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## Contents – March 2018



# SLR School Law Reporter

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## Editors' Note

Regular readers of *School Law Reporter* will see a change to the format of each case summary this month, with a brief description following the citation. This change reflects the reformatting under way in the SLR Express online database of cases. Eventually, all of the thousands of cases in SLR Express (dating to 2008) will be easier for members to search because of the descriptions.

Another recent change related to *School Law Reporter* is the compilation of all the Case Commentaries published since 2015 into an index, featuring links directly to the articles. You can find this as a subcategory of *School Law Reporter* in the left menu bar under Member Pages (where both current and archived issues of SLR are linked).

We thank Robert Cloud, Richard Fossey, and new guest writer Clifford Harbour for their Case Commentary this month. These expanded case summaries of about 1,500 words are an ideal way to be published, without requiring a large time commitment.

## Elementary and Secondary Education

### Noncertified Employees

#### Discrimination

***Hines v. Boston Pub. Schs.***, 264 F. Supp. 3d 329 (D. Mass. 2017) – Paraprofessional claims abuse, unfair reassignment

Hines, a paraprofessional assigned to a special education class, filed suit alleging multiple claims under the ADA and Section 1983. Hines suffered both physical impairments, in the form of a weak left leg and stiff knee, in addition to mental impairments of a learning disorder and attention deficit disorder. Despite Hines' request for reasonable accommodation, she was assigned to a class requiring the use of stairs, and she was allegedly subjected to interference and abuse from teachers when they "verbally berated" Hines in front of students. Following Hines's complaint to the state education agency regarding the harassment of teachers, Hines suffered a physical assault from a student. Hines again requested a different assignment, and the request was denied by the principal. After a second student assault, Hines was notified by the district that her request for reasonable accommodation would be granted, though her work assignment remained unchanged until Hines continued to complain regarding harassment. The court dismissed the due process claim, though it refused to dismiss the remaining claims of violations of Hines' rights under the ADA, hostile work environment, and breach of contract. While the district argued that Hines was able to perform her job and that the alleged harassment was not due to her membership in a protected class, the court found that Hines' allegations held plausibility and that the district did not engage in an interactive process or reasonable accommodation prior to reassignment. – *Catherine Robert*

# March 2018 Regional Reporters

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- Maureen Fox, Sacred Heart University

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***Rogers v. Chicago Bd. of Educ.***, 261 F. Supp. 3d 880 (N.D. Ill. 2017) – TA sues for discrimination in FMLA case

An African American teaching assistant sued the Chicago schools for discrimination based on disability, race, and age. She was over 50 years old. Her job requirements included sitting with a special needs child, accompanying her to various parts of the campus, changing her diaper as needed, and other tasks of assistance. In addition, the teaching assistant was frequently required to chase the student and hold her to stop outbursts that could harm the student or others. The teaching assistant underwent back surgery and utilized twelve weeks of Family Medical Leave Act time. She did not return to work after the twelve weeks and did not notify the district of her need for additional time. When she did return, she brought a physician's statement that she needed a great deal of accommodation, including light duty, no lifting, no bending, no sitting on the floor. The district determined that those conditions prohibited her from returning to her previous position. The principal of the campus had no other positions available that would allow her the accommodations needed. For several months after her return to work, she was in a district-wide pool for transient jobs. She eventually retired, but filed suit against the district for a series of discrimination claims. The district moved for summary judgment, which was granted in full. The court found that the teaching assistant was no longer qualified to perform the functions of her previous job, thus there was no evidence to support ADA claims. The district did provide reasonable accommodation. Further, the teaching assistant did not establish a case that demonstrated race, age, or disability discrimination. – *Barbara Qualls*

## Pupils

### Fourteenth Amendment Rights

*Mann v. Palmerton Area Sch. Dist.*, 872 F.3d 165 (3d Cir. 2017) – District not liable for football player's brain injury

In November 2011, a student football player experienced a hard hit during a practice session. While some players thought that the player may have been exhibiting concussion-like symptoms, he was sent back into the practice session by his coach. After being returned to practice, the player suffered another violent collision and was removed from the practice field. The student/player was later diagnosed with a traumatic brain injury. Thereafter, the student/player's parents brought Section 1983 action against school district and football coach, alleging state-created danger theory of liability and violation of due process of the Fourteenth Amendment. The district court granted the coach qualified immunity and granted the school district's motion for summary judgment. The parents appealed.

On appeal, the court held that the student's alleged right to be free from deliberate exposure to a traumatic brain injury after exhibiting signs of a concussion in the context of a violent contact sport, football, was not clearly established at time of student-athlete's injury. It was not so plainly obvious that requiring the football player—fully clothed in protective gear, including a helmet—who experienced a violent blow and showed signs of a concussion, to engage in the same activity that caused the first substantial hit violated the student-athlete's constitutional rights; thus, the football coach was entitled to qualified immunity on the student-athlete's Section 1983 action.

The appellate court further held that the school district was not liable under Section 1983 on the student-athlete's claim that a custom or policy of the school district or its failure to provide more intense concussion training to its coaches caused violation of his constitutionally protected right under the Fourteenth Amendment to be free from deliberate exposure to a traumatic brain injury. There was no evidence of a pattern of recurring head injuries in the school district's football program, nor was there evidence that the student-athlete's football coach or any other member of the coaching staff deliberately exposed injured players to continuing risk of harm that playing football posed. – *Bonnie Hoffman*

*Betz v. Satteson*, 259 F. Supp. 3d 132 (M.D. Pa. 2017) – Teacher not at fault in scooter incident injury

After a classmate rode a scooter in the hallway in violation of the school's code of conduct, another student, the plaintiff's son, interfered with a teacher's attempt to apprehend the scooter rider by physically blocking the teacher while yelling for the other student to escape. When other teachers tried to take the plaintiff's son to the office, he also tried to escape and ran into a door, cutting his head. The parents filed a Section 1983 suit against the teacher, school administrators and district alleging excessive force. The court granted the defendants' motion for summary judgment, holding that the teacher was operating in a good-faith effort to restore order and that no evidence was provided to indicate that the teacher intended to cause harm. Consequently, the teacher was entitled to qualified immunity and not liable for assault or battery. The teacher's actions were not egregious or so arbitrary as to rise to the level of a substantive due process violation, or to the level necessary to sustain a claim for intentional infliction of emotional distress. Finally, no school district policy existed, and no custom or common practice of allowing teachers to assault students could be demonstrated, to support district liability. – *Joe Dryden*

### Law Enforcement

*K.C. v. State*, 84 N.E. 3d 646 (Ind. Ct. App. 2017) – Pat-down search resistance leads to new charges

School officers responded to a report of a stolen phone inside a high school classroom and began to conduct pat-down searches of the students. K.C., a student in the room, refused to allow one of the officers to search his body for the phone, and instead, he physically resisted the pat-down. Consequently, he was arrested and charged as a delinquent child for acts constituting six different crimes if committed by an adult.

During a fact-finding hearing, the defense moved to suppress from evidence the events that occurred after the attempted pat-down search, claiming that the officers' searches violated the school's code of conduct and, therefore, the exclusionary

rule applied. The juvenile court denied this motion and found the student delinquent on two counts. The defendant appealed, arguing that the juvenile court abused its discretion in allowing the admission of the challenged evidence. In affirming the lower court's holding, the Indiana Court of Appeals explained that even if the underlying search had been unreasonable, the new-crime exception to the exclusionary rule nonetheless applied to permit the admission of the evidence. Specifically, the court noted that when a suspect responds to an unconstitutional search by physically attacking the officer, evidence of the new crime is admissible notwithstanding the prior illegality. Thus, the evidence was admissible. – *Ilana Linder*

## Students with Disabilities

*I.T. v. Dep't of Educ., Hawaii*, 700 Fed. App'x 596 (9th Cir. 2017) – IDEA case attorney fee reduction

The district court had reduced an attorney fees award in an IDEA case by limiting the hours awarded, as well as the amount per hour, to $300 per hour. Because the student's attorney prevailed on only one narrow issue and only 13% of the relief requested, the appeals court upheld the lower court's reduction in hours awarded. The hourly rate requested of $400 per hour was based upon a case involving the failure to conduct an archeological survey in a rail transit project. The appeals court held that the rate in this case was not the prevailing rate in the community for similar work performed by attorneys of comparable skill, experience, and reputation. Because a prior special education case had awarded fees at the rate of $285 per hour, the appeals court approved a rate in this case at $300 per hour. – *Dave Dagley*

*C.G. v. Winslow Twp. Bd. of Educ.*, 704 Fed. App'x 179 (3d Cir. 2017) – Video depositions denied, fees cut

In this case, the parents of school children appealed from an order of the district court barring their attorney from personally videotaping depositions during the course of a fee dispute and reducing their fee award from the requested $160,000 to $47,000. The fee dispute arose from the settlement of their action against the township board of education, seeking an individualized education plan and an accommodation plan pursuant to the Individuals with Disabilities Education Act (IDEA) and the Rehabilitation Act.

