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Contents – August 2015

Elementary and Secondary Education

Charter Schools/Alternative Schools

Cal. Charter Sch. Assn. v. Los Angeles Unified Sch. Dist., 345 P.3d 911 (Cal. 2015). A charter school association alleged that the school district violated a state board of education regulation governing allocation of classrooms to charter schools. The district used "norming ratios," which were designed to establish a uniform student/teacher ratio in a given grade level throughout the district. It also contended that classrooms to be counted in the ratios should only be those provided to K-12 students and not classrooms dedicated to other uses, such as preschool or adult education. The charter school association argued that the state regulation required the district to count the number of classrooms in comparison group schools to determine allocation of classroom facilities. It also noted that classrooms counted in the ratios must include classrooms not solely dedicated to instruction of K-12 students.

The trial court ordered that the district must comply with the state regulation and not use norming ratios to reduce teaching stations offered to charter schools in the future. The court of appeals reversed, holding that the use of norming ratios was consistent with the intent of the state regulation.

The state supreme court held that district-wide norming ratios were not a proper method to calculate facility offers to charter schools per the applicable regulation. However, the court agreed with the district that it must only include classrooms provided to K-12 non-charter students rather than classrooms dedicated to other purposes. Additionally, the court held that counting classrooms provided to K-12 students is not tantamount to counting classrooms staffed by teachers. The court instructed the district to modify its approach to allocating classrooms to charter schools in the future. *– Benjamin White*

Noncertified Employees

Discrimination

Gorham v. Town of Trumbull Bd. of Educ., 7 F. Supp. 3d 214 (D. Conn. 2014). The Trumbull Board of Education (BOE) hired Gorham for the position of custodial floater. New hires, such as Gorham, are placed on a 180-day probationary period. The BOE extended Gorham's probationary period for thirty days on the basis of some

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Education Law Association®

School Law Reporter

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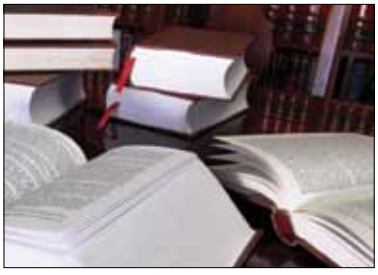


performance issues. Subsequently, the BOE determined that Gorham was performing satisfactorily, and his probationary period ended. Gorham was promoted to the position of night custodian at Trumbull High School. Gorham's performance showed improvement after the initial probationary period, and he received raises and promotions.

There was an established understanding among the employees in the custodial department that they might take items found in the trash. The custodial staff was directed by their supervisors not to take any items from the lost and found until the accumulation of the items overflowed into the hallway. A school administrator directed the staff to place the items in a plastic bag to be donated to Goodwill.

Gorham had engaged in taking items that did not qualify for this understanding. Based on video evidence, he was seen taking various items and acting in a nefarious manner. When confronted with the evidence and allegations, Gorham lied to the investigators by altering his story multiple times. In lieu of termination, he was allowed to resign with the caveat that the union representing him would not file a grievance. Gorham elected to bring action against the BOE, requesting summary judgment, alleging that it terminated his employment based on his race (African American), and age (forty-six), in violation of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Connecticut Fair Employment Practices Act. He further alleged that the defendant retaliated against him by not reinstating him after he filed a charge of discrimination with the Commission on Human Rights and Opportunities. The district court issued a summary judgment for the defendant BOE on all points raised in the complaint by the plaintiff. – *Brett Geier*

Labor Relations

Leon v. Port Washington Union Free Sch. Dist., 49 F. Supp. 3d 353 (E.D.N.Y. 2014). A school employee brought action against the school district alleging that the district violated the Fair Labor Standards Act and breached the collective bargaining agreement by failing to pay overtime wages over a period of nearly twelve years. The practice of the district was to have employees report shift hours rather than actual hours worked. According to the court, the plaintiff stated a claim for overtime violation by providing sufficient estimates that she worked an additional 1.5 to 2 hours per week, as well as working through most bona fide meal periods. The court denied the district's motion to dismiss, but did not treat the motion as one for summary judgment.

The court also did not grant district's motion to dismiss on the breach of contract claim. The district contended that the plaintiff should have proceeded through the union; however, the court noted that the collective bargaining agreement grievance procedure did not apply to matters related to an employee's rate of compensation. The court held that the complaint adequately alleged a breach of contract claim, with factual support for both sides of the claim appropriate to be pursued through discovery. – *Rob Hachiya*

Pupils

Attendance/Transportation

In re J.M. v. The State of Wyoming, 334 P.3d. 568 (Wyo. 2014). A social worker for the Department of Family Services learned that a minor child, J.M., had missed thirty-six days of school and thirty of those days were unexcused. The county attorney filed a neglect petition against the mother. The juvenile court conducted a hearing and found that the mother had neglected J.M. by failing to provide an adequate education for his well-being. The mother appealed the order of neglect, claiming she was entitled to notice and counseling from the school district before the petition was filed. The Wyoming compulsory attendance statute requires the attendance officer for the school to provide notice to the parent, guardian, or custodian of any child having an unexcused absence. According to the statute, the attendance office must counsel with the teachers, students, parents, and guardians or custodians to investigate the causes of the unexcused absence. If an additional unexcused absence occurs, and the attendance officer believes it is willful neglect, he or she is required to file a complaint in the state district court.

The Wyoming State Supreme Court determined an employee of the Department of Family Services initiated the complaint and the compulsory attendance statute did not apply. The court found that this case was governed by the child protective services statutes and the Child Protection Act. Pursuant to these guidelines, "any person who knows or has reasonable cause to believe or suspect that a child has been abused or neglected … shall immediately report it … When the best interest of the child requires court action, [DFS shall] contact the county and prosecuting attorney to initiate legal proceedings and shall assist the county and prosecuting attorney during the proceedings." 334 P.3d at 571. The finding of neglect on the part of the mother was upheld. – *Brett Geier*

First Amendment Rights

Hatcher v. Fusco, 570 Fed. App'x 874 (11th Cir. 2014). Amber Hatcher, a female high school student, claimed her public high school principal, Shannon Fusco, violated her rights under the First and Fourteenth amendments. Hatcher brought suit in federal court under 42 U.S.C § 1983. Hatcher asked Principal Fusco for permission to participate in an event called a "Day of Silence," which occurs at thousands of middle and high schools and universities nationwide. On this particular day, participating students vow to take a form of silence in order to draw attention to the silencing effect of bullying and harassment directed toward lesbian, gay, bisexual, and transgender (LGBT) students. After contacting the superintendent, Fusco informed Hatcher that it was district practice not to approve student protests and her event was disapproved. Hatcher approached the principal twice more, arguing the event should be allowed. On each occasion, Fusco told her "no" and described what the ramifications would be if the protest occurred. The day before the event, the principal met with the student and warned her what the disciplinary consequences would be if she followed through with the protest. In addition,

Fusco telephoned Hatcher's parents, encouraging them to convince their daughter not to participate, explaining that there would be consequences if she did participate, and suggesting that they keep her home from school in order to avoid problems.

The day of the event, Hatcher wore a red T-shirt to school bearing the words "DOS April 20, 2012: Shhhhh." Hatcher also attempted to keep silent by communicating with the aid of a dry-erase board, handed out information about her reason for keeping silent, and asked friends to explain on her behalf. However, she did not refuse to respond to any teacher or instruction. The dean of students assigned Hatcher to in-school suspension for the remainder of the day. When the student asked why she was being punished, the dean of students responded, "Mrs. Fusco told you not to do this." Hatcher claimed that the principal violated her First Amendment rights to free expression. She also claimed that Fusco was liable under the Fourteenth Amendment for the actions of her subordinates. The district court denied Fusco's motion to dismiss the complaints based upon qualified immunity. Fusco argued that her alleged role was insufficient to support a reasonable inference that she was among the violators. The Eleventh Circuit Court of Appeals disagreed with this theory. The allegations supported a reasonable inference that Fusco personally attempted to dissuade Hatcher from participating in the Day of Silence; she repeatedly threatened Hatcher and her parents with consequences for Hatcher's participation. The court found that it is reasonable to infer that Fusco may have caused or knowingly failed to prevent Hatcher's in-school suspension. The partial motion to dismiss was affirmed. – *Brett Geier*

Fourteenth Amendment Rights

Votta ex. rel. R.V. and J.V. v. Castellani, 600 Fed. App'x 16 (2d Cir. 2015). Claims of violation of substantive due process—brought on behalf of six high school football players against their coach, the school district, and the superintendent of schools—were dismissed by the district court, and the circuit court upheld the dismissal. The coach's use of profanity and racist or sexist epithets did not implicate a fundamental constitutional right. His rough handling of players, which included shaking them and screaming at them while in close proximity, even considered in the aggregate was a minor infringement on their constitutional right to bodily integrity, insufficient to shock the conscience. Finally, although the court described the coach's exhortations to intentionally injure players on opposing teams as "disturbing" and "repugnant," none of the plaintiffs was a victim of those exhortations: The allegations that the plaintiffs were injured emotionally and psychologically were too conclusory to allow a jury to plausibly infer that they had been caused by the coach's infringement on his players' fundamental rights. – *Kathryn McCary*

Sexual Harassment

Carmichael v. Galbraith, 574 Fed. App'x 286 (5th Cir. 2014). Jon, a thirteen-year-old middle school student in Texas, committed suicide after allegedly being bullied by fellow students. Jon's parents filed suit under Title IX, claiming indifference by the school to the bullying. The parents contended that on numerous occasions, their son was accosted by a group of boys in the locker room, often having his underwear removed. During the last incident, members of the football team stripped him, tied him up, and placed him in a trash can. In addition, team members called him "fag," "queer," and "homo." The attack was videotaped and uploaded to YouTube. Shortly after the last incident, Jon committed suicide. The parent's complaint alleged that numerous school officials were aware of and were deliberately indifferent to the bullying, including numerous teachers, the bus driver, the school counselor, and other staff. The school district had policies in place to address bullying; however, they were allegedly ignored in Jon's case.

