phones, which can include "banning any electronic signaling device that operates through the transmission or receipt of radio waves, including, but not limited to, paging and signaling equipment, by pupils of the school district while the pupils are on campus, while attending school-sponsored activities, or while under the supervision and control of school district employees."[5] Georgia prohibits the use of "any electronic devices during the operation of a school bus, including but not limited to cell phones; pagers; audible radios, tape or compact disc players without headphones…."[6]

While permitting school districts to prohibit cell phones, the California legislature protects students where "an electronic signaling device … [has been] determined by a licensed physician and surgeon to be essential for the health of the pupil …."[7] New Jersey allows an exception to the ban on cell phones on school premises, but places the burden on a student to produce evidence "to the satisfaction of the school authorities a reasonable basis for the possession of the device on school property."[8] Effective August 16, 2013, the Arkansas legislature delegated authority to school districts to "establish a written student discipline policy and exemptions concerning the possession and use by a student of a personal electronic device"[9] which could include, among other items, a "cellular telephone."[10]

The New Jersey statute is worth noting because of its comprehensiveness, authorizing school districts to:

(1) Allow or restrict the possession and use of a personal electronic device;

(2) Allow the use of a personal electronic device in school for instructional purposes at the discretion of a teacher or administrator;

(3) Limit the times or locations in which a personal electronic device may be used to make telephone calls, send text messages or e-mails, or engage in other forms of communication;

(4) Allow or prohibit the use of any photographic, audio, or video recording capabilities of a personal electronic device while in school;

(5) Exempt the possession or use of a personal electronic device by a student who is required to use such a device for health or another compelling reason;

(6) Exempt the possession or use of a personal electronic device after normal school hours for extracurricular activities; and,

(7) Include other relevant provisions deemed appropriate and necessary by the school district.[11]

Case Law

Thus far, there have been relatively few cases litigating issues related to possession or use of cell phones on school property. In *J.W. v. Desoto County School District* (*J.W.*),[12] a school district had a policy prohibiting both the possession and use of cell phones on school property. A student (R.W.) was observed by a school employee opening his cell phone within the school building to access a phone call from his father. After demanding and receiving the cell phone from R.W., a teacher opened the phone to review the personal pictures stored on it and taken by R.W. while at his home. Several photographs stored on the phone depicted R.W. dancing in his home bathroom and one photograph, also taken in the bathroom, showed B., another SMS student, holding a BB gun. The student was taken to the seventh-grade principal, who opened the phone and examined the photographs. A police sergeant, also present in the principal's office, also opened the phone and examined the photographs. The principal and sergeant then accused R.W. of having "gang pictures," and issued a suspension notice to R.W. pursuant to Discipline Rule 5–3, which prohibited students from "wearing or displaying in any manner on school property ... clothing, apparel, accessories, or drawings or messages associated with any gang ... associated with criminal activity, as defined by law enforcement agencies." During a suspension, and later, expulsion, hearing, the police sergeant testified that, based on the pictures of a student

with BB gun and on the gang pictures, R.W. represented "a threat to school safety." In rejecting the student's Fourth Amendment search and seizure claim, the federal district court reasoned that "[it was] apparent that the phone constituted contraband when it was brought on campus, and R.W. greatly increased his chances of being caught with that contraband (and of being suspected of further misconduct) when he elected to use it on school grounds."[13] The district court further noted that it was irrelevant whether the cell phone was opened by the principal and police sergeant because "the search in this case was justified at its inception."[14] In summary, the court observed that "a student's decision to violate school rules by bringing contraband on campus and using that contraband within view of teachers appropriately results in a diminished privacy expectation in that contraband."[15]

The district court in *J.W.* distinguished the result in *Klump v. Nazareth Area School District* (*Klump*)[16] where a Pennsylvania federal district court declined to grant qualified immunity to school personnel involved in the seizure of a student's cell phone. The court determined that, since school policy permitted possession of a cell phone (but not its use), the mere fact that the cell phone fell out of the student's pocket in class provided no basis for seizure of the phone. Moreover, both individual school officials and the school district could be liable for a Fourth Amendment search and seizure violation, as well as a state claim for invasion of privacy, where the officials had accessed the names of student contacts and other items on the phone.

In *Laney v. Farley* (*Laney*)[17] the Sixth Circuit Court of Appeals upheld a school's one-day suspension of a student for possession of a cell phone that had rung while a student was sitting in class. The school's rule banned students from having a personal communications device such as a cell phone on school property during class hours. The parents of the student challenged the procedural fairness of the school's rule that punished their child's impermissible cell phone possession by holding the phone for thirty days and then returning it to the parents (not the student), and by punishing the student with a one-day, in-school suspension. The Sixth Circuit in *Laney* observed that the one-day suspension fell far short of the ten-day suspension which, the U.S. Supreme Court had held in *Goss v. Lopez*,[18] entitled a student to a due process hearing. In *Laney*, the one-day suspension, "during which the student was required to complete school work and was recorded as having attended school,"[19] had not deprived her "of a property interest in educational benefits or a liberty interest in reputation."[20] The Sixth Circuit in *Laney* chose not to address whether the confiscation of a cell phone would have deprived the student of a First Amendment speech or Fourth Amendment privacy right, but, rather, limited its decision to the procedural fairness of the school's enforcement of its policy.

