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SLR Express Feature Article

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Elementary and Secondary Education

Elementary & Secondary Education

Charter Schools/Alternative Schools

Thomas Jefferson Classical Acad. v. Rutherford Co. Bd. of Educ., 715 S.E.2d 625 (N.C. Ct. App. 2011). Thomas Jefferson Classical Academy (TJCA), a charter school, claimed that the Rutherford County Board of Education (RCSD) did not distribute the full share of its per pupil appropriation due it from RCSD's "local current expense" fund, as required by statute, over a period of years. RCSD argued that a portion of the funds deposited into the account were restricted funds, not intended as a part of the per pupil calculation. The court determined that RCSD owed TJCA monies, but that RCSD has the authority to create a special account for restricted funds to avoid this problem in the future.

Noncertified Employees

Contracts, Salary & Benefits

Mueller v. Lincoln Pub. Sch., 803 N.W.2d 408 (Neb. 2011). The plaintiff, an employee of the defendant, was awarded workers' compensation benefits for an injury she sustained at work. The plaintiff, an hourly food services employee, worked a typical academic year with summers

off, but took her compensation over the course of twelve months. The main issue in this case centered on the proper standard for determining a "weekly wage" for someone in the plaintiff's position. The defendant argued that the state trial court had improperly calculated the plaintiff's "weekly wage" and therefore inflated her workers' compensation benefits. In agreement, the Nebraska Supreme Court held that the state trial court's calculation of the plaintiff's "average weekly wage" did not properly approximate her actual weekly income. The court reversed the state trial

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Federal Courts		Higher Education	
<i>U.S. Supreme Court</i>	Fred Hartmeister Texas Tech University	<i>Federal Cases</i>	Luke M. Cornelius University of North Florida
	Rebecca Hellbaum Health Sciences Center, Texas Tech University	<i>State Cases</i>	Joy Blanchard Florida International University
<i>Court of Appeals</i>			Elizabeth T. Lugg Illinois State University
<i>1st Circuit</i>	Vicky McGinley West Chester University of Pennsylvania		Neal Hutchens University of Kentucky
<i>2nd Circuit</i>	Kathryn McCary McCary & Huff, LLP	State Courts	
<i>3rd Circuit</i>	Wendy Beetlestone Hangley Aronchick Segal & Pudlin	<i>Southern</i>	Johnny R. Purvis University of Central Arkansas
<i>4th Circuit</i>	Jennifer Sughrue Old Dominion University	<i>Northwestern</i>	Rick Geisel Grand Valley State University
<i>5th Circuit</i>	Larry Rossow University of Houston-Victoria	<i>Northeastern</i>	Jesulon Gibbs University of South Carolina
	Stewart Mayers Southeastern Oklahoma State University		Justin Bathon University of Kentucky
<i>6th Circuit</i>	Betty Cox University of Tennessee at Martin	<i>Southwestern</i>	Allison Fetter-Harrot Indiana University
<i>7th Circuit</i>	Suzanne Eckes Indiana University		Michael Tan William Woods University
	Amy Stekete Baker & Daniels LLP	<i>Southeastern</i>	Rebecca Schlosser Sul Ross State University
<i>8th Circuit</i>	Séamus P. Boyce Church, Church, Hittle, & Antrim		Jennifer Sughrue Old Dominion University
<i>9th Circuit</i>	Todd Sorensen Williams Kastner	<i>Pacific</i>	Ed Irvin State of Nevada
<i>10th Circuit</i>	Traci Ballard University of Oklahoma-Tulsa		Kimberly Gee Lozano Smith
<i>11th Circuit</i>	Benjamin J. de Leon San Marcos, CA	<i>Atlantic</i>	Joseph Clark Nordonia Hills City Schools
<i>Federal Supplement</i>	Brenda Kallio University of North Dakota	<i>New York</i>	Jeanne Surface University of Nebraska-Omaha
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	Philip Wagner Licking Heights Local School District		
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court's decision and remanded the case with instructions for the plaintiff's "weekly wage" to be recalculated once the parties further clarified exactly how the plaintiff's take-home pay was determined in the first place.

Dunlap v. Madison Parish Sch. Bd., 61 So. 3d 833 (La. Ct. App. 2011). Plaintiff was employed as a cafeteria worker for the defendant for approximately 20 years. In 2005, she was injured when she was attempting to hang an iron mixing bowl, weighing approximately 13 pounds, when it fell on her. The plaintiff claimed that she suffered migraine headaches, vision problems, neck problems, depression, and obesity as a result of her injury. A Louisiana court of appeals held that the plaintiff's health issues were pre-existing; thus, the plaintiff's symptoms were not related to her work for workers' compensation purposes.

Discrimination

United States v. Brennan, 650 F.3d 65 (2d Cir. 2011). In 1996 the Department of Justice (DOJ) commenced a disparate impact enforcement proceeding against the New York City School District, asserting that the hiring process for custodians and custodian-engineers discriminated against blacks, Hispanics, Asians and women. In 1999, the DOJ and the school district agreed on a settlement, which awarded retroactive seniority to identified individuals. The settlement was approved over the objection of three incumbent custodians, who were denied the opportunity to intervene. In 2001, the Second Circuit Court of Appeals remanded, directing that they be allowed to intervene. On remand, three groups intervened: the incumbent custodians who originally sought intervention and two groups of those who benefited by the original settlement agreement. Analyzing the matter using the then-current affirmative action framework, the district court found that some of the retroactive seniority grants violated either Title VII or the Equal Protection Clause or both, and issued a declaratory judgment specifying the extent to which each individual was lawfully granted retroactive seniority.

On the present appeal, the circuit court addressed the claim that voluntary implementation by the school district of the disputed paragraphs of the settlement agreement violated their rights under Title VII or the Equal Protection Clause, in light of the decision of the Supreme Court in *Ricci v. DeStefano*, 129 S. Ct. 2658 (2009). Drawing a distinction between affirmative action and make-whole relief, the court concluded that the award of retroactive seniority in this case was not affirmative action and, therefore, could not be justified as being intended to promote equal opportunity and eradicate future discrimination. Instead, it was make-whole relief, which could be granted only to those who experienced actual discrimination. Retroactive seniority, being a race-conscious discriminatory action, could be implemented only if the employer had a strong basis in evidence for believing that there was a prima facie

disparate impact case against it, and either the employment practice having that impact was neither job-related nor consistent with business necessity, or there was no equally valid, less discriminatory, alternative that the employer had refused to adopt. The court noted that the determination, whether there is a strong basis in evidence of a prima facie case, must be: objective, not subjective; focused on evidence of liability, not the employer's fear of litigation; and gauged at the time the decision was made, without regard to subsequent information. The employer also needs, prior to implementing a voluntary, race-conscious, discriminatory remedy, a strong basis in evidence that it will be subject to liability if it fails to do so, that a court-imposed remedy would be equivalent to or broader than the voluntary remedy, and that the voluntary remedy is necessary to avoid disparate impact liability. The court noted that the *Ricci* test was intended to create a legal framework under which employers would neither hesitate before taking voluntary remedial action for fear of later being proven wrong and held to account for disparate treatment, nor take voluntary action based on a characteristic protected under Title VII at the slightest hint of a disparate impact claim. The court declined to reach the Equal Protection Clause questions as premature, since it is possible the case could be disposed of entirely by the district court on non-constitutional grounds under Title VII.