The district court dismissed the complaint for failure to state a claim upon which relief may be granted. The district court reasoned that, essentially, the sexual harassment alleged by the Carmichaels was not pervasive and the pervasive bullying alleged was not sexual harassment. The district court agreed with the Carmichaels that "on one occasion"—which was the incident in March 2010 where Jon was stripped nude and videotaped in the locker room, shortly before his suicide—the harassers and bullies spoke words that had a sexual connotation. The district court was not persuaded, however, that the allegations in the complaint supported the inference that all of the numerous instances of harassment and bullying alleged were instances of sexual harassment.

The Fifth Circuit Court disagreed with the district court, citing the Carmichaels' complaint that there were *incidents* of sexual assault. In addition, the Fifth Circuit Court identified that the removal of a person's underwear without their consent on numerous occasions constitutes pervasive harassment of a sexual character and falls outside the list of simple "insults, banter, teasing, shoving, pushing, and gender-specific conduct" which are "understandable … in the school setting" and are not actionable under Title IX. 574 Fed. App'x at 290. Therefore, the Fifth Circuit Court reversed the district court's finding in the Title IX complaint. – *Brett Geier*

Viney v. Jenkintown Sch. Dist., 51 F. Supp. 3d 553 (E.D. Pa. 2014). A defendant school district's motion to dismiss was granted in part and denied in part after a former student filed suit against the district alleging sexual abuse and deliberate indifference to that abuse. In 2009-2010, while the seventeen-year-old female student was a senior, she was subjected on numerous occasions to sexual encounters in the office of the athletic director/principal assistant. Teachers commented about the amount of time the student spent with the staff member, but no one took action to investigate or stop the almost daily meetings.

The school district asserted that the two-year statute of limitations applied in the case, but the court concluded that a twelve-year limitation applied in cases of childhood sexual abuse. However, the state claims against the district were dismissed under Pennsylvania's Political Subdivision Tort Claims Act when the court determined that the district was entitled to immunity because no exceptions in the Tort Claims Act applied to the case. The court did not dismiss the plaintiff's federal cause of action under 42 U.S.C. Section 1983, where

the plaintiff asserted a violation of her rights to bodily integrity under the Fourteenth Amendment. – *Bob Hachiya*

Students with Disabilities

Wenk v. O'Reilly, 783 F.3d 585 (6th Cir. 2015). M.W., a seventeen-year-old high school student with an intellectual disability, received special education services as a student in the Grandview Heights City School District. During the 2009-10 academic year, her teachers documented certain comments made by the student that raised concerns of possible sexual abuse by M.W.'s father (Mr. Wenk). They failed to report the concerns to school officials at this time.

In the 2011-12 school year, the father met with Schott, the district's director of pupil services, to request that the district organize a special education prom in order to afford additional social opportunities for these students. One month later, he met with Schott and the school principal with the goal of amending M.W.'s Individualized Education Plan (IEP) to include more interaction with students without disabilities; the meeting ended in an argument between the father and principal. Thereafter, the father ceased to communicate with the school and contacted the Ohio Department of Education to express his concerns about his daughter's lack of social opportunities. A representative from the department contacted Schott to advise her of the parental complaint.

During this time, M.W.'s teachers shared their concerns about possible sexual abuse with Schott. Schott did not independently investigate the allegations, but reported them to Franklin County Children Services (FCCS) and included statements about the father's physical appearance and demeanor which had nothing to do with the abuse allegations. The teachers later disputed much of the information Schott reported. Nonetheless, Mr. Wenk was criminally investigated by the police. After the FCCS found the allegations unsubstantiated, the criminal investigation against the father was dismissed. The teachers were never disciplined for not reporting the allegations earlier.

The Wenks then filed suit under Section 1983 against Schott and other system employees, claiming that the child abuse report was filed in retaliation for the parents advocating to amend M.W.'s IEP, in violation of the First Amendment. The U.S. District Court for the Southern District of Ohio denied the defendant's motion for summary judgment on qualified immunity grounds, and she appealed. On appeal, the parents moved for damages or attorney fees and costs.

The appellate court affirmed and held that the Wenks had established a violation of the First Amendment. Schott's child abuse report constituted an adverse action, regardless of the report's truth or lack thereof. Further, Schott was motivated by retaliation to make the report about the father since Schott's action occurred only three weeks after she was contacted by the Ohio Department of Education about Mr. Wenk's concerns with M.W.'s IEP. Moreover, the evidence suggested that Schott "embellished or entirely fabricated other allegations, including those that most clearly suggested sexual abuse." 783 F.3d at 596. The court rejected Schott's contention that she had a mandatory duty under state law to report the suspected abuse because there was a factual dispute concerning whether Schott would have reported the Wenks if not for their protected conduct. Accordingly, since Schott should have known that she violated the parents' right to be free from retaliation for exercising their First Amendment rights and by filing a child abuse report in bad faith, she was not accorded qualified immunity. The court denied the parents' request for an award of damages or attorney fees and costs. – *Betty Cox*

Stanek v. St. Charles Cmty. Unit Sch. Dist. #303, 783 F.3d 634 (7th Cir. 2015). A student with autism and his parents sued the school district and several individual educators in their individual and official capacities under Section 1983. They argued that school officials failed to provide their son with appropriate educational services before he graduated from high school, in violation of the Individuals with Disabilities Education Act, the Americans with Disabilities Act, and the Fourteenth Amendment. The district court dismissed the parents' lawsuit because they lacked standing. However, the court did find that the student had standing, but he failed to sue the appropriate party.

The Seventh Circuit Court of Appeals held that the district court improperly dismissed the complaint. The court found that the student sufficiently argued that the school district denied him a free appropriate public education when school officials denied him the use of study guides and extra time to complete his work as outlined in his IEP. His discrimination claims under the ADA were improperly dismissed because his teachers refused to comply with the IEP by forcing him to work on group projects that did not align with the directives of the IEP. The circuit court also found that the district court had properly dismissed the retaliation claim where the parents had asserted that they were retaliated against for asserting their rights. Vacating the dismissal in part, the circuit court remanded the case. – *Suzanne Eckes*

Everett H. ex rel. Havey v. Dry Creek Joint Elem. Sch. Dist., 5 F. Supp. 3d 1184 (E.D. Cal. 2014**).** The parents of Everett H. filed suit on behalf of their son alleging educational harms based on purported violations of Everett's right as a student with a disability to a free and appropriate public education (FAPE), pursuant to the provisions of the Individuals with Disabilities Education Improvement Act and various state statutes. The plaintiffs also asserted associated violations of Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act of 1973, and finally asserted claims under the auspices of 42 U.S.C. § 1983 (Section 1983). Named as defendants were the district; board of trustees; four individual administrators; the California Department of Education; and State Superintendent of Public Instruction Tom Torlakson, in his official and individual capacities.

Everett H., a disabled student who was diagnosed with an autism spectrum disorder causing motor and neurological delays, attended Dry Creek Elementary School for approximately five years. During that period, the plaintiffs and Dry Creek had disagreements about the special education program provided to the student. The parents contended the school made various errors with respect to the provision of FAPE,

including the IEP process and providing education in the least restrictive environment. The district eventually filed for a special education hearing before the Office of Administrative Hearing (OAH) with regard to FAPE and assessment issues. According to the plaintiffs, once they began advocating for their son's rights, the district engaged in retaliatory activity. Allegations included manipulating IEP documentation to mislead the parents, engaging in activity that endangered Everett's safety, and exposing him to repeated humiliation. While the due process hearing was in progress, the plaintiffs filed at least five Complaint Resolution Processes against Dry Creek with the California Department of Education (CDE). The parents contended that the CDE found Dry Creek in "systemic noncompliance." Several months after Everett H. left Dry Creek Elementary School, the district dismissed the OAH case and no administrative due process hearing decision was ever issued. The plaintiffs sent multiple letters addressed to Torlakson explaining Dry Creek's violations, their failure to abide by the corrective actions required by the CDE, and the CDE's failure to investigate the violations.

In terms of Torlakson's official capacity, the court dismissed this complaint because the allegation that he failed to train the employees who committed the alleged violations was without factual backing, as was the assertion that his inaction was pursuant to an express policy. In relation to a claim for relief pursuant to § 1983, a causal connection must be established that demonstrates Torlakson knowingly refused to terminate a series of acts by others, which he knew or reasonably should have known would cause others to inflict a constitutional injury. The suggestion that Torlakson had, or should have had, personal knowledge of every administrative action filed against the CDE is unrealistic, thus relief was denied the plaintiffs. – *Brett Geier*

B.C. ex rel. B.M. v. Pine Cent. Sch. Dist., 971 F. Supp. 2d 356 (S.D.N.Y. 2013). A parent who felt her child was not receiving a free and appropriate education enrolled the child in a non-state-approved, private school and subsequently petitioned for tuition reimbursement. The independent hearing officer denied her request for tuition reimbursement and the parent petitioned for review with a state review officer (SRO). However, the parent failed to timely file paperwork and the SRO dismissed the case for lack of subject matter jurisdiction. The parent then requested review by the district court, asserting that the SRO's decision was arbitrary and capricious. The district court noted the parent's attorney had filed similar petitions for other parents and was aware of the required paperwork and the applicable timelines, and upheld the SRO's decision. – *Brenda Kallio*

Capital City Pub. Charter Sch. v. Roberta Gamble, 27 F. Supp. 3d 121 (D.D.C. 2014). At a due process hearing, the hearing officer ruled against the parent on all counts and ruled the charter school was the prevailing party. The charter school then filed suit in district court alleging the parents' attorney had knowingly filed a case that was frivolous, unreasonable, and without foundation. The district court agreed and awarded the charter school attorney fees. – *Brenda Kallio*

District of Columbia v. Masucci, 13 F. Supp. 3d 33 (D.D.C. 2014). A hearing officer ruled the school district had failed to provide a student with a disability a free and appropriate public education, and the student was entitled to one year of compensatory education at a private school. The school district believed the hearing officer had erred and filed for a stay of the hearing officer's decision. Additionally, the district invoked IDEA's stay-put provision and asserted that since the public school was the current placement, the public school was not required to reimburse the parents for the cost of the private tuition. The parents, fearing loss of placement at the private school, enrolled the child and requested the school reimburse the tuition. The school district refused payment, stating there was sufficient reason to believe they would be granted a stay of the hearing officer's decision. After receiving the case, the district court ruled the school was incorrect in its assumption that it did not have to pay the tuition, as IDEA's stay-put provision is a right given to parents but that the same right is not afforded schools. However, the district court did find the hearing officer's ruling was not well reasoned and granted the school's request to stay the hearing officer's decision. The school district was only required to reimburse tuition from the date of the hearing officer's decision to the date the stay was granted. – *Brenda Kallio*

