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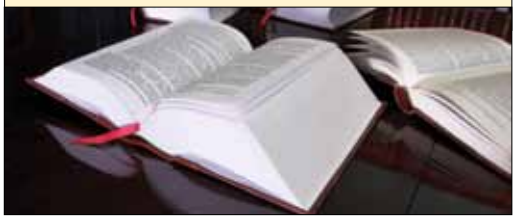

Editors' Note

We want to thank Suzanne Eckes, who will be relinquishing her Seventh Circuit reporter responsibilities as she takes on the role of ELA president. Volunteering to fill her SLR position is fellow Indiana University colleague, Janet Decker. Janet will turn over her Northeast reporter duties to Ricky LaFosse and Ilana Lauren Linder, both current Ph.D. students at Indiana University.

Also stepping up to the plate is attorney Kathryn McCary, who is now covering cases in the Sixth Circuit.

Elementary and Secondary Education

Charter Schools/Alternative Schools

Frederick Classical Charter Sch., Inc. v. Frederick Cnty. Bd. of Educ., 164 A.3d 285 (Md. Ct. App. 2017). The Maryland Court of Appeals ruled that the Maryland State Board of Education had erred in its ruling that affirmed the Frederick County Board of Education's decision to deny funding for student transportation to the Frederick Classical Charter School based on the school's charter wording that shifted the responsibility for transportation to the parents, with certain exceptions. The charter school cited case law and state education law that required charters to receive funding commensurate with the amount dispersed to other schools in the local jurisdiction. The charter school then argued that the parents who agreed to provide transportation were not parties to the charter. The charter school also argued that a charter operator is to receive funding even if the charter school is not providing a service (e.g., transportation) that the local board generally provides, so long as the charter school does not request the local school system to provide the service. The Maryland Court of Appeals ruled that the State Board had erred in its ruling that the charter school was not entitled to transportation funding because the state board did not provide those services, and in its ruling that the charter school was not entitled to transportation funding because the school agreed to forgo this entitlement in their charter contract with the local board. Five justices ruled in favor and two were opposed. – *Mary Kay Bacallao*

Noncertified Employees

Contracts, Salary & Benefits

Knoll v. Olathe Sch. Dist. No. 233, 398 P.3d 223 (Kan. Ct. App. 2017). In 2006, the Kansas legislature enacted a statute requiring workers' compensation claims to be dismissed for lack of prosecution if they are not resolved within five years of filing. In 2009, an employee of Olathe School District was injured while working. Effective May 2011, the Kansas legislature amended the statute to reduce the time limit for prosecuting workers' compensation claims from five years to three years. The employee

Regional Reporters

Federal Courts

U.S. Supreme Court ..... **Christine Kiracofe**
Northern Illinois University
Spencer Weiler
University of Northern Colorado

Court of Appeals

First Circuit ..... **David Dagley**
University of Alabama
Second Circuit ..... **Kathryn McCary**
Law Office of Kathryn McCary
Third Circuit ..... **Bonnie Hoffman**
Hangley Aronchick Segal, Pudlin & Schiller
Fourth Circuit ..... **Jennifer Sughrue**
Southeastern Louisiana University
Lisa Driscoll
University of Tennessee-Knoxville
Regina Biggs
George Mason University
Fifth Circuit ..... **R. Stewart Mayers**
Southeastern Oklahoma State University
Sixth Circuit ..... **Kathryn McCary**
Law Office of Kathryn McCary
Seventh Circuit ..... **Janet Decker**
Indiana University
Eighth Circuit ..... **R. Stewart Mayers**
Southeastern Oklahoma State University
Ninth Circuit ..... **David Dagley**
University of Alabama
Tenth Circuit ..... **Traci Ballard**
University of Oklahoma-Tulsa
Eleventh Circuit ..... **Jennifer Sughrue**
Southeastern Louisiana University
Lisa Driscoll
University of Tennessee-Knoxville
Federal Supplement ..... **R. Stewart Mayers**
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Brett Geier
Western Michigan University
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Kentucky Department of Higher Education
Joe Dryden
Texas Wesleyan University

Higher Education

Federal Cases ..... **Joseph McNabb**
Northeastern University
Barbara Qualls
Stephen F. Austin State University
Thomas Graca
Harvard Law School
State Cases ..... **Elizabeth Lugg**
Illinois State University
Marilyn Anglade
Florida State University
Vanessa Miller
Penn State University

State Courts

Southern ..... **Gretchen Oltman**
Creighton University
Northwestern ..... **Rick Geisel**
Grand Valley State University
Northeastern ..... **Ilana Linder**
Indiana University
Ricky LaFosse
Indiana University
Southwestern ..... **Michael Tan**
William Woods University
Rebecca Schlosser
Sul Ross State University
Southeastern ..... **Jennifer Sughrue**
Southeastern Louisiana University
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ELA and the staff of the *School Law Reporter* gratefully acknowledge the research assistance provided by the staff of The West Group.

The *School Law Reporter* contains citations and summaries for current education law decisions reported by state and federal courts of record in the U.S., as well as the most recent U.S. Supreme Court docket. A Case Index is published annually. ELA members can access cases via the *SLR Express*, a searchable online database with all the cases that have appeared in *School Law Reporter*.

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filed a claim with the Kansas Division of Workers Compensation in November 2011. The district, citing the amended statute, moved to dismiss her claim for lack of prosecution in 2015, about three years and three months after the claim was filed. The administrative law judge (ALJ) determined that the employee still had time to prosecute her claim because the version of the statute effective at the time of the employee's injury controlled, and denied the district's motion. After the Kansas Workers' Compensation Board affirmed the ALJ's ruling, the district appealed to the Court of Appeals of Kansas. The court noted that a statutory change applies retroactively when it would not prejudice substantive or vested rights, and when either the statute's language indicates legislative intent that it operate retroactively or the change is procedural or remedial in nature. The court reasoned that because the amendment merely shortened the time period for prosecuting a claim, it was procedural in nature and did not prejudice the employee's substantive or vested rights. The court therefore held that the 2011 amendment applied retroactively, and directed that the employee's claim be dismissed for lack of prosecution. – *Stephen Worthington*

Discrimination

Rizo v. Yovino, 854 F.3d 1161 (9th Cir. 2016). A math consultant in Fresno County public schools discovered that her male counterparts were paid more for the same work. She sued under the Equal Pay Act, Title VII of the Civil Rights Act, and state law. In its motion for summary judgment, the county conceded that she was paid less, but argued that the difference was based on a factor other than sex, which is an affirmative defense. However, that other factor was a pay structure based entirely on prior salaries. The district court held that when a pay structure produces different salaries for males and females, then the pay differential is not based on any other factor than sex. Thus, the district court granted the county's motion for summary judgment. The appeals court noted that this case is guided by *Kouba v. Allstate Insurance Co.*, 691 F.2d 873 (9th Cir. 1982), in which the court acknowledged that prior salary can be a factor other than sex, if the employer can show the prior salary effectuates some business policy, and the employer uses salary reasonably in light of its stated purpose. The appeals court vacated the award of summary judgment and directed the lower court to reconsider whether the stated business reason for the use of prior salary was a factor other than sex. – *Dave Dagley*

Dismissal, Nonrenewal & RIF

Sato v. Orange Co. Dep't of Educ., 861 F.3d 923 (9th Cir. 2017). A classified employee of a county department of education (DOE), who was fired during his probationary period, filed suit under state law and Section 1983 predicated on a failure to provide due process in his termination. The DOE moved to dismiss on the grounds that the DOE is an arm of the state protected from suit by the Eleventh Amendment. The employee argued that the DOE's status had changed after the passage of a 2013 bill to restructure public education financing and governance, so that it no longer enjoyed immunity. The federal district court held that the legislation had not undermined the DOE's immunity, and entered final judgment in favor of the DOE. The appellate court examined Eleventh Amendment immunity based on three factors: fiscal impact on the state treasury; whether the governmental entity performs central government functions; and whether the governmental entity can sue and be sued in its own name. An analysis of the fiscal aspects of the 2013 bill left the court to observe that, after the 2013 bill, funds between the state and local government are still hopelessly intertwined. Regarding the second factor, the requirement for local entities to make three-year plans does not change the fact that public education is a statewide or central governmental function. Finally, local school districts and DOEs may sue and be sued, but the court continued its view that this factor weighs less than the other two. The motion to dismiss was affirmed. – *Dave Dagley*

Berrett v. Clark Co. Sch. Dist. No. 161, 682 Fed. App'x 623 (9th Cir. 2017). A husband and wife were employees of an Idaho school district. He and the school district agreed to limit his hours as a part-time maintenance supervisor, so he would not lose his disability payments. He asked for additional help, and the school district hired his wife to mow lawns to give him more time to complete his duties. She was already employed as the lunchroom supervisor, and it was documented that she also had a disability. In 2012, there was a propane leak in the old gymnasium. About five months later, the husband posted a derogatory comment about the superintendent, who confronted him about the posts and directed him to remove them. Subsequently, both the husband and wife were terminated from their positions and were evicted from a school-provided house. The couple sued, alleging violations of the state whistleblower's act, the Fair Housing Act, and the ADA. The husband argued that he was terminated in retaliation for speaking about the propane leak in the gymnasium, not because of the Facebook posts. The district court granted summary judgment for the school district. However, the appeals court held that the district court erred in granting summary judgment on the husband's whistleblower claim, because he established a prima facie case of retaliation for his speech. That court upheld the other grounds for summary judgment and remanded the case. – *Dave Dagley*

