Education Law Association's

ED LAW Update

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A New Name, A New Start

Contents - April 2021

Welcome to the Education Law Association's newest periodical, *ED LAW Update.* This title replaces the long-lived *School Law Reporter,* which concluded in its 63rd year with the March 2021 issue.

A lot of Education Law Association and NOLPE (National Organization on Legal Problems in Education) history transpired under the *School Law Reporter* and *ELA Notes* periodical titles. We retired the latter last year—as we began delivering more organizational content in our e-newsletter, *ELA Weekly*—and merged it into the digital-only version of *School Law Reporter*.

Somehow, though, "school law" didn't quite cut it as a title for a forward-looking digital publication serving an organization with so many faculty members and administrators in higher education and attorneys with that practice, as well as a constantly increasing percentage of education law cases being outside the P-12 category.

The idea for a new periodical has been under consideration by the ELA Board for several years. It's part of a larger plan to overhaul members' access to relevant and timely content. We're building a new infrastructure, so to speak.

ED LAW Update looks a lot like recent issues of *School Law Reporter*—a purposeful transition from the old to the new. The biggest difference in this first issue of *ELU* is the debut of Cases in Point. Here, we've reintroduced the former *SLR* case summaries in smaller numbers, with our writers summarizing the most relevant cases and providing analytical comments reflecting their opinions.

Under the *ELU* setup, recent court decisions will be selected for interest and relevance to ELA members in several main subject areas. Team leaders and reporters organized around those topics will write the case summaries with brief analysis.

The idea for Cases in Point is quality rather than quantity. No one has time to follow every case in the growing field of education law, so the ELU team whittles down the numbers to the most worthwhile cases to follow in primary categories.

Filling out the rest of the monthly issues of *ED LAW Update* will be the highly regarded Education Law Into Practice (ELIP) articles, co-published in West's *Education Law Reporter*, plus Case Commentary articles with deeper analysis and commentary than the Cases in Point.

The advent of this new periodical offers several advantages to ELA members. First, it's leading the way toward a new and easier approach to finding useful content on our website, in meaningful categories. Second, it offers writing opportunities at three levels—sizes small, medium, and large—for members who want to develop or maintain their writing skills. And third, it demonstrates Education Law Association's commitment to change that esteems the past, energizes the present, and embraces the future.

Here we GO!

Writers for This Issue

Jacob A. Bennett, Ph.D., Adjunct Faculty of Higher Education, University of New Hampshire, Durham, NH

Amy L. Dagley, Ph.D., Assistant Professor, Educational Leadership, The University of Alabama Birmingham, AL

David L. Dagley, Ph.D., J.D., Professor Emeritus, Educational Leadership, The University of Alabama, Tuscaloosa, AL.

Todd A. DeMitchell, Ed.D., John & H. Irene Peters Endowed Professor Emeritus of Education Law & Labor at the University of New Hampshire, Durham, NH

Joe Dryden, J.D., Ed.D., Associate Professor, School of Graduate Education, Texas Wesleyan University, Ft. Worth, TX

Richard Fossey, J.D., Ed.D., Professor Emeritus and former Policy Director of the Picard Center, University of Louisiana at Lafayette, LA; ELIP Coeditor

Richard Geisel, J.D., Ph.D., Professor, Grand Valley State University, Grand Rapids, MI

Beth K. Godett, Ed.D., J.D., Adjunct Professor, Education Law, Rider University, Lawrence, NJ, and Fairleigh Dickinson University, Teaneck, NJ

Alejandra Gonzalez-Mejia, Ph.D., Alumna, The University of Texas at San Antonio, San Antonio, TX

Gina L. Gullo, Ed.D., Clinical Faculty Member, Seton Hall University, South Orange, NJ

Barbara J. Hickman, Ed.D., Assistant Professor, College of Education, University of Wyoming, Laramie, WY

Bonnie Hoffman, J.D., Shareholder, Hangley Aronchick Segal Pudlin & Schiller, Philadelphia, PA

Elisabeth M. Krimbill, Ed.D., Assistant Professor, Texas A&M University San Antonio, San Antonio, TX; current member of ELA Board of Directors

Ilana L. Linder, J.D., Associate, Manley Burke, Cincinnati, OH, and Associate, Fraternal Law Partners; current member of ELA Board of Directors

Elizabeth T. Lugg, J.D., Ph.D., Associate Professor, Educational Law, Illinois State University, Normal, IL; current member of ELA Board of Directors; ELU Editor

Allan G. Osborne, Jr., Ed.D., Principal (Retired), Snug Harbor Community School, Quincy, MA; ELIP Coeditor; Past President of the Education Law Association

Catherine Robert, Ed.D., Assistant Professor, Educational Leadership & Policy Studies, The University of Texas at Arlington, TX

Charles J. Russo, J.D., Ed.D., Panzer Chair in Education and Director of the Ph.D. Program in Educational Leadership in the School of Education and Health Sciences and Research Professor of Law in the School of Law, University of Dayton, Dayton, OH; *ELA Yearbook* Editor; Past President of the Education Law Association

David P. Thompson, Ph.D., Professor, The University of Texas at San Antonio, San Antonio, TX

Perry A. Zirkel, Ph.D., J.D., LL.M., University Professor Emeritus of Education and Law, Lehigh University, Bethlehem, PA; *Special Education Legal Alert* Blogger; Past President of the Education Law Association

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 ISSN Pending.

CONTACT INFORMATION
Education Law Association
P.O. Box 45593, Westlake, Ohio 44145
Phone/Fax: 833-ELA-1954 (833-352-1954)
Email: ela@educationlaw.org
Website: www.educationlaw.org

John W. Borkowski.....2021 President
Thomas E.M. Hutton.....Interim Executive Director
Patricia A. Petrusky.....Member Services Consultant
Pamela J. Hardy.....Publications Consultant
Linda M. Schwartz.....Project Support
Kimberly Waite-Cooper.....Project Support
Allan G. Osborne, W. Richard Fossey, Christine S. Kiracofe.....ELIP Editors
Elizabeth T. Lugg, Patrick D. Pauken.....*ED LAW Update* Editors

Cases in Point

Summary and brief analysis of noteworthy education law cases

April 2021

Constitutional Law

Adams v. McMaster, 851 S.E.2d 703 [384 Educ. L. Rep. 1062] (S.C. 2020).

In response to the COVID-19 global pandemic, Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which included an appropriation of $30.75 billion to the Education Stabilization Fund to be allocated to three different types of educational-based sub-funds.

The governor of South Carolina applied for and was awarded a $48,467,924 grant from one of those sub-funds. Specifically, the grant funds South Carolina received under the CARES Act constituted a Governor's Emergency Education Relief ("GEER") (sub) Fund. As a GEER Fund grant, South Carolina's award was allowed to be used toward providing emergency support to institutions of higher education, local educational agencies, or other education related entities within the state that the governor deemed essential for carrying out emergency educational services to students, particularly those institutions impacted the most by the COVID-19 pandemic.