Pupils

First Amendment Rights

D.J.M. v. Hannibal Pub. Sch. Dist., 647 F.3d 754 (8th Cir. 2011). A student sent electronic messages from home to a classmate where he explained that he was going to obtain a gun and shoot some other students at school. He also stated that he wanted the school district "to be known for something". The messages were forwarded to the building principal who suspended the student for the remainder of the school term. The student admitted to having depression. The student and his parents sued the school district and its superintendent alleging violation of the student's rights under the First Amendment. The school district moved for summary judgment, which was granted by the United States District Court for the Eastern District of Missouri. The plaintiffs appealed. Upholding the district court's decision, the Eighth Circuit determined that the student's statements were true threats not subject to First Amendment protection because the student intentionally communicated to a classmate what could be reasonably understood to be a true threat of a serious nature. Even though the school district did not wait to see if the student would take further steps to carry out the threat, this was not required. Also, even if the messages were not a true threat then the school district was within its right to discipline the student because the student's threatening message had substantially disrupted the school's operation.

Fourteenth Amendment Rights

K.W. ex rel. Brown v. City of N.Y., 275 F.R.D. 393 (E.D.N.Y. 2011). On November 25, 2009, a classmate cut off one of K.W.'s braids with a pair of scissors from a student's desk. Previously, a classmate had "pulled" all of the beads out of K.W.'s hair, had shoved and elbowed her and the same child had repeatedly taken K.W.'s lunch. K.W.'s mother believed that the school took no steps to resolve the matter. K.W.'s mother brought action against the city department of education and others, alleging that the school's failure to protect students from peer classroom bullying violated the Fourteenth Amendment. She also asserted state causes of action for denial of a right to education and negligent hiring, supervision and retention practices. Defendants moved to dismiss. The District court held that the police department's failure to respond to complaints of bullying, if proven, did not violate student's due process rights. In addition, the court held that no claim existed for violation of the Equal Protection Clause and no claim existed under section 1985. Finally, the district court declined to accept supplemental jurisdiction over state law claims.

Sexual Harassment

Wolfe v. Fayetteville, Ark. Sch. Dist., 648 F.3d 860 (8th Cir. 2011). A former high school student sued the school district alleging that he was a victim of sexual harassment. He claimed he was harassed at the hands of other students, including being falsely labeled as homosexual. The accused harassers, however, explained that they did not perceive the plaintiff as homosexual. Instead, they were retaliating against him for his treatment of another student with a disability. Before the United States District Court for the Western District of Arkansas, the plaintiff alleged that he was a victim of sexual harassment and that the school district was deliberately indifferent in violation of Title IX. After being instructed by the court that, for there to be a violation, the harassment must be motivated by gender or failure to conform to gender stereotypes, the jury issued a verdict in favor of the school district. The plaintiff appealed to the Eighth Circuit Court of Appeals arguing that the district court improperly instructed the jury by including a requirement that the harassment be gender-based. The Eighth Circuit agreed with the district court that proof of gender-based motivation was required for a Title IX deliberate indifference claim. Acts of name-calling and creating rumors alone did not amount to gender-based harassment. Because the jury instruction provided by the district court accurately portrayed the law, the Eighth Circuit upheld the district court's decision.

Walker v. Barrett, 650 F.3d 1198 (8th Cir. 2011). A student alleged that he was sexually abused by a teacher starting when he was 15 years old. Plaintiff filed suit against the school district and school officials 15 years after the

abuse allegedly started. The United States District Court for the Western District of Missouri dismissed the lawsuit due to statutory time limitations. The plaintiff appealed to the Eighth Circuit Court of Appeals. On appeal, the Eighth Circuit upheld the district court's decision because the claims were untimely. The plaintiff did not allege repressed memories of the abuse. Even though the limitations period for some of the claims were tolled until his 21st birthday, he had five years from the end of the tolling period to file suit. A provision that would have permitted the limitations period of the federal claims to be extended did not apply to nonperpetrator defendants.

Students with Disabilities

K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795 (8th Cir. 2011). A student suffered from various impairments (mood disorder and ADHD) and was diagnosed as "other health impaired". An IEP was developed for the student pursuant to the Individuals with Disabilities Education Act (IDEA). Unsatisfied with the student's progress, the parents filed a due process complaint and request for administrative hearing. After a hearing was held the administrative law judge (ALJ) determined that the school district denied the student a FAPE where it failed to consider outside evaluation reports in developing the student's IEP and did not provide adequate specificity regarding the adaptations it provided. The school district then appealed to the United States District Court for the District of Minnesota. The district court reversed and determined that the evidence did not support the ALJ's decision and that the school district properly considered outside evaluation reports. The student had made significant academic progress. The school district incorporated many of the recommendations from those reports and went out of its way to obtain feedback from the student's psychiatrist. Also, rather than include deficient adaptations, the student's IEPs included specialized services sufficient for academic progress. The student appealed to the Eighth Circuit Court of Appeals. On appeal, the Eighth Circuit affirmed the judgment of the district court.

Brad K. v. Bd. of Educ. of City of Chi., 787 F. Supp. 2d 734 (N.D. Ill. 2011). The district court ruled that while having a central office administrator determine placement based on a review of the student's individual education program (IEP) was unusual, as long as the IEP had been properly constructed with parental input the school district was not in violation of the Individuals with Disabilities Education Improvement Act. Additionally, the court ruled the parents' had failed to show the school district violated Title II of the Americans with Disabilities Act when it placed the student, who suffered from developmental disabilities in speech, language, and motor skills, in a school with 18 steps knowing the child could only safely navigate six steps independently.

Walker v. District of Columbia, 786 F. Supp. 2d 232 (D.D.C. 2011). Parents filed suit alleging the independent hearing officer (IHO) failed to award compensatory physical therapy and did not address the increase of tuition that would occur when the student—who has epilepsy, developmental and cognitive disabilities, and a speech disability—went from a half-day program to a full-day program at the private school. The parents had placed their child in a private school after the public school allegedly failed to implement the IEP. The court ruled the parents were entitled to a tuition reimbursement equivalent to the cost of the full-day program. The district court remanded the issue of compensatory physical therapy back to the IHO for a factual recommendation as to an appropriate amount of physical therapy.

B.H. v. W. Clermont Bd. of Educ., 788 F. Supp. 2d 682 (S.D. Ohio 2011). B.B. suffers from a variety of disabilities, including mental retardation, epilepsy, selective autism, ADHD, explosive behavior disorder, and post-traumatic stress disorder. Plaintiff, B.H., filed for a due process hearing claiming that the district had failed to provide B.B. with a free appropriate public education (FAPE) when it failed to consider outside evaluations in its determination of services needed for B.B. The independent hearing officer (IHO) found that these procedural violations denied B.B. as FAPE. In addition, the IHO found that B.B. did not benefit from the IEP's behavioral goals and, in fact, B.B. had regressed as a result of the school's use of physical restraints and the inconsistent application of a behavioral intervention plan. The State Review Officer (SRO) overturned the IHO's ruling and B.H. filed suit in district court. Upon review, the court determined the SRO had erred on multiple claims and reinstated the IHO's decision. Therefore the parents were entitled to compensatory education and prevailing party status.

R.E. v N.Y. City Dept. of Educ., 785 F. Supp. 2d 28 (S.D.N.Y. 2011). Parents of J.E., a child with autism, sought reimbursement for the expense of J.E.'s placement in the McCarton School for the 2008-2009 school year. The impartial hearing officer (IHO) found that J.E.'s IEP was inadequate and that the parents were entitled to reimbursement. On appeal, the state review officer reversed and found in favor of the school district. The parents filed suit in district court asserting the SRO's decision was biased because the SRO lived with a person who had previously worked for the State Education Department and because a spreadsheet of case decisions showed that SROs ruled in favor of school districts in three out of four cases. The district court dismissed all allegations of bias but did determine the SRO had made an erroneous ruling on the facts and the parents were entitled to judgment on their claim. There was no evidence that the two of the school district's attendees at the IEP—the school psychologist and the special education—knew J.E. personally. In this particular case,

the only members of the team with personal knowledge of the child were representatives of the McCarton School. According to the court, the SRO had erroneously concluded that the public school placement was appropriate under the IDEA and failed to properly address whether the private placement was appropriate. Upon findings and conclusions, the State Review Officer's Decision is reversed as clearly erroneous, the Independent Hearing Officer's "Findings of Fact and Decision" are reinstated and judgment was granted to plaintiffs on their complaint. Plaintiffs were granted leave to submit a fee application pursuant to the fees shifting provision of IDEA.