Sweetwater Cnty. Sch. Dist. No. One v. Goetz, 399 P.3d 1231 (Wyo. 2017). A school district custodian was suspected of attempting to steal a student's backpack, which contained a tablet computer. Four supervisors and administrators discussed the matter with the employee over the course of three separate meetings. When the district decided to terminate the employee, it met with her a fourth time to present the letter of termination. After the school board upheld her termination, the employee filed a petition for review in Wyoming state court. The state district court determined that the school district failed to adequately notify the employee of the allegations against her or that her employment was in jeopardy prior to terminating her, and directed that she be reinstated. The school district then appealed to the Supreme Court of Wyoming. The state supreme court held that the employee received adequate notice of the claimed wrongdoing, the evidence supporting it, and the possibility of termination over the course of the first

three meetings. The court further held that any procedural shortcomings were harmless because the employee admitted that she'd presented everything she had to present before the fourth meeting. The state supreme court reversed the district court's decision accordingly. – *Stephen Worthington*

Tort Liability

Cartagena v. Access Staffing, LLC, 57 N.Y.S.3d 143 (N.Y. App. Div. 2017). The plaintiff allegedly was injured when she slipped and fell on a wet floor in the school where she was employed, which an employee had recently mopped. The defendant moved for summary judgment, which was denied. The appellate court held that the plaintiff's affidavit provided a fact issue as to whether a special relationship existed between the school and the employee who had mopped the floor. The affidavit stated, in part, that no one from the school directed or supervised the employee, nor did the school provide him with a uniform or equipment. The defendant's motion for summary judgment was properly denied. – *Maureen Fox*

Kranick v. Niskayuna Cent. Sch. Dist., 56 N.Y.S.3d 636 (N.Y. App. Div. 2017). A plaintiff allegedly was injured July 24, 2015 when, while exiting a bus at the defendant's bus parking garage, he stepped into a depression in the parking lot and injured his knee. While he reported the event to his supervisor three days later, the full extent of his injury was not determined until January 2016, at which point he filed a notice of claim. In March 2016, the plaintiff started this procedure for leave to file a late notice of claim. The trial court denied his application, finding that while the plaintiff provided a reasonable excuse for the delay, he was not able to show a lack of prejudice to the defendant due to the late notice. The plaintiff appealed. The appellate court reversed, holding that the record did not demonstrate the defendant would be substantially prejudiced by filing of late notice of claim. – *Maureen Fox*

Grajko v. City of N.Y., 57 N.Y.S.3d 11 (N.Y. App. Div. 2017). While working on school property as a bricklayer in July 2015, the plaintiff allegedly tripped and fell due to an uneven floor on a scaffold while lifting 60-70 pound buckets. He filed a workers' compensation claim that month, but did not motion for leave to serve a late notice of claim against the city until July 2016. The motion was granted, and the city appealed. The appellate court reversed, denied the motion, and dismissed the petition, finding that the plaintiff's alleged failure to realize the extent of his injuries within ninety days of his accident was not a reasonable excuse for the delay, especially since he filed a workers' compensation claim just weeks after the accident. The plaintiff also failed to show that defendants had actual knowledge of the facts within the statutory period. – *Maureen Fox*

Pupils

Discipline

J.S. v. Grand Island Pub. Sch., 899 N.W.2d 893 (Neb. 2017). A middle school student was suspended for fifteen days by her principal for her posts on social media that caused a substantial disruption at school. The student appealed her suspension to the superintendent and the school board, but both upheld the suspension. Thereafter, the plaintiff appealed her suspension to a state trial court under provisions found in the state's Student Discipline Act (Act). The state trial court upheld the suspension, and the plaintiff once again appealed. The Nebraska Supreme Court also dismissed the appeal, but on the basis that it lacked subject matter jurisdiction because the plaintiff had failed to follow the requirements of the Act. "By failing to serve the summons and a copy of the petition upon the Board, she [plaintiff] failed to timely petition for review." 899 N.W.2d at 899. Accordingly, the court concluded that the state trial court had also lacked subject matter jurisdiction and, therefore, the plaintiff's appeal of her suspension was dismissed. – *Rick Geisel*

Discrimination

Davis v. Folsom Cordova Unif. Sch. Dist., 674 Fed. App'x 699 (9th Cir. 2017). A parent sued the school district and eleven of its employees for civil rights violations under Title IX and Section 1983, regarding incidents involving his older daughter. The district court dismissed the parent's complaints for failure to state a claim. The parent alleged that a school district policy that held cheerleaders to a higher academic standard than football players violated Title IX, and that the school district and individual defendants retaliated against him by limiting his older daughter's practice time and cheer camp position on the cheerleading squad, thereby causing him emotional distress. The appeals court affirmed the dismissal of all claims against the school district and the individual defendants in their official capacities on Eleventh Amendment grounds. The parent failed to state a claim of a specific constitutional violation against the defendants in their individual capacities. Finally, the parent failed to identify a liberty or property interest to support a due process claim. – *Dave Dagley*

Davis v. Folsom Cordova Unif. Sch. Dist., 674 Fed. App'x 715 (9th Cir. 2017). A parent sued the school district and three of its employees following incidents related to his youngest daughter, alleging violation of various civil rights under Section 1983, including his First Amendment rights, and seeking damages under Title IX for emotional distress arising from the school's retaliation against him. The district court dismissed all claims, and the appeals court affirmed. The Section 1983 claims against the school district and employees in their official capacities failed due to Eleventh Amendment immunity. The parent failed to state a claim against defendants in their individual capacity, failed to state an equal protection claim, and failed to state a retaliation claim under Title IX. The parent's alleged injuries did not support a speech retaliation claim, because they were not adverse actions sufficient to support the claim. – *Dave Dagley*

First Amendment Rights

Brinsdon v. McAllen Indep. Sch. Dist., 863 F.3d 338 (5th Cir. 2016). Brinsdon was a high school sophomore when her Spanish class was assigned to memorize and recite the Mexican Pledge of Allegiance in Spanish. She complained to the teacher and principal, and received an alternative assignment. Brinsdon

then secretly recorded her classmates reciting the pledge and her father submitted the footage to a national news website. Following media attention and numerous outside threats to the Spanish teacher, Brinsdon was removed from class and completed the course through independent study. She filed suit, claiming violation of her First Amendment rights for the assignment to recite the pledge, and retaliation and disparate treatment based on her removal from class. The court denied all claims. The Spanish teacher and principal were granted qualified immunity, and Brinsdon failed to establish municipal policy on the part of the district. The Fifth Circuit Court of Appeals affirmed. – *Catherine Robert*

Fourteenth Amendment Rights

McKenzie v. Talladega City Bd. of Educ., 242 F. Supp. 3d 1244 (N.D. Ala. 2017). C.M., an elementary school student who suffers from numerous physical and cognitive disabilities and has difficulty walking, was injured during a bus evacuation drill. While the facts are disputed, the plaintiffs allege that during the drill, the bus driver guided C.M. to the back of the bus and then encouraged her to jump through the rear exit down to the ground where C.M.'s teacher stood, observing the drill and intending to help her to the ground. C.M. slipped and fell backward into the bus, injuring her right arm. Her mother filed suit against the board of education, C.M.'s teachers, and the bus driver who conducted the drill, asserting claims under Section 1983 for violations of C.M.'s substantive due process and equal protection rights. Following discovery, the defendants moved for summary judgment. The primary issue considered by the court was whether or not the defendants' conduct met the relevant substantive due process standard set by the U.S. Supreme Court. Under that standard, "conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience shocking in a constitutional sense." 242 F. Supp. 3d at 1256. The court held that although the defendant teacher and bus driver may have exercised poor judgment, their conduct fell well short of being arbitrary or conscience-shocking. – *Phillip Buckley*

Students with Disabilities

R.B v. New York City Dep't of Educ., 689 Fed. App'x 48 (2d Cir. 2017). The plaintiffs sought tuition reimbursement for the unilateral private placement of their son, asserting that procedural violations in developing the IEPs for two school years resulted in substantive inadequacy. Specifically, on appeal, they alleged that the district had failed to obtain an in-person assessment of the student's vocational and transition needs. The court concluded that there was no need for an in-person assessment where the district relied on a privately obtained assessment submitted by the parents, and itself conducted vocational interviews of the parents and the private school teachers; further, the parents had declined to allow the student to attend a scheduled meeting to discuss postsecondary goals and transition services to which the district invited him. Even assuming that the failure to conduct its own in-person assessment was a procedural violation by the district, the parents had failed to articulate how that failure impeded his right to a FAPE, or constituted either a deprivation of educational benefits or a significant impediment to the parents' opportunity to participate in decision making. – *Kathryn McCary*