Upon being awarded the GEER Fund grant, the governor announced the creation of the Safe Access to Flexible Education ("SAFE") Grants Program. Under the SAFE Grants Program, $32 million of the GEER Funds the state received would be used to provide one-time, need-based grants (of up to $6,500/student) to cover the 2020-2021 tuition costs for eligible students to attend specific private and independent schools that would be selected by the governor's advisory panel. To apply for the SAFE grants, families first applied through the program's online portal. Once an eligible student selected one of the panel's selected private/independent schools to attend, the parent/guardian of that student directed the electronic payment of the SAFE Grant funds to the school through a secure online platform. If a student withdrew from the school during the school year, the school was required to issue a prorated refund to the SAFE Grants Program for any unused portion of the prepaid tuition.

In response, a local school district, education association, and others filed a lawsuit seeking declaratory and injunctive relief to challenge the constitutionality of the governor's allocation of the federal funds for the creation of the SAFE Grants program. The circuit court issued a temporary restraining order, which was extended until the court issued its opinion on the merits of the case.

The Supreme Court of South Carolina, having accepted the case in its original jurisdiction, concluded that the governor's allocation of GEER funds to support the SAFE Grants Program constituted an improper use of public funds for the direct benefit of private schools, as prohibited by the state constitution.

After concluding that the petitioners in this case had standing to bring this case based upon the public importance doctrine, the court first determined that the GEER funds did indeed constitute "public funds" within the meaning of the relevant constitutional provisions that precluded the use of public funds to support private or religious educational institutions. Here, the court found that the funds were not simply passively flowing through the state, but instead were being actively utilized by the state (through its governor) and were being deposited in the state treasury. Moreover, the court rejected South Carolina's claim that, because the students and their families participating in the SAFE Grants program were the primary beneficiaries of the funding, the private schools only *indirectly* benefited from the SAFE Grant Program. After all, the SAFE tuition grants were directly transferred from the state treasury to the selected private school through use of a secure online portal, and the CARES Act specifically prohibited the direct payment of funds to individuals, requiring instead that the payments go only to entities.

As noted by the court in its opinion, even in the midst of a pandemic, the law remains a constant, and the current circumstances cannot dictate the outcome of a matter. Indeed, "no matter the circumstances, the Court has a responsibility to uphold the Constitution." This case serves as a reminder that, even with the best of intentions—such as helping to fund struggling educational institutions when faced with unprecedented circumstances—must be carefully executed to ensure compliance with the applicable rules and regulations. After all, if exceptions to well-established principles are permitted in one case, the integrity of a system that was developed to ensure equal application of the laws to all is called into question. – *Ilana Linder*

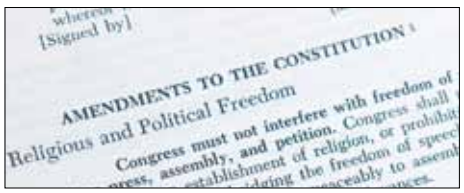
A.H. by and through Hester v. French, 985 F.3d 165 [385 Educ. L. Rep. 475] (2d Cir. 2021).

A high school senior and the religious school she attended (plaintiffs) filed suit against the Vermont Agency of Education (defendant) after being denied participation in the state's Dual Enrollment Program (DEP). Under Vermont's DEP, juniors and seniors in high school can dual-enroll at approved Vermont colleges. Eligible high school students can take up to two college courses paid for by the state. Tuition is paid directly to approved colleges and universities in amounts predetermined by the state legislature. According to state statute, a student is eligible to participate in the DEP if they are enrolled in a Vermont public school, a home study program, or an approved independent school that the student's sending district of residence pays *publicly funded* tuition to on behalf of the student. Some school districts in Vermont are small enough that they do not have a high school for resident students. According to Vermont's Town Tuition Program (TTP), if a district provides elementary education, then they must also provide secondary education. Districts can do this by maintaining their own high school or by using public funds to pay the tuition of secondary students to attend a public high school in another district or to attend a *secular* independent high school of the parents' choosing. Districts that choose the latter option are often referred to as "sending" districts. This case addresses an issue that intersects with Vermont's TTP and DEP.

Residing in a "sending" district, the plaintiff chose to attend a religious high school and was therefore denied public

funding according to Vermont's TTP. As a result, the plaintiff was also denied the opportunity to dual-enroll in college classes under Vermont's DEP because the school she attended was not *publicly funded* according to the program's requirements. The plaintiffs filed suit alleging the DEP, as applied, violated the Free Exercise Clause of the First Amendment, and they requested a preliminary injunction. The federal trial court denied the motion for a preliminary injunction based on the finding that the DEP's requirements were "facially neutral and generally applicable, were not motivated by a discriminatory intent, and do not impose unconstitutional burdens on religious exercise" (985 F.3d at 170). The plaintiffs appealed.

The essential issue in this case is whether the "publicly funded" requirement in Vermont's DEP discriminates against students who choose to attend religious schools in violation of their free exercise rights under the First Amendment. Reversing the federal trial court's denial of a preliminary injunction, the Second Circuit Court of Appeals held that the plaintiffs were likely to prevail on the merits of their case at trial. The court concluded that Vermont's DEP as applied to the plaintiffs violated their free exercise rights under the First Amendment. In so doing, the court heavily relied on two relatively recent U.S. Supreme Court decisions that found generally applicable restrictions on government benefits to religious organizations solely because of their status as religious organizations to be violative of the Free Exercise Clause. The court noted that in *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S. Ct. 2012 (2017) the U.S. Supreme Court found that a Missouri grant program providing subsidies for playground resurfacing at preschool and daycare centers violated the Free Exercise Clause when it denied the application submitted by a church daycare program solely because the church was a religious organization. Likewise, in *Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246 (2020) the U.S. Supreme Court held that Montana violated the Free Exercise Clause by singling out religious schools as ineligible recipients for state scholarship


[Signed by]

AMENDMENTS TO THE CONSTITUTION

Religious and Political Freedom

Congress must not interfere with freedom of assembly, and petition. Congress shall establishment of religion, or prohibit

funds simply because of their religious status. Drawing parallels between *Trinity Lutheran* and *Espinoza* and the plaintiffs' free exercise claims in this case, the Second Circuit concluded that the plaintiffs had a clear likelihood of success on the merits of their First Amendment claim, and therefore granted injunctive relief.