New Milford Bd. of Educ. v. C.R., 431 F. App'x 157 (3d Cir. 2011). A parent of a child with autism filed a due process complaint after the school district refused reimbursement for in-home services that they had procured for their child. The administrative law judge found that an after-school program was required in order to provide the child with a free appropriate public education and the district court agreed. On appeal the Third Circuit noted that, while a student's failure to generalize certain skills learned in school to the home environment is an insufficient basis to conclude that a school district was not providing a child with the requisite free appropriate public education, the at-home program in this case was "required for him to receive the meaningful educational benefit mandated by the IDEA." 431 F. App'x at 160.

J.P. v. Anchorage Sch. Dist., 260 P.3d 285 (Alaska 2011). The state supreme court held that even when a child is ultimately determined to be ineligible for special education services, the Individuals with Disabilities Act (IDEA) provides certain remedies when procedural violations occur during the process of evaluating the child's eligibility. In this case, parents asked the school district evaluate their son for special education services. While awaiting the results of the assessment, the parents arranged for private tutoring. When the district did not assess the child's eligibility within the forty-five-day statutory deadline, the parents arranged for their child to be privately assessed. The district subsequently completed its evaluation and determined the child to be ineligible for services. The parents alleged that the district owed them the cost of both the child's tutoring and his private evaluation. The court held that the parents were not entitled to reimbursement for the private tutoring because the child was ultimately determined to be ineligible for special education services. However, because the district failed to meet its duty under the IDEA to evaluate the child by the statutory deadline, the district was required to reimburse the parents for the cost of the private eligibility assessment.

Davis v. Wappingers Cent. Sch. Dist., 431 F. App'x 12 (2d Cir. 2011). In this case, the plaintiffs alleged that their school district failed to offer a free appropriate public education (FAPE) to their son for the 2004-2005 school

year because the committee on special education that developed the IEP lacked essential members and did not consider certain evaluative data, and because the IEP was not given to the parents until after the school year started. The record indicated that no one present in either the CSE meeting held to develop the IEP in question was able to answer questions about the curricular requirements of the child or about the services or modifications that would be provided. The parents sent the child to a private school and sought reimbursement. The impartial hearing officer and the state review officer each held that the school district had not offered a free appropriate public education (FAPE), and the district court affirmed. On appeal, the court of appeals agreed and held that a FAPE had been denied. Regardless of the substantive merits of the IEP the committee produced, the several procedural violations significantly affected the ability of the parents to participate in its development, thus depriving their son of educational benefits. On the other hand, there was no showing of how the private school's general program addressed the student's particular needs, or of how it was modified or supplemented to do so. The parents were properly denied tuition reimbursement.

Tort Liability

Credit v. Richland Parish Sch. Bd., 61 So. 3d 861 (La. Ct. App. 2011). Plaintiff brought suit against the defendant after her daughter was pushed in front of a school bus while engaged in a fight with another student. The plaintiff's daughter died as a result of the accident. Thereupon, her mother filed suit against the defendant school board for the wrongful death of her daughter and survival damages. The trial court held that the plaintiff had no cause of action against the school board employees, and the plaintiff appealed. The court of appeals reversed and remanded, stating that the plaintiff's wrongful death claims brought against the defendant were not precluded by the state statute limiting liability for the defendant's statements and actions exhibited within the course and scope of their duties.

School Boards

Tort Liability

Karalyos v. Bd. of Educ. of Lake Forest Cmty. High Sch. Dist. 115, 788 F. Supp. 2d 727 (N.D. Ill. 2011). A thirteen-year-old girl suffered spinal injuries when she was instructed to dive into a pool as part of a swimming program at Lake Forest High School. She filed suit alleging negligence and wanton and willful conduct. The defendant filed a motion to dismiss, claiming that it and its employees were immune from suit. Under state law, to qualify for immunity, the act must require discretion and must involve a policy decision. Finding the swim instructor's command to dive into the pool was not a policy decision and that

the instructor's command constituted willful or wanton behavior, the district court denied the school district's motion to dismiss.

Pryor v. Iberia Parish Sch. Bd., 60 So. 3d 594 (La. 2011). The plaintiff, a sixty-nine-year-old grandmother (still recovering from hip surgery approximately one year prior to her accident) went to a high school football game to watch her grandson play a football game. While descending the bleachers at halftime in order to go the restroom she fell and sustained injuries as she stepped from the second row of bleachers to the first row, which was a distance of eighteen inches. Thereupon, she filed suit against the defendant claiming that the condition of the bleachers were defective. The Supreme Court of Louisiana held that the condition of the bleachers were not unreasonably dangerous and held for the school board.

School Districts

Constitutional Rights

Doe v. Indian River Sch. Dist., 653 F.3d 256 (3d Cir. 2011). The Third Circuit was asked to determine whether a school district's long standing practice and fairly recent policy of allowing the recital of a prayer before each board meeting was constitutional under the Establishment Clause of the First Amendment. The school district argued that the school board was akin to a legislative body and, thus, the prayer was constitutional pursuant to *Marsh v. Chambers*, 463 U.S. 783 (1983). The student contended that the board was not like a legislative body but, rather, Establishment Clause jurisprudence governing prayer in public schools should apply. The Court agreed with the student finding that the need to protect students from government coercion in the form of endorsed or sponsored religion rendered the practice and policy unconstitutional. While attendance at the school board meetings was not technically mandatory some students were required to attend (in that they were members of a group that took part in key components of the meetings) and others would have forfeited intangible benefits by declining to be there (for example, students who were being honored by the Board would forego the celebration of their success if they did not attend). Furthermore, the meeting took place on school property and the board retained complete control of the agenda and the schedule. The Court concluded that the primary effect of the prayer was to advance religion and that it fostered excessive government entanglement in religion thus rendering the practice and policy unconstitutional.

Cox v. Warwick Valley Cent. Sch. Dist., 654 F.3d 267 (2d Cir. 2011). The plaintiffs' middle-school aged son had displayed a pattern of incorrigible misbehavior. Meetings with him and his parents and the signing of a behavioral

contract had failed to effect a change. In response to an English assignment to write about what he would do if he had only hours to live, he wrote an essay saying he would get drunk, smoke, do drugs, break the law, then commit suicide by taking cyanide and shooting himself in front of friends. His teacher showed the essay to the principal. The principal met with the student, who explained that the essay was fiction and he did not intend to harm himself or others. The principal assigned the student to in-school suspension for the rest of the day while he decided what to do. Concluding that the student posed no imminent threat to himself or others, the principal took no disciplinary action. However, after discussion with the school psychologist and guidance counselor and on the advice of the superintendent, the principal reported the matter to the Department of Child and Family Services (CFS), which investigated but ultimately concluded that the report of abuse was unfounded. The parents commenced suit against the principal and the school district, asserting that the student had been disciplined in retaliation for writing the essay, in violation of his First Amendment speech rights, and that the report to CFS violated the parents' Fourteenth Amendment due process rights. The court of appeals upheld a grant of summary judgment to the principal and district. Even if the essay was speech entitled to protection under the First Amendment, the school did not censor it, or discipline the student because of it. The principal had an obligation to investigate whether the essay indicated that the student posed a danger; the temporary, protective, removal from the general school setting during that investigation was not adverse action, in the absence of evidence that the principal intended to either chill or punish the student's speech. The call to CFS, made pursuant to the principal's understanding of his statutory duty, was not adverse action in retaliation for the student's speech. Because it did not result in any loss of custody by the parents--even during the psychiatric evaluation that CFS compelled them to have performed on their son--they failed to state a claim for denial of substantive due process. As the principal acted pursuant to law in order to protect the student, and no jury could conclude that his report and the subsequent actions of CFS were outrageous or shocking to the conscience, there was no evidence of the malice necessary to support such a claim in the absence of loss of custody.