The court of appeals held, on a procedural issue of first impression, that counsel for the parents was not entitled to videotape the deposition himself on his laptop because counsel did not qualify as an "officer," which is defined as either a "person appointed by the court" or a person "designated by the parties under Rule 29(a)," under the federal rule of civil procedure requiring that oral deposition be conducted by an officer. As for the reduction of attorney fees, the court of appeals found that the reduction was warranted because counsel's inappropriate reaching for fees shocked the conscience of the court, given the disparity between counsel's vast expertise and the lengthy amount of time billed for routine matters; his inadequate documentation of emails, including unrealistic lengths of time allotted for reading message-read receipts; his failure to bill at lower paralegal rates where appropriate; and his billing for hours expended on an unsuccessful recusal motion. – *Bonnie Hoffman*

*H.E. v. Walter D. Palmer Leadership Learning Partners Charter Sch.*, 873 F.3d 406 (3d Cir. 2017) – Attorney fee award based on procedural win in IDEA case

The parents of children with disabilities brought an action under the Individuals with Disabilities Education Act (IDEA) challenging an administrative hearing officer's decisions dismissing their complaints seeking to require the state educational agency to remedy a closed charter school's failure to provide their children with a free appropriate public education (FAPE). The district court vacated the hearing officer's decisions and remanded the claims to the hearing officer for a hearing. After the parents and agency agreed, on remand, on a number of hours of compensatory education owed to their children, the district court denied the parents' motion for attorney fees, reasoning that they had received only interlocutory procedural relief and, for that reason, were not prevailing parties under the IDEA. The parents appealed.

The court of appeals held that the district court's order denying the parents' motion for attorney fees was a final appealable order, even though the agency's suit challenging the hourly rate applicable to its compensatory education payments remained pending, and children had not yet received FAPE. The district court denied the fee motions only after it had already granted all of the parents' other requests for relief; the agency's case did not involve any claim raised in the parents' complaint (and was not consolidated with the parents' claims); and there was nothing further for the district court to do with respect to the parents' claims. The court of appeals further held that the parents were "prevailing parties" eligible for reasonable attorney fees in their action under the IDEA, even though the district court's decision only vindicated the parents' procedural rights and did not resolve their substantive claims under IDEA, given "the importance Congress attached" to the IDEA's procedural safeguards. In other words, the court of appeals concluded that even a purely procedural victory under the IDEA can confer prevailing party status. – *Bonnie Hoffman*

*Cox v. District of Columbia*, 264 F. Supp. 3d 131 (D.D.C. 2017) – Fees cut in DC case

After securing a judgment in an administrative proceeding against the District of Columbia Public Schools (DCPS) for violating their son's right to a free appropriate public education, the parents, as the prevailing party, filed a motion to collect attorney fees and costs in excess of $50,000. The court reviewed affidavits from multiple attorneys who provided information on their experience, the complexity of the hearing, and their hourly rates. DCPS did not contest the attorney's billing practice or experience, but did question reasonableness of the requested rate.

After examining prior cases involving the collection of attorney fees in IDEA administrative hearings, the court held that the plaintiff was unable to show that the proceedings were sufficiently complex to justify an award of the full USAO Laffey

Matrix rate. Also, the plaintiffs were unable to demonstrate that full Laffey rates were aligned with awards to prevailing parties for similar IDEA hearings. Consequently, the court awarded a rate of 75%, amounting to $38,351.25 in attorney fees, along with $2,577.85 for travel, parking, photocopying, faxes, and postage. – *Joe Dryden*

*McLean v. District of Columbia*, 264 F. Supp. 3d 180 (D.D.C. 2017) – Evaluation discrepancy spurs IDEA action

D.M., a 6-year-old student, began exhibiting behavior problems during the 2013-2014 school year. His teacher and mother referred him for evaluation for special education, and he was evaluated in April 2014. The evaluators concluded that D.M. did not meet the eligibility criteria for special education. D.M.'s mother disagreed and had D.M. independently evaluated, leading to a diagnosis of ADHD and oppositional defiant disorder (ODD). She enrolled D.M. at a different school for the 2015-2016 school year. The psychologist at the new school evaluated D.M. and determined that he met the criteria for special education based on specific learning disability (SLD) and other health impairment (OHI), based on his ADHD.

As a result of a discrepancy between evaluations, D.M.'s mother filed a due process complaint against the district alleging that they denied D.M. a free appropriate public education (FAPE) under IDEA. The specific claim was that the district failed to comprehensively evaluate D.M. during the 2013-2014 school year because the school's evaluation did not include classroom observations or a teacher interview. The hearing officer ruled in favor of the school district, because D.M.'s mother had not shown that D.M.'s ADHD adversely affected his academic performance.

D.M.'s mother appealed the decision to the federal district court. Both parties filed cross-motions for summary judgment. The federal district court held that the hearing officer's decision was inadequate because he took the expert witness's testimony out of context; the hearing officer did not fully consider the professional opinion of the plaintiff's experts. The case was remanded to allow the hearing officer to assess the expert's testimony to decide whether D.M.'s ADHD was a qualifying disability under IDEA. – *Erin Biolchino*

*A.H. v. Illinois High Sch. Ass'n*, 263 F. Supp. 3d 705 (N.D. Ill. 2017) – Disabled athlete loses suit over track and field accommodation

A.H. is a high school student with cerebral palsy who is a member of his school track, cross country, and swim teams. He sued the Illinois High School Association (IHSA), a not-for-profit which organizes interscholastic events, seeking accommodations for his disability at track and field events under Title II and III of the Americans with Disabilities Act (ADA), Section 504(a) of the Rehabilitation Act, and equal protection clauses of the federal and Illinois constitutions. Specifically, A.H. was seeking realistic qualifying times for para-ambulatory athletes and a para-ambulatory division in the annual 5k Road Race.

The court held that IHSA's policies were facially neutral and, therefore, the court did not support A.H.'s claim of intentional discrimination. The court also held that this was not a disparate impact case because A.H. did not show that he would have a realistic shot at qualifying for the track events if he were not disabled. "While A.H. has introduced evidence that he is considered an 'elite physically disabled athlete,' the evidence that A.H. can compete successfully in his classification provided no basis to support an inference that he would enjoy similar success competing in the far deeper pool of able-bodied athletes." 263 F. Supp. 3d at 722. Further, the court explained that A.H.'s request that the IHSA lower qualifying standards is not a reasonable accommodation because it would "fundamentally alter the nature of the program" (p. 723). The court granted IHSA's motion for summary judgment on the claims related to IHSA's event qualifying policies. The court denied IHSA's motion for summary judgment related to the Road Race 5k event, because the record did not show whether A.H. could compete safely in the event. – *Erin Biolchino*

*S.H. v. Mt. Diablo Unif. Sch. Dist.*, 263 F. Supp. 3d 746 (N.D. Cal. 2017) – Student denied FAPE after move to new district

S.H. was a high school student eligible for special education with a disability of speech and language impairment (SLI) and autism. During his freshman year, while S.H. was attending a private school at his family's expense, his family moved into the boundaries of the Mount Diablo Unified School District (District). S.H. challenged the IEP from October 2015 offered by the District, and was appealing the decision of the Office of Administrative Hearings (OAH).

The court held that the hearing officer had improperly broadened the Ninth Circuit Court of Appeals' holding in *Doug C. v. Hawaii Department of Education*, 720 F.3d 1038 (9th Cir. 2013), that when faced with conflicting obligations under IDEA, a school district "must make a reasonable determination which course of action promotes the purposes of IDEA and is least likely to result in a denial of FAPE." 263 F. Supp. 3d at 758 (citing *Doug C.*, 720 F.3d at 1046). Accordingly, the court held that school districts do not have "discretion to pick and choose between applicable obligations" under IDEA. *Id.* at 759.

The court also held that when a student transfers from one school district to another, the new school district, and not the parent, has the burden of ensuring that they obtain a student's file and correct and complete IEP. The court affirmed the holding from *Doug C.* that a school district "cannot eschew its affirmative duties under the IDEA by blaming the parents" (p. 760, citing *Doug C.* at 1045).