A New York appeals court, in *Price v. New York City Board of Education*,[21] addressed a facial constitutional challenge to a school board policy that prohibited "cell phones, iPods, beepers and other communication devices … on school property."[22] The policy notwithstanding, a principal could "grant permission for a student to bring a cell phone into a school building for medical reasons."[23] In rejecting the parents' challenge to the policy as overbroad and devoid of legitimate purpose, the New York appeals court held that comparing student conduct regarding cell phones to that of adults was not an improper purpose. As the court observed, "[w]hile the vast majority of public school children are respectful and well-behaved, it was not unreasonable for the Chancellor[24] to recognize that if adults cannot be fully trusted to practice proper cell phone etiquette, then neither can children."[25] In addition, the appeals court rejected the parents' claim that the policy as enforced interfered with the Fourteenth Amendment Liberty Clause right of parents and their children "to communicate with each other between home and school."[26] The appeals court observed that "[n]othing about the cell phone policy forbids or prevents parents and their children from communicating with each other before and after school."[27] The trial court in Price made a perceptive comment regarding balancing the interests of schools and school administrators on one side with those of parents and their children on the other:

> As one cannot predict the future, except only to recognize there will continue to be rapid and significant changes in technology, it is clearly possible that in the future, inexpensive, effective, appropriate and available devices and systems may change the situation. However, this Court also recognizes that, because the pace of change of technology is so rapid, Courts should also avoid, wherever possible, deciding issues on the basis of the current technology. Court decisions take several years from the commencement of a suit to the final appeal. Technology moves faster. Even where a Court had the perspicacity to understand all relevant technical issues properly, its ruling would probably be obsolete long before the last appeal. While Courts in some instances must make such decisions, they are better left to administrators who at least have the potential capacity to institute new rules to meet changing technologies.[28]

Recommendations

The dearth of case law regarding the legality of school policies restricting or prohibiting cell phones on school premises limits the application of that case law. One can only speculate as to the viability of constitutional claims that have yet to be addressed by courts, as well as the precedential value of claims that have been addressed in unreported decisions.

The threshold issue is whether a cell phone can be classified as contraband. Whether cell phones are considered to be contraband will depend on how a school district chooses to define their presence and use on school premises. Schools theoretically have a range of possibilities in defining cell phones as contraband. At one end of the continuum, cell phones can be treated like tobacco, alcohol, or weapons, and be banned completely from schools. However, at the other end of the continuum, cell phones can be permitted and used at schools, and to that extent would not be considered contraband at all. Between these two extremes, the range of options regarding cell phone usage might include: allowing them to be carried by students in school, but not to be used; kept in student lockers (or other designated locations) but not used; permitted in schools and used in limited venues, such as in the school lunchroom during lunch; limited in their use only to "emergencies"; or, for those students with IEPs or Section 504 plans, permitted to be used as specified in those documents. The limited case law suggests that courts are

going to accord school boards and school administrators a broad sweep of permission in determining whether cell phones are going to be considered contraband. As suggested in *J.W.*, a determination that a student's possession or use of a cell phone is contraband will probably be sufficient to support the seizure of a cell phone, but not necessarily accessing student files on the cell phone.[29]

The notion has been rejected that restrictive school district cell phone policies, as well as seizure of cell phones pursuant to those policies, violate the Fourteenth Amendment Liberty Clause right of parents to direct the education of their children.[30] Generally, courts, while recognizing the Liberty Clause right of parents to make decisions concerning the venue in which their children are taught,[31] hold that the right does not extend to parents making decisions about public school curriculum.[32]

No case has yet to address the issue of free speech in the context of school or law enforcement officials seizing a cell phone. In *Miller v. Mitchell*,[33] the Third Circuit recognized a First Amendment right of students to be free from compelled speech, although the court did not address whether the First Amendment would also protect student expression that included the right to place nude pictures on their cell phones themselves if they did not show them to anyone else. Whether students can assert free expression protection for pictures or words stored on their cell phones has been addressed in cases where students create web page pictures or descriptions considered to be objectionable by school officials and a threat to the safety of the school. [34]

Involving law enforcement officers, rather than school officials, in search and seizure of student cell phones does not immunize school officials from individual liability where law enforcement officers are acting pursuant to the direction of school officials and it is clear that a constitutional right has been violated. However, where a clear constitutional right is not at stake, qualified immunity is a viable defense. The question of qualified immunity is an issue only where the remedy sought is injunctive, as opposed to damages. Thus, where a student whose cell phone had been seized by school and law enforcement officials seeks injunctive relief to recover the phone and to prevent her participating in a reeducation program, a court could reject motions for absolute and qualified immunity by the officials.[35]

ENDNOTES

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1 J.*S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 371 Ed. Law Rep. 656 (3d Cir. 2011).

2 *Id*. at 951.

3 For a discussion of contraband and its application to searches, see C. Russo and R. Mawdsley, 2d ed., Searches, Seizures and Drug Testing Procedures: Balancing Rights and School Safety 1-2 (Horsham, PA: LRP Publications, 2008) (3d ed. in press).

4 N.J. Stat. Ann. § 2C:33-19.

5 Cal. Educ. Code §48901.5(a).

6 Ga. Code Ann. § 20—2-751.5(b)(1)(B).

7 *Id*., §48901.5(b).

8 N.J.S.A. 2C:33-19.

9 Ark. Code Ann. § 6-18-515.

10 *Id*., § 6-18-515 (a)(1).

11 *Id*., § 6-18-515 (c)(1-7).

12 2010 WL 4394059 (N.D. Miss. 2010).

13 *Id*. at *4.

14 *Id*.

15 *Id*. at *5.

16 *Klump v. Nazareth Area Sch. Dist.,* 425 F. Supp.2d 622 (E.D. Pa. 2006).

17 *Laney v. Farley*, 501 F.3d 577, 225 Ed. Law Rep. 93 (6th Cir. 2007).

18 *See Goss v. Lopez*, 419 U.S. 565 (1975) (holding that a student suspension of ten or more days entitled a student to procedural due process).

19 *Id.* at 584.

20 *Id.*

21 *Price v. New York City Bd. of Educ*., 855 N.Y.S.2d 530, 231 Ed. Law Rep. 856 (N.Y. App. Div. 2008).

22 *Id*. at 533.

23 *Id.*

24 The Chancellor in New York City is the highest education administrative official who is delegated authority to implement the regulations and bylaws enacted by the city's Board of Education. *See* McKinney's Educ. Law § 2554 (13) (b).

25 *Price*, 855 N.Y.S.2d at 538.

26 *See Price v. New York City Bd. of Educ*., 837 N.Y.S.2d 507, 523 (N.Y. Sup. Ct. 2007).

27 *Price*, 855 N.Y.S.2d at 530-31.

28 *Price*, 837 N.Y.S.2d at 830-31.

29 *See Klump*, *supra*, note 16.

30 *See Price v. N.Y. City Bd. of Educ.*, 855 N.Y.S.2d 530 (N.Y. App. Div. 2008).