Elections

Brandvold v. Lewis and Clark Pub. Sch. Dist. No. 161, 803 N.W.2d 827 (N.D. 2011). This litigation stems from the consolidation of three school districts into just one school district in 2003. The reorganization plan was voted on separately in all three districts and was ultimately approved by all. The petitioners filed an action for declaratory relief almost six years after the 2003 election upon learning in 2009 that one of the school districts had not disclosed certain financial obligations it had under lease-purchase

agreements it had entered into. As a result, the petitioners argued that the election to consolidate the three districts should be rendered invalid. The state trial court dismissed the petitioners' lawsuit based on a failure to state a claim on which relief could be granted. The main issue on appeal was "whether a declaratory judgment action challenging the result of a public election based upon an alleged pre-election irregularity is rendered moot by the completion of the election" (803 N.W.2d at 830). The North Dakota Supreme Court held that it was, and thus the completed election which resulted in the consolidation of the three school districts rendered the petitioners' claim moot. In reaching its conclusion, the court noted the "impracticality of the relief sought" based simply on the proposition that some voters *may* have voted differently had they known about the financial obligations of the one district.

Property and Contracts

State ex rel. Dept. of Educ. v. Vantage Technologies Knowledge Assessment, LLC, 261 P.3d 17 (Or. Ct. App. 2011). The appeals court affirmed a jury verdict of \$3,521,435 against the Department of Education (DOE) in a breach of contract action. The DOE entered a contract with a company, Vantage Technologies Knowledge Assessment, LLC, for the provision of standardized testing software to allow Oregon to comply with the requirements of the No Child Left Behind Act. The initial contract, executed in March 2001, provided that Vantage's software would support 540,292 individual tests per school year, and if DOE delivered more than 110% (594,321) tests in any contract year, "DOE will enter into good faith negotiations with Vantage to establish a new pricing structure." In May 2004, the parties amended the contract to include several new provisions, including the following: "The limit of 500,000 tests is removed from the contract now there is no limit." When the volume of tests began to exceed 594,321, Vantage requested negotiations for a new pricing structure. The DOE refused to pay and, in a subsequent court action, Vantage claimed that the DOE had breached the agreement to enter into negotiations to establish a new pricing structure if tests exceeded 594,321 in any year. The DOE argued that the May 2004 amendment eliminated the previously negotiated limit of 594,321 tests, while Vantage asserted that the language related only to Vantage's physical infrastructure and capacity for testing. The trial court held that the contract language was ambiguous and submitted the issue to the jury. The jury returned a verdict in favor of Vantage for \$3,521,435. In affirming the judgment, the appeals court agreed that because the contract language was reasonably susceptible to both parties' interpretations, the issue was properly submitted to jury as factfinder.

Teacher & Administrator Employment

Discrimination

Phyllis v. Harrisburg Sch. Dist., 430 F. App'x 118 (3d Cir. 2011). A Harrisburg School District learning support teacher filed suit under the Age Discrimination in Employment Act after she was suspended indefinitely and without pay. The teacher pointed to a handful of instances that she contended provided direct or circumstantial evidence of age-based discrimination. The Third Circuit disagreed. Most of the evidence for her position was found in her unsworn declaration, which did not state that the contents of the declaration were true subject to penalty of perjury, as required by 28 U.S.C. § 1746. Even absent the procedural flaw, the teacher's "evidence" for age discrimination was insufficient to support her claim. Most specifically, she had not identified that similarly situated younger teachers received better treatment than she or other older teachers.

Hartley v. Rubio, 785 F. Supp. 2d 141 (S.D.N.Y. 2011). Plaintiff Roger Hartley, a former teacher in the New York City public school system brought action against Principal Henry Rubio, the City of New York, and the New York City Department of Education for discrimination on the basis of race and national origin. Hartley was employed by the school district in 1979 and began teaching at A. Philip Randolph Campus High School in 1994. Since 2006, Rubio has been employed as principal. In October 2006, a teacher submitted a written memorandum to the school's principal regarding Hartley's conduct, describing his behavior toward students and threats against her. An assistant principal also wrote a complaint about Hartley's behavior and Hartley's harsh criticism of her. In March 2007, Hartley and Rubio engaged in a heated, verbal argument in the hallway in front of several parents who had been waiting to meet with Hartley. At one point in the argument, Rubio left and came back with a school safety agent, after which Hartley threatened to have Rubio arrested. At a meeting the following with day, attended by Hartley, Rubio, two Superintendents and a union representative, Hartley was reassigned the Manhattan Regional Operation Center. He failed to report to the Center for several months. Upon Hartley's return, Rubio requested that Hartley meet with him for a discipline conference. A conference was held on December 6, 2007, and Hartley's union representative advised Rubio that Hartley would not answer any questions. Hartley remained at the center until January 3, 2008 when he accepted a teaching position at a public school in another district. Hartley did not return to the center October 2008. In November 2007, the Department of Education concluded that Hartley had been on unauthorized leave from March 26, 2007 until his return in November and was wrongfully paid nearly \$50,000 for that period of time. As a result, the Department

of Education began withholding pay for the then-current pay periods to being to recoup the wrongfully-dispersed salary. Hartley was charged with insubordination, conduct unbecoming a teacher or condition prejudicial to the good order, efficiency or discipline of the service, substantial cause rendering Hartley unfit to perform his obligations properly to the service, and just cause for termination. Hartley failed to request a hearing. On December 30, 2008, after a regularly scheduled meeting of the Education Panel, his services with the Department of Education were terminated.

The District Court held that the employer's reasons for termination were not race or national origin discrimination; the employer's actions were not adverse, as required to establish prima facie case of retaliation; there was no causal connection between the employee's complaint about discrimination at school and his reassignment 28 months late.

Labor/Labor Relations

Foreign Academic & Cultural Exchange Serv., Inc. v. Tripon, 715 S.E.2d 331 (S.C. 2011). Foreign Academic & Cultural Exchange Service, Inc. (FACES), a business that hires teachers in foreign countries to place them in schools in the U.S. for a designated period of time, alleged that the defendant breached her contract by not returning to her home country after completing her contract. It was during the contract period that the defendant met and married a U.S. citizen. After completing her teaching contract with FACES, she took a teaching position in another school district, received an H-1B visa after her J-1 visa expired, and refused to leave the country. FACES sued for breach of contract and of duty of loyalty and requested damages. The circuit court granted summary judgment in favor of the defendant and FACES appealed. The state supreme court determined that the circuit court erred by granting summary judgment on the matter of breach of contract and of breach of duty and reversed. There were material questions of fact on whether she breached her contract by not returning to her home country.