In this case, as well as in the Supreme Court's cases in *Trinity Lutheran* and *Espinoza*, the state actors denied a religious organization an otherwise generally available public benefit out of concern for violating the First Amendment's Establishment Clause or even more restrictive state prohibitions on using public monies to advance religion. Nevertheless, in all three of these cases the courts have found the denials of these public benefits, as applied, to have violated the Free Exercise Clause of the First Amendment. It would appear that in order to survive a Free Exercise claim, the denial of a generally applicable public benefit to a religious organization would require more than just a blanket denial based on the religious status of an organization. Importantly, the Second Circuit found that Vermont's DEP only burdened high school students at religious high schools and was therefore not religion-neutral. The court found that the choice presented to the plaintiff to either go to school at a religious school or benefit from the DEP, but not both, was an impermissible burden on the plaintiff's free exercise of her religion. – *Richard Geisel*

Employment

Whalen v. Pub. Sch. Employees' Ret. Bd., 241 A.3d 1242 [384 Educ. L. Rep. 921] (Pa. Commw. Ct. 2020).

While still employed as a public school principal in the Wyoming Valley West School District (District), Raymond J. Whalen filed with the Equal Employment Opportunity Commission (EEOC) and argued before the Federal District Court for the Middle District of Pennsylvania a claim of age discrimination under the Age Discrimination in Employment Act (ADEA) against the District on the basis that he was excluded from raises awarded to other District principals, all younger. Whalen and the District settled out of court. The settlement agreement awarded $15,000 "in the form of a salary enhancement" and that the payment would "be income qualified for full pension credit by [Public School Employees' Retirement System (PSERS)] to be allocated to the year 2013-2014." The agreement also stipulated that Whalen would submit an irrevocable letter of retirement effective September 24, 2014. Whalen signed that letter June 27, 2014, the same day he and the District signed the agreement.

When Whalen filed for retirement, his final average salary (FAS) was calculated without including the settlement payment. He filed an appeal claiming the settlement payment should have been included as retirement-covered compensation (RCC) for purposes of calculating FAS for retirement benefits. Per the relevant section of the state Retirement Code, FAS is determined by considering "the highest average compensation received as an active member during any three nonoverlapping periods of 12 consecutive months," so the exclusion or inclusion of the settlement payment would make a significant difference in that calculation. In a Motion for Summary Judgment (Motion) filed in response to Whalen's appeal, PSERS argued that the settlement payment could only constitute valid RCC if the agreement identified the payment as lost wages and also indicated when those wages would have been earned, rather than when the payment would be received. According to PSERS, the payment was not compensation as defined by the Retirement Code, but a payment made in exchange for a release of all discrimination claims and in conjunction with a notice of retirement.

Whalen filed a response to PSERS' Motion which did not dispute any facts, but which identified statements from District staff seeming to corroborate the claim that the payment was to be treated as back pay and intended to compensate Whalen for salary he should have received over the three years prior to his retirement, but which he did not receive as a result of age discrimination. The Public School Employees' Retirement Board (Board) agreed with PSERS and granted their motion. Whalen appealed the Board's decision to the Commonwealth Court of Pennsylvania (Court). The Court cited precedent to establish that "settlement agreements are governed by contract law," and that "[t]he goal of contract interpretation is to ascertain and give effect to the parties' intent." Ultimately, the Court's decision hinges on the sense that "[w]hen a written contract is clear and unambiguous, the parties' intent is contained in the writing itself." The Court was unpersuaded by the Board's reference to a case where a payment was made as relief for a grievance claim

and another where a payment was made to remedy a below-average salary. The Court found that Whalen's case is distinguishable in that the payment made was intended as back pay as remedy for age discrimination and found the settlement agreement to be an unambiguous contract describing the settlement payment as "income qualified for full pension credit."

The Court's reversal of the Board's decision indicates the importance of clear and unambiguous language in the drafting of settlements, construed as contracts between the signing parties. Whalen's initial claim sought back pay and compensatory damages for age discrimination, and the settlement of that claim clearly described the intent of both parties to construe the payment as income for purposes of PSERS calculations. – *Jacob Bennett*

Eberline v. Douglas J. Holdings, Inc., 982 F.3d 1006 [384 Educ. L. Rep. 678] (Mich. 2020).

Cosmetology students alleged that they were entitled to compensation under the FLSA for janitorial work they performed as part of their assigned responsibilities in the salon. The cleaning tasks were not listed within the school's curriculum, but students did receive credit for their time spent performing cleaning duties. The appeals court reversed the lower court's partial summary judgment in favor of the students. Citing *Solis v. Laurelbrook* (642 F.3d, 6th Cir. 2011) as the decision governing FLSA claims, the appeals court stated that the legal question to apply is which party derives the primary benefit from the work in question. The lower court erred when it departed from *Laurelbrook* analysis and instead asked if the cleaning duties were "well beyond the bounds of what could be fairly expected to be part of the internship." In the reversal, the appeals court remanded the district court to first determine if the work was substantial enough to be tracked and, if so, to then apply the *Laurelbrook* primary beneficiary test.

Educational institutions that assign labor to students should be familiar with the FLSA guidelines for what constitutes an employee-employer relationship as compared to a student-educator relationship. While the outcome is yet undecided in this case, the *Laurelbrook* standard asks us to consider if the students' benefits of learning and performing cleaning duties are greater than the benefits that Douglas J. receives as a result of their efforts. – *Catherine Robert*

Jim v. Shiprock Associated Schools, Inc., 833 Fed.Appx. 749 [385 Educ. L. Rep. 505] (10th Cir. 2020).

This appeal affirms the district court's grant of summary judgment to Shiprock Associated Schools as an exception to Title VII for an "Indian tribe." The plaintiff, Ms. Kim Jim, sued her employer, Shiprock Associated Schools, Inc., a private corporation, for discrimination under Title VII. The issue before the court was whether or not the employer was exempt under 42 U.S.C.§ 2000e(b), which provides an exemption for Indian tribes under Title VII. The Navajo Nation's statutes authorize the establishment of local school boards, which are then empowered to operate educational programs, which are also operated under the Tribally Controlled Schools Act, 25 U.S.C. §§ 2501-11. The Navajo Nation supplies the board members, and most of the students and employees of the school and provides oversight of the corporation's performance. In addition, the corporation received federal funding under 25 U.S.C. 2502(a)(1)(B) because it was controlled or operated by an Indian tribe under 25 U.S.C. 2511(9).

The confusion in the case arose because, although the Navajo Nation controls the school and over 98% of the students and 80% of the employees are members of the Navajo Nation, there are still those 20% of employees that are U.S. citizens and expect the protection of U.S. laws. In addition, the school itself was created and complies with state education laws. Under federal law, however, the Navajo Nation is just that—a nation separate from the United States of America. The court was very clear that Title VII doesn't apply. – *Amy Dagley*

McCann v. Lincoln Cnty. Bd. of Educ., 851 S.E.2d 512 [384 Educ. L. Rep. 1054] (W.Va. App. 2020).