Ultimately, the court held that the district denied S.H. a FAPE because of three procedural errors: (1) failing to specify whether individual or group speech and language services were being offered, (2) failing to have a general education teacher attend the October 2015 IEP meeting, and (3) using an invalid IEP (an IEP the parent did not consent to) as the starting point for the interim IEP. As a remedy, the court ordered the IEP team to conduct a full IEP within thirty days, ordered the district to provide S.H. with twenty 40-minute group speech and language sessions, and awarded attorney fees to the parents. – *Erin Biolchino*

*Sch. Dist. of Philadelphia v. Post*, 262 F. Supp. 3d 178 (E.D. Pa. 2017) – IEP change without notice results in suit

D.P. is a second-grade student who has qualified for special education with a diagnosis of autism spectrum disorder (ASD). A disagreement about D.P.'s placement led to the parents to file a due process complaint against the Philadelphia School District (district) alleging violations of IDEA, Section 504, and ADA; parents allege that the district failed to provide D.P. with FAPE and retaliated against them for their advocacy on behalf of D.P.

Because the parents and the district could not agree on an IEP, D.P. was placed in a general education classroom and his previous IEP from early education was used. In October 2014, the district began to pull D.P. out of class for 45-90 minutes per day (360 minutes per week) to receive special education instruction to catch up in reading and math. The district did this without holding an IEP meeting and without notifying D.P.'s parents (who learned about it in February 2015).

The court relied heavily on *Ridley Sch. Dist. v. M.R.,* 680 F.3d 260 (3d Cir. 2012) in its analysis, emphasizing the significance of parent and district collaboration in creating an IEP. The court held that the district's removal of D.P. from the general education classroom for 45-90 minutes per day without a change in the IEP, without the parents' consent, and without even notifying the parents, was a violation of the IDEA, Section 504, and the ADA. Accordingly, the court held that the hearing officer was correct in his ruling that the district denied D.P. a FAPE and affirmed the hearing officer's award of compensatory education hours totaling the same amount of time D.P. was removed from the general education classroom. The court affirmed the hearing officer's judgment that the district did not retaliate against D.P.'s parents. – *Erin Biolchino*

*M.G. v. District of Columbia*, 246 F. Supp. 3d 1 (D.D.C. 2017) – Parent recoups tuition charges

M.G. placed her child in a private school and sought reimbursement for the cost of tuition, in addition to the remaining cost of the child's previous placement. A hearing officer denied M.G.'s request and M.G. filed this action. The court adopted the magistrate judge's recommendation that M.G. was entitled to tuition reimbursement for the new school placement. While the district argued that M.G. failed to give ten days' written notice, the court found that M.G. acted reasonably and had attempted to convene a meeting regarding her child's IEP. The court remanded the remaining claim regarding the $355 payment due to the previous school for further fact-finding. – *Catherine Robert*

*M.K. v. Prestige Acad. Charter Sch.,* 256 F. Supp. 3d 532 (D. Del. 2017) – Legal claims following settlement agreement are dismissed

M.K. was injured when staff restrained him on his first and only day at Positive Change Academy. M.K., by and through his mother, filed an administrative complaint against Prestige (the school that assigned M.K. to Positive Change) and negotiated a settlement agreement. The agreement awarded compensation for education expenses and attorney fees, and included a release against Prestige for all claims arising under the IDEA, Section 504, and the ADA. In this following action, M.K. alleged improper restraint, that this restraint was in violation of the ADA, and that Positive Change was liable for tortious conduct. The court dismissed all claims, finding the complaints against Prestige were barred by the original agreement and that the remaining complaint against Positive Change was insufficient to stand alone. – *Catherine Robert*

*Paul G. v. Monterey Peninsula Unif. Sch. Dist.*, 256 F. Supp. 3d 1064 (N.D. Cal. 2017) – Student with felonies refused admittance to state residential facilities

A suit against the Peninsula Unified School District and the California Department of Education alleged that the plaintiff, Paul G., was denied a free appropriate education (FAPE) under the Individuals with Disabilities Act of 2004 (IDEA), Americans with Disabilities Act, and Section 504 of the Rehabilitation Act of 1973.

Paul G. was a student with autism who attended Marina High School in the Monterey, California Unified School District in 2014-2015. His deteriorating behavior caused the school district to place him on "home hospital instruction" in February 2015. When the student received instruction at a local library on July 14, 2015, he became agitated and ran from the library when the home instructor asked him to be quiet. In the process of running from the library, Paul knocked an elderly lady to the ground, injuring her. As a result, he was charged with three felonies and not permitted to the leave the state until pending charges were resolved. On July 20, 2015, the district offered Paul G. placement in a residential treatment facility during an individual education plan (IEP) meeting, but no residential facility in California would accept him. He was 18 years of age at the time. In September 2015, the California Department of Education declined to participate in Paul's IEP meeting.

Filing for a due process hearing, the plaintiff alleged that the denial of access to any of California's residential treatment facilities was denial of FAPE. The Office of Administrative Hearings (OAH) dismissed the complaints against the district, California Department of Education (CDE), and Department of Social Services (DSS), citing the requested relief was beyond the scope of jurisdiction for the OAH in a due process claim. The plaintiff appealed. The court sided with the district and CDE, citing failure of the plaintiff to exhaust administrative remedies. – *D. Christopher Scott*

*Silver Lining Group EIC Morrow Cnty. v. Ohio Dep't of Educ. Autism Scholarship Program*, 85 N.E.3d 789 (Ohio Ct. App. 2017) – Autism scholarship funds not owed to unregistered locations

Silver Lining Group, a provider of behavioral services for students with autism, filed a complaint against the Ohio Department of Education (ODE) claiming it was owed for services provided through the ODE's Autism Scholarship Program. The ODE denied that it was indebted to Silver Lining Group, or that it had been unjustly enriched by receiving Silver Lining's services, because Silver Lining failed to separately register each of its service locations, despite clear instructions to do

so by the Department. Accordingly, the ODE moved for summary judgment, which the lower court granted. Silver Lining appealed. In affirming the lower court's grant of summary judgment, the court of appeals reasoned that because two of Silver Lining's four locations were not properly registered as private providers of services, and because the plain language of the applicable rules was unambiguous, Silver Lining's failure to register the locations precluded those locations from receiving Autism Scholarship Program funds. – *Ilana Linder*

### Tort Liability

*Hanson v. Sewanhaka Cent. High Sch. Dist.*, 64 N.Y.S.3d 303 (N.Y. App. Div. 2017) – Student kicked in gym class loses suit

Patrick Hanson, a student at Sewanhaka Central High School, was injured when he was kicked by another student during a basketball game in gym class in March 2012. He launched an action to recover damages for his injuries against the defendant, Malik Freeman, and the school, alleging each was negligent. The school district and the plaintiff separately moved for summary judgment dismissing the complaint, based upon the doctrine of primary assumption of risk. The Supreme Court, Appellate Division, held that the student assumed the risk of injury and the compulsion doctrine did not apply to overcome the defense of assumption of risk, affirming for the school district. – *Jeanne Surface*

*Tzimopoulos v. Plainview-Old Bethpage Cent. Sch. Dist.*, 64 N.Y.S.3d 323 (N.Y. App. Div. 2017) – Accident at recess not predictable

Christopher Tzimopoulos, who had cerebral palsy, and his father brought personal injury action against the Plainview-Old Bethpage Central School District alleging negligence by the district in failing to provide adequate supervision during school recess, and in allowing Christopher to participate in a wall ball game in which he collided with a fellow student. The Supreme Court, Nassau County, granted the school district summary judgment. Christopher and his father appealed. After the depositions had been conducted, the defendants moved for summary judgment and contended that they provided adequate supervision to the children during recess; that the plaintiff's individualized education plan did not restrict him from playing during recess; and that, in any event, any alleged failure to provide adequate supervision was not a proximate cause of the plaintiff's injury because the collision occurred suddenly and unexpectedly. The Supreme Court, Appellate Division, held that the school district provided adequate supervision and any alleged failure to provide adequate supervision by the school district was not the proximate cause of Christopher's injuries. – *Jeanne Surface*

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## School Districts

### Taxation/Funding

*1001 Ogden Ave. Partners v. Henry*, 84 N.E. 3d 1157 (Ill. App. Ct. 2017) – Taxpayer suit for improper bond tax use fails

The trial court consolidated several cases by taxpayer groups alleging that several school districts had been issuing working-cash-fund bonds for inappropriate purposes and that taxes levied for the bond were illegally obtained. When providing notice and an opportunity to petition the associated tax levy in each instance, the school districts stated that the bonds would be used for "corporate purposes" and then used the bonds in large part for the routine maintenance of school buildings. The taxpayers argued that the school districts were scamming taxpayers by not issuing bonds under a separate statute of the school code devoted to building maintenance and providing notice in a manner consistent with that statute's procedures.