Sexton v. Kipp Reach Acad. Charter Sch., Inc., 260 P.3d 435 (Okla. Ct. App. 2011). The appeals court reversed the trial court's dismissal of a teacher's lawsuit against a school, where the teacher alleged that the school breached an implied contract to employ him for the following school year. The teacher alleged that after the school verbally extended an employment offer to him, sent him a letter of intent, enrolled him in a faculty conference, and issued him a faculty cell phone, the school discovered he was gay and rescinded the offer of employment. The court held that the teacher's allegations were legally sufficient to state a claim for breach of implied contract and permitted his lawsuit against the school to go forward.

Wy'E. Educ. Ass'n v. Oregon Trail Sch. Dist. No. 46, 260 P.3d 626 (Or. Ct. App. 2011). The district and the

teachers' union were parties to a collective bargaining agreement that expired in June 2004. After they reached impasse regarding a successor agreement, the union notified the district that the teachers intended to go on strike on October 25, 2005. On October 19, the district notified the teachers that, if the strike occurred as announced, the teachers would be ineligible to receive district-paid fringe benefits for the month of November. The strike commenced as planned, and the district deducted the amounts due for fringe benefit premium costs from each teacher's paycheck. The union filed a complaint with the ERB alleging that the district had committed an unfair labor practice. The ERB understood the union's argument to be that the district had a past practice of deducting from teachers' pay a prorated portion of the cost of premiums when teachers worked for less than a full pay period, and that the district had violated this past practice by deducting the full amount instead of the prorated amount. After finding that the union failed to establish this past practice, the ERB dismissed the union's complaint. The association sought judicial review of ERB's ruling in favor of the school district. The court found that the ERB had misconstrued the union's argument: the union had actually argued that the district had no authority to deduct any amounts from teachers' pay based on the teachers' failure to work. The court reversed the ERB's dismissal and ordered the ERB to make another determination based on the union's actual argument.

Higher Education

Board of Trustees

Tort Liability

Florida State Univ. Bd. of Trs. v. Monk, 68 So. 3d 316 (Fla. Dist. Ct. App. 2011). A public university became aware of possible misconduct in an office that provided academic support to student athletes. The school's chief audit officer issued a report that stated considerable testimonial evidence supported the allegation that two employees, a learning specialist and a tutor, in the office had perpetuated academic dishonesty that possibly violated the university's academic honor policy. The report, which did not name the learning specialist, was made available to the public, and her identity became publicly known. She resigned her position from the university and filed a defamation suit.

The university sought to dismiss the action on the grounds that it enjoyed absolute immunity from the defamation suit, but the trial court denied the motion, determining that the request was premature at the current stage of the proceedings. The District Court of Appeal of Florida, granting the school's motion to review the denial, held that the university possessed an absolute immunity because the report and its publication were

completed in connection with the performance of official duties. According to the opinion, the nature of the charges alleged, the potential for sanctions against the school by the National Collegiate Athletic Association, and the fact that the university is public made release of the report necessary.

University of Tex. Health Sci. Ctr. at Houston v. Garcia, 346 S.W.3d 220 (Tex. Ct App. 2011). A participant in an informal volleyball game injured a toe while on a public university's outdoor sand volleyball court. (Garcia, the injured party, caught his big toe on a piece of tarp that had become exposed from beneath the sand.) The injured individual sued the university on the basis of premises liability, alleging that the property owner knew or should have known that the sand on the volleyball court needed to be periodically inspected, maintained, or repaired. The trial court denied the university's motion to dismiss the action on governmental immunity grounds. In reviewing the case, the Court of Appeals determined that playing volleyball on an outdoor sand court constituted a "recreational activity" under the state's recreational use statute. As such, the individual had to show gross negligence in regards to the upkeep of the sand volleyball court to fall under an applicable waiver of sovereign immunity under the recreational use statute. The court held that the individual's claims failed to specify allegations that indicated gross negligence, but it did remand the case to the lower court to provide the claimant an opportunity to amend his pleadings in relation to the issue of gross negligence.

Nonacademic Personnel Employment

Contracts, Salary & Benefits

Whithaus v. Curators of Univ. of Mo., 347 S.W.3d 102 (Mo. Ct. App. 2011). Whithaus had been receiving long-term disability benefits through the university's insurance plan for ten years when he was informed that he was no longer considered disabled under the plan. He appealed the decision yet was denied by Assurant Employee Benefits, the administrator of the plan. When Whithaus' attorney requested a copy of the policy and further review of the claim, the request was denied because it had not been filed within the prescribed 90 days after the initial notice of denial of benefits. Whithaus filed suit and the university moved to dismiss for lack of subject matter jurisdiction, citing that Whithaus had failed to exhaust all administrative remedies. The trial court granted the motion to dismiss but the appeals court reversed and remanded the decision because the insurance policy did not require that any subsequent appeals be made within 90 days after the initial notice of denial of benefits.

Waters v. Ind. State Univ., 953 N.E.2d 1108 (Ind. Ct. App. 2011). While attending a university-sponsored employee appreciation luncheon, Waters was injured after she twisted her body to get out of a restaurant-style booth and cracked her right femur, causing her to have to undergo multiple surgeries and rendering her incapable of returning to work. Waters was classified as morbidly obese, suffered from diabetes, and needed the assistance of a cane to walk. The Worker's Compensation Board denied her claim for benefits, reasoning that her injuries were a result of her physical condition and not any risk associated with her employment. On appeal the court reversed and remanded the decision, citing prior state precedent that interpreted such activities as after-hours parties to be part of employment. The court also noted that the injury resulted not from her preexisting health issues but because she had to twist her body to exit the booth.

Discrimination

Pearson v. Unification Theological Seminary, 785 F. Supp. 2d 141 (S.D.N.Y. 2011). Plaintiff, Veronica Pearson, was an African-American female who was hired as an admissions officer at the defendant private religious college. She claims that the college had a racist climate in which minority employees were relegated exclusively to lower status jobs and that she suffered a loss of certain assignments, most notably her responsibility for planning convocation, as a result of racial discrimination. After an outburst with her supervisor, which resulted in the summoning of the police and EMS, Pearson was taken to a local hospital and hospitalized for a period of 10 days where she was diagnosed and treated for bi-polar disorder. She received a termination notice before she was able to return to work because of "disruptive behavior, property damage, curses and threats of harm to supervisor." Pearson alleged racial discrimination and a host of other claims, including mental disabilities. The court determined that the only properly stated claim for discrimination would have been the employee's removal from planning the school's convocation, a duty that was reassigned to a non-employee student who subsequently was hired to replace her. The court dismissed her claims under the Civil Rights Act, Section 1981, by noting that she had failed to prove racial discrimination since the student who took over these duties was also African American.

Dismissal, Nonrenewal & RIF

Caldon v Bd. of Regents of the DO-016 Univ. Sys. of Ga., 715 S.E.2d 487 (Ga. Ct. App. 2011). Plaintiff was an administrative assistant in the office of the President at Macon State College in Georgia. One of plaintiff's duties was to prepare monthly leave reports. Plaintiff became concerned by what she saw as the President under-reporting

his leave. She discussed the matter with him. When he continued to, in her opinion, under-report she told him she could no longer complete his leave reports. Plaintiff alleged that this action, along with her reporting other questionable financial practices in the President's office, was the reason for her termination, and that her termination was in violation of the Georgia Whistleblower Act. The defendant claimed that plaintiff was terminated for insubordinate behavior, after being given a chance to resign. The trial court granted summary judgment to the defendant Board of Regents, finding that the plaintiff failed to present a prima facie case which would contradict the testimony and other evidence proffered by the defendant. The appellate court affirmed.