31 *See Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that state compulsory attendance law did not apply to Amish parents where their children, while not attending a school until age 16, were involved in practical training after they completed eighth grade).

32 *See Brown v. Hot, Sexy and Safer Publications*, 68 F.3d 525, 104 Ed. Law Rep. 106 (1st Cir. 1995) (refusing to recognize that parent right to direct the education of their children extended to the content of a school assembly); *Mozert v. Hawkins Cnty. Bd. of Educ.*, 827 F.2d 1058, 41 Ed. Law Rep. 473 (6th Cir. 1987) (rejecting parent claim to select the curriculum for their child).

33 *Miller v. Mitchell*, 598 F.3d 139 (3d Cir. 2010) (affirming that a district attorney's threat of charging students with child pornography for sending sexually suggestive photographs of themselves with text messages if they did not participate in a reeducation program violated their First Amendment right to be free from compelled speech).

34 *Cf. Layshock v. Hermitage School Dist*., 650 F.3d 205, 271 Ed. Law Rep. 638 (3d Cir. 2011) (en banc) (holding that student's comments about a school administrator, although lewd and offensive, were protected speech where the comments had not been created or displayed at school) and *J.S. ex rel. Snyder v. Blue Mountain School Dist*., 650 F.3d 915, 271 Ed. Law Rep. 656 (3d Cir. 2011) (en banc) (in reversing the expulsion of a student who had placed, off the school grounds, lewd, vulgar and offensive speech on his computer, the court of appeals found no substantial likelihood of disruption or material interference with school discipline where the student and no other students had accessed the computer) *with Wynar v. Douglas County School Dist*., 728 F.3d 1062 (9th Cir. 2013) (upholding the expulsion of a student who had sent violent and threatening messages from his home to his friends about planning a school shooting, the Ninth Circuit determining that such messages constituted a "true threat" that took the case out from under free expression).

35 *See N.N. v. Tunkhannock Area Sch. Dist.*, 801 F.Supp.2d 312, 316-17, 274 Ed. Law Rep. 472 (M.D. Pa. 2011) (denying qualified immunity where the plaintiff was seeking only injunctive relief).

ELA

Three Birds with One Stone: Does Meeting the Requirements of the IDEA for an IDEA-Eligible Student also Comply with the Requirements of Section 504 and the ADA?*

Perry A. Zirkel, Ph.D., J.D., LL.M.**

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The general view is that because its obligations are relatively detailed and deep,[1] the Individuals with Disabilities Education Act (IDEA)[2] serves as an effective means of also meeting the requirements of a pair of anti-disability discrimination laws—Section 504[3] and its sister statute,[4] the Americans with Disabilities Act (ADA)[5]—for a student within the overlapping coverage of these statutory frameworks.[6] For example, it is not at all uncommon to find court decisions that in the wake of a ruling that the district fulfilled its obligation to provide a free appropriate public education (FAPE) under the IDEA summarily disposed of the § 504 FAPE claim.[7] An occasional case extends this automatic-interplay logic more broadly; for example, in response to a class action suit on behalf of IDEA-eligible youth, Washington's highest court concluded: "[the plaintiff class] has not cited, and this court has not found, any cases where a court held that § 504 was violated but the IDEA was not."[8]

The purpose of this case note is to illustrate that the general conception that fulfilling the IDEA requirements also "kills the other two birds"—Section 504 and the ADA—is either not the rule or at least, even when narrowed to the issue of FAPE for a public school child with an individualized education program (IEP) under the IDEA, is not without exceptions. The focal example will be the Ninth Circuit's recent decision in *K.M. v. Tustin Unified School District*.[9]

The subsequent discussion will offer additional examples of the various significant differences between the IDEA and § 504 or the ADA[10] that the courts increasingly have established in recent years in the K-12 public school context.[11]

The Ninth Circuit's Decision in K.M.

This decision was for two consolidated cases. The relevant facts in each case were that (1) the student was in secondary school with an IEP based on hearing impairment; (2) the parents requested, via the IEP process, the provision of Communication Access Realtime Translation (CART), a word-for-word transcription service in which, similar to court reporting, a trained stenographer provides captions in real time on a computer screen; (3) the student was able to follow the classroom conversation and make good progress with intense concentration, resulting in exhaustion at the end of the school day; (4) the district denied the request for CART as not being necessary for the child to access and benefit from the general curriculum; (5) the parents challenged the denial via an impartial hearing under the IDEA and lost; (6) their appeal to federal district court resulted in a ruling that the district complied with the IDEA and, as an automatic result, also met its alternate obligation under § 504 and the ADA; and (7) their appeal to the Ninth Circuit was limited to review of the lower court's ADA ruling.

As a result, the Ninth Circuit addressed "a narrow question: whether a school district's compliance with its obligations to a deaf or hard-of-hearing child under the IDEA also necessarily establishes compliance with its effective communications obligation to that child under Title II of the ADA."[12] Title II applies to public entities, including school districts,[13] and its effective communications regulation requires the provision of "appropriate auxiliary aids and services where necessary to afford an individual with a disability an equal opportunity to participate in … a program …conducted by a public entity."[14] Moreover, the Title II regulations expressly include in the definition of auxiliary aids and services "real time computer-aided transcription services"[15] and require "giving primary consideration to the requests of the individual with disabilities" in the determination of what auxiliary aids and services are necessary.[16] Yet, a separate, more general Title II regulation provides an overriding limitation that the public entity need not take any action that would constitute either a fundamental alternation or an undue financial and administrative burden.[17]

The Ninth Circuit started its analysis with a general comparison of the IDEA

and Title II of the ADA, concluding, for example, that "the IDEA and Title II differ in both ends and means."[18] More specifically, the court characterized the IDEA as substantively aimed at a floor of access, but requires that access regardless of the costs or other burdens or alterations, and Title II as aimed substantively at equal accessibility for individuals with communication disabilities, but only to the extent as not posing an undue hardship or fundamental alteration.[19]

Next, the Ninth Circuit identified two lines of its case law—one interpreting the IDEA's FAPE provision and § 504's FAPE regulation[20] as "'overlapping but different'"[21] and the other confirming the close interrelationship between § 504 and the ADA.[22] The reversible error at the district court level in these consolidated cases, according to the Ninth Circuit, was combining these two lines of cases without detecting and applying the nuanced differences within each one. For the first line, the Ninth Circuit distinguished between the effect of substantively complying with IDEA FAPE on a claim predicated on § 504 FAPE, and its effect on claims predicated on other §504 theories.[23] For the second line, the court pointed out differences between § 504 and the ADA in terms of jurisdiction,[24] causation,[25] administering agency,[26] and—specifically significant in this case, FAPE. For this last difference, the court concluded that whereas § 504 (and the IDEA) provide for FAPE, the ADA has no such requirement; instead, the plaintiff-parents predicate

their claim on the aforementioned[27] ADA effective communication regulation.