District of Columbia v. Wolfire, 10 F. Supp. 3d 89 (D.D.C. 2014). During a due process hearing, the school district asserted it was not required to provide an IEP for a child with special needs who had been parentally placed in a private school. The district court ruled IDEA requires Local Education Agencies to provide special education and related services to children placed by their parents in private school, and that those services cannot be provided without a proper IEP. – *Brenda Kallio*

Donus v. Garden City Union Free Sch. Dist., 987 F. Supp. 2d 218 (E.D.N.Y. 2013). The parents of several children with disabilities filed suit against the school district alleging the school had failed to provide services and discriminated against the children. The district court ruled the parents' allegations were subject to the Individuals with Disabilities Act (IDEA) and, therefore, no monetary damages were available. The court also held that parents were required to exhaust administrative remedies. Although the school had not met all of its IDEA requirements, the court did not find a district-wide failure to develop and implement individual education programs. – *Brenda Kallio*

Douglas v. District of Columbia, 4 F. Supp. 3d 1 (D.D.C. 2013). While the parents and the school district had engaged in discussions regarding changing a student's placement prior to the 2013-2014 school year, school began without an agreed-upon individualized education program (IEP). The public school refused to allow the student to attend without an official IEP.

The parents sought exclusion for the requirement to exhaust administrative remedies and a stay-put order until the IEP could be finalized. The district court ruled that the parents had met the requirements to trigger stay-put until the IEP/placement had been determined. – *Brenda Kallio*

Fullmore v. District of Columbia, 40 F. Supp. 3d 174 (D.D.C. 2014). A parent filed for a due process hearing alleging the school district had failed to comprehensively and appropriately reevaluate her son, and had thereby denied him a free and appropriate public education (FAPE). As part of her complaint, she petitioned for an independent educational evaluation (IEE) and compensatory education. An IEE was conducted and, as a result of the evaluation, the child's medications were altered. The crux of the case then became whether the case became moot once the school agreed to the IEE. After review, the district court determined there was insufficient information to determine whether FAPE had been denied, and ordered the parties to meet and discuss the matter. – *Brenda Kallio*

Holden v. Miller-Smith, 28 F. Supp. 3d 729 (D. Mich 2014). Parents of a child with special needs filed suit four months past IDEA's two-year statute of limitations. Parents asserted they were entitled to equitable tolling as an exception to IDEA's time limitations. The district court ruled equitable tolling is not applicable to IDEA, and that even had it had been available, the specifics of this case did not warrant an exception. – *Brenda Kallio*

J.H. v. Sch. Town of Munster, 38 F. Supp. 3d 986 (D.D.C. 2014). Parents asserted their son experienced depression, anxiety, and emotional problems due to hazing by members of the school swimming team. The parents and the school district determined a psychological evaluation was in order, but the parents insisted that the evaluation be videotaped. The psychologist stated that he was a reputable psychologist subject to ethical standards and that the presence of a videographer had the potential to taint results. The court agreed and stated that especially since the student was currently in college, there was no need to provide supervision during the examination. – *Brenda Kallio*

Lofton v. District of Columbia, 7 F. Supp. 3d 117 (D.D.C. 2013). Despite protests by the mother and all members of the IEP team meeting, the school district determined a student should be moved from a private to a public school setting. The mother sought a temporary restraining order and, at the due press hearing, the hearing officer ruled the school had predetermined the student's placement and had denied the mother meaningful participation at the IEP meeting. The school district appealed. The district court ruled that a temporary restraining order would not cause substantial harm to the school district, and that the TRO would remain in place until a properly developed IEP was adopted. – *Brenda Kallio*

M. M. and I. F. v. New York City Dept. of Educ., 26 F. Supp. 3d 2495 (S.D.N.Y. 2014). Because a student maintained sufficient grades, the school district would not qualify her as a student with an emotional disability. The district court ruled that when determining whether a student's emotional difficulties constitute a disability, the student's grades, as well as the student's ability to attend school, are both critical factors. Thus, the court ruled that since the student had been emotionally unable to attend school for much of the academic year, the student's emotional status did qualify as a disability and the school had been remiss in not creating an appropriate individual education program. Additionally, the court ruled that while the document drawn between the student's parents and a grandmother did not meet the technical requirements of a legal document, the intent was clear in that while the grandmother paid the private tuition, the funds were a loan to the parents and constituted monies paid by the parents to the private institution. – *Brenda Kallio*

Moore v. Chilton County Bd. of Educ., 1 F. Supp. 3d 1281 (D. Ala. 2014). Parents filed suit claiming their daughter had committed suicide because the school district had failed to stop students from disability bullying. The school district claimed the student's unusual gait and weight did not constitute disabilities that negatively impacted her education. The district court ruled that the presence of an impairment does not automatically qualify the person for protection under ADA and Section 504. In this case, however, the district court assumed, for purposes of summary judgment, that both the student's bowed legs and her weight constituted a disability covered under ADA and Section 504. The district court next determined that the student had not made the bullying known to the appropriate personnel and, therefore, the school district could not be held liable for disability harassment they had no knowledge was occurring. – *Brenda Kallio*

Morris v. District of Columbia, 38 F. Supp. 3d 57 (D.D.C. 2014). The school district asserted that because a student's probation was revoked and he was placed in a state-mandated group home with no release date, the school district was not responsible for creating a full-time IEP. However, the district court ruled that since the student was placed in the group home after the due process case had been heard by the hearing officer, it was appropriate to remand the case back to the hearing officer for clarification. – *Brenda Kallio*

N.M. ex rel. W.M. v. Central Bucks Sch. Dist., 992 F. Supp. 2d 452 (E.D. Pa. 2014). Parents filed suit asserting the school district had failed to provide their son with a free and appropriate education. The parents believed the student had not demonstrated sufficient academic improvement and that the school had not acted effectively to protect their son from bullying. The district court ruled the child had made appropriate academic progress and that while the school could have done more to stop the bullying, the school had addressed the bullying issues in an appropriate manner. – *Brenda Kallio*

Pagan-Negron v. Sequin Indep. Sch. Dist., 974 F. Supp. 2d 1020 (W.D. Tex. 2013). A parent alleged that on a day when her child had exhibited substantially disruptive behaviors, the classroom teacher asked the principal to intervene. Allegedly, the principal entered the classroom and asked the students for a show of hands if they were tired of C.M.P. (the disruptive child) and his behaviors. More than a year after the alleged event, the parent filed suit claiming her child had been humiliated in front of his peers and that his teachers had created a hostile environment in violation of the Rehabilitation Act (Section 504) and the Americans with Disabilities Act (ADA). The parent sought tort-like damages, asserting the school district failed to provide the student with a safe, non-hostile educational environment. Upon review, the district court combined the Section 504 and the ADA provisions and subsequently determined the parent was not entitled to compensatory damages, as she had been unable to demonstrate either school policy or the principal had exhibited a pattern of discrimination. Additionally, the court noted that since, at the time of the incident, the child had not been diagnosed with Asperger's, the school could not be held responsible for discrimination toward a disability that had not yet been diagnosed. – *Brenda Kallio*

V.S. by his parent D.S. v. New York City Dep't of Educ., 25 F. Supp. 3d 295 (E.D.N.Y. 2014). The IEP listed a specific school where a student was to be educated. Visiting the designated school, the parent found it inappropriate, contacted the school district, and subsequently placed her child in a private school. The school district informed the parent the school listed in the IEP was not the school where they had actually planned to educate the child, and therefore the parent was not entitled to a private placement. She filed suit alleging the school had denied her the right to evaluate the true school site. The district court agreed with the parent and awarded reimbursement for the placement of her child in an appropriate private school. – *Brenda Kallio*

Tort Liability

Fike v. Miller, 437 S.W.3d 640 (Tex. App. 2014)**.** Fike, as next friend of the minor child Bodine, filed suit after an incident occurred in the school gymnasium. Bodine was in the gym with other students when he stumbled and fell as he attempted to tap another student on the neck. Ten to twelve students then ran to Bodine and hit and kicked him while he was on the floor. He was injured, and as a result, he rested and drank from a cup of water instead of participating in the activities of the class. Miller, who was assigned to be in the gym supervising the students but was not in the gym when Bodine was injured, approached Bodine and told him to discard the water. When Bodine told Miller what happened, Miller responded that he did not want to hear his excuses and then asked him why he was in athletics. After Bodine replied because "he can be," Miller responded that he was not fit to be in athletics because he was fat.

In her suit, Fike asserted a claim of negligence and a violation of the Fourteenth Amendment Due Process and Equal Protection clauses by Miller, Superintendent Gregory, and Latexo Independent School District (LISD). Fike had also sued several students for the assault, but that suit was severed. She asserted claims pursuant to Section 1983 and Texas Education Code § 22.0511 against LISD and Miller and Gregory in their individual capacities, contending that LISD failed to properly train its employees in the prevention and intervention in the misconduct committed by its employees. Fike argued that LISD and its employees engaged in deliberate indifference to the peer harassment, and this indifference amounted to the district's policy, custom, or practice. The state district court, affirmed by the state court of appeals, found that Fike's Section 1983 claim did not constitute an assertion of personal involvement in the constitutional deprivation or a causal connection between the conduct by the school, the coach, and the superintendent, and the alleged constitutional violation. The plaintiff's allegation that the defendants were liable for a violation of the Equal Protection Clause was not sufficient because the student was not a member of a protected class. Finally, Texas Education Code § 22.0511 did not apply because there was no discipline by a school district employee that resulted in injury to the student. Bodine was not being disciplined when he was hit and kicked by the other students, and the superintendent and the school had nothing to do with any punishment. – *Brett Geier*

Hennefer v. Blaine County Sch. Dist., 346 P.3d 259 (Idaho 2015). A high school student died in an automobile accident while performing a three-point turnabout at the instruction of school driving training instructor. The district court jury returned a special verdict finding the student's death resulted from the instructor's reckless conduct. It found the instructor fully responsible for the death and the school district liable for non-economic damages totaling $3.5 million. The school district appealed to the state supreme court arguing, among other things, that the instructor did not act recklessly in causing the accident and the district court erred in its awarding of damages to the student's family.