Professor & Administrator Employment

Contracts, Salary, and Benefits

Nye v. Univ. of Wash., 260 P.3d 1000 (Wash. Ct. App. 2011). Nye was the named plaintiff in a class action lawsuit arguing that the University of Washington was in breach of contract when it suspended faculty merit raises. In 2000, a campus executive order had provided for annual bonuses for meritorious faculty yet contained a "funding caution" that stipulated that these were contingent upon legislative appropriations. In 2009, because of a 12-percent budget reduction, the university president worked with the faculty senate to promulgate a new executive order that would suspend the merit bonuses. On appeal, the court upheld an earlier decision to grant summary judgment and dismiss the claims, citing that the president had acted within his authority as set forth in the faculty handbook.

Tenure and Promotion

Texas A&M Univ.-Kingsville v. Yarbrough, 347 S.W.3d 289 (Tex. 2011). An associate professor at the university filed a grievance seeking to dispute her department chair's annual evaluation of her performance. When the university did not allow her grievance to be brought forth, she filed suit and asserted that the chair's narrative in the evaluation would be prejudicial to her tenure application. Because she subsequently was awarded tenure before the suit was filed and no live controversy existed, the court reversed the appeals court's previous judgment and dismissed the case.

Tort Liability

Haegert v. McMullan, 953 N.E.2d 1223 (Ind. Ct. App. 2011). A university professor was fired for sexually harassing his supervisor. Informal complaints regarding alleged instances of sexual harassment against the professor had also been documented by the supervisor and the university's

affirmative action officer. The former professor sued the supervisor, alleging defamation, tortious breach of an employment contract, and intentional infliction of emotional distress. The trial court granted summary judgment in favor of the supervisor. On appeal, the Court of Appeals of Indiana upheld the grant of summary judgment. The court held that the allegations in the complaint were insufficient to state a claim for defamation, that the professor was protected by a qualified privilege in relation to communicating informal student complaints against the professor to university officials, and that no evidence existed that the supervisor sought to inflict emotional distress.

Students

Education Loans/Financial Aid

In re Marcotte, 455 B.R. 460 (Bankr. D.S.C. 2011). A debtor suffered serious injuries in a car accident prior to attending and completing college. Despite this he was able to complete his degree, with funding in the form of student loans, and also to work for six years after graduation, during which he made his scheduled loan payments on this debt. After six years the debtor's medical condition, caused by the original accident, declined to the point where he could no longer work. Since then he has moved in with his parents to minimize expenses and earns a minimal disability income. Evidence at court established he is unlikely to return to employment for any foreseeable future. Debtor also was able to demonstrate that his minimal income was insufficient to meet his medical and living expenses and he argued this justified an undue hardship discharge of his remaining student loan. Against this the debt-holder noted that the debtor owned a 401k retirement account sufficient to repay his outstanding student loan and had, recently, with a relative's assistance, purchased a vehicle. The district court discharged the remaining debt under the hardship exception noting that the debtor had made good faith efforts to repay his obligations, that the vehicle was necessary to his ongoing medical needs, and that previous bankruptcy precedents did not require the liquidation of retirement accounts even for the purpose of satisfying student loan repayment.

Education Resources Inst., Inc. v Hawkins, 931 N.Y.S.2d 11 (N.Y. App. Div. 2011). Defendant breached a student loan agreement with plaintiff. Plaintiff sued and defendant moved for dismissal arguing that the six-year statute of limitations had run. Defendant failed to establish a prima facie case that the limitations period began to run on 2003. Defendant's motion to dismiss was denied. Also denied was plaintiff's claim for late charges was also dismissed for failure to provide evidence that plaintiff was entitled late charges.

DeForge v Karwoski, 87 A.D.3d 1323, 930 N.Y.S.2d 703 (N.Y. App. Div. 2011). In an appeal from an order of the Supreme Court, Onondaga County, the denial of summary judgment for plaintiff and the granting of defendant's cross motion for summary judgment was reversed. Plaintiff had sued defendant to recover money that he paid as cosigner for a student loan taken out by defendant, his daughter. The court stated that, "In cosigning the loan agreement, plaintiff acted as a surety and thus, in accordance with the general rule, is equitably entitled to full indemnity against the consequences of the default of defendant, the principal obligor." 87 A.D.3d at 1324. A separate written contract was not required for recovery.

Fourteenth Amendment Rights

Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by any Means Necessary (BAMN) v. Regents of Univ. of Mich., 652 F.3d 607 (6th Cir. 2011). This litigation was prompted by the passage of "Proposition 2" by Michigan voters. Proposition 2 effectively barred the legislatures and all state and local government boards and agencies, including the Regents, from enacting any laws or policies granting any preferences in a number of areas, including college admissions, based on race, sex, color, ethnicity, or national origin. This amendment to the state constitution was inspired directly in response to the U.S. Supreme Court rulings in *Gratz v. Bollinger*, 539 U.S. 244 (2003), and *Grutter v. Bollinger*, 539 U.S. 306 (2003), which had permitted the use of race and other characteristics as a "factor" in college admissions so long as it was not a sole determining factor. The Court of Appeals, in reversing the district court, found that Proposition 2 violated the Fourteenth Amendment because it shifted the burden of seeking race-based preferences impermissibly from minority groups and those supporting minority rights to those opposed to such policies. The court noted that under Proposition 2, persons and organizations opposed to such race-based preferences could now merely rely upon pressure upon state boards and officials, or judicial injunction, while those seeking such preferential policies must now seek to first persuade state voters to overturn the new constitutional language contained in Proposition 2.

Law Enforcement

U.S. v. Litledale, 652 F.3d 698 (7th Cir. 2011). While conducting a search of a home, pursuant to a proper warrant for evidence of child pornography, federal agents learned that a previously unknown resident was then attending classes at a nearby college. Several agents of Homeland Security went to the college and, with the assistance of campus police, removed the student from class and, with his cooperation, escorted him to an office in the campus security building and interviewed him about the online

child pornography traced to his home address. At the time the agents had no specific suspects as several persons lived in the home and used the computers there. After some 25 minutes of interviewing, the student admitted that he was the person who had accessed and downloaded the objectionable material. Upon being read his *Miranda* rights the student signed a confession and was allowed to leave. Later he was convicted and sentenced to a significant prison term. He moved for suppression of his pre-*Miranda* statements and subsequent confession alleging he was subjected to a custodial interrogation without having been informed of his right to remain silent or request counsel under the Fifth Amendment right against self-incrimination. The Court of Appeals rejected this appeal. Although the subject was interviewed by armed police in a room with a closed door, the court noted that at no time was the student arrested and, in fact, was informed he was free to leave at anytime. The court also noted that the subject freely consented to accompany the agents and campus police to the interview and was interviewed in a regular office, and not an interrogation room or secure cell.

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U.S. Supreme Court Docket

Summary of Court Action Reported
 from November 8, 2011
 through December 12, 2011

Provided by Fred Hartmeister
 and Rebecca Hellbaum

Cases Decided

None.

Cases Awaiting Decision after Oral Argument

No. 10-553. *Hosanna-Tabor Evangelical Lutheran Church v. Equal Employment Opportunity Comm.*, 597 F.3d 769 (6th Cir. 2010). A parochial elementary school teacher in Michigan was terminated in April, 2005. At a church golf outing one year earlier, the teacher suddenly become ill and was taken to the hospital. After finally being diagnosed with narcolepsy following several months on disability leave, the teacher informed her employer with a return-to-work release that she expected to return to work in the foreseeable future. In the meantime, the church congregation implemented modifications to some of its employment policies. Following its review, the EEOC ultimately filed a complaint against the church for violating the Americans with Disabilities Act (ADA). The teacher then intervened and filed her own complaint under the state's Persons with Disabilities Civil Rights Act. Holding as a matter of first impression that the retaliation claim was barred by the ministerial exception, the district court granted summary judgment to the employer, and both the teacher and EEOC filed timely

notices of appeal. After determining that the district court's factual determinations were not clearly erroneous, the Sixth Circuit Court of Appeals vacated the summary judgment in defendant's favor and remanded for a determination on the merits of the retaliation claim. The appellate court reasoned that the teacher had been mischaracterized as a ministerial employee since her primary function involved teaching secular subjects rather than spreading the faith. In the appellate court's opinion, simply being a "called teacher" did not transform her position from secular to religious in nature. In short, the question presented by the petitioner to the Court is whether the ministerial exception applies to a teacher at a religious elementary school who teaches the full secular curriculum but also teaches daily religion classes, is a commissioned minister, and regularly leads students in prayer and worship. *Certiorari* was granted on March 28, 2011, and the Court heard arguments in the case on October 5, 2011.