J.C. v. Katonah-Lewisboro Cent. Sch. Dist., 690 Fed. App'x 53 (2d Cir. 2017). The plaintiffs, disagreeing with the school district's placement of their son with multiple disabilities in a 12:1:2 classroom, unilaterally enrolled him in a private placement that offered the 8:1:1 classroom recommended by two pediatric neuropsychologists who had evaluated him, and sought tuition reimbursement from the district. The impartial hearing officer (IHO) concluded that the school's placement was not appropriate and that the parents were entitled to tuition reimbursement. The state review officer (SRO) agreed with the school district that the placement it offered was appropriate, since the student-to-adult ratio of 4 to 1 was the same as that recommended, and he believed the distraction issues identified by the evaluators could be mitigated sufficiently to make the larger class size work. The district court reversed, deferring to the judgment of the IHO rather than the SRO, and the circuit court affirmed. Ordinarily courts in the second circuit defer to the judgment of the highest-level state education official to rule in a matter, in this case the SRO. However, the SRO failed to recognize, in finding that the student-to-adult ratios were the same, both that there is a distinction between teachers and teaching aides or assistants, and that the number of students in the classroom had been a significant issue identified by the evaluators; moreover, the evidence he relied on with respect to mitigation was unconvincing. As a result, his conclusion was entitled only to reduced deference, and that of the next-highest-level education official to rule—the IHO—prevailed. As the IHO had further concluded that the private placement was appropriate and that the equities favored reimbursement, issues not reached by the SRO, the court upheld the award of tuition reimbursement. – *Kathryn McCary*

Emma v. Eastin, 673 Fed. App'x 637 (9th Cir. 2016). Students with disabilities sued the school district under IDEA and ADA, and also sued the state superintendent, the state department of education, and individual state board members, alleging failure to monitor the school district adequately, failure to investigate complaints, and failure to enforce its own directives. The parties entered into a consent decree. The district court denied the state department's motion to set aside the court monitor's report and set aside the monitor's draft corrective action plan. The district court also denied the state department's request to stay implementation of the final corrective action plan. The appeals court affirmed the district court's orders, noting that the dispute arises under the consent decree, rather than particular provisions of IDEA. The district court retained jurisdiction and did not exceed its subject matter jurisdiction or the scope of the consent decree in its orders. – *Dave Dagley*

M.C. v. Antelope Valley Union High Sch. Dist., 858 F.3d 1189 (9th Cir. 2017). This case report was amended three days after it was first released, but was not released for publication for several months. The amended version softens language from the original, which boldly states that an IEP *is* a contract, to say that the IEP is *like* a contract. As reported earlier, the mother of a blind student filed a due process complaint, alleging procedural

and substantive violations of the IDEA. The mother claimed that the school had failed to adequately document the services to be provided by a teacher of the visually impaired (TVI) and failed to specify the assistive technology (AT) devices that were to be provided to the student. The school had recognized that it had made a mistake in recording the requisite minutes of TVI services that were to be given, and unilaterally revised a copy of the IEP without holding another IEP meeting or notifying the mother of the changes. California law requires the IEP to specify the AT devices, and the school failed to specify what devices were provided. The school failed to ever respond to the parent's due process complaint, even though IDEA requires a response within ten days. The appeals court held that the school's failure to respond may not have denied FAPE, but it is still violated IDEA and due process. The appeals court recognized the mother as the prevailing party, reversed the district court's highly deferential affirmation of the administrative law judge's findings, and remanded to the district court for proceedings consistent with its decisions. – *Dave Dagley*

Pedraza v. Alameda Unif. Sch. Dist., 676 Fed. App'x 704 (9th Cir. 2017). A mother, acting *pro se* on behalf of her son with a disability, appealed the district court's dismissal of their IDEA claims and dismissal of their breach of contract claims, as well as the district court's grant of summary judgment in favor of the school district and state department of education. The appellate court held that the district court did not err in dismissing Section 1983 claims predicated on IDEA and Section 504, and the court did not abuse its discretion in consolidating two related cases. Further, the court did not err in granting the school district's motion for judgment on the pleadings, because the plaintiffs were approximately two months late in filing an appeal. It was proper for the court to dismiss the state department of education, because IDEA does not provide a private right of action, and IDEA does not provide authority for the department to enforce a settlement agreement. With no genuine issue of material fact, the district court was correct in granting the school district's motion for summary judgment. – *Dave Dagley*

S.H. v. Tustin Unif. Sch. Dist., 682 Fed. App'x 559 (9th Cir. 2017). A student with a disability diagnosed as Dravet syndrome received services in a program operated by the county department of education (DOE). The parents refused to provide consent to the school district's proposed placement. Both sides sought a due process hearing, and the hearing officer decided that the school district placement would provide the student with FAPE. The district court granted summary judgment in favor of the school district. On appeal, the court affirmed the grant of summary judgment and noted that the parents were provided adequate, if not extraordinary, opportunities to participate in the placement decision. At least one of the parents attended and participated in every IEP meeting. Even though the district did not provide a prior written notice, that error was considered harmless, because the parents were already on notice about the placement decision, and there existed sufficient documentation from the many IEP meetings and due process hearing about any possible factual disputes about what placements and additional assistance were offered. – *Dave Dagley*

Dep't of Educ. of Hawaii v. Leo W., 226 F. Supp. 3d 1081 (D. Haw. 2016). A parent filed a due process complaint when her child, a kindergarten student, was denied extended-year services (ESY) and did not receive a new behavioral evaluation upon request. The hearing officer concluded that the district violated the child-find provisions of IDEA and awarded private school tuition reimbursement to the parent. On appeal, the district demonstrated that the parent's request for a behavioral evaluation, based on continuing behavioral issues at home, was considered, and the child's success in the regular educational environment was evidence that there were no behavioral concerns in the school. While the district's failure to conduct the new evaluation following the parent's request was a procedural violation, the court found it was not a violation of its child-find obligations, and did not constitute a denial of FAPE. Accordingly, the court reversed the hearing officer's decision to award reimbursement of private school tuition. The court further upheld the hearing officer's findings that the district was justified in its decision to exclude ESY services from the IEP, and that their assignment of 300 minutes per week of services was sufficient to meet the child's needs. – *Catherine Robert*

J.E. v. New York City Dep't of Educ., 229 F. Supp. 3d 223 (S.D.N.Y. 2017). Following a series of hearings regarding the education of J.E., a child with a disability, an independent hearing officer (IHO) found the city department of education failed to provide J.E. with a free and appropriate public education (FAPE) for the 2012-2013 school year, and the parents had acted appropriately by enrolling their child in a private school. The IHO ordered the department to provide appropriate equitable relief. A state review officer reversed the hearing officer's decision that J.E. had been denied a FAPE, and remanded the matter to the hearing officer to address numerous other issues. On remand, the hearing officer determined that the department had provided J.E. with a FAPE, and denied relief. – *Brett Geier*

Cofino-Hernandez v. Commonwealth, 230 F. Supp. 3d 69 (D.P.R. 2017). A parent was the prevailing party in a special education due process complaint that awarded her reimbursement of her child's private school tuition fees. The district did not comply with the administrative law judge's order for tuition reimbursement, so the mother filed this complaint seeking reimbursement for both the tuition and attorney fees for the original work and this extended action. The court found the proposed rates of $100 per hour as reasonable for the community; and that the billed hours, 35 for the original administrative complaint and 17.4 for the district court action, demonstrated an adequate and efficient use of their time. As such, the district was ordered to pay $5240 in attorney fees. – *Catherine Robert*

Tort Liability

Swank v. Valley Christian Sch., 398 P.3d 1108 (Wash. 2017). A high school junior suffered a head injury while playing football for his private school in Washington state. After the student was cleared for further play by his physician in Idaho, he played in the next game. As the student's performance declined over the course of the game, his coach (a volunteer) admonished the student and at one point shook the student

by his face mask. The student incurred another head injury later in the game and, as a result, died. When the student's parents sued the school, coach, and physician in Washington state court, the trial court granted summary judgment for the defendants on all counts. The intermediate appellate court remanded the general negligence claim against the school, but affirmed on all other counts. The parents then appealed to the Supreme Court of Washington, which reversed in part and affirmed in part. First, the state supreme court held that the Lystedt law, a Washington statute requiring schools to follow certain procedures to protect student athletes with concussions or head injuries, contained an implied cause of action. Second, the court held that the claims against the coach could proceed despite Washington's volunteer immunity statute because the parents presented sufficient evidence that the coach had been grossly negligent or reckless and the statute only protects simple negligence. Third, the court affirmed that the trial court lacked personal jurisdiction over the physician because the challenged medical care took place out of state. The state supreme court remanded for further proceedings consistent with its opinion. – *Stephen Worthington*