The state supreme court affirmed the judgment and post-trial orders of the district court. It found sufficient evidence of recklessness to send the question to the jury. Specifically, the instructor made a conscious choice to have an inexperienced student driver make a hazardous three-point turn in the midst of several aggravating circumstances (e.g., inclement weather, poor road conditions, poor lighting conditions). The court also held that the jury instructions given by the district court fairly and adequately covered a driver's duties of care; additional instructions would have been unnecessarily repetitive, while placing undue emphasis on the driver's duties over the instructor's duties. – *Benjamin White*

School Districts

Constitutional Rights

Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake County, 2 F. Supp. 3d 1277 (M.D. Fla 2014). The Carver Middle School Gay-Straight Alliance wanted to be recognized by the Lake County School Board at Carver Middle School in order to receive certain benefits that would accompany that recognition. The school board declined to grant the Alliance such status. Action was filed by the Alliance against the school board. Subsequently, the Alliance filed a motion for preliminary injunction prohibiting the school board from denying the Alliance access to the forum for non-curricular student clubs, from denying the Alliance official recognition as a student club, and from denying the Alliance the ability to operate the Alliance at Carver with all attendant benefits afforded to student clubs. The court denied the board's motion to dismiss, but also denied the Alliance's motion for a preliminary injunction.

The Alliance's complaint stated two claims. Count one sought relief under the Equal Access Act. Count two invoked 42 U.S.C. § 1983 and sought relief under the First Amendment—specifically the right to free speech and association. The court evaluated the claims separately and individually. As for the Equal Access Act claim, the statute only applies to secondary schools and no state law in Florida defines any of those terms as used in the Act. In concert with this issue is that the plaintiffs are unable to point to any published decision by any court applying the Act to any school below the high school level. While some Florida law and other literature suggests a synonymous relationship between middle school and secondary school, an equal or greater number of references suggest that secondary school means high school. Establishing a definition would require the court to embark upon a legislative duty, which it refused to do. Therefore, the court determined that the plaintiffs have not demonstrated a substantial likelihood of prevailing on the merits of their claim.

As for the First Amendment claim, the board was of the opinion the topics of discussion were not age-appropriate. The Alliance, based upon the content of its charter, would discuss experiences, challenges, and successes of LGBT students and their allies. The plaintiffs cited *Tinker v. Des Moines School District*, 393 U.S. 503 (1969), to supply the rule of decision; that strict scrutiny is required; and that, in the absence of any basis for reasonably forecasting disruption of, or interference with, the educational mission of the school by the recognition of Alliance as an approved club, the rejection of the club because of the content of its speech is a violation of the First Amendment. The board argued that *Hazelwood Independent School District v. Kuhlmeier*, 484 U.S. 260 (1988), should govern this case. The board pointed out that there had been no limitation of any kind upon pure speech activity by Alliance or any of its members, and no discipline or penalty of any kind had been imposed upon the Alliance or any of its members because of speech or speech related activities. The only deprivation has been the withholding of sponsorship by the school. The court concluded that *Hazelwood* governed in this case. As for the reasonableness of the board's action, the court held that the legal status of the LGBT community is at the forefront of public debate. It is a very controversial issue, which has often turned violent. The court felt it was reasonable that those in charge of a public middle school would want to distance the school and its pupils from a debate left to more mature educational levels. As with the Equal Access Act claim, the court found that the Alliance did not sustain its burden of persuasion and does not have a substantial likelihood of success on the merits of its claim under the First Amendment. – *Brett Geier*

First Amendment Rights

Child Evangelism Fellowship of Ohio, Inc. v. Cleveland Metro. Sch. Dist., 600 Fed. App'x 448 (6th Cir. 2015). Child Evangelism Fellowship (CEF), a religious group, sought to enjoin the school district from charging a facilities fee on the basis that the district violated CEF's free speech rights and discriminated by waiving the fee for a non-religious group. The U.S. District Court for the Northern District of Ohio denied the motion for a preliminary injunction, and CEF appealed. The appellate court affirmed the decision and held that the group failed to demonstrate a likelihood of success on the merits of its claim.

The district's policy allowed an outside group to use school facilities if the group obtained a permit and paid a fee. CEF used one of the elementary schools to conduct an after-school enrichment program without paying a fee. The following year, after the district informed CEF that the group would need a permit, CEF obtained one and requested a fee waiver, which the school board denied. CEF thereafter learned that the Boy Scouts used the district's facilities without paying a fee. The district denied the existence of a fee-waiver policy, but confirmed that, in certain circumstances, it accepted goods or services as in-kind payment of the permit fee. Such was the situation with the Boy Scouts pursuant to various items provided to students participating in their program; the value of these goods exceeded the amount of the yearly fee. The district, additionally, approved a similar agreement with an evangelical Christian group. CEF never proposed an in-kind arrangement but, instead, requested waiver of the fee, the grant of which would have violated the district's policy.

The court concluded that CEF failed to show that the district had a fee-waiver policy, but, rather, the district accepted in-kind payment in lieu of monetary fees. The difference between a waiver and in-kind payment was "constitutionally significant" since "a waiver subsidizes speech while accepting an in-kind payment of equal or greater value does not." 600 Fed. App'x at 452. – *Betty Cox*

Sunshine Laws & FOIA

Missoula County Pub. Sch. v. Bitterroot Star, 345 P.3d 1035 (Mont. 2015). A former food services supervisor was investigated by her employer school district for fraudulent or illegal financial transactions. Following the investigation, the district initiated disciplinary action. The employee left her position and filed a wrongful discharge suit. Two weekly

newspapers later requested that the school district release documents related to her termination as food services director, specifically records concerning investigation of fraudulent or illegal activity. The district identified several documents for potential release and requested an *in camera* review by the district court to determine whether they should be released to the newspapers.

The district court found that the school district acted prudently in filing the action. It held that some of the documents should not be released because the former employee had a right of privacy in the specific documents. However, the district court determined that six documents relating to misuse of public money, misuse of public facilities, and careless management practices should be released. The former employee appealed to prevent release of the documents.

The state supreme court affirmed the district court's decision. It agreed with the district court's assessment that the school district followed a prudent course by requesting the *in camera* review, especially because the newspapers and employee invoked important constitutional rights. It further held that the district court conscientiously and correctly applied state law in determining that the former employee did not have a protectable privacy interest in the investigatory documents. Any privacy interest she had, the court wrote, was outweighed by her position involving the public trust. – *Benjamin White*

Predisik v. Spokane Sch. Dist. No. 81, 346 P.3d 737 (Wash. 2015). Two public school district employees were placed on administrative leave while their district investigated alleged misconduct. Two media outlets submitted public records requests to the district requesting the administrative leave letter given to one of the employees, along with "information on all district employees currently on paid/non-paid administrative leave." 346 P.3d at 739. The requests returned three relevant public records, including the requested administrative leave letter and two spreadsheets documenting the amount of leave pay the employees had accumulated up to the date of the request.

The employees separately sued the school district to prevent disclosure of the documents, alleging they were exempt under the "personal information" and "investigative" record exemptions of the state's Public Records Act (PRA). The trial court found that the employees' identities, but not the records themselves, were exempt from disclosure. The judge ordered all three records disclosed with the names of the employees redacted. The Court of Appeals affirmed the trial court's decision.

The state supreme court reversed and remanded. It held that public records revealing active investigations, but not describing the actual allegations being investigated, do not implicate the employees' privacy rights under the state's PRA. It further explained that public employees have no privacy right in the fact they are under investigation by a public employer. The court further held that being investigated is merely a status of their public employment rather than a detail of their personal lives, making the exemptions under the state's PRA inapplicable. Four justices dissented, arguing that the employees have a right to privacy in their identities. They supported the trial court's decision to release the records but redact the employees' names. – *Benjamin White*

Taxation/Funding

Nebuda v. Dodge County Sch. Dist. 0062, 861 N.W.2d 742 (Neb. 2015). Taxpayers (plaintiffs) sued their school district (defendant) after the defendant entered into a lease-purchase agreement with a bank in order to fund various school improvements. The agreement was entered into after voters rejected a bond proposal to fund those same school improvements. Plaintiffs argued that the defendant violated a state statute prohibiting the issuance of bonds without voter approval. However, the state trial court found that in the past the court had upheld such agreements to make school improvements without the approval of voters if the improvements are not funded by bonded debt, and that this was consistent with state law. "The court found that the school district had not funded the project through bonded indebtedness." 861 N.W.2d at 742. As a result, the state trial court dismissed the plaintiffs' lawsuit, and they appealed. The Nebraska Supreme Court held, among other things, that the agreement the defendant entered into did not violate the state statute barring the issuance of bonds to finance such improvements without voter approval because entering into the agreement did not constitute the issuing of bonds of indebtedness, either directly or indirectly. Accordingly, the state trial court's decision to dismiss the plaintiffs' lawsuit was affirmed. – *Rick Geisel*

Tort Liability

LM v. State, 862 N.W.2d 246 (Mich. Ct. App. 2014). The American Civil Liberties Union (plaintiff) sued the State of Michigan, the State Board of Education, the Michigan Department of Education, the state Superintendent of Public Instruction, and the Highland Park Public Schools (defendants) on behalf of eight minors who, the plaintiff alleged, received inadequate instruction based on their lack of proficiency on the reading portion of the Michigan Educational Assessment Program test. The plaintiff sought special assistance on behalf of the minor students who allegedly failed "to obtain basic literacy skills and reading proficiency as required by the state." 862 N.W.2d at 250. The ACLU brought claims under both the state constitution and state statutes. Most of the defendants' motions for summary disposition were denied by the state trial court, and the defendants appealed.