Four school secretaries (plaintiffs) who worked for the Lincoln County Board of Education (defendant) filed separate grievances with the Public Employees Grievance Board (PEGB) requesting a reclassification of their positions to "Executive Secretary" rather than "Secretary III," classifications that are delineated and defined in state law. The PEGB concluded that the plaintiffs' positions did not meet the statutory definition of an Executive Secretary; however, the PEGB still found that the plaintiffs were entitled to a reclassification of their positions to Executive Secretary because they met the defendant's definition of that rank as outlined in the defendant's own policies. Thereafter, the defendant appealed and the state trial court agreed with the PEGB that the plaintiffs' positions did not meet the statutory definition of an Executive Secretary; however, the state trial court reversed the PEGB's determination that the plaintiffs' positions should be reclassified based on the defendant's policy descriptions. Finding that the defendant's policy contravened the statutory definition, the state trial court returned the plaintiffs to their original classification as Secretary III. The plaintiffs then appealed to the Supreme Court of Appeals of West Virginia.

Affirming the state trial court's ruling, the appellate court concluded that the defendant's policy definitions were in sharp contrast to the state's statutory definitions. Consequently, the court found that the PEGB was in error when it reclassified the plaintiffs' positions to Executive Secretary. While the plaintiffs argued that the defendant's policy definitions of Secretary III and Executive Secretary merely expanded state law, both the trial court and the appellate court found that the defendant's definitions were an "illegal contravention to State Code" (851 S.E.2d at 516). While this case was a straightforward matter of statutory interpretation, it serves to remind school boards of the importance of adopting clear policies that are consistent with state law. It further serves to remind school boards of the importance of *regularly* reviewing school policies and updating such policies to maintain compliance with state laws. Finally, this case underscores the fact that when school policies flat out contradict the plain meaning and purpose of state laws, they will not be viewed favorably as merely building upon or expanding state laws, but they will necessarily be found to contravene the law. – *Richard Geisel*

Monadnock Regional School Dist. v. Monadnock Dist. Educ. Association, NEA-NH, 242 A.3d 789 [385 Educ. L. Rep. 824] (N.H. 2020).

A New Hampshire school district and its teachers' association had a collective bargaining agreement (CBA) that required the school district to appropriate $2.3 million for health insurance costs in 2012-2013, the first year of the CBA. The association agreed to have employees bear 15% of the premium costs, and the school district should pay

85%. Money left over from the $2.3 million, which was $213,655 in that year, was to be placed in a pool. For the next three years, the association agreed that employees would pay 10% of the annual premium, and the school district would pay 90%. There was a surplus in the second year of the CBA of $192,309, and a surplus in the third year of the CBA of $154,633. In the fourth year, the parties agreed upon a successor CBA by which the funds in the pool would go to funding health insurance costs in the successor contract. However, the school district's legislative body refused to fund it. The CBA provided advisory arbitration on the matter, but the school district instead filed for declaratory judgment, that it would be unlawful to transfer the funds, since the funds lapsed in each of the prior years. The trial court agreed, but the state's supreme court reversed. The high court held that the CBA was a contract, which produced enforceable obligations, which arose prior to the end of each fiscal year for which they were appropriated. Because the funds were already appropriated, they did not need to be reappropriated at a later date. – *Amy Dagley*

Professional Staff Congress/CUNY v. Rodriguez, 478 F.Supp.3d 509 [385 Educ. L. Rep. 568] (S.D.N.Y. 2020).

The Professional Staff Congress (PSC) is the bargaining agent and representative for approximately 30,000 employees at the City University of New York (CUNY). Due to the pandemic and concomitant falling enrollments, 2,800 adjuncts were notified in March 2020 that their contracts would not be renewed for the fall semester. Congress allocated funds to universities to mitigate negative effects of the pandemic under the Coronavirus Aid, Relief, and Economic Security (CARES) Act, and CUNY had funds allocated for its assistance. About half the funds were allocated to assist students directly, and the other half was aimed at allowing the university to continue to pay its employees and contracts during disruptions or closures due to the coronavirus. The university learned how much it would be getting at a date late enough to interfere with the university's ability to plan for the number of positions it could fill with adjuncts, and the parties were negotiating over a later notification date.

PSC sued CUNY, arguing that its decision to not renew the appointments of 2,800 adjunct professors violated the CARES Act. The court held that CARES Act did not confer an individual right to each of the adjunct professors, thus blocking a Section 1983 application to defend the right; and that the CARES Act does not provide an implied remedy of enforcement for the Act.

It must be remembered that despite the pandemic and resulting federal legislation such as the CARES Act to provide aid for financial damages caused by state-ordered shutdowns, existing law, both statutory and contract, continues to be in effect. The CARES Act also did not create new rights nor create a manner to enforce the act. Recipients of monies under the CARES Act had a great deal of latitude in determining how best to spend the funds. CUNY's decision to spend the money equally on students and then on employees and contractual obligations fell within that latitude. – *Amy Dagley*

State ex rel. Jones v. Bd. of Educ. of Dayton Pub. Sch., 160 N.E.3d 777 [385 Educ. L. Rep. 962] (2020).

The former treasurer (plaintiff) of the Dayton City Schools filed an action against the Board of Education of Dayton City Schools (defendant) for violating the Ohio Sunshine Law (OSL) when it terminated the plaintiff and the superintendent at a special board meeting without giving proper notice of what was on the agenda for the special meeting. This litigation has been ongoing for the last four years, and this is the second time that the Ohio Court of Appeals has ruled on aspects of this case.

The underlying facts of the case are rather straightforward and undisputed. The plaintiff was employed by the defendant pursuant to a three-year contract, which could only be terminated earlier based on various criteria in the contract. Approximately six months prior to the end of the plaintiff's contract, the defendant held a special board meeting and voted not to renew the plaintiff's contract. In doing so, the defendant violated the OSL by not specifying that the nonrenewal of the plaintiff's contract would be discussed in open session at the meeting. To the contrary, the defendant actually gave inaccurate or false information on the notice of the special meeting by stating that the defendant might act on recommendations from the superintendent and/or treasurer at the meeting.

In previous phases of this litigation, the court found this to be implausible since the superintendent and treasurer would not be bringing recommendations to terminate their own contracts and the defendant was well aware of this. In fact, the notice of the special meeting was altered the day after the meeting to be more compliant with the OSL. All of this taken together led the court to conclude that "the Board president knew when the special meetings notice was issued that the Board would not be considering the recommendations of the superintendent or treasurer at the special meeting" (160 N.E.3d at 781).