Hendrickson v. Moses Lake Sch. Dist., 398 P.3d 1199 (Wash Ct. App. 2017). A freshman in a high school shop class severed her thumb when she attempted to dislodge a board from an active table saw. She sued her school district for negligence in Washington state court, arguing that the district had breached three different duties of care. The jury found that although the school district was negligent, the student's injury was proximately caused by her contributory negligence. On appeal, the student argued that (1) the trial court erred by failing to instruct the jury that school districts have a heightened standard of care to protect students from foreseeable harm; and (2) the school district's heightened standard of care prohibited it from asserting contributory negligence. The intermediate appellate court agreed with the plaintiff's first argument, but rejected the second. First, the appellate court held that the trial court's failure to instruct the jury about the district's heightened standard of care was reversible error. The court reasoned that if the jury were given proper instructions, it may have found additional breach of the district's duties and that such breach proximately caused the student's injury. Second, the appellate court held that the district could assert contributory negligence because no exceptions to that rule applied, and the court could discern no reason to create one. The appellate court remanded the case for a new trial, directing the trial court to instruct the jury as to both the district's heightened standard of care and contributory negligence. A dissenting judge posited that the improper instructions were harmless error because the jury heard and rejected each of the plaintiff's theories of liability anyway. – *Stephen Worthington*

School Boards

Elections

Keim v. Douglas Cnty. Sch. Dist., 399 P.3d 722 (Colo. Ct. App. 2015). The district commissioned the American Enterprise Institute (AEI) to author and publicize a report favorably describing the school reform efforts of the district and its school board. When the district disseminated a link to the report in its e-newsletter less than two months before a school board election, a school board candidate filed a campaign finance complaint with the Colorado Secretary of State. The complainant alleged that the district had used public resources to support certain incumbent board candidates in violation of a state statute. After the administrative law judge (ALJ) ruled in favor of the complainant, the district appealed to the Court of Appeals of Colorado. The court observed that the statute prohibits the district from giving anything of value to a candidate, directly or indirectly, for the purpose of promoting the candidate's election. The court held that the district did not violate the statute because mass distribution of the report was not equivalent to giving the report to a candidate or their agent, even indirectly. Accordingly, the court reversed the ALJ's ruling. A dissenting judge posited that dissemination of the report violated the statute because it was an indirect contribution to the election of certain incumbents. The dissenting judge also posited that the district further violated the statute by paying AEI to promote those incumbents. The Court of Appeals' ruling was later affirmed by the Supreme Court of Colorado. 397 P.3d 377 (Colo. 2017). – *Stephen Worthington*

Open Meetings Law

State ex rel. Krueger v. Appleton Area Sch. Dist. Bd. of Educ., 898 N.W.2d 35 (Wis. 2017). A parent of a public school student brought an action against their school board and the defendant's curriculum materials review committee for allegedly violating the state's open meetings law. The plaintiff argued that the committee violated the open meetings law by holding meetings that were not open to the public. The state trial court granted summary judgment in favor of the defendant, and the plaintiff appealed. The Wisconsin Court of Appeals subsequently affirmed that judgment, and the plaintiff once again appealed. The main issue on appeal to the state supreme court was whether the curriculum review committee "was a governmental body subject to Wisconsin's open meetings law." 898 N.W.2d at 38. The Wisconsin Supreme Court concluded that it was. It held as a matter of law that "[w]here a governmental entity adopts a rule authorizing the formation of committees and conferring on them the power to take collective action, such committees are 'created by ... rule'…and the open meetings law applies to them." *Id.* Concluding that this is exactly what the defendant did in forming the curriculum materials review committee, the decision of the Court of Appeals was reversed, and the case was remanded back to the state trial court for further proceedings. – *Rick Geisel*

School Districts

Constitutional Rights

Michigan Gun Owners, Inc. v. Ann Arbor Pub. Schs., 897 N.W.2d 768 (Mich. Ct. App. 2016). A gun owners association and the holder of a concealed pistol license filed a lawsuit challenging a school district's policy that banned the possession of firearms in schools and at school-sponsored activities. The plaintiffs argued that a state law barring weapons in schools but providing certain concealed carry excep-

tions to the general prohibition preempted or superseded the defendant's policy. The state trial court granted the defendant's motion for summary judgment, and the plaintiffs appealed. The issue on appeal before the Michigan Court of Appeals was very straightforward: Does state law preempt the defendant's policy that bans the possession of all firearms in schools and at school-sponsored events? The court held that state law did not preempt the defendant's policy. Furthermore, it found no inconsistency between the defendant's policy and the exceptions laid out in the state law at issue. Accordingly, the state trial court's grant of summary disposition for the defendant was affirmed. – *Rick Geisel*

Michigan Open Carry Inc. v. Clio Area Sch. Dist., 897 N.W.2d 748 (Mich. Ct. App. 2016). A parent and a gun rights association (plaintiffs) filed a lawsuit against the Clio Area School District and various district officials (defendants) seeking a declaratory judgment that the defendants' "policy banning possession of firearms on school property and at school-sponsored events, even if the individual held a concealed weapons permit, was preempted by state law." *Id.* The plaintiffs argued that an individual with a concealed weapons permit should be able to open carry in schools under current state law, and therefore the defendants' policy was preempted by state law. One of the plaintiffs, a parent in the district, attempted several times to do just that prior to the defendants passing a policy to forbid any kind of firearms possession on school grounds or at school-sponsored activities. The state trial court granted summary disposition to the plaintiffs, and the defendants appealed. The Michigan Court of Appeals reversed the decision of the state trial court and held that state law did not expressly preempt the defendants' weapons policy. The court's rationale for its ruling was that the state legislature never expressly reserved to itself the exclusive ability to regulate weapons in schools; therefore, the defendants' policy in no way usurped the authority of the legislature. – *Rick Geisel*

Sunshine Laws & FOIA

Kirsch v. Bd. of Educ. of Williamsville Cent. Sch. Dist., 57 N.Y.S.3d 870 (N.Y. App. Div. 2017). Kirsch initiated this proceeding seeking to compel the defendant to supply certain email records of the superintendent pursuant to the Freedom of Information Law. Defendants contended that Kirsch lacked standing because her request was made by her attorney. The court rejected that argument, since the administrative appeal letter stated that the attorney was making the request on her behalf. The requested emails were reasonably described to enable the district to identify and produce them; therefore, the defendant's allegation that the request would require review of thousands of records was unwarranted. – *Maureen Fox*

Taxation/Funding

Douglas v. Stillwater Area Pub. Sch., Indep. Sch. Dist. 834, 899 N.W.2d 546 (Minn. Ct. App. 2017). A taxpayer sought to compel her school district to hold a new bond referendum to obtain voter approval before it proceeded with changes to its use of previously approved bond proceeds. The respondent reallocated bond proceeds it intended to use at three of its elementary schools and instead directed those funds toward a project in one of its other schools that entailed heating, ventilation, and air conditioning (HVAC) work. The petitioner argued that the changes required a new bond approval. The respondent maintained that their use of bond proceeds was consistent with the purposes stated in the ballot language and, therefore, they had discretion to reallocate those proceeds to a more pressing need. The state trial court dismissed the petition, and the petitioner appealed. The main issue on appeal was one of what exactly defines the scope of how a school district can use approved bond funds. The petitioner argued that the ballot language, as well as the school board's resolution, defined the scope. The respondent argued that the ballot language alone defines the scope of how bond proceeds can be used. The Minnesota Court of Appeals found as a matter of law that it is the ballot language alone that defines the scope of a bond's purpose. Additionally, the court concluded that the respondent's use of the bond funds to make HVAC upgrades at a different building was within the scope of the ballot language, and thus the respondent did not have to seek another bond referendum. The state trial court's decision to dismiss the petition was affirmed. – *Rick Geisel*

Teacher & Administrator Employment

Contracts, Salary & Benefits

Kawashima v. State, 398 P.3d 728 (Haw. 2017). Two groups of plaintiffs, the Garner plaintiffs and the Kawashima plaintiffs, filed separate class actions against the Hawaii Department of Education in state court. The Kawashima plaintiffs claimed that the department had underpaid them for their work as part-time temporary teachers (PTTs) in violation of a state regulation. The Garner plaintiffs made a similar claim, and also claimed that the department had underpaid them for their work as substitute teachers in violation of a state statute. The Garner plaintiffs were awarded back wages plus interest, while the Kawashima plaintiffs were only awarded back wages. The department appealed both rulings, and the Kawashima plaintiffs cross-appealed for interest on their back wages. The appeals were transferred to the Supreme Court of Hawaii and consolidated. First, the state supreme court held that neither group of plaintiffs was entitled to back wages for their work as PTTs because the regulation at issue lacked the force and effect of law. The regulation lacked the force of law, the court reasoned, because it concerned the department's internal management and did not affect rights or procedures available to the public. Second, the court held that the Garner plaintiffs were not entitled to interest on back wages for their work as substitute teachers because the state had not waived immunity from pre-judgment interest on such claims. In reaching that conclusion, the court rejected the Garner plaintiffs' argument that another statute required the department to pay them within thirty days of service because that statute applied to contractors, not state employees. The state supreme court reversed and remanded accordingly. – *Stephen Worthington*