The Michigan Court of Appeals found no basis for the plaintiff's claim rooted in the state constitution. According to the court, "…the role of the state in education is neither as direct nor as encompassing as argued by plaintiffs. The trial court should have granted summary disposition in favor of the state and district defendants with respect to plaintiffs' constitutional claims." 862 N.W.2d at 252-53. Additionally, the court found that there was no private right of action in the state statute used by the plaintiff as a basis for one of its claims. As a result, the court found that the underlying complaint was an administrative matter best left to individuals to work out directly with the school district, and that no judicial remedy was appropriate for the deficiencies alleged. Accordingly, the

court reversed and remanded, concluding that the plaintiff's claims should be summarily dismissed. – *Rick Geisel*

Teacher & Administrator Employment

Discrimination

Bennett v. District of Columbia, 6 F. Supp. 3d 67 (D.D.C. 2013). In August 2008, Bennett was hired as a guidance counselor along with two other counselors at Calvin Coolidge Senior High School (CCSHS) in the District of Columbia Public Schools (DCPS). During the course of the 2008-2009 school year, the plaintiff alleged that one of the newly hired counselors called her "old fogey" and "old-fashioned." According to the plaintiff, she complained about these actions to CCSHS's principal and assistant principal in September 2009. Also, during that month DCPS Chancellor Michelle Rhee issued a reduction-in-force (RIF) to eliminate positions at schools that could not be supported by the school's budget. The director of operations for DCPS followed the action with a directive to principals to identify positions in the school to be eliminated without consideration of who was in such positions. The list was sent to the director of operations for approval. Once approval was given, the principal was required to rate each staff member that held the position to be eliminated. The director of operations specifically instructed principals not to consider age when rating the staff members. After the principals made their ratings, DCPS's Office of Human Resources issued a final "weighted" ranking to each of the staff members under review and would then issue a notice of separation to the lowest-scoring employees.

The principal of CCSHS decided to eliminate one of the guidance counselor positions at the school. Bennett received the lowest weighted score among the three counselors and was terminated by DCPS. She filed suit under the Age Discrimination in Employment Act (ADEA) and the District of Columbia Human Rights Act (DCHRA), alleging that DCPS terminated her because of her age and in retaliation for her complaints the previous school year.

Both Bennett and the school district were denied summary judgment by the court. First, the district offered legitimate nondiscriminatory reasons for its decision. However, the district failed to demonstrate that there was no genuine issue of material fact as to whether those stated reasons were pretextual. – *Brett Geier*

Willis v. Norristown Area Sch. Dist., 2 F. Supp. 3d 597 (E.D. Pa. 2014). Willis, the plaintiff, was hired as an art teacher at the high school. Shortly after his hire, students and a parent made allegations that the teacher used profanity in class and made inappropriate comments to several students. The district investigated the allegations and suspended Willis without pay for two weeks, gave him an unsatisfactory performance evaluation, and directed him to undergo professional counseling. Upon returning, Willis sent an email to the director of human resources and the principal requesting that he be allowed to record all of his classes on his cassette recorder, and he be given a mentor to help him with coaching; both requests were denied by the district. A few months after the first incident, additional allegations were made against Willis including inappropriate comments and activities. After the district investigated, it suspended him one day without pay and transferred him to another school at his request. Almost two years later, Willis attempted suicide at his home and was hospitalized. Following his return to school, he was accused of making additional inappropriate comments to several of his students. He highlighted the fact that he was having personal issues, had stopped seeing the therapist, and was taking different medication. Subsequently, two additional meetings were held with the superintendent, and at the conclusion of those meetings Willis was suspended two days without pay.

Allegations of inappropriate behavior by Willis continued. The district investigated and set up meetings to discuss them. Prior to those meetings, Willis checked himself into a clinic, where he was hospitalized for seven days. At that time he did not return to work, but instead filed a claim for long-term disability benefits and applied for a leave of absence with the district. Approximately six months later, Willis was released to return to work. Following up on the allegations prior to his long-term disability absence, the district met with him, provided him with an unsatisfactory review for that year, and terminated his employment. Willis filed a complaint alleging that he requested accommodations of returning to work with the overlap support of a substitute teacher, which the district denied.

Willis contended that the district violated the Americans with Disabilities Act (ADA) and the Pennsylvania Human Relations Act (PHRA) for discriminatorily terminating him and for its failure to accommodate his disability. The court found that the district offered a legitimate, nondiscriminatory reason for firing Willis: his inappropriate statements to students. In addition, Willis claimed the district "built the case for his termination" rather than helping him (2 F. Supp. 3d at 606). This is a bare assertion and is insufficient to raise a genuine issue of material fact. On the disability discrimination claim, the court held that Willis did not establish that he was qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer. Based on these facts, the district court granted summary judgment to the district. – *Brett Geier*

Woods v. Salisbury Behavioral Health, 3 F. Supp. 3d 238 (M.D. Pa. 2014). Woods, a teacher certified in elementary education and secondary education, retired after twenty-nine years in a public school district as an emotional support and learning support teacher. After a year of retirement, she was hired by New Story as a special education teacher. New Story posted an opening for a school coordinator position, which was not primarily a teaching position; its duties included acting as a substitute teacher and providing classroom support as needed. As a qualified candidate, Woods applied for the school coordinator position. When she inquired with the human resources manager about the status of the position, the manager informed her that he felt she was overqualified and the salary would be much less than what she was making currently.

New Story's administration then revised the posting, eliminating the special education requirement in order to make it easier to fill. The CEO of New Story recruited another candidate and ultimately hired her, even though this candidate never actually applied for the position. It is clear that the person hired would not have been qualified had the credential of special education teaching certification not been removed. During Woods' tenure at New Story, her relationship among her team began to deteriorate and several individuals were transferred or removed from her room. One paraprofessional requested a transfer away from Woods due to unsatisfactory attendance, inability to administer effective instruction, and the failure to comprehend the premise of applied behavioral analysis principles. Woods notified the district at the beginning of the next school year that she would be resigning. During the course of that summer, she saw a mental therapist for anxiety. She told the therapist that she intended to retire in September, but wanted to continue working through the summer because of the extra salary.

Woods filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) and the Pennsylvania Human Relations Commission (PHRC) after exhausting all of her administrative remedies. She claimed that New Story discriminated against her when she was not selected to fill the school coordinator position. Summary judgment was granted for New Story due to the fact that the school coordinator position was not better than Woods' job as a special education teacher—it was actually a demotion. Her retaliation claim failed because her inquiry about the status of her application and the coordinator position did not constitute protected activity. Finally, Woods' claim of a constructive discharge was dismissed because she was not threatened with discharge; encouraged to resign; demoted or subject to reduced pay or benefits; involuntarily transferred; or had her job responsibilities altered. – *Brett Geier*

Dismissal, Nonrenewal & RIF

Schlosser v. Bethel Sch. Dist., 333 P.3d 475 (Wash. Ct. App. 2014). Lynda Schlosser was hired by Bethel High School in 1998 and for ten years received "satisfactory" on her evaluation reports. In her eleventh year, the assistant principal rated Schlosser "unsatisfactory" for two areas and "satisfactory" for the other five areas, as well as "satisfactory" overall. The following year, the same assistant principal rated Schlosser "unsatisfactory" in one area and "satisfactory" in the others, resulting in an overall "satisfactory" rating. A different assistant principal evaluated Schlosser the next year and determined her overall rating was "unsatisfactory." The superintendent provided a letter the next school year notifying Schlosser that her overall performance was unsatisfactory and he placed her on a sixty-school-day probation period including a plan for improvement. The district hired a retired school administrator (coach) to work with Schlosser with the goal of returning her to "satisfactory" status. During a four-month period, the coach conducted eight evaluations and found Schlosser "unsatisfactory" overall in each of them. The superintendent, after receiving the coach's report, determined that probable cause existed to nonrenew Schlosser's employment with Bethel School District at the end of the school year.

Schlosser appealed the findings of a hearing officer and superior court to the Court of Appeals of Washington. The court held that Schlosser had neither tenure rights to continue her public school employment nor a property interest in continued employment that was analogous to tenure rights. In following the statutory procedures and deciding not to renew Schlosser's contract, the district did not deprive her of a property interest requiring due process. The district's post-deprivation review, which followed the statutory requirements, met procedural due process requirements. The hearing officer's findings of fact that Schlosser was unsatisfactory were not clearly erroneous, because evidence convincingly showed that Schlosser was unsatisfactory over the course of the semester. Substantial evidence supported the hearing officer's overall conclusion that the district was justified in not renewing the contract. – *Brett Geier*

Employee Misconduct

Hohenstein v. Nevada Employment Sec. Div., 346 P.3d 365 (Nev. 2015). An elementary school teacher was arrested and pled guilty to possessing marijuana in his residence in violation of state law. Because it was his first offense, the district court suspended his sentence, did not enter a conviction judgment, and placed him on probation for up to three years. Upon learning of his arrest and guilty plea, the teacher's school district suspended him and began termination proceedings. During the termination proceedings, he entered his plea with the district court and the school district terminated his employment because of the plea. The teacher subsequently applied for unemployment benefits, but the state Employment Security Division (ESD) denied his request. The ESD found that his guilty plea established that the district terminated him for workplace misconduct, thereby disqualifying him for unemployment benefits.

The state supreme court reversed and remanded the decision. It held, per state law, that a guilty plea may not be used as the basis for denying unemployment benefits. Specifically, the court noted that the plea, along with the district court's order to not enter a conviction, effectively placed the teacher's criminal proceedings on hold, thereby restoring his record to the status prior to the arrest. The court also held the ESD's finding that the district terminated the teacher for misconduct connected with his work (e.g., the conviction of a felony) lacked substantial evidentiary support. – *Benjamin White*

Higher Education

Board of Trustees

Labor Relations

Nassau Cmty. Coll. Federation of Teachers, Local 3015 v. Nassau Cmty. Coll., 6 N.Y.S.3d 604 (N.Y. App. Div. 2015). Petitioners sent a Freedom of Information request to

the respondent, Nassau Community College Foundation. The respondent declared that it was not a governmental agency and therefore not subject to the Freedom of Information Act (FOIA). The petitioners then filed an action to determine whether the respondent was a public agency subject to FOIA and the respondent moved to dismiss. The motion to dismiss was granted and the petitioners appealed. On appeal, the Appellate Division reversed the decision of the New York Supreme Court, stating that the respondent had failed to provide documentary evidence that it was not a public agency, thereby establishing a defense as a matter of law. – *Elizabeth Lugg*

Tort Liability

Thomas M. Cooley Law Sch. v. Kurzon Strauss, LLP, 759 F.3d 522 (6th Cir. 2014). Anziska, who was a partner in the law firm Kurzon Strauss, posted a statement on the website "JD Underground" which claimed that Thomas M. Cooley Law School (Cooley Law) manipulated postgraduate employment and salary information. Cooley Law produced a cease-and-desist letter claiming the JD Underground post was false and defamatory. After conversation with Cooley Law's general counsel, Anziska posted a retraction on JD Underground. Shortly after the retraction, Anziska sent a draft proposal of a class action to twenty individuals, eighteen of whom were either former or current students of Cooley Law. Upon recommendation from Anziska, the complaint was forwarded to an additional twenty people, and ultimately became publicly available on the Internet. Cooley Law filed suit against Kurzon Strauss LLP, alleging state-law claims of defamation, tortious interference with business relations, breach of contract, and false light. The district court granted summary judgment in favor of Kurzon Strauss, and Cooley Law appealed.