Thus unraveling these two general lines of case law, the Ninth Circuit concluded that they do not resolve the narrow question in this case, instead finding the answer by focusing on "the *particular* provisions of the ADA and the IDEA covering students who are deaf or hard-of-hearing, as well as the implementing regulations for those provisions."[28] More specifically, noting that the IDEA only requires special consideration for the needs and opportunities of students with hearing impairments or deafness,[29] the Ninth Circuit found these significant additions in the ADA Title II context: (1) the "where necessary" language in the effective communications regulation,[30] (2) the student-preference provision in the related regulation;[31] (3) the related equal opportunity standard;[32] and, on the limitation side, (4) the fundamental alteration defense.[33]

Finally, holding that "[t]he failure of an IDEA claim does not automatically foreclose a

Title II claim grounded in the Title II effective communications regulation,"[34] the Ninth Circuit remanded these cases to the district court level to apply these distinguishable ADA standards to the particular contours of this case. In doing so, the court acknowledged that this procedure allows (1) the parties to further develop the factual record and, if necessary, revise their legal positions; (2) the district to renew their motion for summary judgment on other grounds; and (3) the court to determine whether there is a genuine issue of material fact on this clarified basis or any alternate district grounds.[35]

Discussion

Although the Ninth Circuit's ruling shows the nuanced and potentially significant distinctions between the IDEA and the ADA for students in K-12 education, at least two tempering caveats are warranted. First, as the court clarified,[36] the scope of application is narrow, specifically limited to CART and other such auxiliary aids and services for public school students with communications disabilities. Second, even within this limited scope, the two plaintiff-students were not necessarily successful; upon remand, further proceedings could result in a ruling for the district based on the applicable fundamental alteration defense or alternate grounds.[37] Nevertheless, at least partially illustrating its potentially positive plaintiff effect, a federal district in California granted another IDEA-eligible deaf student a preliminary injunction for CART in the wake of *K.M.*[38]

Extending more broadly to FAPE, which is the mainstay of IDEA litigation, the Ninth Circuit in *K.M.* was careful to add dicta that preserved the two-birds-with-one-stone effect where the IDEA and § 504 and/or ADA claims are identical.[39] At the same time, this limitation retained, at least in the Ninth Circuit, the partially analogous distinction between § 504 and the ADA where a district has denied FAPE under the IDEA.[40] More specifically, in the *Mark H.* decision[41] on which the K.M. court repeatedly relied,[42] the Ninth Circuit preserved the possibility of a money damages claim under § 504 in the wake of a denial of FAPE under the IDEA.[43] This litigation, after another visit to the Ninth Circuit and a second remand, ended in a costly settlement.[44] The intervening Ninth Circuit decision spelled out two alternative routes to liability in such circumstances—denial of reasonable accommodation resulting in lack of meaningful access, or violation of § 504 regulatory standard for FAPE—both culminating in the requirement to prove deliberate indifference on the part of the defendant.[45] In the reported case law thus far, this particular development has not extended to the plaintiff-parents' advantage[46] beyond the Ninth Circuit.[47]

Finally, on its broadest side, *K.M.* serves as a reminder of the various subtle but potentially significant differences among the IDEA, § 504, and the ADA[48] that increasingly are being tested in the K-12 context.[49] In some cases, the result has been surprisingly disappointing for the plaintiff-parents of students with disabilities.[50] In others, as in *K.M.*, the plaintiff-parents have gained an advantageous handhold.[51] However, this handhold, if the purpose of the handhold is liability for money damages,[52] poses an uphill climb in terms of the rather daunting deliberate indifference or, depending on the jurisdiction,[53] similar standard.[54]

In sum, the answer to whether the IDEA stone kills the other two birds—or whether the § 504 or ADA bird flies free[55]—is the same as it is for most special education questions: "It depends."[56]

ENDNOTES

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1 For this general comparative view in terms of depth and breadth, see, e.g., Perry A. Zirkel, Section 504, the ADA and the Schools, One:5 (2011).

2 20 U.S.C. §§ 1400–1482 (2012).

3 29 U.S.C. § 794 (2012).

4 For the "sister statute" metaphor, see, e.g., *Arce v. Potter*, 818 F. Supp. 2d 402, 407 (D.P.R 2011).

5 42 U.S.C. §§ 12101–12213 (2012).

6 For a systematic comparison among these three statutory frameworks and their implementing regulations, including the scope of eligibility—i.e., the definition of disability under the IDEA and the broader definition of disability shared by § 504 and the ADA—see Perry A. Zirkel, *A Comprehensive Comparison of the IDEA and Section 504/ADA*, 282 Ed. Law Rep. 767 (2012).

7 *See, e.g.*, *D.K. v. Abington Sch. Dist.*, 696 F.3d 233, 285 Ed. Law Rep. 730 (3d Cir. 2013); *Seladoki v. Bellaire Local Sch. Dist. Bd. of Educ.*, 53 IDELR ¶ 258 (S.D. Ohio 2009); *Greenwood v. Wissahickon Sch. Dist.*, 571 F. Supp. 2d 654, 668, 237 Ed. Law Rep. 276 (E.D. Pa. 2008); *C.N. v. Willmar Pub. Sch.*, 50 IDELR ¶ 274 (D. Minn. 2008); *Corey H. ex rel. B.H. v. Cape Henlopen Sch. Dist.*, 286 F. Supp. 2d 380, 386, 182 Ed. Law Rep. 808 (D. Del. 2003); *cf. Bd. of Educ. of Twp. High Sch. Dist. No. 211 v. Ross*, 486 F.3d 267, 278, 220 Ed. Law 482 (7th Cir. 2007) (least restrictive environment requirement). Although not as common, some courts reach the same conclusion for the converse situation of a denial of FAPE, although pointing out additional requirements depending on the remedy sought. *See, e.g.*, *Brennan v. Reg'l Sch. Dist. Bd. of Educ.*, 531 F. Supp. 2d 245, 279, 229 Ed. Law Rep. 513 (D. Conn. 2008); *Perrin v. Warrior Run Sch. Dist.*, 61 IDELR ¶ 257 (M.D. Pa. 2013).