The trial court granted the schools districts' joint motion for summary judgment, holding that the plain language of the corporate-purpose statute permitted school districts to transfer or abate funds to areas of need, including building maintenance. The court of appeals affirmed. – *Richard LaFosse*

### Tort Liability

*Ford v. Tulsa Pub. Schs.*, 405 P.3d 142 (Okla. Civ. App. 2017) – Tort claim for injury caused by school bus driver

The plaintiff alleged that she was injured due to the negligence of a school bus driver employed by the school district. The plaintiff further alleged that after she sent a letter entitled "Notice of Claim Pursuant to the Oklahoma Governmental Tort Claims Act" to the district, she entered settlement negotiations with the district's claims adjuster. When the plaintiff subsequently sued the district in state court, the trial court dismissed her case for failing to comply with the Act's procedural requirements. The plaintiff then appealed to the Court of Civil Appeals of Oklahoma. After addressing threshold issues, the intermediate appellate court noted that the Act provided that a notice of claim must be "filed with the office of the clerk of the governing body" before a plaintiff may bring suit, and that such suit must be brought within 180 days after denial of the claim. The court held that factual issues existed as to whether the plaintiff met these requirements, and remanded the case to the trial court to resolve those issues in evidentiary hearings. – *Stephen Worthington*

*Stephenson v. Elison*, 405 P.3d 733 (Utah Ct. App. 2017) – Sexual abuse claim deemed untimely

In 2008, the plaintiff approached his former middle school teacher, the school district, and the police with allegations that the teacher had committed sexual abuse in the 1980s. In 2013, the plaintiff filed a notice of claim with the district and subsequently sued the teacher, his former principal, and the district in Utah state court. During litigation, the plaintiff submitted an expert opinion stating that he was "unable to factually

comprehend . . . that he had been sexually abused" until he filed suit. After the trial court dismissed the plaintiff's claims as untimely, the plaintiff appealed. The Court of Appeals of Utah observed that under a state statute, the plaintiff was required to file a notice of claim with the district within one year after the claim arose. Because the plaintiff had admitted in pleadings that he was aware of the facts underlying his claims in 2008, the court held that he was required to file such notice by 2009 at the latest. In reaching this conclusion, the court held that any contradictions between the expert opinion and the plaintiff's admissions did not create a genuine issue of material fact. The court dismissed the appeal accordingly. – *Stephen Worthington*

## Teacher & Administrator Employment

### Constitutional Rights

*Friedenberg v. Sch. Bd. of Palm Beach Cnty.*, 257 F. Supp. 3d 1295 (S.D. Fla. 2017) – Substitute teacher applicant refuses mandatory drug testing

Friedenberg, a retired teacher, applied for several positions with a district and was offered the position of substitute teacher, pending fingerprinting and a drug test required for all successful applicants to the district. Friedenberg agreed to fingerprinting, but refused the drug test and filed this action challenging the district policy specifically as it applied to non-safety-sensitive positions such as substitute teacher. The court cited conflicting opinions regarding the status of teachers as safety-sensitive, ultimately finding that the protection of the children was a compelling argument. The court also found that the drug testing procedure was not unduly intrusive and denied Friedenberg's motion for a preliminary injunction. – *Catherine Robert*

### Discrimination

*Wenc v. New London Bd. of Educ.*, 702 Fed. App'x 27 (2d Cir. 2017) – Reasonable accommodations provided after teacher's medical leave

Wenc was an elementary school teacher who used a leg prosthesis for mobility and was assigned to a first-grade classroom. Because of a lesion created by his prosthesis, his doctor recommended that he take medical leave for the 2011-2012 school year, which he did. When his paid leave entitlement ran out, the school district advised him that he could apply for unpaid FMLA leave; he did so, and it was approved. He returned to teaching during the 2012-2013 school year. Wenc asserted that the school district had discriminated against him under the ADA and cognate state law by failing to grant his request to be assigned to a sixth-grade classroom on his return, and had retaliated against him for that request by forcing him to apply for unpaid leave in the spring of 2012. The court upheld summary judgment for the school district on all claims. Although his doctor provided a second note in April 2012 opining that a sixth-grade classroom would be more suitable for Wenc, that same note stated that it remained in his best interest to stay on leave. Wenc later argued that he had felt able to return to work at that time, but the evidence in the record indicated he was not in fact trying to do so. Even if he had been able to return, the leave he was provided—whether paid or unpaid—in reliance on his own doctor's recommendation, constituted a reasonable accommodation. When he returned the following school year, there were no sixth-grade vacancies available, but he was provided a second full-time classroom aide in his first-grade classroom, as recommended by a neutral physician after a functional capacity examination. The assignment of an additional aide, whose performance Wenc testified was satisfactory, was a reasonable accommodation, as the employer was not required to either reassign another employee or create a new position in order to accommodate his request to teach sixth grade.

Even if providing him with unpaid leave at the end of the first school year could be viewed as an adverse employment action, it did not support a determination that he had been forced by the employer to take that leave, because the evidence showed that he had not then been cleared by his doctor to return to work, and did not wish to do so. The district was not required to extend his paid leave, as an alternative to granting the unpaid leave, since it had no policy authorizing further paid leave, which was not required under FMLA. – *Kathryn McCary*

*Kergerise v. Susquehanna Twp. Sch.*, 321 F.R.D. 121 (M.D. Pa. 2016) – Superintendent charges constructive discharge due to discrimination

A former superintendent sued the district and school board members, claiming that she was constructively discharged due to discrimination based on race, gender, and age. She listed a series of events to support her allegations. The responsibility of the defendants was to appropriately reply to each point of her allegations. As instructed by the court, the defendants had only three options for response: admit an allegation, deny an allegation, or state that they have insufficient knowledge to form an admission or denial. The superintendent's appellate position was that since the district and its named board members did not admit or deny many of her own allegations of wrongdoing, that the court should accept her statements that described the wrongdoing as fact, and determine judgment based on that information. The court agreed that the defendants' response was insufficient, but declined to substitute the superintendent's allegations for fact. Instead, the defendants were instructed to submit improved and amended responses, without reliance on a statement that the superintendent's allegations were "conclusions of law" that did not require a response. – *Barbara Qualls*

*Murphy v. Dep't of Educ. of the City of New York*, 64 N.Y.S.3d 637 (N.Y. App. Div. 2017) – Plaintiff loses age discrimination suit

Linda Murphy brought an action against the city department of education to recover damages for discrimination in employment by age in violation of the Age Discrimination in Employment Act of 1967. The plaintiff alleged that she was subjected to a repeated instance of discrimination by the principal and assistant principal and complained of a hostile

work environment that led to the constructive discharge of the plaintiff. The defendants moved to dismiss the complaint, and the Supreme Court granted the defendants' motion. The plaintiff appealed. To establish a prima facie case of age discrimination under the ADEA, a claimant must demonstrate that she was within the protected age group, was qualified for the position, was subject to an adverse employment action, and that the adverse action occurred under circumstances giving rise to an inference of discrimination. In this case, the complainant alleged that the plaintiff was subject to two types of adverse employment action. She was constructively discharged due to a hostile work environment, and she was given unsatisfactory ratings concerning certain annual performance evaluations. In the order appealed from, the court concluded that the amended complaint failed to adequately allege that the plaintiff was subject to an adverse employment action. The negative evaluations may not serve as independent adverse employment actions because those discrete acts occurred more than 300 days before the plaintiff filed a complaint with the Equal Employment Opportunity Commission. Although considered the annual performance evaluation in connection with the plaintiff's contention that she was constructively discharged due to a hostile work environment, under the circumstance they may not independently satisfy the requirement that she was subject to an adverse employment action. To establish a cause of action alleging hostile work environment under the ADEA, a plaintiff must show that the harassment was sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment. After reviewing all of the allegations, the Appellate Division held that the teacher failed to state a claim of constructive discharge based on a hostile work environment, and affirmed for the district. – *Jeanne Surface*

### Dismissal, Nonrenewal & RIF

*Dickinson v. Spieldenner*, 85 N.E. 3d 552 (Ohio Ct. App. 2017) – Gym teacher termination not defamation, court says

A physical education teacher was terminated by the school district after he threw a ball at a student and called him a "dummy." Prior to this incident, multiple other charges regarding the teacher's inappropriate conduct with students had been filed, including an allegation that he had thrown a child into a garbage can. These prior incidents were discussed during the school board's hearing on the teacher's employment, and some were also included in local news articles covering the story. The board decided to terminate the teacher.