The Sixth Circuit Court reviewed *de novo* the summary judgment. Cooley Law School first contended that Kurzon Strauss published defamatory statements. A primary component of a defamation suit is whether the defamatory statement was done with actual malice that was false, or with reckless disregard of whether it was false or not. The court concluded that a reasonable jury could not find proof that Kurzon Strauss acted with malice. Cooley Law raised the issue that the actual malice standard does not apply because Kurzon Strauss's statements are defamatory commercial speech. The Sixth Circuit Court declined to address the Cooley Law's commercial speech issue because the school did not raise this issue. Instead, the court function is to review the case presented to the district court, rather than a better case fashioned after an unfavorable order. Arguments not squarely presented to the district court are not reviewed on appeal.

The court determined that the school was properly classified as a limited-purpose public figure because the defendants showed the existence of a "public controversy" regarding whether law schools were reporting accurate postgraduate employment data and whether law school graduates could afford to pay back student loans, and the school voluntarily injected itself into the public debate by publicly responding to a question and reports. The judgment of the district court was affirmed. – *Brett Geier*

Nonacademic Personnel Employment

Contracts, Salary & Benefits

Hildebrant v. State ex rel. Dep't of Workforce Servs., Workers' Safety and Comp. Div., 345 P.3d 875 (Wyo. 2015). An HVAC technician employed by a state university suffered a compensable workplace injury when he fell from a ladder while performing his duties. As part of his treatment, his doctor recommended implantation of a spinal cord stimulator in his back. A state agency denied pre-authorization for the implant, and the appellant requested a hearing to dispute the denial. The Office of Administrative Hearings determined that the implant was premature and upheld the denial. The district court affirmed the decision by the hearing officer.

The state supreme court affirmed the hearing officer's determination. The court held that evidence supported the conclusion that implantation of the stimulator was not medically necessary. The court noted that two doctors who reviewed the records provided by the state agency recommended the state deny the request. Specifically, they both stated that without better understanding and addressing of the appellant's other symptoms, it would be premature to approve implanting the stimulator. – *Benjamin White*

Discrimination

Miles v. City Univ. of New York, 6 N.Y.S.3d 54 (N.Y. App. Div. 2015). A claimant's employment discrimination claim against Baruch College of the City University of New York was dismissed after the claimant failed to file and provide service of the claim in a timely manner. Not only did the claimant provide service through regular mail, an improper method of service, but service was not deemed completed until received by the opposing party. The statute of limitations on the claim had expired prior to receipt. – *Elizabeth Lugg*

Professor & Administrator Employment

Contracts, Salary & Benefits

Lupyan v. Corinthian Colleges Inc., 761 F.3d 314 (3rd Cir. 2014). Lupyan was hired as an instructor in Corinthian Colleges Inc.'s (CCI) Applied Science Management Program in 2004. In 2007, Lupyan's supervisor noticed that she seemed depressed and suggested she take a personal leave of absence. On advice from her supervisor, Lupyan applied for short-term disability coverage. She received a Certification of Health Provider, a standard Department of Labor form, from her doctor providing certification of a mental health condition. Based on this document, CCI's human resources department determined that Lupyan was eligible for leave under the FMLA, rather than personal leave. CCI's supervisor of administration met with Lupyan and instructed her to check the box marked "Family Medical Leave" on her Request for Leave Form. The supervisor also changed Lupyan's projected date of return based upon the Certification of Health Provider. CCI allegedly mailed a letter to Lupyan advising her that her leave was designated as FMLA leave, and further explained her rights. Lupyan denied ever

having received the letter, and denied having any knowledge she was on FMLA leave until she returned to work.

Lupyan was released by her doctor to return to her teaching position with certain restrictions. Her supervisor notified her that she could not come back to work if any restrictions were a condition of her return. Lupyan returned a short time later with a full release from her psychiatrist that confirmed she was able to return to work without any restrictions or accommodations. CCI then notified her that she was being terminated from her position due to low student enrollment, and because she had not returned to work within the twelve weeks allotted. Lupyan claimed this was the first time she had any knowledge that she was on FMLA leave. She alleged that CCI interfered with her rights under the FMLA by failing to give notice that her leave fell under the Act, and that she was fired in retaliation for taking FMLA leave. The district court granted CCI's initial motion for summary judgment as to both claims. The district court, *sua sponte*, reversed its ruling and recognized that summary judgment was not appropriate because there was a factual dispute regarding whether CCI had informed Lupyan of her FMLA rights. Relying on testimony from CCI employees, the district court, under the mailbox rule, determined that Lupyan had received the letter. Summary judgment was entered in favor of CCI.

The Third Circuit Court reversed the summary judgment. First, the court found that an employer was improperly awarded summary judgment on a former employee's FMLA interference claim based on a weak, rebuttable presumption under the mailbox rule that the employee received a letter notifying her of her FMLA rights. The employee's contention that she never received the letter burst the presumption and required a jury determination. Second, Lupyan offered evidence that she was prejudiced by the alleged lack of notice, as she claimed that she would have returned to work sooner if she had known that her leave fell under the FMLA. Third, the employer was erroneously awarded summary judgment on the employee's FMLA retaliation claim because a reasonable jury could have found that the employer's stated reason for the employee's termination was pretextual. – *Brett Geier*

Employee Misconduct

Kao v. Univ. of San Francisco, 177 Cal. Rptr. 3d 145 (Cal. Ct. App. 2014)**.** Kao, a tenured mathematics professor at the University of San Francisco (USF), was exhibiting disturbing behavior. He began to rant incoherently and threaten colleagues, and became physical in some instances. Kao's behavior became so unpredictable that many people feared for their safety, and USF began an investigation. The dean inquired with a clinical and forensic psychologist about markers for violence or things to look for that might indicate an escalation of hostilities, and how the institution should respond. The psychiatrist, an expert in threat assessment, suggested Kao undergo a fitness-for-duty evaluation (FFD). The FFD is confidential, and no psychiatric diagnosis can be disclosed to the employer. The evaluator can only tell the employer whether the employee is fit to perform the job, not fit, or fit with accommodation.

USF placed Kao on a leave of absence without duties, prohibiting him from being on campus while on leave, and required him to participate in the FFD. Kao, through his counsel, notified the university that he refused to comply with the requirement to participate in the FFD. University administration contacted Kao, tried to persuade him to comply with the request for a FFD, and warned him of disciplinary action if he failed to comply. After a meeting with Kao and his attorney, USF administration decided to suspend Kao without pay and terminate him if he did not comply with the request for a FFD. After multiple letters between Kao and USF, the university terminated Kao's employment for his failure to carry out the work-related instructions of the University to cooperate with an independent medical evaluation.

Kao's central contention in his complaint is that USF had to engage in an interactive process before it could refer him for an FFD. The California Court of Appeals determined that a university had no duty to engage in such a process interactive process to determine reasonable accommodations for Kao. Substantial evidence showed that the FFD was job-related and consistent with business necessity. The university did not violate the professor's right to confidentiality of medical information. The Court of Appeals affirmed the decision of the Superior Court. – *Brett Geier*

Property and Contracts

Bd. of Regents of the Univ. Sys. of Ga. v. Winter, 771 S.E.2d 201 (Ga. Ct. App. 2015). A foreign postdoctoral applicant filed suit after the university rescinded its unwritten offer of employment when, through the plaintiff's own actions, his visa status rendered him unemployable. The university filed a counterclaim when the trial court denied its request for summary judgment on the basis of sovereign immunity. The appellate court found in favor of the university and remanded to the trial court to enter summary judgment. The appellate court found that although the postdoctoral student had signed some preliminary paperwork for employment, no contract for employment existed, which meant that the university had not waived sovereign immunity in order for a breach of contract claim to be filed. – *Joy Blanchard*

Students

Discrimination

Heike v. Cent. Mich. Univ. Bd. of Trustees, 573 Fed. App'x 476 (6th Cir. 2014). In 2005, Central Michigan University (CMU) offered Heike an athletic scholarship to conditional yearly renewal for the 2006-2007 academic year. Heike accepted the offer and, in September 2006, matriculated at CMU, where she played as a member of the women's basketball team for the next two seasons. After Heike's freshman season, CMU replaced Coach Kleinfelther, the head coach who had recruited her, with Coach Guevara. At the close of Heike's sophomore season, Guevara revoked her scholarship. Heike appealed Guevara's decision to the school, asserting that Guevara failed to provide a written explanation of her alleged athletic deficien-

cies and that, in revoking her scholarship, CMU treated her differently than other athletes of a different race and gender. Guevara responded by indicating that Heike did not have the skills necessary to compete at Division I. On June 11, 2008, the CMU Officer of Scholarship and Financial Aid held an appeals hearing at Heike's request. The appeals committee promptly upheld Guevara's decision, and CMU sent Heike a letter confirming the decision in writing.