While in the earlier phases the trial court granted summary judgment to the defendant, subsequently the court of appeals reversed the judgment based on the fact that the remedy for violating the OSL requires that any actions taken at a meeting in violation of the OSL be invalidated. As a result, the defendant's action to officially nonrenew the plaintiff's contract at the special board meeting was held to be invalid. By the time the court made this ruling, the plaintiff's contract had come to an end without ever being officially nonrenewed, and this raised disputed issues integral to this second/current phase of litigation between the two parties. On remand, the state trial court held that the plaintiff was entitled to a one-year contract renewal, including various salary increments consisting of contributions to the state retirement system, an additional bonus contribution to the state retirement system, and an annuity that was part of his former compensation package. The state trial court, however, denied plaintiff's request for attorney's fees. Thereafter, both parties cross-appealed. The plaintiff argued that he should be granted contract renewals for all the years this case has been in litigation, not just one year, because the defendant never sent him a non-renewal notice. The plaintiff further argued that he should be entitled to attorney's fees under the OSL. In a cross-appeal, the defendant argued that while the initial salary increment consisting of a contribution to the plaintiff's retirement fund was not in dispute, there should not have been an award for the extra contributions to that fund or the annuity, which were part of the plaintiff's bargained three year contract. The defendant argued that the one-year renewal of the plaintiff's contract was a renewal based on operation of law under state statute as a result of the defendant's violation of the OSL, and therefore it was not appropriate to award the plaintiff the "extra" salary increments that would have been part of a negotiated contract.

The Ohio Court of Appeals affirmed the state trial court's ruling that the plaintiff was only entitled to a one-year contract exten-

sion based on the clear wording of the OSL. "Based on the wording in the statute, the clear intent is to extend employment for one year only, based on a board of education's failure to comply with statutory requirements. There is no requirement to issue a contract, only a requirement to extend employment for one year" (160 N.E.3d at 785). The court next turned its attention to the plaintiff's request for attorney fees. Reversing the lower court on this point, the court held that the plaintiff was entitled to reasonable attorney fees because the defendant could not have reasonably believed that its actions served public policy. The court pointed to the defendant's action in failing to describe what would be discussed at the special board meeting on the notice given to the public and, in fact, putting misleading information on the notice, as well as altering the notice a day after the meeting, but keeping the original date on the notice. Taken together, the court found the defendant's actions to be contrary to public policy, thus justifying an award of reasonable attorney's fees to the plaintiff. Finally, the court entertained the defendant's objection to certain salary "increments" awarded to the plaintiff. Reversing the lower court on this point, the court of appeals found that as a matter of statutory construction, there was no way the annuity and extra contribution to the plaintiff's state retirement account could be classified as "increments" as that term was used in a situation like this where a contract was renewed by operation of law for one year only.

There are some clear takeaways from this case. First, a violation of the OSL could potentially invalidate whatever is decided at a meeting where the OSL was not followed. In terms of a contract nonrenewal decision, a violation of the OSL will result in a one-year contract renewal; however, nonrenewal notices are not required thereafter. In other words, a one-year renewal is granted by operation of law and it terminates by operation of that same law regardless of notice. Another insight from this case is that the term "increments," as used in various Ohio statutes pertaining to education, indicate simpler things like cost-of-living increases or base retirement account contributions, but do not include all the perks one may have negotiated in a previous contract like funding an annuity or making extra "catch-up" contributions to a retirement account. Finally, in what should be a clear warning to boards of education in Ohio, more egregious violations of the OSL that cannot be reasonably characterized as serving public policy may put the district in jeopardy of paying a plaintiff's attorney fees. – *Richard Geisel*

Taylor-Travis v. Jackson State Univ., 984 F.3d 1107 [385 Educ. L. Rep. 458] (Miss. 2019).

Taylor-Travis, the head women's basketball coach for Jackson State University, was terminated for misappropriation of university funds and mistreatment of student athletes. Following the complaints from several team members that Taylor-Travis was pulling players from the travel list and providing her family with airline tickets and several reported instances of player mistreatment, the university investigated. In protesting her termination, Taylor-Travis requested arbitration, citing her right to do so under her employment contract. The university refused arbitration and refused payment of the remaining two years on her contract. Taylor-Travis filed suit, alleging breach of contract and violations under Title VII and Title IX. Also at issue was a breach of privacy complaint stemming from the university's release of two sets of documents to the media which included 1) a previous complaint that she made regarding the lack of support for her team compared to men's sports and male coaches, and 2) the notice of allegations made against her.

The district court found that the university did not have cause to terminate Taylor-Travis. She successfully demonstrated that her policy violations were not "deliberate, serious, and willful." In fact, she had made similar travel policy violations prior to these incidents without reprimand, and male coaches routinely engaged in similar policy violations. The appeals court upheld the breach of contract ruling in favor of Taylor-Travis, but reversed the lower court's finding that her privacy was violated. As a public figure, the allegations against her were a legitimate public concern. Taylor-Travis was unsuccessful with her claim of Title IX retaliation, she did not establish a clear "causal connection" between her complaint and her termination.

This case provides a reminder for employers to document employee misconduct consistently. Taylor-Travis had a valid complaint that the university did not previously enforce its own policies. The more prudent course of action when disciplining an employee is to first determine if this is a common violation or if other similarly situated employees have committed the same infraction without facing consequences. The university also erred when leaping to termination and refusing arbitration. There is a wide gap between violations of policy (for which Taylor-Travis successfully presented evidence to the contrary) and the "deliberate, serious, and willful" standard needed for termination. – *Catherine Robert*

Williams v. Shelby County Bd. of Educ., 479 F.Supp.3d 721[385 Educ. L. Rep. 635] (W.D.Tenn. 2020).

A Tennessee school district "excessed," or terminated, the employment of a teacher due to reduction in force in March 2016, but did not follow the provisions of the Teacher Tenure Act. The school district fully complied with the act in October 2018, when the school board finally authorized the termination. In a prior order, the court had found that the school district had violated the Teacher Tenure Act; that the teacher had a right to back pay only; that her back pay ran from March 7, 2016, through October 30, 2018; and that the school district could not offset any earnings by the teacher from employment outside the school district. The federal district court scheduled a briefing conference and met to determine the back pay owed the teacher; they also decided that the teacher was due prejudgment interest, limited to an effective rate of ten percent per annum. The amount was calculated at $192,988.02 in back pay. The court ordered the parties to return with a calculation for prejudgment interest.

This case just goes to show that it may seem like a minor oversight when the letter of the law is not followed, when in reality it is a very costly oversight. There is a reason that school districts have board counsel. Don't be penny-wise but pound-foolish in using their expertise in personnel matters. – *Amy Dagley*

Burgess v. Coronado Unified School District, 272 Cal.Rptr.3d 919 [385 Educ. L. Rep. 905] (Cal.App. 2020).

During a school district's spring break in 2017, information came from a former student alleging wrongdoing by a long-time teacher and coach from a time years before, when the former student was in middle school. As the school district returned to classes in April 2017, the teacher was placed on administrative leave with pay. The teacher was ultimately reinstated and returned to the classroom in November 2017 because the alleged victim did not formally file a complaint within six months, as required by state law. The school district informed the teacher by letter of the date of his return to teaching duties, along with a recommendation that the teacher take care that he not find himself alone with any student unless absolutely necessary for the student's health, safety, or welfare. The superintendent also issued a press release regarding the actions taken by the school district.