Stout v. Bd. of Trs. of the Emps. Ret. Sys., 398 P.3d 766 (Haw. 2017). As a full-time high school teacher for the Hawaii

Department of Education, the claimant was a member of the state Employees' Retirement System (ERS) and regularly contributed to ERS through salary deductions. The claimant was also employed by the department as a summer school teacher, but made no contributions to ERS from those earnings. After the claimant was shot in the chest while teaching summer school, she applied for disability retirement benefits with ERS. The ERS Board of Trustees ultimately denied her application because she was injured while acting as a summer school teacher, a position that did not qualify for ERS membership. When the claimant appealed the Board's decision in state court, the court affirmed. The claimant then appealed to the Supreme Court of Hawaii. The state supreme court held that, under the plain language of the relevant state statute, the claimant was eligible for disability retirement benefits because her disability resulted from an accident which occurred while she was actually performing her duties as a state employee. The court also determined, after reviewing the legislative history, that the legislature intended to cover members based on whether they become disabled as a result of their state employment, rather than on the amount of their contributions or length of their service. The court accordingly rejected a dissenting judge's position that claimants should only receive disability retirement benefits if they incurred the disabling injury while acting in an ERS-eligible position. The court vacated the decision of the ERS board, and remanded for further proceedings consistent with its opinion. – *Stephen Worthington*

Discrimination

Malcolm v. Honeoye Falls-Lima Educ. Ass'n, 684 Fed. App'x 87 (2d Cir. 2017). Malcolm, a tenured teacher, resigned in settlement of a disciplinary proceeding. She then sued her local union and the statewide organization with which it was affiliated, asserting that they discriminated against her based on her race in failing to file grievances at her request, or to provide her with representation in the discipline process. The circuit court upheld the magistrate judge's decision to grant the defendants' motions for summary judgment filed after the plaintiff had an opportunity to engage in discovery, and his denial of her request for leave to amend the complaint. Summary judgment was properly granted to the statewide organization because the pro se plaintiff had served process only on the organization's counsel, who was not among the officers authorized to accept service under the Federal Rules of Civil Procedure. Despite Malcolm's claim, the magistrate judge had jurisdiction to grant summary judgment because the parties had signed a consent to the exercise of that jurisdiction. The plaintiff's claims of discrimination by the local union were properly dismissed since she did not show that other teachers whose grievances the union did support were similarly situated to her in all respects. The counseling memo placed in her file explicitly stated that it was not disciplinary in nature, while the memo placed in a comparator's file contained language suggesting that it should be interpreted as a disciplinary letter of reprimand; the letter placed in the other employee's file also mentioned private medical information that arguably should not have been referenced in a personnel file, which hers did not. – *Kathryn McCary*

Eubank v. Lockhart Indep. Sch. Dist., 229 F. Supp. 3d 552 (W.D. Tex. 2017). Eubank was employed by Lockhart Independent School District (LISD) as a school counselor, most recently at Bluebonnet Elementary School. At the beginning of the 2014-2015 school year, Eubank provided LISD with a doctor's note that she suffered from various medical conditions and listed multiple activities that would be needed in order for her to effectively take care of herself. Sotelo, the principal of Bluebonnet Elementary, informed Eubanks that she would honor the doctor's suggestions.

After a parent complained to the school about an unrelated classroom instruction matter, Sotelo met with Eubank memorializing her concerns about the activity. Eubank followed up by stating that her ADA accommodations that had been promised were not yet provided. Sotelo responded by noting that she would gladly accommodate anything Eubank's health requires. Suarez, a district human resources employee, responded to Eubank by noting that the vague references to medical conditions in the physician's note were not sufficient to demonstrate a disability under the ADA, and requested more information. Eubank responded by saying that her medical conditions had not changed since her prior accommodations had been approved. Sotelo stated she would continue to allow and encourage Eubank to take advantage of all accommodations she had previously been allowed, but directed her to submit adequate documentation. Eubank refused, maintaining that her physician's letter should establish her disability.

Eubank filed a number of grievances, alleging discrimination, retaliation, harassment. The assistant superintendent rejected her complaints. Eubank complained that the investigation was not impartial. The board of education voted to terminate Eubank and gave multiple reasons for doing so. Eubank requested a hearing from the Texas Education Agency (TEA). The TEA appointed an independent hearing examiner, who found evidence to substantiate seven of the ten reasons for termination. Eubank filed a charge of discrimination with the Equal Opportunity Employment Commission, which notified her that the investigation failed to substantiate her claim. She then filed suit and the district filed a motion for summary judgment; the district court held for the district. – *Brett Geier*

Dismissal, Nonrenewal & RIF

McGuire v. Indep. Sch. Dist. No. 833, 146 F. Supp. 3d 1041 (D. Minn. 2015). McGuire had been a kindergarten teacher in the Independent School District No. 833 since 1999. The district hired McGuire in the fall of 2012 as the varsity girls' basketball coach at Woodbury High School. In the fall of 2013, a student, Player C, enrolled at Woodbury High School and elected to play basketball that year. Prior to the season, the player's parents requested a meeting with McGuire and the school principal to ask whether their daughter would make the team and how much playing time she would have. McGuire stated that he did not know. After the meeting, the parents requested that McGuire be removed from his coaching position. Subsequently, Player C transferred to another high school, but the parents continued to make complaints.

In January 2014, in response to the parents' complaints, the principal contacted some of the players about how McGuire

conducted practices and treated players. Pending the completion of the investigation, she placed McGuire on non-disciplinary leave, during which time he was unable to coach the team. McGuire contended that he had never been informed of why he had been placed on leave, what the allegations were, and what evidence supported those allegations. He remained on leave for the remainder of the season, and his coaching contract was subsequently nonrenewed. The decision to nonrenew was based on the results of the investigation and not solely on the parent complaints.

McGuire requested a hearing before the school board. The board of education declined to reverse his nonrenewal. McGuire commenced action on the nonrenewal of his coaching contract, alleging a deprivation of procedural due process in violation of the Fourteenth Amendment, while the defendant school district moved for summary judgment. McGuire argued that because he had a property interest in the renewal of his season-long coaching contract, he was entitled to certain constitutional due process protections when his contract was nonrenewed. The district court rejected the claim, as McGuire did not show that he had a legitimate claim to a life, liberty, or property interest. – *Brett Geier*

Higher Education

Athletics

NCAA Regulations

Hardie v. NCAA, 861 F.3d 875 (9th Cir. 2017). An African American women's high school basketball coach was convicted of possession of a controlled substance with intent to distribute. He was excluded from participation in NCAA-certified youth athletic tournaments, because the NCAA's policy excluded anyone with a felony conviction. The coach brought a claim against the NCAA, arguing that the NCAA's policy violated Title II of the Civil Rights Act of 1964. The district granted summary judgment to the NCAA on the coach's claim. The appellate court did not decide whether Title II can support disparate impact claims, but assuming for the sake of argument that it does, the coach was unsuccessful in creating a genuine issue of material fact that a proposed policy that excluded violent felons, but not nonviolent felons, would be as effective at achieving the NCAA's goals as the challenged policy. A concurring opinion observed that even if Title II authorized disparate impact liability, the business-necessity defense would preclude the coach's claim. – *Dave Dagley*

Board of Trustees

Constitutional Rights

Hughes v. Kisela, 862 F.3d 775 (9th Cir. 2017). Three university police officers responded to a report of a person hacking at a tree with a knife. Upon arrival at the scene, the police officer saw a woman with a kitchen knife. When she started walking toward another woman, the police yelled for her to drop the knife. She did not comply. Because of a chain link fence, the officers could not further approach the woman. A police corporal shot the woman four times. The woman brought suit under Section 1983, alleging excessive force in violation of her constitutional rights. The district court granted summary judgment for the defendants, observing that the corporal's actions were reasonable and that he was entitled to qualified immunity. The appellate court held that the facts, when viewed in the light most favorable to the victim, did not support the district court's decision. Consequently, the court reversed and remanded for further proceedings. – *Dave Dagley*

Financial Affairs

University of Washington v City of Seattle, 399 P.3d 519 (Wash., 2017). The University of Washington wanted to demolish a building on its campus in Seattle, but the building had been nominated for potential landmark designation under Seattle's municipal code. The plaintiff university filed a declaratory judgment action asking for judicial determination that the municipal ordinance could not apply to the plaintiff's buildings as a matter of law. The position of the university was that the city's landmark ordinance was a local ordinance, which was inapplicable to university property because it conflicted with the Board of Regents' exclusive authority over the buildings on campus. The lower court had found for the plaintiff. On appeal, the court found that the statutory wording provided that the regents' control over university property was subject to limitation by other applicable statutes. As a state agency, the plaintiff is subject to those limitations. Furthermore, the court determined that the university's property located within Seattle is subject to the municipal regulations absent a specific, directly conflicting statute. As such, the judgment of the lower court was reversed. – *Elizabeth Lugg*