Heike originally filed suit in federal district court on the basis of claim preclusion. She initiated two suits: the first one under Section 1983, alleging equal protection and due process violations under the Fourteenth Amendment and the second one, prior to the dismissal of the original suit, alleging violations of Title VI of the 1964 Civil Rights Act and Title IX of the Educational Amendments Act of 1972. The district court dismissed Heike's second action as barred by the doctrine of claim preclusion. Heike's original claims and subsequent claims all derive from her sophomore basketball season. She did not assert any new material facts in her second complaint. As for the first complaint, the district court dismissed all of Heike's claims against CMU on the basis of sovereign immunity. The court explained that CMU and the individual defendants in their official capacities would not be subject to suit for monetary damages under § 1983 because they are not "persons" within the meaning of the statute. The Sixth Circuit Court affirmed the district court's holding. – *Brett Geier*

Education Loans/Financial Aid

Olvera v. Univ. Sys. of Georgia's Bd. of Regents. 771 S.E.2d 91 (Ga. Ct. App. 2015). The plaintiffs, noncitizen college students covered by the federal Deferred Action for Childhood Arrivals program (DACA), brought an action against the defendant, the University System of Georgia's Board of Regents, seeking a declaration that they were entitled to in-state tuition at the system's institutions. The trial court granted the defendant's motion to dismiss on the ground that sovereign immunity barred the action. On appeal, the court affirmed. It stated that the trial court had correctly determined that the defendant's policy regarding noncitizen eligibility for in-state tuition fell outside any waiver of sovereign immunity under state laws and regulations. The plaintiff failed to meet its burden of showing that the policies were agency rules subject to such state laws and regulations. Therefore, the trial court did not err in finding that sovereign immunity barred the action. – *Elizabeth Lugg*

Tort Liability

Spears v. Shelter Mutual Ins. Co., 160 So.3d 631 (La. Ct. App. 2015). A student filed suit against her former professor, the state university, and the professor's homeowner's insurance after the professor held the plaintiff and other classmates hostage, struck the plaintiff, spit in her face, and threatened to kill anyone who left the classroom. The student filed suit for injuries related to emotional and psychological trauma that she suffered from the incident. The professor filed a cross-claim against his insurance company, and the insurance company countered that the incident was intentional in nature and occurred as part of his employment. The trial court entered partial summary judgment for the professor. The appellate court upheld the ruling, finding that the trial court did not err in rejecting the insurance company's assertion that it was not responsible, finding that the fact that the professor suffered from bipolar disorder played a role in determining whether the incident in question should be construed as accidental. – *Joy Blanchard*

Duncan v. Cuyahoga Cmty. Coll., 29 N.E.3d 289 (Ohio Ct. App. 2015). The plaintiff filed suit for injuries she sustained from participating in a class required in order to take the state police officer examination. The course was on self-defense, and the instructor failed to use protective mats on the floor. Related to claims that there had been a breach of contract, the trial court entered summary judgment in favor of the community college where the class was held, and the appellate court upheld that decision. (It should be noted that in previous proceedings the appellate court ordered that negligence claims against the college be dropped based on sovereign immunity.) The appellate court ruled that the plaintiff could not demonstrate that a contract existed between her and the community college, other than what content would be covered in the course. – *Joy Blanchard*

Table of Cases

U.S. Supreme Court Docket

Summary of Court Action Reported
From June 18, 2015 through July 20, 2015
Provided by Spencer Weiler and Christine Kiracofe

Cases Decided

None.

Cases Awaiting Decision after Oral Argument

None.

Certiorari Granted

No. 14-915. *Friedrichs v. Cal. Teachers Ass'n*, 2013 U.S. Dist. LEXIS 188995 (9th Cir. 2013). Under California law, a union is awarded exclusive bargaining representation for all public school employees if the union represents a majority of the employees. In such a situation, the union is authorized to levy on all employees, both those belonging to the union and those that do not belong, an agency fee to cover costs associated with collectively bargaining contracts. Claiming that current state law violates an individual's right to free speech and association, the plaintiffs filed a motion for summary judgment, but it was granted in favor of the defendants and this appeal followed. On June 30, 2015, the Supreme Court granted certiorari.

Cases Recently Filed

No 15-35. *E. Tex. Baptist Univ. v. Burwell*, 10 F. Supp. 3d 725, 2015 U.S. App. LEXIS 10513 (5th Cir. 2015). Three complaints were filed by religious organizations arguing that the Affordable Care Act's (ACA) requirements, namely that employers either offer their employees health insurance that includes contraceptive objectionable practices or the employers can submit a form declaring their religious opposition to the requirements, violate the Religious Freedom Restoration Act. [The three appeals were consolidated into one class action lawsuit due to the similar content of the three complaints.] The ACA allows for accommodations; for employers to access these accommodations they must object to the requirements on religious grounds, must be a nonprofit organization, must view itself as religious, and must certify that it meets the criteria. The religious organizations challenging these requirements, all based in Texas, felt these accommodation requirements were excessive and sought an injunction against these requirements. The district court ruled in favor of the plaintiffs. On appeal, the Fifth Circuit Court reversed the lower court and determined the plaintiffs failed to show that the requirements created a substantial burden or inhibited them from being able to exercise their religious rights under the established law.

No 14-1533. *Zhou v. State Univ. of N.Y. Inst. Of Tech.*, 592 F. App'x 41 (2d Cir. 2015). Zhou was a former faculty member at State University of New York Institute of Technology (SUNY IT), but he was not reappointed to his position. As a result, Zhou filed a lawsuit claiming that he was unfairly terminated due to discrimination, a hostile work environment, and retaliation. The defendants, namely the SUNY IT, filed a motion in district court for summary judgment alleging that Zhou was not renewed due to his low teaching scores, student complaints, and the recommendation made by a peer review committee. This motion was granted and appealed. Zhou only contested the retaliation claim, and the appellate court deemed Zhou's evidence compelling and remanded the case back to the district court. The case was argued in front of a jury at the district level and the jury awarded Zhou damages. SUNY IT appealed this ruling, relying on a recent ruling by the U.S. Supreme Court in *Univ. of Texas Sw. Med. Ctr. v. Nassar*, which stated, "retaliation claims must be proved according to traditional principles of but-for causation, [which]…requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." Analyzing the ruling from *Nassar* and the directions given to the jury at the district level, the appellate court vacated the district court's ruling and remanded the case back to the district court.

No 14-1529. *Lilly v. Lewiston-Porter Cent. Sch. Dist.*, 593 F. App'x 87 (2d Cir. 2015). A local New York school board member was removed for failure to complete required training courses in accordance with state law. The removed board member alleged that at least one of his peer board members "harbored animosity towards him and sought his removal" in

violation of Lilly's due process rights. The district court granted summary judgment for the school district, and the Second Circuit affirmed. On appeal to the Supreme Court, the petitioner presents the following legal questions: (1) If required, did the school board have subject matter jurisdiction to remove one of its members? (2) Were the board member's due process rights violated when he was removed from the school board? (3) Is due process tainted by "the animus of one, a minority or majority" of members that comprise a school board?

No 14-1522. *U.L. v. New York State Assembly*, 592 F. App'x 40 (2d Cir. 2015). U.L., the parent of a student who attends a Jewish private school in New York, filed suit arguing that the state's child protection laws violate several constitutional amendments. The district court dismissed U.L.'s case, finding that the defendants were entitled to sovereign and legislative immunity. The Second Circuit affirmed, holding that even if U.L were able to "plead around" the issue of legislative immunity "his claims would still fail as a matter of law." Also, the Second Circuit determined that U.L.'s claims under the Fourteenth Amendment would fail because the challenged child protection statutes do not target a suspect class or "impair the exercise of a fundamental right, and easily pass muster under rational basis review." U.L.'s appeal to the Supreme Court asks the tribunal to consider the following legal questions: whether the Equal Protection Clause of the Fourteenth Amendment requires state child protection laws to apply similarly to public and private school children, and whether the Due Process Clause requires that "parents not be forced to choose between public schools that protect children's safety and private (including religious) schools that provide the type of education that the parents desire."

Certiorari Denied

No 14-1387. *Meyer v. Burwell*, 592 F. App'x 786 (11th Cir. 2014). Stacey Meyer was employed as a Consumer Safety Officer for the Food and Drug Administration (FDA). In late 2006, she informed her then-supervisor, William Lyn, that she suffered from several different psychiatric conditions that impacted her work, including social phobia, avoidant personality disorder, and dependent personality disorder. Lyn responded by assigning her to work primarily at the FDA office, instead of in the field. Despite the change in her work assignment, she subsequently accrued several "unscheduled absences." Her frequent absences resulted in Meyer being placed on leave restriction for the following six months. While on leave restriction, she was required to report her arrival and departure times at work each day and provide a doctor's note for any absence due to illness. In 2010, Meyer began missing work frequently again, resulting in her new supervisor placing her on leave restriction just as had been done four years prior. Upon notice of her second leave restriction, Meyer filed a formal request for reasonable accommodation for her disabilities under the Rehabilitation Act. A meeting between Meyer, union representatives, and FDA supervisors resulted in a compromise that would allow Meyer to work any eighty hours of her choosing during a two-week period so long as she worked from 10 a.m. through 2:00 p.m. Monday through Friday. However, shortly after the compromise went into effect, a new collectively bargained agreement abolished her "any 80" schedule. Meyer agreed to work a "first 40" schedule, permitting her to work any forty hours of her choosing each week so long as the 10:00 – 2:00 period was included. Shortly thereafter, two of Meyer's FDA co-workers reported that Meyer had been making non-work-related visits to local parks during her required working hours; these allegations were proved true by an internal investigation. When Meyer was subsequently fired, she filed suit alleging that her termination constituted disability-based discrimination in violation of the Rehabilitation Act. She also argued that she was terminated because she filed a complaint alleging discrimination with the EEOC in 2011. The district court disagreed, finding for Meyer's employer, and the Eleventh Circuit affirmed. On appeal, Meyer presents two questions to the Court: 1) whether summary judgment was appropriate in a case involving the Rehabilitation Act where the employer revoked reasonable accommodations; and 2) if an employer can be held liable under the Act for "failing to engage in good faith in an interactive dialogue regarding reasonable accommodation with an employee whose mental disability impairs her ability to communicate." Certiorari was denied on June 29, 2015.