8 *Tunstall v. Bergeson*, 5 P.3d 691, 707, 146 Ed. Law Rep. 528 (Wash. 2000).

9 725 F.3d 1088, 296 Ed. Law Rep. 800 (9th Cir. 2013).

10 For student cases in the K-12 public school context, the relevant part of the ADA is Title II, which applies to "public entities." For an overview of the various parts of the ADA and annotated rulings for each part, see Zirkel, *supra* note 1.

11 For a comprehensive overview of the differences, along with the commonalities, see Zirkel, *supra* note 6.

12 *K.M. v. Tustin Unified Sch. Dist.*, 728 F.3d at 1092.

13 *See supra* note 10.

14 28 C.F.R. § 35.160(b)(1) (2012).

15 *Id.* § 35.104.

16 *Id.* § 35.160(b)(2).

17 *Id.* § 35.164.

18 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1097.

19 *Id.*

20 34 C.F.R. § 104.33(a) (2012).

21 *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1098 (citing *Mark H. v. Lemahieu*, 513 F.2d 922, 933, 229 Ed. Law Rep. 53 (9th Cir. 2008)).

22 *Id.* (citing *Duvall v. Cnty. of Kitsap*, 260 F.3d 1124 (9th Cir. 2001).

[23] *Id*. at 1099.

[24] Title II applies to all public entities, whereas § 504 applies to entities, both public and private, that receive federal financial assistance. *Id*.

[25] Title II applies to discrimination based on disability (i.e., motivating factor analysis for mixed motive cases), whereas § 504 more strictly applies to discrimination based solely on disability. *Id*.; *see also CG v. Commonwealth of Pennsylvania*, 234 F.3d 229, 235–236, 298 Ed. Law Rep. 10 (3d Cir. 2013).

[26] Congress delegated regulatory responsibility for Title II centrally to the Department of Justice (DOJ) but for § 504 on a decentralized basis—e.g., to the U.S. Department of Education for K-12 (and postsecondary) schools. *Id*.

[27] *See supra* notes 14-16 and accompanying text.

[28] *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1100 (emphasis in original).

[29] *Id.* at 1100 (citing 20 U.S.C. § 1414(d)(3)(B)).

[30] *See supra* note 14 and accompanying text.

[31] See *supra* note 16 and accompanying text. Acknowledging but avoiding the thorny question of conflicting preferences between the parent and the child, which did not arise in these consolidated cases, the court noted: "We do not decide whether the child's preferences might trump the parent's in a situation in which they disagreed." *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1101 n.5.

[32] *Id*. at 1101 (citing 28 C.F.R. § 35.160(a)(1) & (b)(1)). In the § 504 context, this standard is more accurately termed "commensurate opportunity." *See, e.g*., *Bd. of Educ. v. Rowley*, 458 U.S. 176, 186 & n.8, 5 Ed. Law Rep. 34 (1982). For a discussion of this standard, see, e.g., Mark Weber, *A New Look at Section 504 and the Americans with Disabilities Act*, 16 Tex. J. C.L. & C.R. 1 (2010); Perry A. Zirkel, *The Substantive Standard for FAPE: Does Section 504 Require Less than the IDEA?* 106 Ed. Law Rep. 471 (1996).

[33] Applying this limitation to the effective communication regulation, the court reasoned as follows, with notable deference to the interpretation of the administering agency (*see supra* note 26): "In particular, as the DOJ explained in its amicus brief to this court, the ADA effective communication obligation 'is limited to the provision of services for existing programs; the ADA does not require a school to provide new programs or new curricula' (emphasis in original)." *Id*. at 1102. As a related matter, the court concluded that the "meaningful access" standard under the ADA (and § 504), which is attributable to *Alexander v. Choate*, 469 U.S. 287, 299 (1985), "incorporates rather than supersedes the[se] applicable interpretive regulations. *Id.* at 1103.

[34] *Id*. at 1102.

[35] *Id*. at 1103. In adopting this remand approach, the court again cited *Mark H*., here for the analogous situation "where the parties and the district court had misunderstood the interaction between two federal statutes, and remanded for further proceedings consistent with the relationship between those statutes as newly clarified by our opinion." *Id*. Interestingly, the two statutes in *Mark H.* were the IDEA and § 504, further illustrating the usual pairing but selective parsing of § 504 and the ADA.

[36] *See supra* note 12 and accompanying text.

[37] At least as likely, the outcome of the case may be a settlement, which is not uncommon in the wake of denials of dismissal or summary judgment. *See, e.g*., Laura Beth Nielsen, Robert L. Nelson, & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization?: Employment Discrimination in the Post Civil Rights United States*, 7 J. Empirical Stud. 175, 184-86 (2010) (finding that in the 14% of employment discrimination cases that survived summary judgment, 57% settled before a trial); *cf.* Kathryn Moss, Michael Ullman, Jeffrey W. Swanson, Leah M. Ranney, & Scott Burris, *Prevalence and Outcomes of Employment Discrimination Claims in the Federal Courts*, 29 Mental & Physical Disability L. Rep. 303, 306 (2005) (finding approximately 60% of the ADA Title I lawsuits ended in settlement).

[38] *D.H. ex rel. Harrington v. Poway Unified Sch. Dist.*, 2013 WL 6730 (S.D. Cal. Dec. 19, 2013). An alternative strategy, which a recent decision illustrates, is for the parent to exit the child from special education and request such technology accommodations via § 504. *D.F. v. Leon Cnty. Sch. Bd*., 62 IDELR ¶ 167 (N.D. Fla. 2014) (ruling that parent of deaf child who exited child under the IDEA but requested assistive technology stated a claim under § 504).