The teacher sued the school district, alleging violation of due process rights and failure to conform the teacher's treatment to the collective bargaining agreement during the events described above. In the same timeframe, a local news outlet filed a motion to intervene, seeking information about the allegations against the teacher and the school district's response to the allegations under the state's public records act (PRA) to obtain more. The teacher moved to enjoin the release of the records. The teacher then sued the school district additionally for libel in September 2018, based upon the superintendent's press release.

On October 1, 2018, the state court of appeal issued an opinion, holding first that the teacher's claims were moot, because the teacher had been reinstated in November 2017. However, the issues presented could continue to arise repeatedly between tenured teachers and their employing school districts. For this reason the court issued an opinion that the trial court had not erred in denying the teacher's request for a writ of mandamus, because administrative leave with pay did not deprive the teacher of any property rights. Likewise, the school district had not exceeded its authority in placing the teacher on administrative leave with pay. State law did not specifically preclude it; also, the collective bargaining agreement addressed suspensions, but did not address administrative leave with pay. The court directed that its opinion was not to be published in an official record.

On December 24, 2020, the appeals court issued three orders. In one order, the court upheld the trial court's application of the state's anti-SLAPP statute, which bars libel suits against government officials who speak publicly in performing their duties. The press release contained no false statements and was absolutely privileged under the statute. The court also noted that the school district was entitled to recover attorney fees on appeal. The second order corrected one sentence in the first order, to specify that attorney fees on appeal were subject to terms of the anti-SLAPP statute.

The third order issued last December addressed the news outlet's request for attorney fees, which can be awarded when a person requesting the production of public records under a state public records act achieves a "substantial public benefit" in making information in governmental records known to the public. The appellate court examined the nature, amount, and timing of release of public records by the school district. Early in the proceedings, the school district provided 27 pages of records. The trial court judge held five pages back, which did not relate to allegations of a substantial nature, but released the other 22 pages. Later, a subsequent judge ordered the release of a copy of the student complaint, two updates from the credentialing commission, 74 pages of emails from parents praising or criticizing the teacher, and a petition signed by 1,144 parents favoring the teacher's reinstatement. Much of the information had already been released via court filings. The trial court held, and the appellate court affirmed, that the benefit to the public arising from the news outlet's lawsuit under the public records act was not substantial enough to warrant the award of attorney fees.

The events, issues, and outcomes in the four orders released by the court of appeal in this case are instructive, especially for education practitioners reading these materials. The story line represents several important interests and values: the right of the student making the allegation to support and personal privacy; the right of the teacher to support and to personal privacy; the need to protect schoolchildren from unacceptable behaviors; as well as the right of the public to know the government's, and thus the people's, business. The interests and values translate to a web of policies, regulations, statutes, and relevant legal standards. The story line is one in which education practitioners really need to take each step in conference with legal counsel. – *Dave Dagley*

Slippery Rock Univ. of Pennsylvania, State Sys. of Higher Educ. v. Ass'n of Pennsylvania State Coll. & Univ. Fac., 241 A.3d 1278 [384 Educ. L. Rep. 933] (Pa. Commw. Ct. 2020).

Dr. Rhonda Clark was hired on a part-time temporary basis in 2010 to teach for the School of Business at Slippery Rock University and was rehired on a full-time temporary basis in the next three academic years. In academic year 2014-2015, the contract offered was for 75% time rather than full time, but for the next three academic years her contract was back up to full time. In April 2018 Dr. Clark became aware that her workload was reduced in 2014-2015 in order to avoid triggering a provision in the collective bargaining agreement (CBA) that would have made her eligible for tenure-track status after five consecutive years of full-time teaching at Slippery Rock. Citing the relevant article of the CBA, Dr. Clark requested a vote by faculty in the School of Business on the question of her conversion to tenure-track status, and the vote passed with majority support. The University declined to grant the conversion.

On May 11, 2018, Dr. Clark filed a grievance pursuant to the CBA in place from July 1, 2015, through June 30, 2018. The University denied the grievance for the stated reasons that it was untimely and that Dr. Clark had not worked the requisite five consecutive years at full-time status. The arbitrator hearing the grievance considered whether or not the University violated the CBA by reducing Dr. Clark's workload in order to avoid conversion. On the procedural question of timeliness, the arbitrator found that the claim was filed "within forty (40) calendar days of the date on which the grievant […] learned of such occurrence," as required by CBA. The arbitrator rejected the University claim that Dr. Clark "sat on her rights" and did not exercise "due diligence." On the procedural question of whether a conversion status vote could proceed without notice from the University, the arbitrator found that the CBA called for preparation of a list of eligible faculty but did not require a department to wait for such a list before voting. Finally, on the merits of the grievance, the arbitrator found that the University was in violation of the CBA for intention-

ally reducing Dr. Clark's workload to avoid conversion, and ordered tenure-track status be granted and back pay awarded.

The University appealed, arguing that the award did not draw its essence from the CBA and that the promotion violated public policy that reserved such power exclusively for the University president. Taking up the appeal, the Pennsylvania Commonwealth Court reviewed the grievance according to the two-prong essence test, which requires that the issue at hand be encompassed by the CBA and that the arbitrator's interpretation be rationally derived therefrom. There is no dispute as to the first prong, as the issue of conversion is clearly encompassed. On the derivation prong, the University argued that the award added terms to the CBA by excusing diligence on the part of Dr. Clark or her union, subtracted terms by allowing the conversion vote without notice from the University, and granted a promotion in violation of public policy. The Court held that the arbitrator's decision regarding filing of the grievance draws its essence from the CBA, and that the award is rationally derived from the language of the CBA.

Noting that the burden of proving a violation of public policy rests with the asserting party, the Court applied a three-part test that requires identifying precisely what remedy the arbitrator imposed, inquiring into whether that remedy implicates "well-defined, dominant" public policy "ascertained by reference to […] laws and legal precedents," and finally determining whether the award compels violation of the implicated policy. While the University characterized the remedy as promoting Dr. Clark from instructor to associate professor rank, the court held that the remedy was to award back pay and grant tenure-track status per CBA, but to leave question of rank to the University. On the question of public policy implication, the court found that the University president's power to appoint is limited by law when a CBA governs, as was the case here. Ultimately, the court found that the remedy was consistent with the CBA and was not in violation of public policy. The Court affirmed the award.

The decision serves as a reminder that arbitration awards are only rarely reversed, and only according to the narrow exception provided in the essence test, and that a public policy exception is a "narrow exception to a narrow exception." Given that such conditions incline toward deference to the arbitrator's decision, any appeals must show that the award departs from CBA language and compels violation of well-established public policy. – *Jacob Bennett*

First Amendment

Sabra v. Maricopa County Community College Dist., 479 F.Supp.3d 808 [385 Educ. L. Rep. 645] (D.Ariz. 2020).