The teacher appealed his termination to the court, claiming defamation and false-light invasion of privacy against the school board, alleging that the board's actions resulted in both economic damages and medical injury. The defendants moved for summary judgement, asserting that the truthfulness of the statements made about the teacher precluded liability. The lower court granted the defendants' motion, and the plaintiff appealed to the Ohio Court of Appeals.

In affirming the lower court's decision, the court explained that both claims failed for the same reasons. Specifically, the statements were not false and there was no evidence of fault, malice, or reckless disregard on behalf of the defendants. Furthermore, because the statements were made in the course and scope of the employment of the school district's administrators, the defendants were entitled to a qualified privilege. Therefore, the plaintiff's claims had no merit. – *Ilana Linder*

### First Amendment Rights

*Roybal v. Toppenish Sch. Dist.*, 871 F.3d 927 (9th Cir. 2017) – Demoted principal's due process victory overturned, speech retaliation survives

A principal with seven years of experience was moved to an assistant principal position, with a small pay increase. He called an attorney and was then transferred to a teaching position, with a $44,000 pay cut. The principal sued in state court, alleging violation of due process in his salary reduction and retaliation for speaking to an attorney. The school district removed the case to federal district court, which held that the school district violated due process as a matter of law and granted the principal summary judgment on that claim. The court further held that there were issues of material fact about whether the principal's speech rights were violated, and that the superintendent was not entitled to qualified immunity. On this interlocutory appeal regarding the question of qualified immunity, the appeals court determined that a violation of state tenure law did not necessarily create a violation of federal procedural due process, and that reduction of the principal's salary did not violate procedural due process. The court reversed the summary judgment in favor of the principal on the due process charge, and directed the lower court to review the principal's speech retaliation claim. – *Dave Dagley*

## Higher Education

### Athletics

### NCAA Regulations

*Hardie v. NCAA*, 876 F.3d 312 (9th Cir. 2017) – NCAA ban on felons coaching survives appeal

A high school women's basketball coach, who was African American, had been convicted of possession of a controlled substance with intent to distribute. On the basis of this conviction, the NCAA denied him certification to coach. The coach brought a claim against the NCAA under Title II of the Civil Rights Act of 1964. The district court granted the NCAA's motion for summary judgment. Under the burden-shifting framework required by *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), the coach failed to show at the third step that a proposed policy that excluded violent felons, but not nonviolent felons, would be equally effective at achieving the goals of

the challenged policy of barring all felons. The appeals court affirmed the lower court's judgment. – *Dave Dagley*

## Nonacademic Personnel Employment

### Dismissal

*Kelly v. Unemployment Comp. Bd. of Review*, 172 A.3d 718 (Pa.Cmwlth. 2017) – Unemployment benefits denied to employee who resigned due to religious objections

A project manager in the university's Health Sciences Tissue Bank alleged that she resigned because of religious objections to a new project her employer assigned her to manage—which involved the collection of fetal tissue from abortions, miscarriages, and fetal autopsies—and sought unemployment benefits. The Unemployment Compensation Board of Review affirmed a referee's decision denying her unemployment compensation. The claimant appealed. On appeal, the court affirmed the board's decision because she had failed to notify her university employer of her religious objections to the use of fetal tissue. The first time that she registered a religious objection to collecting fetal tissue was in her letter of resignation. Her argument that such notification would have been a futile act because so long as her employer collected fetal tissue it conflicted with her religious convictions was not persuasive, as she had worked on other projects for the employer with no difficulty. – *Elizabeth Lugg*

### Tort Liability

*Oregon State Univ. v. Superior Court*, 225 Cal.Rptr.3d 31 (Cal.App. 4 Dist. 2017) – Injured crane operator's suit raises interstate issues

Sutherland, an employee at Oregon State University, was severely injured when a crane he was operating tipped over while he was loading a stack container owned by the appellant onto a vessel owned by his employer, the University of California San Diego. He filed a complaint asserting negligence because the stack container's weight was not displayed on its exterior and was not accurately recorded on the bill of lading provided by the appellant. Sutherland opposed the demurrer, arguing that the appellant lost the benefits and protections of the Oregon Tort Claims Act when it made the decision to engage in activities in California. The lower court overruled the appellant's demurrer to the complaint, alleging that the complaint failed to comply with the Oregon Tort Claims Act's notice provision. The appellant petitioned for a preemptory writ of mandate directing the trial court to vacate the order and enter a new order sustaining the demurrer without leave to amend, alleging that the challenged order violates the U.S. Constitution's full faith and credit clause. On rehearing, the court found that the Oregon Tort Claims Act did not conflict with or violate California's public policy; therefore, it was due full faith and credit and the superior court erred by overruling the appellant's demurrer. However, since the facts showed that Sutherland had satisfied his burden of demonstrating a reasonable possibility he could cure the pleading's defects, the court sustained the demurrer with leave to amend. – *Elizabeth Lugg*

*University of Texas M.D. Anderson Cancer Center v. McKenzie*, 529 S.W.3d 177 (Tex.App.-Hous. 2017) – Immunity waived in university hospital malpractice case

The family of a patient who died after participating in a clinical trial at the appellant university hospital brought a complaint for medical malpractice. The hospital responded that the court lacked jurisdiction because it was immune under the Tort Claims Act. The court denied this plea and the hospital appealed. On appeal, the court held the use of tangible personal property, a perfusionist employed by an independent contractor during the patient's surgical-chemotherapeutic procedure, waived governmental immunity under the Tort Claims Act. Waiver of immunity was also shown by the plaintiffs in that the appellant's use of a water solution containing dextrose was the proximate cause of the patient's death. The case was reversed and remanded. – *Elizabeth Lugg*

## Professor & Administrator Employment

*State ex rel. Fairmont State Univ. Bd. of Governors v. Wilson*, 806 S.E.2d 794 (W.Va. 2017) – Venue controversy for FOIA case jurisdiction

Some members of the faculty of Fairmont State sued the Fairmont State University Board of Governors (FSU-BOG) and the West Virginia Higher Education Policy Commission (HEPC) alleging that they did not fully comply with a Freedom of Information Act (FOIA) request. At trial, the faculty members sought injunctive relief, a writ of mandamus, and a declaratory judgment. Both FSU-BOG and HEPC filed identical motions to dismiss claiming improper venue, citing state statute that provided that the proper venue for lawsuits against state agencies was Kanawha County. The trial court denied these motions, and FSU-BOG filed its petition for a writ of prohibition with this court. This court looked to several factors to determine whether it should grant the writ, including the existence of a clear error as a matter of law. Further, the court noted that "a writ of prohibition may be used to preclude a circuit court from hearing a lawsuit against a state agency when it does not have venue." In its analysis, the court found that the circuit court improperly found that Marion County was a proper venue for this lawsuit, as the statute clearly states that "actions wherein a state agency or official is named…may be brought only in the Circuit Court of Kanawha County." Therefore, this court granted the writ of prohibition. – *Marilyn Anglade*

### Discrimination

*People ex rel. Rahn v. Vohra*, 85 N.E.3d 579 (Ill.App. 2 Dist. 2017) – Appellee's resignation changes standing of appellant's case

The appellant was dean of the College of Engineering Technology at Northern Illinois University. He had been litigating claims against the appellee since 2009 based on

discrimination, retaliation, and copyright infringement. He appealed dismissal of his *pro se* complaint in *quo warranto*, on the grounds that his case became moot when the appellee resigned from the position from which the dean sought the appellee's ouster. The court stated that under rulings from the Illinois Supreme Court, *quo warranto* was not a criminal prosecution, therefore civil remedies applied. The fact that the appellee no longer occupied the office would not make the case moot so long as any civil remedy was available. However, since under Illinois law, in order to have standing a private party must have an interest in the office itself, the court found that the dean lacked standing, and the decision of the lower court was affirmed. – *Elizabeth Lugg*

*J.F. Ingram State Tech. College v. Carter*, 227 So.3d 499 (Ala. Civ.App. 2017) – Former dean's demotion reinstated on appeal