Tort Liability

Humphrey v. Oregon Health & Sciences Univ., 398 P.3d 360 (Or.App. 2017). The plaintiff, Humphrey, appealed a judgment dismissing her medical malpractice claim as "untimely and for failure to comply with the notice requirements" of the Oregon Tort Claims Act (OTCA). Humphrey argued she sufficiently pleaded that defendants made a payment which suspended the statute of limitations and satisfied the OTCA notice. She also argued that the complaints she made to the defendants satisfied the "actual notice requirement" under the same Oregon statute. The defendants, Oregon Health & Sciences University, argued that because the payment received was free or discounted, the "advanced payment" provision was not met. Here, the court agreed with the plaintiff and determined that she satisfied the OTCA notice requirement. Accordingly, the court concluded that Humphrey properly alleged the limitations period was tolled since the defendants made an "advanced payment" under the statute's requirements. The court found "advanced payment" can be construed to mean free or discounted services required for purposes of the tolling provision. As such, the University hospital's alleged provision of free medical services to the patient, after complaints about patient's dental surgery, could toll limitations. – *Vanessa Miller*

Wesly v. Nat. Hemophilia Foundation, 77 N.E.3d 746 (Ill. App. 3 Dist. 2017). On September 20, 2014, the National Hemophilia Foundation presented the plaintiff, Wesly, with the 2014 Physician of the Year award at a ceremony. After receiving this award, the complaint alleged that the defendants communicated false and defamatory statements to the NHF regarding the plaintiff's qualifications to receive the award. The following year, on September 18, the plaintiff filed a defamation action against numerous defendants, including Georgetown University, on the grounds that one of the physicians accused of defamation was employed by Georgetown University and was, therefore, an agent of the university. On December 8, the defendant Georgetown University filed a motion to dismiss for lack of personal jurisdiction by the Illinois courts. The trial court denied the motion to dismiss. On appeal, the court found that the Illinois long-arm statute—which governs the exercise of personal jurisdiction by an Illinois court over a nonresident defendant such as Georgetown—did not apply. Because Georgetown University was not doing business in the state of Illinois, there were no grounds to exert general jurisdiction. Specific jurisdiction did not exist because no tortious act occurred within the state of Illinois; the physician accused of making defamatory statements did not do so on Georgetown's behalf and was not acting as an agent. The lower court's judgment was reversed. – *Elizabeth Lugg*

Nonacademic Personnel Employment

Contracts, Salary & Benefits

U.S. ex rel. Hoggett v. Univ. of Phoenix, 863 F.3d 1105 (9th Cir. 2017). Enrollment counselors (relators) at a private university brought a qui tam action under the False Claims Act, alleging that the university continued to submit false certifications that it was complying with a recruiter incentive compensation ban, during a settlement period in an earlier qui tam action. The federal district court dismissed the action for lack of subject matter jurisdiction. On appeal, the relators' post-judgment motion was styled as a motion to alter the judgment, or to amend the judgment. However, the court held that it was in its substance a motion to stay entry of judgment. Consequently, the appeal was untimely, and was dismissed. – *Dave Dagley*

Professor & Administrator Employment

Discrimination

Wilkins v. Bd. of Regents of Harris-Stowe State Univ., 519 S.W.3d 526 (Mo.App. E.D. 2017). Wilkins, a Caucasian woman, was hired to teach at Harris-Stowe State University (HSSU) as an adjunct instructor in the Teachers Education Department. HSSU is a historically black college and a majority of the faculty members are African American. Approximately nine years after her hire, HSSU faced budgeting concerns and was prompted to conduct a "reorganization plan." As a result, the Dean of the Teacher Education Department, Dr. Smith, recommended to the Vice President that Wilkins be terminated, which occurred shortly thereafter. However, contrary to HSSU policies, Wilkins was terminated over less-senior African American instructors. Moreover, two instructors, who identified as black, were hired shortly after Wilkins was terminated. Wilkins then brought legal action, believing her termination was a violation of the MHRA. In Count I, she alleged that she was discriminated against by HSSU and the Board when they decided to terminate her contract because of her race. In Count II, Wilkins alleged her contract was terminated in relation to a race-related discrimination claim. During discovery, the trial court found that the Board deleted Dr. Smith's email account, admitting the allegations of attempting to make the department "blacker" by recommending Wilkins' termination. On appeal, the Board contended the awarded punitive damages of $3,500,000 violated its due process rights. In determining whether an award is "grossly excessive" to violate due process rights, the court considers: "(1) the degree of reprehensibility of the conduct at issue; (2) the ratio of actual harm to punitive damages; and (3) the difference between the punitive damage award and the civil penalties authorized or imposed in comparable cases." However, for MHRA cases, the third factor is irrelevant. Here, the court holds that the record supports a jury finding that Wilkins "experienced substantial emotional and psychological damage," in addition to damages to her "reputation in the academic field and her ability to earn income." She was embarrassed throughout her termination process and deprived of "one of the most important touchstones of her life—the ability to shape and guide future educators." Moreover, by acting in opposition to internal policies and deleting Dr. Smith's email account, a fact-finder would be able to infer that the Board acted with intentional malice, trickery, and deceit. Thus, the court held that the awarded punitive damages did not violate the Board's due process following the termination of Wilkins for a race discrimination action. – *Vanessa Miller*

Dismissal, Nonrenewal and RIF

Stennis v. Bowie St. Univ., 236 F. Supp. 3d 903 (D. Md. 2017). Stennis was an assistant professor at the university between 2009 and 2014. During that time, she became aware of student concerns about discriminatory treatment, specifically of women and gay students. She spoke to her supervisor about these concerns, and he advised her to meet with a group of students and report to him what she found. After meeting with students, Stennis constructed a report with student concerns and comments, including direct criticism of the supervisor himself. His reaction was strongly negative, including a series of threatening and derogatory emails sent to Stennis. Stennis met with both the supervisor and dean of her college and with a human resources officer, who declined to act. Subsequently, Stennis' application for tenure was rejected by the Faculty Review Committee, as well as the supervisor and dean. Stennis resigned and filed suit based on constructive dismissal. The university's move for dismissal was granted because Stennis failed to provide evidence that the tenure decision was retaliation for her protected speech. In addition, some of the free speech events were outside the timeline for applicability for Title VII and state claims. – *Barbara Qualls*

First Amendment

Sarkar v. Doe, 897 N.W.2d 207 (Mich. App. 2016). The plaintiff was a distinguished professor with over thirty-five

years of cancer research experience. An offer of employment from the University of Mississippi was rescinded shortly before his contract was to begin based on allegations lodged in a public space, pubpeer.com, by an anonymous individual. The professor's only option was to return to his former university, from which he had resigned. He was allowed to return but in a nontenured position, because the same information had been sent to his prior employer. The plaintiff filed suit with five counts against the defendants, John/Jane Doe, for defamation. In an attempt to uncover the anonymous individual who had posted on pubpeer.com, the plaintiff filed a subpoena for such information. Pubpeer.com responded with a motion to quash the subpoena, and the trial court granted the motion to quash. On appeal, the court found the plaintiff had not shown the likelihood that the anonymous statements would be found to be defamatory, and a summary judgment was granted because the statements repeatedly invited readers to review the plaintiff's research for themselves and reach their own conclusions; therefore, the comments were protected by the First Amendment. – *Elizabeth Lugg*

Tenure & Promotion

***Chu v. Jones*,** 58 N.Y.S.3d 184 (N.Y.A.D. 3 Dept. 2017). The petitioner, Chu, was appointed as an assistant professor of English at the University at Albany in 2007. Chu applied for tenure and promotion to associate professor during the 2012-2013 cycle. Tenure and promotion was denied in May 2014 by the university's president following a multi-step review process. The decision was affirmed by the Chancellor of the State University of New York the following year. In 2015, Chu sought annulment of the determination "on the ground that it was arbitrary and capricious." Here, the court affirmed the university decision. The court believed that the multi-step review process was thorough and complete, with input by multiple institutional actors. The president's determination was based on academic measures; the petitioner's "lack of scholarly productivity" led to her not receiving tenure or promotion. In five years, her scholarly contributions amounted to three journal articles, three book reviews, and five conference presentations. In comparison to other faculty up for tenure and promotion, the president found that the petitioner's contributions were not satisfactory. The court agreed and found that the denial of tenure and promotion had a rational basis. – *Vanessa Miller*

McKeny v. Middleton, 242 F. Supp. 3d 661 (S.D. Ohio 2017). The plaintiff, McKeny, was an assistant professor at Ohio University who had been denied tenure by the university. McKeny alleged that the tenure denial was based on his sexual orientation and sought relief under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. §1983. Defendants moved for summary judgment, arguing that McKeny's claims were time-barred. The issue of whether McKeny's claims were brought within the 300-day statutory limitation period hinged on whether the limitation period commenced at the time of the Dean's denial of tenure, or at some later point after the conclusion of the university's internal appeal processes. The federal district court held that the Dean's denial of tenure was both "non-tentative and self-effectuating," and was therefore the point in time at which the limitation period began. As such, McKeny's claims were brought after the expiration of the limitation period and therefore were time-barred. The court granted summary judgment to the defendants. – *Thomas J. Graca*

Students

Discrimination

Yennard v. Herkimer BOCES, 241 F.Supp.3d 346 (N.D.N.Y. 2017). In this disability discrimination claim, Autumn Yennard, a nursing student at Herkimer Board of Cooperative Educational Services (BOCES), sought relief from the court based on the following claims: (1) discrimination pursuant to Section 504 of the Rehabilitation Act of 1973, and denial of reasonable and necessary accommodations; (2) retaliation under Section 504; (3) retaliation under the Americans with Disabilities Act of 1990; (4) hostile learning environment pursuant to Section 504; (5) hostile learning environment under the ADA; (6) disability discrimination pursuant to the New York State Human Rights Law; (7) defamation (in the forms of both slander and libel); (8) negligence; (9) breach of contract; (10) intentional infliction of emotional distress (IIED); and (11) Title 42 U.S.C. § 1983 constitution violation. Yennard, the plaintiff, suffers from bipolar disorder, with symptoms such as depression, poor concentration, or decision-making challenges. After being accepted into the BOCES Licensed Practical Nurse (LPN), Yennard disclosed her disability and provided documentation, as well as accommodation requests.