[39] *K.M. v. Tustin Unified Sch. Dist.,* 728 F.3d at 1101 (adding that "nothing in our holding should be understood to bar district courts from applying ordinary principles of issue and claim preclusion in cases raising both IDEA and Title II claims where the IDEA administrative appeals process has functionally adjudicated some or all questions relevant to a Title II claim in a way that precludes relitigation").

[40] In contrast, the Ninth Circuit adheres to the general judicial understanding, rooted in the § 504 regulations, that the provision of FAPE under the IDEA serves as compliance with the FAPE requirement under § 504. *A.M. v. Monrovia Sch. Dist*., 627 F.3d 773, 782, 263 Ed. Law Rep. 44 (9th Cir. 2010) (citing 34 C.F.R. § 104.33(b)(2)). Other jurisdictions agree. *See supra* note 7.

[41] *Mark H. v. Lemahieu*, 513 F.2d 922, 229 Ed. Law Rep. 53 (9th Cir. 2008). The court focused on the "design" language in what others (*supra* note 32) have characterized as the commensurate opportunity standard of the § 504 FAPE regulation. *Id*. at 233. The other, more significant difference is that the commentators focused on the purported affirmative differences between the IDEA and § 504 FAPE standards (i.e., when the district has provided an appropriate IEP under the IDEA), whereas *Mark H*. is premised on a denial of FAPE under the IDEA.

[42] For examples, see *supra* notes 21 and 35.

[43] The denial of FAPE was limited to an unappealed hearing officer decision, resulting in corrective actions that, according to the original, reversed decision in this line of litigation cost the defendant $250,000 for each of the two plaintiff children with autism. *Mark H. v. Lemahieu*, 372 F. Supp. 2d 591, 594, 199 Ed. Law Rep. 214 (D. Hawaii 2005). However, the allegations, accepted as facts for the purpose of summary judgment, spelled out a rather flagrant denial of FAPE. *Mark H. v. Lemahieu*, 513 F.2d at 925–28. For the summary judgment ruling, see *infra* note 44. The Fifth Circuit initially distinguished bad faith/gross misjudgment from deliberate indifference for liability under § 504, but subsequently vacated this opinion, remanding the case for resolution of the exhaustion issue. *Stewart v. Waco Indep. Sch. Dist*., 711 F.3d 513, 290 Ed. Law Rep. 503 (5th Cir. 2013), *vacated and remanded*, 61 IDELR ¶ 92 (5th Cir. 2013).

[44] *Mark H. v. Hamamoto*, 620 F.3d 1090, 261 Ed. Law Rep. 48 (9th Cir. 2010), *on remand*, 849 F. Supp. 2d 990, 282 Ed. Law Rep. 913 (D. Haw. 2012), *reconsideration denied*, 58 IDELR ¶ 222 (D. Haw. 2012). Subsequently, the state reportedly agreed to a $4.4 million settlement subject to approval by its legislature. Mary Vorsino, *State to Pay 4.4 Million in Landmark Settlement*, Honolulu Star Advertiser, Aug. 29, 2012, http://www.staradvertiser.com/s?action=login&f=y&id=167809065

[45] *Mark H. v. Hamamoto*, 620 F.3d at 1097–1103.

[46] Indeed, in some cases in other jurisdictions the courts have relied on the first Ninth Circuit decision in *Mark H.* to rule in favor of the defendant-district. *See, e.g*., *Miller ex rel. S.M. v. Bd. of Educ*., 565 F.3d 1232, 244 Ed. Law Rep. 528 (10th Cir. 2009) (ruling that the parents failed to prove discrimination, per *Mark H*., beyond denial of FAPE under the IDEA); *Brown v. Dist. 299-Chicago Pub. Sch.*, 762 F. Supp. 2d 1076, 267 Ed. Law Rep. 178 (N.D. Ill. 2010) (ruling that the parents failed to prove that the lack of implementation of the IEP affected the student's access in comparison to nondisabled students).

[47] For the latest example in the Ninth Circuit, see *D.A. v. Meridian Joint Sch. Dist. No. 2*, 289 F.R.D. 614, 294 Ed. Law 221 (D. Idaho 2013) (denying summary judgment with regard to deliberate indifference in FAPE case).

[48] *See* Zirkel, *supra* note 6.

[49] For various examples, see Perry A. Zirkel, *Section 504 for Special Education Leaders: Persisting and Emerging Issues*, 25 J. Special Educ. Leadership 99, 103–05 (2012).

[50] *See, e.g*., *S.H. ex rel. Durrell v. Lower Merion Sch. Dist.*, 729 F.3d 248, 297 Ed. Law Rep. 58 (3d Cir. 2013) (rejecting misidentification case for lack of deliberate indifference); *Ellenberg v. New Mexico Mil. Inst.*, 572 F.3d 815, 246 Ed. Law Rep. 713 (10th Cir. 2009) (ruling that IDEA eligibility does not automatically, without specific showing, equate to eligibility under § 504). In some cases, the direction of the effect has depended on the jurisdiction. *Compare Bishop v. Children's Ctr. for Developmental Enrichment*, 618 F.3d 533, 260 Ed. Law 580 (6th Cir. 2010) (applying tolling to statute of limitations for § 504), *with P.P. v. W. Chester Area Sch. Dist*., 585 F.3d 727, 250 Ed. Law Rep. 517 (3d Cir. 2009) (interpreting statute of limitations under § 504 as identical with that under IDEA).

[51] *See, e.g*., *A. v. Hartford Bd. of Educ.*, 976 F. Supp. 2d 164 (D. Conn. 2013) (ruling that § 504 is one means of enforcing an IDEA hearing officer decision); *I.H. v. Cumberland Valley Sch. Dist*., 842 F. Supp. 2d 762, 281 Ed. Law Rep. 1057 (M.D. Pa. 2012) (ruling that expert witness fees are available under § 504); *C.C. v. Cypress Sch. Dist.*, 56 IDELR ¶ 295 (C.D. Cal. 2011) (granting preliminary injunction for IDEA student's service dog claim under the ADA); *D.R. v. Antelope Valley High Sch. Dist.*, 746 F. Supp. 2d 1132, 265 Ed. Law Rep. 215 (C.D. Cal. 2010)

[52] As a major potential comparative advantage under § 504 and the ADA, this remedy is not available under the IDEA. *See, e.g*., *C.O. v. Portland Pub. Sch*., 679 F.3d 1162, 280 Ed. Law Rep. 28 (9th Cir. 2012), *cert. denied*, 133 S. Ct. 859 (2013); *Chambers v. Sch. Dist*., 587 F.3d 176, 250 Ed.