The former dean of instruction at the appellant institution was reassigned from his position to that of center director, with a reduction in salary, following an investigation of improper behavior. He sought review of the decision. The hearing officer determined that the appellee's behavior did not rise to the level of "just cause" as required by law, and the demotion was voided. On appeal, the college argued that the hearing officer applied the wrong standard of review; that the hearing officer made no distinction between the standard of review for findings of fact and for conclusions of law. The appellate court held that the decision of the college in demoting the appellee was neither arbitrary nor capricious. Because the appellant articulated reasonable justification for the decision that was supported by facts, combined with the extreme deference due the decision, the hearing officer exceeded his discretion in reversing the decision. – *Elizabeth Lugg*

### Dismissal

*McCann v. Sullivan Univ. System, Inc.*, 528 S.W.3d 331 (Ky. 2017) – State supreme court reverses class action denial

This case involves Mary McCann, who was hired by Sullivan University System as an admissions officer. McCann was ultimately fired by Sullivan and filed action in circuit court. Although McCann's case was moved to federal court, these claims were decided in a settlement and the remaining state claims were remanded back to the circuit court. At this time, McCann sought to certify a class. The trial court denied McCann's motion, holding that class actions were precluded for claims brought under Kentucky Statute KRS 337.385. The Court of Appeals agreed. The Supreme Court reversed the judgment, finding that class actions are allowed for claims brought under the aforementioned statute. In making its determination, the Supreme Court of Kentucky explained that the Rules of Civil Procedure govern all civil actions except special statutory proceedings. The court then analyzed whether KRS 337.385 constituted a special proceeding, which was defined as "one that is complete within itself having each procedural detail prescribed." The court determined that KRS 337.385 did not constitute a special proceeding since the statute did not create the comprehensive, wholly self-contained procedural process necessary to be recognized as such. Therefore, the case was remanded back to the circuit court for proceedings consistent with this opinion. – *Marilyn Anglade*

*Lai v. St. John's Univ.*, 64 N.Y.S.3d 227 (N.Y.A.D. 2 Dept. 2017) – Professor's termination for sexual harassment upheld

This appeal follows a CPLR article 78 proceeding wherein a tenured faculty member of St. John's University was terminated following an investigation into complaints of sexual harassment made by a student. The faculty member appealed the decision of the Supreme Court of Queens County, which denied his petition and dismissed the proceeding. This court affirmed the decision, finding that St. John's University substantially complied with its own rules, guidelines and disciplinary procedures, and that their decision was neither arbitrary, capricious, nor an abuse of discretion. – *Marilyn Anglade*

## Students

### Academic/Curricular Issues

*Avalos v. Bd. of Regents of New Mexico State Univ.*, 406 P.3 d 551 (N.M.App. 2017) – Nursing students lose accreditation breach of contract action

The plaintiffs, a group of former nursing students, brought action against the defendant alleging breach of contract to provide a nationally accredited nursing program. When they enrolled they were provided documents stating that the program was nationally accredited, accreditation that the defendant lost prior to their graduation. The defendant sought summary judgment claiming immunity, which was denied. It filed a petition for writ of error, which the appellate court granted to review the immunity claim. The court held that the written documents relied upon by the plaintiffs did not constitute a valid written contract, waiving the defendant's governmental immunity from contract action. Summary judgment was ordered in favor of the defendants. – *Elizabeth Lugg*

### Discipline

*Aryeh v. St. John's Univ.*, 63 N.Y.S.3d 393 (N.Y.A.D. 2 Dept. 2017) – Courts uphold nonacademic misconduct discipline

This matter involved a student at St. John's University law school who was suspended for two academic semesters due to nonacademic misconduct; the student was also placed on probation. The student (petitioner) filed a CPLR article 7 proceeding to review the university's decision, which the Supreme Court, Second Department, New York, denied, and dismissed the proceeding. On appeal, this court determined that courts have a restricted role in reviewing determinations of colleges and universities unless said determinations were made arbitrarily or capriciously. The court further acknowledged that a student subject to disciplinary action at a private university is not entitled to the full panoply of due process rights, and a reviewing court will look to determine whether its published rules are substantially observed. Finding that

St. John's did not act arbitrarily, nor did the University fail to abide by its own rules, this court determined that the Supreme Court properly denied the petition and dismissed the proceeding. – *Marilyn Anglade*

*Quade v. Arizona Bd. of Regents*, 700 Fed. App'x 623 (9th Cir. 2017) – Student fails to show at misconduct hearing

A university student was suspended, based upon conduct code violations for sexual misconduct, underage drinking, and marijuana use. At the misconduct hearing, he had been told that either he or his attorney could speak, and that his witness was barred from testifying because the witness was no longer a student. The student did not participate in the hearing and did not file an appeal in state court. The student brought federal and state claims, which were dismissed in federal district court. The appellate court held that the lower court had correctly dismissed the student's due process claims on the basis of res judicata. – *Dave Dagley*

## First Amendment Rights

*Abbott v. Pastides,* 263 F. Supp. 3d 565 (D.S.C. 2017) – Free speech issues in campus event aftermath spur student organizer's claim

Students at a state university planned a free speech event on campus. The event was scheduled outside the student union building, in the university's "free speech" zone. The chief organizer of the event met with university officials, secured the appropriate permission, and described the kinds of displays and handouts that were intended for use. The event occurred without violence, but there were several complaints, primarily about the display of a swastika and use of terms like "wetback" and other racially provocative names. The university's Assistant Director of the Office of Equal Opportunity Programs asked the chief student organizer to meet to discuss the complaints in a meeting that was characterized as a pre-investigative effort. During the meeting, it was established that the event was an expression of protected free speech. In a follow-up letter, the student organizer was informed that no further investigation or action would take place. The student organizer filed suit alleging that the pre-investigative meeting was an "as-applied" violation that chilled First Amendment speech. The named parties representing the university filed for summary judgment, which was granted. The actions of the university, in its attempt to resolve complaints without accusing the event organizers of wrongdoing, did not constitute "as-applied" deprivation of due process, and the students' request for injunctive relief concerning future policy revision was unenforceable. – *Barbara Qualls*

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# U.S. Supreme Court Docket

**Summary of Court Action Reported from January 15, 2018 through February 12, 2018**

**Provided by Spencer Weiler and Christine Kiracofe**

## Certiorari Granted

**No. 16-1466.** *Janus v. Am. Fed. of State, Cnty. and Mun. Emp. Council* (AFSCME), 851 F.3d 746 (7th Cir. 2017). This case deals with a public union's ability to charge benefiting nonmembers a "fair share" of union dues under the Illinois Public Relations Act. The case was filed on behalf of Illinois Governor Bruce Rauner in an action to stop unions from being able to collect these fair share fees, alleging the process violates members' First Amendment rights "[b]y compelling employees who disapprove of the union to contribute money to it." 851 F.3d at 747. The district court dismissed the case, finding that the governor did not have standing to sue. Plaintiffs Mark Janus and Brian Trygg, both public employees presumably with standing to sue, joined the suit. The Seventh Circuit affirmed the lower court decision, and petitioners requested the U.S. Supreme Court to grant certiorari. This appeal asks the Supreme Court to rule on two questions: First, whether its previous decision in *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), should be overruled; and second, to determine if requiring public employees to affirmatively object (rather than affirmatively consent) to subsidizing speech by public unions runs afoul of the First Amendment. Petitioners' request for certiorari was granted on September 28, 2017. The case was scheduled for oral arguments on February 26, 2018.

## Cases Recently Filed

**No. 17-6363.** *Kelley v. Aldine Indep. Sch. Dist.*, 2017 WL 421980 (Tex. Dist. Ct. App. 2017). Lucille Kelley was employed as a substitute teacher at the Aldine Independent School District (AISD) when she fell after slipping on a piece of fruit in the hallway of the school building. After seeking medical treatment, she was diagnosed with several fall-related injuries to her neck, back, knees, and ankles. Kelley filed a workers' compensation claim that AISD paid. However, Kelley alleged that she experienced continuing medical problems as a result of the fall, including numerous herniated discs in her spine. When these new medical problems were reviewed by the Texas Department of Insurance, a doctor determined that they were not caused by the initial fall and rejected her additional claims. During the trial, Kelley represented herself pro se and did not present any expert testimony that suggested that her disc herniations and other injuries were a result of the fall. The trial court found for the school district and the Court of Appeals of Texas affirmed. Kelley subsequently petitioned the U.S. Supreme Court for a writ of certiorari. The petitioner's request for a writ of certiorari was initially denied on December 4, 2017. However, on December 29, 2017, a petition for rehearing was filed. The case was distributed for conference on February 16, 2018.