The defendant, BOCES, sought judgment on the pleadings pursuant to Rule 12(c) which the court noted was identical to a Rule 12(b)(6) motion for failure to state a claim for purposes of reviewing the motion by the defendant. The court recognized that such relief is available to defendants based on either or both of two grounds: insufficient pleading under Fed. R. Civ. P. 8(a)(2), or a legal cognizability challenge. Yennard filed a motion for leave to amend her complaint, which the court reviewed according to the standard set by Fed. R. Civ. P. 15, permitting the grant of a leave to amend "when justice so requires" (Fed. R. Civ. P. 15(a)(2)). After reviewing the plaintiff's and defendant's claims, the district court determined that the plaintiff satisfied the requirements necessary to state a prima facie claim under either the ADA or the Rehabilitation Act, and she submitted sufficient evidence that BOCES was aware of her disability. Her remaining claims, however, were all dismissed, and she was permitted to amend only her surviving claim. – *Susan C. Bon*

Dismissal

Montany v. Univ. of New England, 858 F.3d 34 (9th Cir. 2017). A master's student in an occupational therapy program at a private university was required as part of a course grade to pass a practical examination where instructors acted as patients and the student was required to manage the patients. In this instance, the instructor allowed his full weight to bear on the student while she was moving him from a wheelchair to a bed. The student's back was injured, but she did not report it to the instructor. She took the exam again, and failed again because her back was hurting. She met with a faculty committee which produced a plan for her to continue her studies,

but did not tell any instructor or the faculty committee about her injury until later. Ultimately released from the program, she sued the university and instructor for negligence, and the university for breach of contract. The federal district court granted summary judgment to the university on both claims, which was affirmed by the appellate court. Testimony from an expert witness was necessary to show that the instructor's action violated the standard of care in such a situation. The student abandoned her breach of contract claim predicated on the student handbook, and neglected to allege that the faculty committee plan was a contract. The appellate court declined to impose upon the university a contractual duty without a decision from Maine's highest court. – *Dave Dagley*

Title IX

***Doe 1 v. Baylor Univ.*,** 240 F.Supp.3d 646 (W.D.Tex. 2017). The plaintiff, Doe 1, filed a motion to compel Baylor University (Baylor), the defendant, to produce materials (Pepper Hamilton Materials) prepared for the university by Pepper Hamilton Law Firm. The law firm Pepper Hamilton, LLP, had been hired by Baylor as an independent and external reviewer of the university's institutional responses to Title IX and related compliance issues, including the review of specific cases. Baylor claimed that the materials sought were privileged work-product materials (Fed. R. Civ. P. 26(b)(5)) and sought to withhold such documents. According to the district court, if Baylor asserts the work-product privilege, they are obligated to explain the documents that were not disclosed in such a manner that enables other parties to assess the claim, but do not need to reveal the allegedly privileged information. In order to balance the desire to protect attorney work product, the court recognized that Baylor could instead provide "an itemized privilege log for attorney work product" including interview recordings, notes, and summaries; notes and summaries based on the review of documentary evidence; and any other documents that summarize or synthesize evidence, such as chronologies or timelines. – *Susan C. Bon*

***Weckhorst v. Kansas State Univ.*,** 241 F.Supp.3d 1154 (D.Kan. 2017). A female student at Kansas State University (KSU), Sara Weckhorst, alleged that KSU failed to adequately respond to her report of a sexual assault at a KSU fraternity. She initiated three claims: violation of Title IX, violation of the Kansas Consumer Protection Act (KCPA), and negligence. The university moved to dismiss for failure to state a claim. Weckhorst filed a motion for leave to amend her complaint, while KSU moved to strike portions of her initially amended complaint. In addition, the United States asserted it had an interest in this case and sought to submit a statement of interest pursuant to § 517, given the shared responsibility of the Justice and Education departments to enforce Title IX in the education context, and ensure private enforcement court with respect to Title IX.

The alleged facts of this case include three separate rapes by two fraternity members after the plaintiff became intoxicated and passed out at a KSU fraternity party being held off-campus. According to Weckhorst's subsequent interactions with KSU when she reported the rapes, the alleged student-assailants were not investigated for possible violation of the KSU Student Code of Conduct as a result of the KSU policy which restricted investigations of off-campus sexual violence, harassment, or discrimination.

In light of KSU's limited control over the fraternity system, the court found that the university-student relationships between KSU, Weckhorst, and her alleged assailants were insufficient to provide the basis for a legal duty or a special relationship. Additionally, because KSU does not have control over the fraternity house as a landlord or owner, the court further ruled that the plaintiff's claim regarding KSU's duty premised on a landlord-tenant relationship could not withstand the KSU motion to dismiss. The court dismissed the motion by the plaintiff, Weckhorst, to amend her second claim under the Kansas Consumer Protection Act (KCPA); however, the court found that her Title IX discrimination claim withstood KSU's motion to dismiss. According to the court, the alleged assailants and the context of the alleged assaults, were reasonably under substantial control by KSU. Further, as a result of KSU's alleged deliberate indifference, the plaintiff was subject to, or at least vulnerable to, further harassment or assaults. – *Susan C. Bon*

Tort Liability

Downes v. Ogelthorpe, 802 S.E.2d 437 (Ga. App. 2017). A 20-year-old college student drowned in the Pacific Ocean while he was in Costa Rica attending a study-abroad program organized by the defendant. His estate brought a wrongful death action alleging negligence and gross negligence. The trial court granted the defendant's motion for summary judgment. The appellate court affirmed, finding that, as a matter of law, the plaintiff had assumed the risk of drowning when he chose to swim in the Pacific Ocean. The dangers of ocean swimming had been discussed and life jackets were available for individuals who did not consider themselves to be strong swimmers. It had not been shown that the defendant was under a statutory or common law duty to provide safety equipment, or that the ocean was analogous to a swimming pool. Because the plaintiff was a competent adult, he would have appreciated the specific risk of drowning posed by entering a body of water so inherently dangerous as the Pacific Ocean. To voluntarily do so established that he had assumed the risk. – *Elizabeth Lugg*

Table of Cases

U.S. Supreme Court Docket

Summary of Court Action Reported from September 10, 2017 through October 9, 2017

Provided by Spencer Weiler and Christine Kiracofe

Cases Decided

No. 16-1533. *E.F. v. Newport Mesa Unif. Sch. Dist.*, No. 15-56452, 2017 WL 1056100 (9th Cir. Mar. 21, 2017). E.F. is a child with autism who suffers from cognitive and communication delays. As a result, he was identified early for special education services and received two years of preschool to help address his learning gaps. After four years and multiple individualized education programs (IEP), E.F.'s parents requested a one-on-one aide for their son. Since E.F. had met most of his prior IEP goals and was making progress on the others, the school district contended there was not a justifiable need for such individualized support. The request was denied. This decision resulted in the parents requesting a due process hearing with an administrative law judge. The hearing took time and the school continued to work with the family to revise E.F.'s IEP. The administrative law judge ruled in favor of the school district. This ruling was appealed to and affirmed by the district court. The Ninth Circuit Court, on appeal, ruled in favor of the school district, concluding that E.F.'s IEPs were, for the most part, reasonably calculated to support his academic needs and provided him with free appropriate public education. On October 2, 2017, the Supreme Court granted E.F.'s petition and vacated the Ninth Circuit decision. The case has been remanded "for further consideration in light of *Endrew F. v. Douglas County School Dist. RE-1*, 580 U.S. ___ (2017)."