Law Rep. 884 (3d Cir. 2009); *Diaz-Fonseca v. Commonwealth of Puerto Rico*, 451 F.3d 13, 210 Ed. Law Rep. 544 (1st Cir. 2006); *Ortega v. Bibb Cnty. Sch. Dist.*, 397 F.3d 1321 (11th Cir. 2005); *Polera v. Bd. of Educ.*, 288 F.3d 478, 164 Ed. Law Rep. 573 (2d Cir. 2002).

[53] The variations on this theme exemplified in the case law cited *infra* note 54 include bad faith and gross misjudgment.

[54] For example, *compare B.M. v. S. Callaway R-II Sch. Dist.*, 732 F.3d 882 (8th Cir. 2013); *G.C. v. Owensboro Pub. Sch.*, 711 F.3d 623, 290 Ed. Law Rep. 597 (6th Cir. 2013) (granting defendants' motion for summary judgment), *with Chambers v. Sch. Dist. of Philadelphia*, 537 F. App'x 90 (3d Cir. 2013); *A.G. v. Lower Merion Sch. Dist.*, 542 F. App'x 194 3d Cir. 2013) (denying defendants' motion for summary judgment).

[55] Although ultimately rejecting the plaintiff's § 504/ADA challenge to Pennsylvania's special education funding formula, the Third Circuit cited *K.M.* for the general lesson that "compliance with the IDEA does not automatically immunize a party from liability under the ADA or [§ 504]." *CG v. Commonwealth of Pennsylvania*, 234 F.3d 229, 235, 298 Ed. Law Rep. 10 (3d Cir. 2013).

[56] It depends not only on the usual multiple factors, such as the particular provision and jurisdiction, but also whether "kills" in this proverbial context means fulfillment of FAPE, denial or FAPE, or—as in *K.M.*—a different issue.

ELA

ELIP Articles in Next Quarter's *ELA Notes*

Education Law Into Practice (ELIP) is a special section of West's Education Law Reporter sponsored by the Education Law Association. Included in this special section are practical articles on topics in education law that are important to practitioners and attorneys.

Sports Participation and Home Schooling: A Game Changer?

Parents who homeschool their children have failed in litigation over whether their children can participate in extracurricular activities, even though taking part in such activities is a privilege rather than a right, and thus have turned their efforts to legislative action with a fair degree of success. A review of the most recent updates of state statutes shows that a growing number of jurisdictions allow students who are homeschooled to participate in extracurricular activities, including sports. Yet, permitting homeschooled students to participate raises important equity issues about whether allowing children whose academic progress may not be measured as stringently as in public schools, in light of state athletic association eligibility requirements, is equitable, or is a game changer that alters the rules unfairly for a vocal minority.

In this article the authors review litigation wherein parents, who homeschooled their children in states lacking statutes permitting them to do so, unsuccessfully filed suit seeking to compel school boards and athletic associations to permit their children to participate in interscholastic sports. The article then briefly reflects on questions surrounding the equity of allowing students who are homeschooled to participate in sports and other extracurricular activities on the same footing as their peers who attend public schools before offering policy suggestions for school boards, educational leaders, and their attorneys as they carry out their charge of overseeing extracurricular activities.

From *Sports Participation and Home Schooling: A Game Changer?*, by Charles J. Russo, J.D., Ed.D., and Allan G. Osborne, Jr., Ed.D. Dr. Russo is Panzer Chair in Education and Director of the Ph.D. Program in Educational Leadership in the School of Education and Health Sciences and Adjunct Professor of Law, University of Dayton, Dayton, OH. Dr. Osborne is Principal (Retired), Snug Harbor Community School, Quincy, MA. Osborne and Russo are past presidents of the Education Law Association.

Longitudinal Trends in Impartial Hearings Under the IDEA

Starting in the 1980s, litigation in the context of K–12 education has remained relatively level, while the segment concerning special education has been rather steadily on the rise. The other distinguishing characteristic of this growth segment is that the driving force, the Individuals with Disabilities Education Act (IDEA), provides an underlying system of administrative adjudication, which is subject to exhaustion. The centerpiece of this underlying system is the impartial hearing, alternatively called the due process hearing (DPH).

Building on prior research, the purpose of this short article is to extend the previous analysis—based on the availability of governmental data—to 1) the next six years, i.e., from 2006–07 through 2011–12, and 2) the other jurisdictions that the IDEA covers, such as the District of Columbia. The specific source of the data is the U.S. Department of Education's Office of Special Education (OSEP) compilation of the annual reports from each IDEA jurisdiction.

From *Longitudinal Trends in Impartial Hearings Under the IDEA*, by Perry A. Zirkel, Ph.D., J.D., LL.M. Dr. Zirkel is University Professor of Education and Law, Lehigh University, Bethlehem, PA. He is a Past President of the Education Law Association.

The Intersection of Hazing, Homophobia, and Title IX in High School Sports

A sexually charged hazing controversy adjudicated by the Tenth Circuit Court in 1996 produced a flurry of publicity and legal commentary. Football team members used athletic tape to tie a high school student spread-eagled to a towel rack in the boys' gym. As a result of the incident the superintendent of the school district cancelled the rest of what had been a very successful football season, polarizing the 6,000 residents of the small town of Smithfield, Utah.

Part I of this commentary will explore the nature and extent of hazing among high school athletes. Part II will review allegations of liability brought to the courts by victims of hazing, and subsequent court decisions. Part III will examine state anti-hazing laws. Part IV will relate hazing to societal norms and expectations about gender and sexuality and examine the homophobic implications of hazing. Finally, Part V will present recommendations for school districts, legislatures, and courts dealing with the problem.