**No. 17-969.** *Ross v. Univ. of Tulsa*, 859 F.3d 1280 (10th Cir. 2017). Abigail Ross, a sophomore at the University of Tulsa (TU), alleged that she had been raped by Patrick Swilling, Jr., a member

of the university men's basketball team. Ross reported the rape to the Tulsa Police Department and the university's dean of students. After the TU campus police conducted an investigation, they determined that there was not enough evidence to suggest that a sexual assault had occurred. In concordance with this finding, the Tulsa District Attorney's office did not file criminal charges against Swilling. Ross chose to leave TU shortly after the alleged rape and filed a civil suit alleging that the university had violated Title IX (among other state claims) by acting with deliberate indifference to previous complaints of sexual assault levied at Swilling. She also argued that the university had negligently failed to protect her from the assault, asserting "negligent supervision" of Swilling and the intentional infliction of emotional distress. The trial court found for the University, granting it summary judgment. The Tenth Circuit Court of Appeals affirmed the lower court's decision, and Ross petitioned the Supreme Court for a writ of certiorari.

**No. 17-966**. *Profita v. Regents of the Univ. of Colorado*, 2017 WL 4534758 (10th Cir. 2017). Taylor Christian Profita (Profita) was a medical student at the University of Colorado Medical school. Profita suffered from anxiety and clinical depression and, as a result, failed his required clinical rotations twice. Profita was subsequently dismissed from the medical school. After receiving treatment for his mental illness, he requested that he be readmitted to the university and be given credit for all of the classwork he had successfully completed before beginning his clinical rotations. The university rejected his request, instructing him that he would need to reapply to the university as a new student. Profita subsequently sued the University, arguing that his mental illness was a covered medical condition under Title II of the Americans with Disabilities Act and that his request for readmission was a "reasonable accommodation for his disability." The district court dismissed Profita's complaint for failure to state a claim, and the Tenth Circuit Court of Appeals affirmed. Profita subsequently petitioned the Supreme Court for a writ of certioriari. The petition was distributed for conference on February 16, 2018.

**No. 17-860.** *Bernard v. East Stroudsburg Univ.*, 700 Fed. App'x 159 (3d Cir. 2017). Isaac Sanders was serving as the Vice President for Advancement at East Stroudsburg University and was accused of sexually assaulting and sexually harassing students under his stewardship. The first accusation occurred in 2007, when Frantz Bernard accused Sanders of sexual assault. The claims were thoroughly investigated, and Bernard was reassigned so he was no longer supervised by Sanders. The investigation included interviews of all parties and witnesses, and the conclusion was that there was a lack of clear evidence to either prove guilt or to exonerate. Bernard claims this investigation was insufficient. In 2008, two more students came forward with accusations against Sanders. University officials responded to the second round of accusations by hiring an independent law firm to do the investigation and immediately suspending Sanders. As a result of this second investigation and the evidence gathered, Sanders was fired from his job. The appellants claimed that the university officials failed to protect them from Sanders, which is a violation of Title IX. The District Court granted summary judgment in favor of the defendants and the appellate court affirmed the District Court's ruling. The petition for certiorari was distributed for conference on February 16, 2018.

**No. 17-760.** *D.L. v. Clear Creek Indep. Sch. Dist.*, 695 Fed. App'x 733 (5th Cir. 2017). During the 2011-2012 school year, D.L. was diagnosed with both physical and mental disabilities, including a developmental disorder, depression, attention deficit disorder, and anxiety. As a result of these diagnoses, D.L. qualified for special education services during his freshman year of high school, despite the fact that D.L. performed well on state testing and maintained high grades in all of his courses except for Spanish, which he failed. The accommodations enumerated on his individualized education program included additional time for tests and assignments, progress monitoring, and counseling. By the end of his sophomore year, school district officials determined that D.L. no longer qualified for special education services. D.L.'s father disagreed with this determination and requested an independent evaluation of his son. This independent evaluation did not happen until a year after the request was made. Without special education services during his junior year, D.L. earned As in all of his classes and had other indicators of academic success. Again, the school district officials determined that D.L. did not require special education services, based on his academic performance as a junior. Instead of services, the school district pledged to monitor D.L. During the second semester of his senior year, D.L. was consistently absent and claimed he felt overwhelmed by school. Efforts were made to adjust his schedule, but D.L. continued to struggle with truancy issues throughout the final semester of his senior year. D.L.'s father felt the decline in performance was due to the school district's refusal to provide D.L. with services, so he requested a due process hearing. The hearing officer ruled, after three days of testimonies, in favor of the school district. Then, after a lawsuit was filed, the district court granted summary judgment in favor of the defendants due to the fact that D.L. failed to allege a clear violation on the part of the school district. In addition, D.L. performed well academically as a junior. The appellate court affirmed the district court's ruling. A petition for certiorari was filed by D.L.

**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.

ELA Case Commentary

In-depth explanation and commentary on a case of interest March 2018

# *Friedenberg v. School Board of Palm Beach County:* Does Suspicionless Drug Testing of Applicants for Substitute Teacher Positions Violate the Fourth Amendment Rights of the Applicants?

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**Clifford P. Harbour, University of North Texas, Denton, Texas**

## Introduction

In *Friedenberg v. School Board of Palm Beach County*,[1] Joan Friedenberg applied for and was offered a substitute teacher's position in Palm Beach County School District, but the offer was conditional. Under School District Policy 3.96 (8) (a), the school district required all job applicants to submit to suspicionless drug testing and undergo a criminal background check. However, drug testing was not conducted until *after* receipt of a conditional job offer. Applicants were required to complete the criminal background check and the drug test before being allowed to participate in New Employee Orientation.

Friedenberg underwent fingerprinting in compliance with the required criminal background check, but refused to submit to a drug test. She filed suit in federal court, challenging the mandatory drug test on Fourth Amendment grounds.[2] The school district's Policy 3.96, titled "Drug and Alcohol-Free Workplace," had many provisions related to applicant screening, but Friedenberg only challenged Section (8) (a), which required suspicionless drug testing of applicants for all positions in the school district. Furthermore, Friedenberg only challenged Policy 3.96 (8) (a) as it applied to applicants for non-safety-sensitive positions, which included all teachers in the district, full-time as well as substitute teachers.

In response to a request from the court, Friedenberg clarified that she was using the term non-safety-sensitive to refer to all positions in the school district except school bus drivers, security personnel, district police officers, and swimming pool lifeguards.[3] After considering the facts in the case, the District Court concluded that Friedenberg only had standing to challenge the application of the policy to substitute teacher applicants.

This commentary analyzes *Friedenberg v. School Board of Palm Beach County*, which was decided by the United States District Court for the Southern District of Florida on June 14, 2017. As explained below, the District Court ultimately denied Friedenberg's motion for a preliminary injunction and upheld the school district's policy that required all applicants for a substitute teacher position to pass a drug test before participating in New Employment Orientation and assuming duties as a substitute teacher.

## Pertinent Facts

Mandatory drug testing by a public employer is a search under the Fourth Amendment, the *Friedenberg* court observed, because the test constitutes a significant intrusion into an individual's right to privacy.[4] Since Palm Beach County School District is a governmental agency, its policy on drug testing must be reasonable.[5] As a general rule, the court noted, a search must be based on individualized suspicion of wrongdoing,[6] but the United States Supreme Court has upheld certain searches (e.g., suspicionless drug testing) absent a showing of individualized suspicion when "special needs, beyond the normal need of law enforcement, make the warrant and probable-cause requirement [under the Fourth Amendment] impracticable."[7] Furthermore, the Supreme Court has emphasized that proffered "special needs" for drug testing must be *substantial* and demonstrating such need is the defendant's burden. If the defendant fails to show a special need, the plaintiff prevails.[8]

To date, the *Friedenberg* Court continued, the U.S. Supreme Court has recognized two concerns sufficiently substantial to justify an exemption to Fourth Amendment restrictions limiting searches and seizures. Those concerns include the specific risk to public safety by employees engaged in inherently dangerous jobs and the protection of children entrusted to public schools' care and tutelage.[9] The District Court in Florida acknowledged that an analysis of previous Supreme Court decisions on these two concerns was essential to properly adjudicate the question before the court: to wit, whether Palm Beach County School had demonstrated a substantial special need for imposing suspicionless drug testing on applicants for substitute teacher positions.[10]

## The District Court's Analysis

The District Court began its analysis by reflecting on two 1989 Supreme Court opinions (both handed down March 21) in which the Court recognized a special need to conduct suspicionless drug testing because of specified risks to public safety. The two cases were *Skinner v. Railway Labor Executives' Association*,[11] and *National Treasury Employees Union v. Von Raab*.[12] The issue in *Skinner* concerned regulations imposing

suspicionless blood and urine testing on railroad employees who had violated industry safety rules and/or been involved in a train accident. The Supreme Court found a special need to impose suspicionless drug testing on certain railroad employees who held "safety-sensitive positions," which the court defined as positions in which "employees discharge duties [so] fraught with risk of injury to others that even a momentary lapse of attention can have disastrous consequences."[13] In the end, the court ruled that the government's compelling interest in railroad safety constituted a special need that justified a deviation from the normal probable cause and warrant requirements of a government search under the Fourth Amendment. In addition, the Court concluded that railroad employees in safety-sensitive jobs had diminished expectations of privacy because they worked in a highly regulated industry.[14] Therefore, the Court permitted suspicionless drug testing of railroad employees in the interest of public safety.