Certiorari Granted

None.

Cases Recently Filed

No. 10-760. *Weishuhn v. Catholic Diocese of Lansing*, 787 N.W.2d 513 (Mich. Ct. App. 2010). A former parochial school teacher whose contract was not renewed filed suit under the Michigan Civil Rights Act and the Whistleblower's Protection Act. Although her primary duties included teaching mathematics, she also taught religion classes and assisted with student liturgies and preparation for the sacrament of confirmation. Holding that a ministerial exception deemed to be applicable in this instance creates an absolute protection for a religious institutional employer, the trial court's grant of summary judgment for the defendants was affirmed.

No. 10-886. *Compton Unified Sch. Dist. v. Addison*, 598 F.3d 1181 (9th Cir. 2010). A special education student under the Individuals with Disabilities Education Act (IDEA) filed an administrative claim seeking compensatory educational services premised on her school district's failure to identify her needs and provide a free appropriate public education. Among other factors the courts considered, the student's ninth grade counselor had attributed the student's very poor grades and first percentile performance on standardized tests to "transition year" difficulties. Only when the student failed every academic subject during the fall of her tenth-grade year did the counselor consider the grades to be a "major red flag." During this period the student also colored with crayons, played with dolls in class, urinated on herself in class and sometimes refused to enter the classroom. At this point—and despite the mother's reluctance to have her child "looked at"—a third-party counselor recommended that the district

assess the student for learning disabilities. Disregarding the recommendation, the district promoted the student to eleventh grade. Only after the mother wrote a letter during the next school year explicitly requesting an educational assessment and Individualized Education Program (IEP) did an assessment take place, and approximately four months later, the student was determined to be eligible for special education services. An administrative law judge, a district judge and a 2-1 panel of the Ninth Circuit Court of Appeals held that the student has a cognizable claim under IDEA for the school district's "willful inaction" and corresponding failure to identify her disabilities. The dissenting Ninth Circuit judge asserts that Congress did not intend to create a cause of action given these circumstances under IDEA. On April 18, 2011, the Court invited the Acting Solicitor General to file a brief expressing the views of the United States.

No. 10-1139. *Faculty Senate of Fla. Int'l Univ. v. Florida*, 616 F.3d 1206 (11th Cir. 2010). Florida has a statutory restriction that limits the use of state money for travel by state employees to countries that the federal government has listed as "State Sponsors of Terrorism." When a group of faculty plaintiffs challenged the restriction, the district court granted partial summary judgment on their behalf. The court concluded that the statutory limitation on using non-state funds was preempted by federal law and violated the federal government's foreign affairs power. Summary judgment was denied with respect to the use of state funds. Both sides appealed and, following a *de novo* review by the Eleventh Circuit Court of Appeals, the judgment with regard to non-state funds was reversed. The appellate court vacated the lower court's permanent injunction barring enforcement of the pertinent statute and remanded the case for further proceedings. The prohibition against using state funds was affirmed. On May 16, 2011, the Court invited the Acting Solicitor General to file a brief expressing the views of the United States.

No. 11-345. *Fisher v. Univ. of Tex. at Austin*, 631 F.3d 213 (5th Cir. 2011). Two unsuccessful state resident undergraduate applicants to the university challenged the use of race in the admissions process. The university countered by arguing that its consideration of race was one part of a complex *Grutter*-like admissions process [see *Grutter v. Bollinger*, 539 U.S. 306 (2003)]. In granting summary judgment to the university, the district court found no evidence of the plan creating a quota by another name and, similarly, it did not amount to racial balancing. On appeal to the Fifth Circuit Court of Appeals, the appellate court took note of the legislatively-mandated parallel diversity initiative that guarantees admissions to Texas students in the top ten percent of their high school classes. In affirming, the court reasoned that the admissions program in use when the student plaintiffs were denied admission

was constitutional at the time. As formulated at this stage by the petitioners, the Court is asked to consider whether the lower courts' interpretation of *Grutter* fits within the bounds of the Fourteenth Amendment's Equal Protection clause as applied in undergraduate admissions decisions.

No. 11-438. *Liberty Univ. v. Geithner*, citation unavailable (4th Cir. 2011). In this case the Court is asked to consider whether the Anti-Injunction Act (AIA) bars pre-enforcement claims against the Patient Protection and Affordable Care Act? The Fourth Circuit Court of Appeals concluded that the AIA prohibited the plaintiff's suit. At this stage the petitioner contends that Congress exceeded its enumerated powers by enacting a law that forces individuals and employers into government-mandated and heavily-regulated health care insurance programs.

No. 11-461. *Kowalski v. Berkeley County Sch.*, citation unavailable (4th Cir. 2011). A student who, while off campus, created a MySpace page intended to harass another student was deemed to have substantially interfered with school operations. Even though the web page was created away from school and was not directed at school officials, the courts below concluded that it was foreseeable under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), that it would lead to "material and substantial disruption." Since the target of the posting missed class to avoid additional abuse, the school's significant interest in preventing bullying was enhanced. In addition, the courts recognized the school's interest in preventing copycat efforts when unpunished misbehavior has a snowballing effect.

No. 11-502. *Blue Mountain Sch. Dist. v. J.S.*, 650 F.3d 915 (3d Cir. 2011) [incorporating *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205 (3d Cir. 2011) decided the same day]. These two high profile *en banc* Third Circuit Court of Appeals rulings highlight variations in the relationship between student-asserted First Amendment rights for off campus online speech and the appropriateness of school officials' disciplinary responses. Turning largely within the principles and parameters established by the Court in *Tinker*, *Fraser*, *Kuhlmeier* and *Morse*, the student-favorable rulings are grounded on divided judicial reasoning.

No. 11-518. *Worrell v. Houston Can! Acad.*, 424 F. App'x 330 (5th Cir. 2011). In April 2007, a former employee filed a Title VII employment discrimination and retaliation claim against her former employer. Following initial disclosures and a preliminary conference call, the Academy propounded its first set of interrogatories and requests for production of documents. Several months later and after the plaintiff failed to respond, a magistrate judge sanctioned the plaintiff and granted a motion to compel. Although the plaintiff attempted to explain away her failure to respond by arguing that her attorney's legal practice had been adversely impacted by Hurricane Ike, the magistrate

rejected the plaintiff's motion to reconsider. Ultimately, the plaintiff's failure to comply with multiple court orders convinced the district court that she did so in bad faith, thus warranting dismissal of the suit with prejudice. On appeal to the Fifth Circuit Court of Appeals, the lower court's holding was affirmed since the plaintiff's repeated failure to obey multiple discovery orders outweighed any possibility of the district court having abused its discretion.