No. 14-1310. *Edwards v. Lake Elsinore Unified Sch. Dist.*, 230 Cal. App. 4th 1532 (2014). Lori Edwards was employed as a teacher in California's Lake Elsinore Unified School district from 2003 until she resigned in 2006. In 2007, she reapplied to the district and was hired as a substitute teacher. Edwards taught full time as a substitute teacher during the 2007-08 school year. On the last time sheet submitted for the 2007-08 school year (after having been paid as a substitute for the entire year), Edwards indicated that she felt she was due back pay from the school district since she had been paid as a substitute and not as a permanent tenured employee. The district disagreed, yet Edwards was subsequently rehired as a permanent employee the following year in a different classroom. In February 2009, she filed a grievance with the district, arguing that her employment category had been misclassified for the 2007-08 school year and that because of this error, she was denied a "retroactive salary increase" after being rehired for the 2008-09 school year. A state trial court found for the school district. The California appellate court affirmed the lower court's decision, holding that Edwards was not misclassified as a substitute teacher and as such was not entitled to back pay. On appeal, the appellant asks the Court to consider whether "a compelling governmental interest permit(s) a public school employer to pay a full-time, highly qualified, black teacher one-fourth the salary of full-time white teachers" in violation of the Fourteenth Amendment, Titles VI and VII, the Fair Pay Act, and the California Education Code. The Supreme Court denied certiorari on June 29, 2015.

ELA Case Commentary

In-depth explanation and commentary on a case of interest No. 5 – August 2015

Federal District Judge Upholds Harvard Law School's Discipline Procedures and Action in Plagiarism Case: *Megon Walker v. President and Fellows of Harvard College*

By Nathan Roberts, University of Louisiana at Lafayette, Lafayette, Louisiana, and Robert C. Cloud, Baylor University, Waco, Texas

On December 30, 2014, a federal district judge in Massachusetts granted summary judgment in favor of defendants—the President and Fellows of Harvard College, the Dean of Students at Harvard Law School (HLS), and the professor who was the Chair of its Administrative Board—on breach of contract and defamation claims. *Megon Walker v. President and Fellows of Harvard College, et al* Civil Action No. 12-10811-RWZ, 2014 U.S. Dist. LEXIS 178301 (D. Mass. Dec. 30, 2014). This commentary addresses the court's analysis of the meaning of "submit," the administrative board process, and the issue of defamation.

Facts

Megon Walker attended Harvard Law School from 2006 to 2009. During this time, she was a member of the Journal of Law and Technology ("JOLT"). Initially, she served as a "sub-citer," checking the accuracy of citations and quotations of articles the JOLT selected for publication. In her third year of law school, JOLT accepted her application for a case comment on *In re Bilski,* 545 F.3d 943 (Fed. Cir. 2008) (en banc), for publication in the spring.

When JOLT staff initiated its "tech edits," concerns arose that aspects of her argument were similar to other published works. A co-editor-in-chief of JOLT reviewed Walker's full draft for plagiarism. It was determined that significant portions of the comment had been copied from other publications addressing the *Bilski* decision and that she had failed to either attribute those sections or had not done so properly. The review stopped after twenty-three items were identified as plagiarism. *Walker v. President and Fellows of Harvard College* at pg. 2.

The issue was brought to the Dean of Students, who informed the Harvard Law School Administrative Board. The Administrative Board reviewed the record and decided to go forward on charges of plagiarism. A hearing on the matter was held after Walker was notified and consulted with counsel. The Dean of Students provided each Board member copies of a twenty-nine-page statement and 313 pages of exhibits submitted by Walker's attorney. The Dean of Students helped Walker collect evidence and internal JOLT emails. The court noted the Dean of Students was not a voting member of the Administrative Board. *Walker v. President and Fellows of Harvard College* at pg. 3.

Although efforts were attempted to work out the issue without a hearing, Walker was notified that plagiarism was too serious to resolve informally. Walker further requested a delay in her exam schedule to provide time to prepare for the hearing; however, the request was denied. When the hearing was completed, the Administrative Board decided on a formal reprimand instead of the more serious sanction of suspension; thereby allowing Walker to graduate with her class. The letter of reprimand is maintained in Walker's file and not published, although it is noted on her transcript. *Walker v. President and Fellows of Harvard College* at pg. 3.

District Judge's Opinion

The court addressed several major items in its opinion regarding (1) the meaning of "submit," (2) the Board proceedings and contract claims, and (3) the defamation claim. Count

I alleged a breach of contract because the Board found she committed plagiarism by submitting her work when Walker contended her draft was not a "submitted" work as defined by the Student Handbook. The court relied on *Merriam-Webster's* dictionary that states submitted means "to give [a document, proposal, piece of writing, etc.] to someone so that it can be considered or approved." *Submit,* Merriam-Webster Dictionary Online (2014), available at www.merriamwebster.com/dictionary/submit. The court further stated that Harvard Law School was reasonable to expect a third-year member of a law journal to believe that the handing over of a draft article to that journal for editing prior to publication was "submitting" the work within the meaning of the Handbook. Under the proper meaning of the term "submit," there is no issue that turning in a draft of an article for editing by JOLT would not qualify as a "submission," whether or not the draft was the author's "final draft." *Walker v. President and Fellows of Harvard College* at pg. 5-6.

Board Proceeding Claims

The court reviewed all four of Walker's claims that Harvard Law School did not comply with its Handbook provisions by failing to (1) have a non-adversarial hearing; (2) conclude in a manner most favorable to her in light of the circumstances; (3) provide her with right to cross-examine any witness at the hearing who had offered evidence against her; and (4) not sanction her unless the charged infraction was established by clear and convincing evidence. First, the court found that the Handbook provision that states the "Board does not consider itself to be an adversarial or prosecutorial body" could not be reasonably interpreted as guaranteeing a non-adversarial proceeding and in any event, the transcript revealed that the proceedings were non-adversarial and Walker's efforts to string a number of isolated events into a prosecutorial effort was not supported. *Walker v. President and Fellows of Harvard College* at pg.7-9.

The court further found the Handbook's statement that the Board seeks to resolve hearings "as favorably to students as possible consistent with the maintenance of the high academic and ethical standards of Harvard Law School" means that students will usually receive the most favorable outcome possible within the bounds of the rules. The board found that Walker had plagiarized; therefore, the Board had no obligation to find Walker not in violation and it did not breach any duty by issuing a lessor sanction, or reprimand, rather than the standard penalty of suspension. *Id* at 9.

The court opined that Walker was not denied the right to cross-examination, as the transcript detailed the instances where cross-examination was stopped and cross-examination was denied on the grounds of irrelevance to the proceeding, and that similar limits exist in the court system. The judge relied on Schaer, 432 Mass. 474, 481 in finding "It is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject." Finally, with regard to Walker's claim of insufficient evidence, the court found there was no dispute she submitted work that was not properly attributed and that the court would not second-guess the Board's evidentiary rules, and that her conduct fell within the Handbook's disciplinary provisions; therefore, there was sufficient evidence to find a violation. *Walker v. President and Fellows of Harvard College* at pg. 9-10.

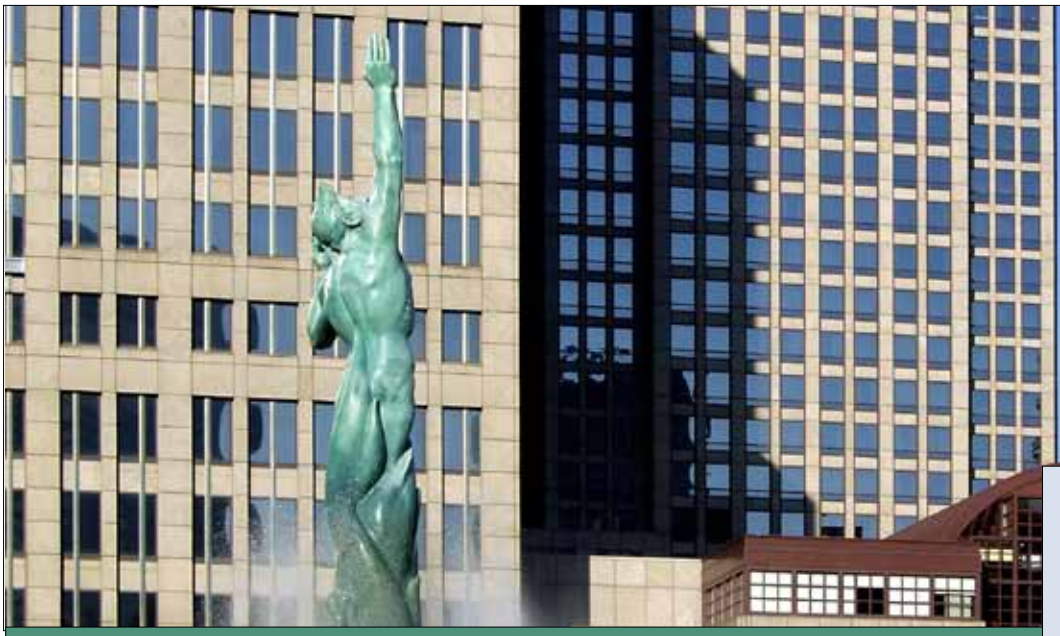
Defamation

Walker's last claim alleged Harvard Law School defamed her because her transcript states that she "was issued a letter of Reprimand by the Administrative Board," which states that she committed plagiarism. The court dismissed this claim as a matter of law because truth of the matter is a defense to a claim for defamation, and it is true that Walker committed plagiarism within the meaning of Harvard's Student Handbook.

Conclusion

The *Walker* decision provides guidance for university student discipline hearings and proceedings in several important aspects. First, it is a reminder that student handbooks are considered contracts and should be closely followed by disciplinary committees. Second, it notes that discipline hearings are not court trials and the rules of court are not strictly followed in these proceedings. It suggests courts should tread lightly when reviewing decisions of university proceedings and defer to the university, as it is not the business of lawyers and judges to tell universities what statements they may consider and what statements they must reject. Finally, universities should draft handbooks so that the procedures comport to basic fairness and provide guidance toward seeking fairness in searching for the truth.

In conclusion, The district judge's decision in *Walker* is not surprising and once again supports the university's right to establish procedures that are less stringent than those followed by trial courts. The decision is important for higher education administrators and faculty in all fifty states. Based on the decision, we are reminded that courts will generally defer to universities in establishing and following their hearing rules and not dictate to universities what they must consider or reject if they comport to basic standards of fairness and equity.



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