In *Von Raab*, the Supreme Court upheld a United States Customs Service policy that required agents to pass a suspicionless drug test before being promoted or transferred to positions involving drug interdiction while carrying a firearm.[15] Although there was no evidence of drug abuse in the Customs Service, the record demonstrated that customs officers contended with attempted bribery from the criminal element and with temptation springing from "their access to vast sources of valuable contraband seized and controlled by the service."[16] The Court described the unique mission of the Customs Service as the "first line of defense" against the smuggling of illicit drugs into the United States and concluded that armed agents involved in drug interdiction did indeed hold safety-sensitive positions. Consequently, suspicionless drug testing of agents applying for or transferring to positions requiring them to carry firearms while carrying out drug interdiction duties was reasonable under the Fourth Amendment.[17]

After reflecting on *Skinner* and *Von Raab*, the District Court considered two other cases in which the Supreme Court found a special need based on the protection of school children: *Vernonia School District 47J v. Acton*,[18] and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.[19] In *Vernonia*, the Supreme Court approved a program imposing random drug testing on high school athletes, because rampant drug use had caused a significant increase in disciplinary problems in the Vernonia schools, and student athletes were "leaders of the drug culture."[20] The Court's opinion in *Vernonia* heavily emphasized the student athletes' diminished expectations of privacy. In the Court's view, the school's responsibility to ensure students' safety constituted a special need justifying random drug testing of athletes.[21]

In *Earls*, the Supreme Court sustained a policy requiring suspicionless drug testing of *all* students participating in an extracurricular activity—not just athletes. Facts in the case documented unacceptable levels of drug use in the school district, constituting a special need that justified suspicionless drug testing of all extracurricular participants. Once again, the Court's opinion in *Earls* emphasized the diminished expectations of privacy among athletes and all other student participants in extracurricular activities.[22]

In *Friedenberg*, the District Court also noted that the majority of the lower courts have concluded that classroom teachers do not occupy safety-sensitive positions,[23] citing a federal district court ruling in *American Federation of Teachers v. Kanawha County Board of Education*[24] as one example. In *Kanawha*, a West Virginia federal court ruled that classroom teachers are not safety-sensitive employees comparable to railroad workers and drug enforcement agents. Moreover, in that court's opinion, the school district had not articulated a special need that outweighed teachers' constitutionally protected privacy interests.[25]

In addition, the District Court noted that the Sixth Circuit Court of Appeals is the only circuit court to impose suspicionless drug testing on applicants for teaching positions. The Sixth Circuit's decision in *Knox County Education Association v. Knox County Board of Education*[26] was based on a perceived special need to address documented drug abuse issues in the county's schools. In the end, the Sixth Circuit concluded that teachers "discharge duties fraught with risks of injury to others such that even a momentary lapse of attention can have disastrous consequences."[27] While acknowledging that teachers do not "fit neatly into the prototypical safety-sensitive positions," the Sixth Circuit declined to interpret the term "safety-sensitive" so narrowly as to exclude teachers. Instead, the Court emphasized the unique *in loco parentis* role occupied by teachers. The Sixth Circuit observed that, "Children, especially younger children, are active, unpredictable, and in need of constant attention and supervision," and "Even momentary inattention or delay in dealing with a potentially dangerous or emergency situation could have grievous consequences."[28]

## Conclusion

In the years since the Supreme Court's decisions in *Skinner* and *Von Raab*, some public school administrators and boards have maintained that public school teachers and other school employees occupy safety-sensitive positions because they are responsible for the safety and security of children under their tutelage and care. In light of increasing levels of substance abuse and violence in the public schools, proponents of suspicionless drug testing assert that teachers and other school employees, like railroad employees and customs agents, should have a reduced expectation of privacy and that suspicionless drug testing is as constitutional and reasonable in the public schools as it is in other governmental agencies when a special need is demonstrated.[29]

In *Friedenberg*, the Palm Beach County School District justified its policy requiring suspicionless drug tests for substitute teacher applicants on the grounds that a substitute teacher is "as legally responsible for students, equipment, and materials as is the regular teacher for whom [he or she] is substituting."[30] Furthermore, substitute teachers have the responsibility at all times to monitor and supervise children and ensure their safety while they are on school campuses.[31] Substitute teachers are

also "on the frontlines of securing the campus and are often the first responders to any given incident."[32] Since substitute teachers are often alone with students for five-and-a-half hours or more during the school day, it is imperative that "substitute teachers be of sound mind at all times."[33]

In the end, the school district's policy statements justifying suspicionless drug testing of substitute teacher applicants were persuasive. The District Court agreed that substitute teachers were, in fact, often the first responders to life-threatening incidents; that constant awareness was imperative; and that any impairment (drug-induced or otherwise) would compromise awareness. Accordingly, the District Court concluded that Palm Beach County School District had a compelling interest in drug testing applicants for substitute teacher positions.

Friedenberg's motion for a preliminary injunction was denied because she had not shown a likelihood of success on the merits, but only insofar as she sought to enjoin the application of Policy 3.96 (8) (a) to applicants for substitute teacher positions. The Court agreed to consider future arguments as to other positions upon an appropriate motion if a class were certified.[34]

## Endnotes

1 257 F. Supp. 3d 1295 (S.D. Fla. 2017).
2 *Id.* at 1298.
3 *Id.* at 1300.
4 *Id.* at 1302, citing Lebron v. Sec'y, Florida Dep't of Children & Families, 710 F.3d 1202, 1206 (11th Cir. 2013).
5 *Id.*
6 *Id.*
7 *Id.* at 1303, citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (internal quotation omitted).
8 *Id.*, citing Chandler v. Miller, 520 U.S. 305, 313 (1997) (emphasis added).
9 *Id.* at 1306, citing *Lebron*, 710 F.3d at 1207.
10 *Id.*
11 Skinner v. Railway Labor Executives Assn, 489 U.S. 602, 619 (1989) [hereinafter *Skinner*].
12 National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) [hereinafter *Von Raab*].
13 *Skinner*, 489 U.S. at 628.
14 *Id.* at 627.
15 *Von Raab*, 489 U.S. at 661.
16 *Id.* at 669.
17 *Id.* at 677.
18 Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995) [hereinafter *Vernonia*].
19 Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822 (2002) [hereinafter *Earls*].
20 *Vernonia*, 515 U.S. at 649.
21 *Id.* at 661-664.
22 *Earls*, 536 U.S. at 831-32.
23 *Friedenberg*, 257 F. Supp. 3d at 1308.
24 AFT-W. Va. v. Kanawha Cty. Bd. of Educ., 592 F. Supp. 2d 883 (S.D.W.Va. 2009).
25 *Id.* at 903-904.
26 Knox County Educ. Ass'n v. Knox Cty. Bd. of Educ., 158 F.3d 361 (6th Cir. 1998).
27 *Id.* at 377.
28 *Id.* at 378.
29 Robert C. Cloud, Suspicionless Drug Testing of Public School Teachers and Other School Employees. *West's Education Law Reporte*r, 282 Ed.Law Rep. [1, 3-4] (Sept. 13, 2012).
30 *Friedenberg*, 257 F. Supp. 3d at 1301, quoting Palm Beach County School District's job application form, DE 22-2 at para. 6.
31 *Id.*, quoting Palm Beach County School District's job application form, DE 22-3 at ¶ 9.
32 *Id.*, quoting Palm Beach County's job application form, DE 22-1 at ¶16.
33 *Id.*, quoting Palm Beach County's job application form, DE 22-3 at ¶ 16.
34 *Id.* at 1314.

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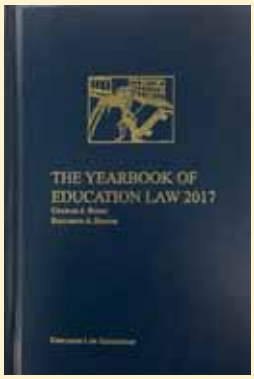


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