No. 11-568. *Pierce v. Woldenberg*, citation unavailable (E.D.N.Y. 2011). Seeking to obtain a preliminary injunction in his civil rights suit, a *pro se* plaintiff who was unsuccessful in gaining admission to a medical school failed to persuade a federal district court that he would suffer irreparable harm, the likelihood of success on the merits, or that the equities in the case weighed in his favor. Bypassing the Circuit Court of Appeal, the plaintiff presents a single question for the Court's consideration: If the use of race in admissions of federally assisted educational institutions is still permitted under Title VII of the 1964 Civil Rights Act, then what standard must an individual plaintiff meet to establish a violation?

No. 11-569. *Indian River Sch. Dist. v. Doe*, 653 F.3d 256 (3d Cir. 2011). This case raises the issue of a school board's long-standing policy of opening its regularly-scheduled meetings with prayer. When challenged on First Amendment Establishment Clause grounds, the board claimed that its practice is akin to a legislative body doing so, the constitutionality of which was upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). Although the district court agreed with the school board's reliance on *Marsh*, the Third Circuit Court of Appeals reversed on appeal. In doing so, the appellate court found guidance in *Lee v. Weisman*, 505 U.S. 577 (1992). It also provided analysis under various Establishment Clause tests including the three-pronged "test" in *Lemon v. Kurtzman*, 403 U.S. 602 (1971) and former Justice O'Connor's "endorsement test" proffered in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984).

No. 11-630. *T.A. v. Forest Grove Sch. Dist.*, 638 F.3d 1234 (9th Cir. 2011). The parents of a high school spring semester junior who had attended school in the district since kindergarten removed their son in 2003 and enrolled him in a private boarding school that charged \$5,200 a month for room and board. Asserting that the move was due to their son's attention deficit hyperactivity disorder, which was not recognized by the local school district as a basis for providing special education under the Individuals with Disabilities Education Act (IDEA), the parents sought reimbursement for the private placement. Among other factors, the student was using marijuana at least three or four times a day, made \$1,200 worth of "1-900" pornographic phone calls, stored drug paraphernalia in his bedroom, and had run away from home. A hearing officer acknowledged that the parents made the placement change for their son for both disability and

non-disability-related reasons. The case had previously made its way to this Court, and in *Forest Grove Sch. Dist. v. T.A.*, ___ U.S. ___, 129 S.Ct. 2484 (2009), it was remanded for further consideration. The district court reasoned that the parents' decision to remove their son from public school was based on non-educational reasons – specifically, the student's substance abuse and discipline problems. As such, equitable considerations did not support any award of private-school tuition. Concluding that the district court did not abuse its discretion, a 2-1 Ninth Circuit Court of Appeals panel affirmed. The petitioners now assert that the lower courts exceeded the scope of the Supreme Court's remand consideration mandate by reversing unappealed factual findings that educational concerns motivated the private placement change.

No. 11-643. *Doe v. Megless*, 654 F.3d 404 (3d Cir. 2011). After school and various other local government officials circulated email and print flyers characterizing a local citizen as dangerous and potentially mentally unstable, the citizen filed a 42 U.S.C. Section 1983 suit. The electronic flyers included the citizen's name, picture, "unknown" mental status, home address, make, model and license plate number of his vehicle, and his Pennsylvania driver's license number. As plaintiff, the citizen claimed that he would suffer by revealing his identity and thus sought anonymity in the judicial proceedings. Rejecting the plaintiff's right to privacy argument, the district court rejected the request for anonymity but provided the plaintiff with an opportunity to file an amended complaint under his real name. After he declined to do so, the plaintiff's suit was dismissed and the Third Circuit Court of Appeals affirmed.

No. 11-666. *Policastro v. Tenafly Bd. of Educ.*, 438 F. App'x 153 (3d Cir. 2011). The Third Circuit Court of Appeals confirmed that the district court properly concluded that a school board's policy governing the use of teacher mailboxes was content neutral and that it serves a legitimate governmental purpose, is narrowly tailored, and leaves open other viable alternatives for communication. The case arose after the policy was used as a basis for disciplining a tenured teacher who had placed a memo he had written in teacher mailboxes. Acting on his own behalf as a *pro se* petitioner, the teacher raises questions about the applicability of the "substantial disruption" standard in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), vis-à-vis the regulation of teacher speech.

Certiorari Denied

No. 11-380. *Workman v. Mingo County Bd. of Educ.*, 419 F. App'x 348 (4th Cir. 2011). A mother filed a 42 U.S.C. Section 1983 action against various West Virginia state and county officials alleging that they violated her constitutional rights in refusing to admit her pre-school-aged

daughter to public school without required immunizations. The mother's actions were at least in part premised on the fact that an older sibling in the family had begun suffering health problems after she was vaccinated. Prior to filing suit the mother had secured a medical waiver for her daughter from the immunization requirement with the support of a child psychiatrist. Although the exemption by the school district lasted for about a month, it was subsequently revoked after a school nurse challenged the waiver certificate. A district granted summary judgment to the defendants, and that decision was affirmed by the Fourth Circuit Court of Appeals after it concluded that the lower court did not err in awarding summary judgment and rejecting the mother's constitutional claims.

No. 11-386. *Bronx Household of Faith v. Bd. of Educ. of the City of N.Y.*, 650 F.3d 30 (2d Cir. 2011). In the latest iteration of a case with roots dating back to 1994 when the plaintiffs first sought approval to use school facilities for a Sunday morning church service, a district court judge granted a permanent injunction precluding the school board's current ban preventing outside groups from using school facilities for worship outside of school hours. On appeal and taking into account the Court's decision in *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), the Second Circuit Court of Appeals reversed the judgment and vacated the injunction. The appellate court concluded that the challenged ban does not constitute viewpoint discrimination because it does not seek to exclude expressions of religious points of view or of religious devotion. Rather, in giving credence to what it describes as the defendant school board's reasonable attempt at avoiding violations of the Establishment Clause, it excludes for valid non-discriminatory reasons only a certain type of activity, in this case the conduct of worship services. The appellate court added that the exclusion of religious worship services is a reasonable content-based restriction that does not violate the Free Speech clause of the First Amendment. Justice Sotomayor took no part in the consideration or decision of the petition.

No. 11-402. *Victory Through Jesus Sports Ministry Found. v. Lee's Summit R-7 Sch. Dist.*, 640 F.3d 329 (8th Cir. 2011). A group with a religious affiliation that hosted summer soccer camps for schoolchildren filed suit against a Missouri school district and its superintendent for restricting the distribution of informational "backpack flyers." Claiming violations of the First Amendment, the organization's claims were denied by the district court following a bench trial. On appeal to the Eighth Circuit Court of Appeals, the decision was affirmed. Although noting that relatively unlimited distribution of materials was granted to certain groups, community youth organizations were allowed to distribute flyers only at three particular times during the year. The appellate court characterized the flyer distribution service as a nonpublic forum, and the

school district's viewpoint neutral process was not based on the organization's religious orientation. Similarly, a facial challenge to the process failed since the superintendent did not exercise unbridled discretion in determining which groups had preferred access to the distribution program.

No. 11-419. *Zhang v. Lake Elsinore Unified Sch. Dist.*, unpublished case (9th Cir. 2011). Acting *pro se* and filing federal constitutional and statutory claims, the mother of a school-aged child asserted that her daughter was discriminated against when she was denied special education rights. The district court dismissed the mother's claims, and the Ninth Circuit Court of Appeals affirmed. The appellate court's decision was based on the plaintiff having failed to show that she was an aggrieved party under the Individuals with Disabilities Education Act (IDEA). Further, the court noted that the mother's conclusory statement that school district officials had acted with deliberate indifference was not supported by sufficient facts. Since Congress intends for the comprehensive enforcement scheme embraced in the IDEA to preclude 42 U.S.C. Section 1983 claims, the constitutional claims were also properly dismissed.

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