Mohamed Sabra was enrolled in an online World Politics course taught by Dr. Nicholas Damask at Scottsdale Community College in 2020. Mr. Sabra and the Council on American-Islamic Relations of Arizona (CAIR-AZ) alleged that an Islamic Terrorism module, one of the six required modules for completing the course, violated the Establishment Clause and Free Exercise Clause of the First Amendment. These claims were brought against the Maricopa Community College District and Dr. Damask in his individual and official capacities. Citing *Am. Diabetes Ass'n v. United States Dep't of the Army,* 938 F.3d 1147 (9th Cir. 2019), the court dismissed the claims made by CAIR-AZ because the organization did not establish an injury nor allege that the creation of material to correct Islamophobic information was not part of the normal function of their organization. In examining Mr. Sabra's claim that the module had a primary effect of inhibiting religion, the court applied the three prongs of the *Lemon* test. Citing *Vernon v. City of L.A.,* 27 F.3d 1385 (9th Cir. 1994) it addressed whether the module failed at the second prong where the "government action "primarily' disapproves" of religious beliefs notwithstanding the fact that one may infer possible government disapproval of religious beliefs" (479 F.Supp.3d at 816). The court pointed out that even some disapproval of religion by the government's practice was not enough to violate the Establishment Clause. In examining the contents of the course as a whole, and the specifics of the module in question, the court concluded that the primary purpose was not inhibition of practicing Islam and dismissed the Establishment Clause claims.

Mr. Sabra further claimed a violation of his Free Exercise rights when "he was forced to choose between denouncing his religion by selecting the "'correct' answer or receiving a lower grade" on the test (476 F.Supp.3d at 818). The court disagreed and concluded that Mr. Sabra was only asked to show his understanding of the material, citing *California Parents for Equalization of Educ.Materials v. Torlakson*, 267 F.Supp.3d 1218 (N.D. Cal. 2017) to show Mr. Sabra was exposed to a religious perspective different from his own (479 F.Supp.3d at 818). On these grounds, the Free Exercise claim was dismissed. In addition, the court decided Dr. Damask would have been entitled to qualified immunity if the other claims had not been dismissed, since the court could not conclude he would have known his actions might be unconstitutional.

This case reemphasizes the long line of precedent stating that mere exposure to material that contradicts an individual's religious beliefs is not sufficient to create a violation of the Free Exercise Clause. Requiring a student to demonstrate an understanding of the material taught does not inhibit one's personal worship. The court also affirmed that teaching about one aspect of a religion as part of a larger context in a course does not violate the Establishment Clause.

A final decision of the court, which is gaining greater importance, is the discussion of qualified immunity. Public actors are entitled to qualified immunity for their actions unless the law in the area is clearly established law. In this case, the court opined that qualified immunity would have been proper, inferring that the law on the constitutionality of such religious materials was not clearly established. Within the past month, both the 8th and 6th Circuits have been asked to address this question. – *Amy Dagley*

Governance

Beachwood City School Dist. Bd. of Educ. v. Warrensville Heights City School Dist. Bd. of Educ., 158 N.E.3d 906 [384 Educ. L. Rep. 997] (Ohio App. 8 Dist. 2020).

This case was about the level of oversight and/or approval required by a state board of education in the event that local school boards make revenue-sharing agreements with other districts. In 2018, the Beachwood School District sued neighboring school district, Warrensville Heights City Schools, for $5 million over a tax-sharing agreement that had been created in 1997 as a part of a collaborative deal between five communities. The income tax had been split between the cities, but the property taxes, which benefit school districts, had been far more contentious. The original land belonged to the Warrensville Heights school district, and in 1997, the two districts had a mediator broker a property tax-sharing deal. In 2018, Beachwood SD said that Warrensville had never made a

payment to them under the sharing agreement and filed suit. Warrensville moved to dismiss, in part because they said that the original agreements were invalid because the Ohio Board of Education had not approved them and if they were found to be valid, that Beachwood had to comply with other matters in the agreement that had so far been unaddressed.

In a reversal of the trial court's opinion, the Ohio court of appeals determined that boards of education have the power to contract with one another under Revised Code (R.C.) 3313.17, and based on the plain language of R.C. 3311.06(D)(3), revenue-sharing agreements that are not incident to a transfer of territory do not need approval from the Ohio Board of Education. Of interest is that if the deal had included actual transfer of land instead of a sharing of tax monies, the agreement would have needed approval from the SBE. – *Barbara Jean Hickman*

Kumar v. Frisco Indep. Sch. Dist., 476 F. Supp. 3d 439 [384 Educ. L. Rep. 783] (E.D. Tex. 2020).

Suresh Kumar filed a voting rights discrimination complaint pursuant to Section 2 of the Voting Rights Act (VRA), alleging that the at-large electoral system of the Frisco Independent School District (District) diluted the voting strength of African American, Hispanic, and Asian minority populations in the District. The initial complaint was ambiguous as to whom Kumar sought to represent, but in an amended complaint Kumar clarified that he claimed a violation of his rights and sought to protect his rights with evidence of the ways a coalition of minority voters had been harmed by a discriminatory electoral system. While the decision covered quite a bit of process regarding determination of standing, admissibility of evidence, and credibility of expert witnesses, this summary addresses only those questions that get to the substance of the case.

On issues of standing, the District Court (Court) found that Kumar's claim had Article III constitutional standing, having proven an injury in fact (impermissible dilution of minority voting power); demonstrated the injury to be fairly traceable to challenged conduct by the District (the at-large electoral system); and demonstrated that a favorable judicial decision would redress the injury (declaring at-large electoral process unconstitutional, granting permanent injunction against said system, and ordering new election plan). As to prudential standing, the Court found that Kumar's claim did not implicate third-party standing doctrine. The District disagreed, but the Court found that the VRA does not require class action, that it does provide for claims to be brought by "an aggrieved person," and that an individual may submit coalition evidence of discrimination of minority groups to which one allegedly belongs.

The Court described in detail a standard of evidentiary analysis including: (1) a two-step framework with a three-part threshold test, drawn from the 1986 Supreme Court case *Thornburg v. Gingles*, and (2) a ten-factor evaluation to determine whether the political process is equally open to minority voters. The latter was based on a U.S. Senate report accompanying the 1982 amendments to the VRA, which henceforth did not require proof of discriminatory intent but rather looked to discriminatory results. To satisfy the *Gingles* test, Kumar first had to demonstrate that the minority coalition was sufficiently large and geographically compact to constitute a majority by means of a hypothetical and illustrative district, which the Court agreed he had done.

It was in the second *Gingles* factor where Kumar's claim fell apart, in the view of the Court, as he could not show that the minority coalition was politically cohesive. This failure stemmed, in part, from the fatally flawed data set provided by one of Kumar's expert witnesses, which did not reliably estimate the proportion of Asian voters in the illustrative district. However, assuming *arguendo* that the data were reliable and that they did establish the minority coalition at the heart of the claim, the Court found that Kumar failed to carry the burden of proving a politically cohesive minority group on the basis that voting data showed minority voters splitting along conservative/liberal lines rather than aligning with each other.