Cases Recently Filed

No. 17-460. *Sato v. Orange County Dep't of Educ.*, 861 F.3d 923 (9th Cir. 2017). On September 27, 2017, appellants petitioned the High Court for a writ of certiorari. By way of background, Sato was hired by the Orange County Department of Education in 2014 as systems database architect. However, within a few weeks after being hired, Sato was informed that he would be terminated immediately but was not given any explanation for the termination, either orally or in writing. He argued that this job action was a violation of his contract, which stated that he could only be fired for cause. The Orange County Department of Education contended that Sato was still in his one-year probationary period, so cause was not required. Sato brought an interesting argument into the case. In 2013, the state of California enacted Assembly Bill 97, which was a massive legislative effort designed to streamline public education and provide greater control locally. Sato argued that this law should view the Orange County Department of Education as no longer an arm of the state and, as such, should not be entitled to sovereign immunity. If this argument were accepted, then a previous ruling in this case would have to be vacated. Sato's contentions were rejected by the district court and that ruling was affirmed on appeal.

No. 17-447. *Window Rock Unif. Sch. Dist. v. Reeves*, 861 F.3d 894 (9th Cir. 2017). Petitioners filed for certiorari on September 25, 2017. This case is a class action lawsuit originally filed against two Arizona school districts—Window Rock Unified School District and Pinon Unified School district—by eight former employees, all of whom are Navajo. These employees filed complaints against their terminations in the two school districts with the Navajo Nation Labor Commission. The school districts contended that the Navajo Nation Labor Commission lacked legal jurisdiction over the public school districts, funded by the state of Arizona. The District Court agreed with the school districts and enjoined further tribal proceedings, but the Ninth Circuit Court of Appeals reversed.

No. 17-386. *Salazar v. South San Antonio Indep. Sch. Dist.*, 690 Fed. App'x 853 (5th Cir. 2017). Adrian Salazar was an elementary student in the San Antonio Independent School District when his vice principal, Michael Alcoser, began to molest him. The abuse continued for several years, even after Salazar entered middle school, when Alcoser continued to "tutor" him during sixth and seventh grades. When Salazar was in seventh grade, the abuse was discovered and his parents filed suit against the school district under Title IX. At trial, a jury awarded Salazar $4.5 million in damages. The district court found that the South San Antonio district was liable for the abuse under Title IX, even though the school official who had actual notice of the abuse was the abuser himself. The Fifth Circuit reversed, stating: "The abuse that Salazar suffered is heart-wrenching, and Alcoser's conduct and breach of trust is despicable. But requiring a recipient of Title IX funds to respond in damages when its employee sexually abuses a student and the only employee or representative of the recipient who has actual knowledge of the abuse is the offender does not comport with Title IX's express provisions or implied remedies." 690 Fed. App'x at 864. On September 13, 2017, Salazar filed for a writ of certiorari before the Supreme Court.

No. 17-325. *Antelope Valley Union High Sch. Dist. v. M.C.*, 858 F.3d 1189 (9th Cir. 2017). M.C. is a student with a number of genetic, physical, and cognitive disabilities. After a number of meetings related to her son's individualized education program (IEP), M.C.'s mother, M.N., signed the IEP. However, shortly after its implementation, M.N. contended that the IEP was inadequate and that school district officials had committed procedural and substantive due process violations. Specifically, M.N. argued that she did not have a role in drafting the IEP, that school officials failed to answer her concerns, and school officials did not properly inform M.N. of all of the available services that could benefit M.C. The complaint was first heard in front of an administrative law judge, who ruled in favor of the school district. This ruling was appealed to the district court, which affirmed the administrative law judge's ruling. The second ruling was appealed to the Ninth Circuit Court, which ruled that the evidence was sufficient to suggest that the school district had violated IDEA, reversed the district court ruling, and remanded the case back to the district court.

No. 17-301. *Kenosha Unif. Sch. Dist. No. 1 Bd. of Educ. v. Whitaker*, 858 F.3d 1034 (7th Cir. 2017). Ashton (Ash) Whitaker, a 17-year-old transgender male, sued the Kenosha Unified School District when he was prohibited from using the boys' bathroom. The school district officials denied his request because they felt that his presence would "invade the privacy rights of his [biologically] male classmates." The school district attempted to remedy the disagreement by giving Ash a key to a private, locked restroom. However, this bathroom was not near Ash's classrooms. A medical condition required Ash to drink a large amount of water each day. In order to avoid stigmatizing himself by walking across the school to the private bathroom, Ash avoided drinking the amount of water his physician suggested. As a result, he suffered migraines, dizziness, and an increased risk of fainting. Ash filed suit, arguing that the school district's decisions violated both Title IX and the Equal Protection clause of the Fourteenth Amendment and asked for a preliminary injunction. The district court rejected a motion to dismiss filed by the Kenosha School District and enjoined the school from requiring Ash to use the girls' restroom. The order was affirmed by the Seventh Circuit, which found that Ash would be liable to suffer irreparable harm without the injunction. The court also noted, as a matter of first impression, that Title IX could apply to transgender students on the basis of gender stereotyping and that heightened scrutiny, not the rational basis test, should be applied to the equal protection challenge.

No. 17-178. *American Humanist Ass'n v. Birdville Indep. Sch. Dist.*, 851 F.3d 521 (5th Cir. 2017). The American Humanist Association alleged that the Birdville Independent School District's occasional practice of including religiously themed invocations before school board meetings violated the Establishment Clause of the First Amendment. The invocations at issue had been delivered by elementary or middle school students. The district did not direct the students on what to say,

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but told them to make sure their statements were relevant to school board meetings. In March 2015, the district changed the portion of the meeting set aside for student statements from "invocations" to "student expressions" and also included a disclaimer that student statements were not necessarily representative of the district's views. The American Humanist Association (along with former district student Isaiah Smith) filed a Section 1983 claim. The Fifth Circuit affirmed the lower court's summary judgment for defendants, finding that the prayer was "legislative" rather than school prayer, and that the practice did not violate the Establishment Clause of the First Amendment. On July 31, 2017, petitioners applied for certiorari to the Supreme Court.

Certiorari Denied

No. 16-1389. *Davis v. Folsom Cordova Unif. Sch. Dist.*, 674 Fed. App'x. 699 (9th Cir. 2017). Richard Davis, III, is the parent of a cheerleader in the Folsom Cordova Unified School District. Upon learning that cheerleaders were held to higher academic standards than football players, Davis complained to the school district about their policy. When the school district failed to address Davis' concerns, he filed suit in the U.S. District Court for the Eastern District of California alleging the double standards violated Title IX. He further alleged that, after he filed his complaint, the district retaliated against him and his daughter for speaking out about his concerns, leading to a Section 1983 claim. The trial court rejected Davis' claims, and Davis appealed. The Ninth Circuit affirmed the lower court decision, finding for the school district. On May 17, 2017, Davis filed a petition for a writ of certiorari to the Supreme Court. On October 2, 2017, the High Court denied the petitioners' request for certiorari.

No. 16-1285. *N.E. v. Seattle Sch. Dist.*, 842 F.3d 1093 (9th Cir. 2016). N.E. was a third-grade student with a disability. At the end of the 2014-2015 school year, the Bellevue School District developed an IEP for N.E. that consisted of two stages. The parents agreed to the first stage, but did not agree to the second. The first stage related to the end of the third grade. Then, the family moved from Bellevue to Seattle. The new school district attempted to institute a similar IEP to the one partially agreed upon by the Bellevue School District and the family. The parents of N.E. argued that the second stage was never agreed upon and, as a result, should not be considered part of the stay-put provision. The key questions involve what constitutes educational placement and when educational placement becomes the then-current placement for stay-put purposes. The parents contended that the second stage should not be in place while the current IEP was disputed. The Seattle School District felt that the second stage was the existing placement and should be where E.F. stayed until the dispute was resolved. The district court ruled that the second stage was where E.F. should stay. The Ninth Circuit Court of Appeals affirmed this ruling. Certiorari was denied on October 2, 2017.

No. 16-1001. *Gohl v. Livonia Pub. Sch. Dist.*, 836 F.3d 672 (6th Cir. 2016). J.G. was born with hydrocephalus, which causes fluids to build up in the brain. He qualified for special education services and was enrolled in a half-day pre-kindergarten program at age 3. His teacher, Sharon Turbiak, had extensive experience teaching special education. However, over the course of the school year, the principal of the school received numerous complaints against Turbiak, claiming she was verbally abusive to the students in her classroom. The principal immediately investigated and, after consulting with the human resources department, held a meeting to inform Turbiak that the behavior was inappropriate and must cease immediately. While her behavior improved for about four months, in March 2012 Turbiak grabbed J.G. by the head, jerking it back and yelling at the student. When confronted by the principal, Turbiak denied grabbing or yelling and claimed she was using an approved technique for students with disabilities. Eventually, Turbiak was placed on administrative leave. J.G.'s mother filed a lawsuit claiming that the school district and Turbiak violated her son's rights. This school district filed a motion for summary judgment, and the district court granted this motion. On appeal, the Sixth Circuit affirmed the district court's ruling due to the fact that the parent's claim did not show that the teacher's actions of grabbing and yelling at J.G. shocked the conscience. The Supreme Court denied the petitioners' request for certiorari on October 2, 2017.