From *The Intersection of Hazing, Homophobia, and Title IX in High School Sports* by Kathleen Conn, Ph.D., J.D., LL.M. Dr. Conn is Associate Professor, Division of Education and Human Services, Neuman University, Aston, PA and Adjunct Professor, Widener University School of Law, Wilmington DE.

Trends in Impartial Hearing Under the IDEA: A Follow-up Analysis

In a recent issue of the Education Law Reporter, Zirkel provided a trends analysis of due process hearings (DPHs) under the Individuals with Disabilities Education Act (IDEA). The two measured variables were filings, which represent the initiation of this hearing process, and adjudications, which represent the completion of the process in terms of a final written decision.

In this follow-up article, based on the recommendation in the prior article and shaped by the scope of the available data, the author extends the recent state-by-state analysis in two ways: 1) ascertaining changes from the prior sixteen-year period for adjudications on an overall and per capita basis, and 2) examining the differences for the most recent period between the overall and the per capita figures for filings and adjudications. More specifically, the questions for this more recent analysis were as follows: 1) What are the rankings and rates in DPH adjudications for the various jurisdictions in the most recent six-year period compared with those for the previous sixteen-year period in terms of a) overall annual average, and b) per capita annual rate? 2) For the recent six-year period, what are the rankings and rates for the overall as compared with the per capita annual figures for a) DPH filings, and b) DPH adjudications?

From *Trends in Impartial Hearings under the IDEA: A Follow-up Analysis*, by Perry A. Zirkel, Ph.D., J.D., LL.M.

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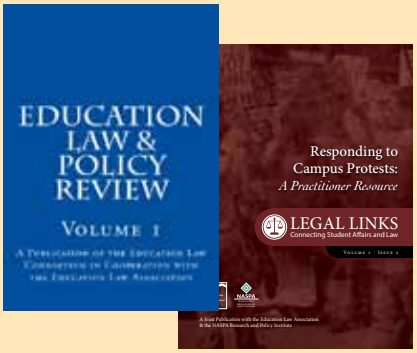

Education Law & Policy Review

New ELA board member John Dayton leads the team at work on the next issue of *Education Law & Policy Review*, scheduled for publication in May. This special issue on free speech in public educational institutions will feature a forward by Mary Beth Tinker, famed plaintiff in *Tinker v. Des Moines*.

This fall, another special issue will focus on the 50th anniversary of the Elementary and Secondary Education Act. Editors will be Elizabeth DeBray and Ann Elizabeth Blankenship.

ELPR is published by the Education Law Consortium in cooperation with the Education Law Association. ELA members have exclusive first access to *ELPR* for 30 days through the ELA website, and thereafter the ELPR will be available in print at cost through the Education Law Consortium, and free online at educationlawconsortium.org.

There is an open call for scholarly papers to be published in the fourth regular issue of *ELPR* (spring 2016). Visit the Consortium website for more information.

An issue on church and state law is planned for fall 2016.

Legal Links

Legal Links represents a collaborative effort between ELA, the premier source of information on education law, and its partner NASPA (Student Affairs Administrators in Higher Education) Research & Policy Institute, which maintains its commitment to address public policy and compliance topics of importance to the field of student affairs.

The next issue, scheduled for May, will be on Legal Issues in Greek Life.

Legal Links will provide opporunities for authors to publish articles on select higher education topics. Contact the ELA office for more information.

Future plans for *Legal Links* may include compilation of the content into a higher education course supplement.

Call for ELIP Papers

Education Law Into Practice Author Guidelines

Education Law Into Practice (ELIP) is a special section of *West's Education Law Reporter* sponsored by the **Education Law Association**. The purpose of this special section is to publish short, practical pieces on topics in education law which are important to practitioners and attorneys. The intent of the special section is to publish checklists, charts, sample forms, model policies, sample memoranda, sample documents, procedural guidelines, and short articles that are thoroughly supported by citations to statutes and case law. All manuscripts are subject to a peer review process.

1. The manuscript should be submitted to either of the co-editors via email. The manuscript should be accompanied by a cover sheet that includes all authors' names, professional titles, affiliations, address, email, and telephone numbers. The manuscript must be prepared in Microsoft Word format following ELIP's *Guidelines for Final Manuscript Preparation*.
2. The manuscript may ***not*** be under consideration by any other publication.
3. The text should be double spaced and footnotes should be single spaced.
4. The manuscript must be prepared according to the guidelines of the latest edition of *The Bluebook: A Uniform System of Citation* using numbered footnotes. Parallel citations to *West's Education Law Reporter* are required, using the following format: 570 F.3d 775, 246 Ed. Law Rep. 638 (6th Cir. 2009). It is the authors' responsibility to make sure that all citations are correct and in the proper format.
5. The topic should be timely, significant, and practical and presented in a direct, concise, clear, and readable style.
6. The topic should be exhaustively researched in terms of applicable primary sources. The footnotes should demonstrate scholarly accuracy and thoroughness.
7. The length of the manuscript, including citations, should be approximately 8-10 pages (2,000-2,500 words). Longer manuscripts generally will be accepted for review on a limited basis if brevity would seriously and inescapably compromise the overall quality of the manuscript.
8. Authors are responsible for supplying any necessary camera-ready charts, tables, or other graphic material.
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2015 Feature/Plenary Sessions

Thursday, November 5

Americans with Disabilities Act at 25: Current Issues for Higher Education (and Transition Issues from K-12)
Laura Rothstein, Professor of Law, Louis D. Brandeis School of Law, University of Louisville, KY

Friday, November 6

Half-day panel held at Cleveland-Marshall College of Law

- Safe Schools: Safety and Legal Issues for K-12 and Higher Education Campuses - *Kenneth Trump, MPA, National School Safety & Security Services, Cleveland, OH*
- Representatives of the VTV Family Foundation, supporting campus safety advocacy and campus violence victim support
- Legal information on school safety issues will be provided by attorney representatives of the U.S. Department of Education, Office of Civil Rights, regional office

Saturday, November 7

Supreme Court Update: A Year in Review and a Look Ahead
Mark Walsh, Contributing Writer for Education Week, Washington, DC