Because all three *Gingles* factors must be met for a finding of vote dilution, and because Kumar failed to meet the second factor, the Court did not address the third factor, a demonstration that the white majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate. Accordingly, the Court dismissed Kumar's claims with prejudice.

Rather than describing an incompatibility between third-party standing doctrine and *Gingles* analysis, the Court decision explains that the two can and must coexist to permit meaningful actions under VRA, and clarifies that *Gingles* sets out an evidentiary burden and not a proxy test for standing. In addition to the important recognition that a court can ease that apparent tension by recognizing *Gingles* without requiring a plaintiff to assert the rights of other unnamed parties, the decision here also points to a deepening political division within minority groups that could make VRA claims difficult to prove in the absence of a politically cohesive minority coalition. – *Beth Godett*

L.S. ex rel. Hernandez v. Peterson, 982 F.3d 1323 Ohio App. 8 Dist. [384 Educ. L. Rep. 701] (11th Cir. 2020).

After the tragic February 14, 2018 shooting by Nikolas Cruz at Marjory Stoneman Douglas High School in Parkland, Florida resulted in the death of seventeen people and injury to seventeen others, fifteen students present at the time filed suit claiming psychological injuries based upon not only the shooting, itself, but also the government's mishandling of its response to the shooting.

The facts, as alleged in the complaint, detail that one officer, Andrew Medina, saw Cruz approach the building that day and allowed him to enter, despite recognizing Cruz as a potential threat based upon prior warnings shared with police officials. While Medina alerted other officials to his presence, he did not approach Cruz beyond driving a golf cart in his direction, nor did he order the school on lockdown, even after hearing shots, explaining that his orders were to do so only upon seeing a gun. The officer in charge, Scot Peterson, along with three others, did not attempt to enter the building or stop the shooting, although facts remain unclear as to whether emergency responders were actually barred from doing so.

The students filed a civil rights complaint that the failure of the officers to protect them violated their rights to substantive due process under the Fourteenth Amendment. The court, on the basis that the duty to protect only applies when a person is in an official's custody, determined that students are not considered to be in custody at school because compulsory attendance and truancy laws do not restrain their freedom in the way that incarceration or institutional confinement would. The court ultimately dismissed the students' complaint on the basis that the officers, even if acting incompetently, failed to demonstrate an intention to harm the students or conduct that shocks the conscience.

The takeaway from this case is that if the action of public officials involving individuals not in their custody during of a developing crisis fails to deliver the desired response, even resulting in harm, such actions would not violate an individual's constitutional right to substantive due process unless done purposefully to cause harm or in a manner that shocks the conscience. – *Beth Godett*

Hecox v. Little, 479 F. Supp. 3d 930 [385 Educ. L. Rep. 657] (D. Idaho. 2020).

In this case, both a transgender woman athlete who was enrolled in a state university and intended to try out for women's cross-country and track teams, as well as parents on behalf of their minor cisgender female high school student athlete, challenged the constitutionality of a new Idaho law ("the Act") that excludes transgender women from participating on women's sports teams. In addition, the Act establishes a "dispute" process that allows a currently undefined class of individuals to challenge a student's sex. If the sex of any female student athlete, whether transgender or not, is disputed, the student must undergo a potentially invasive sex verification process. Under the Act, similarly situated men and boys, whether transgender or not, are not subject to the dispute process because the Act does not restrict individuals who wish to participate on men's teams.

The question before the court was whether the plaintiffs met the criteria for enjoining enforcement of the Act pending a trial on the merits. As an initial matter, the district court held that the transgender woman athlete suffered injury in fact from her inability to participate in state university's women's cross-country and track teams due to Idaho's law, and thus, she had Article III standing to pursue equal protection challenge to the Act. Although she had not yet tried out for teams or been subjected to the Act's dispute process, because the Act prevented her from trying out for women's team at all, and if the university violated the Act and allowed her to try out for women's teams, she also alleged non-speculative risk of suffering invasion of privacy by being forced to disclose her medical information if her sex was challenged.

The court also found that the cisgender female high school student athlete suffered injury in fact, and thus, had Article III standing to pursue her equal protection challenge. The female student athlete was subjected to worse and differential treatment than similarly situated male students who played for boy's teams, by potentially invasive and expensive medical examination, loss of privacy, and embarrassment of having her sex challenged, while male student athletes did not face those same risks. In addition, the court found that the plaintiffs' claims were ripe for review because the transgender female athlete would be prevented from trying out for women's cross-country and track teams and would lose at least one season of eligibility, which she could never get back, and high school student athlete would be subject to disparate rules compared to male athletes, and both females risked facing sex verification challenge.

Finally, the court found that the plaintiffs were entitled to a preliminary injunction enjoining enforcement of the Act pending a trial on the merits. Specifically, the court found that the transgender woman athlete university student had likelihood of success on merits of her as-applied equal protection challenge to the Act because the Act was not substantially related to achieving important government interests of promoting sex equality, providing opportunities for female athletes, or increasing their access to college scholarships, but rather, advanced invalid interest in excluding transgender women and girls from women's sports entirely, regardless of their physiological characteristics.

As to the cisgender female high school student athlete, the court found that this student too had a likelihood of success on merits of her as-applied equal protection claim because the Act was not substantially related to government interests in promoting sex equality, providing opportunities for female athletes, or increasing their access to college scholarships, but rather, hindered those goals by subjecting women and girls to unequal treatment, excluding some from participating in sports at all, incentivizing harassment and exclusionary behavior, and authorizing invasive bodily examinations.

The court found that both students would likely suffer irreparable harm absent a preliminary injunction because the Act would likely violate the students' equal protection rights by denying the transgender athlete the opportunity to try out for and compete on the university women's teams, permanently denying her one year of eligibility, and subjecting her to the state's moral disapproval of her identity, and subjecting the high school student athlete to possible embarrassment, harassment, and invasion of privacy by having to verify her sex. The court found that the balance of equities and public interest weighed in favor of preliminary injunction preventing enforcement of the Act because both students would likely suffer deeply personal and irreparable harms absent injunction, while Idaho officials would not be harmed by injunction that would merely maintain status quo, and preventing violation of equal protection rights was in public interest. – *Bonnie Hoffman*

Title IX

Rowles v. Curators of Univ. of Missouri, 983 F.3d 345) [384 Educ. L. Rep. 712] (8th Cir. 2020).

The Eighth Circuit entertained an appeal from an African American Ph.D. student who was suspended for two years from the University of Missouri following a Title IX investigation for sexual harassment and stalking. The complaint alleged procedural and substantive due process violations; retaliation under the First Amendment; racial and sexual discrimination under Title VI and Title IX, respectively; violations of the Missouri Human Rights Act (MHRA); and argued that the university policy was vague and overly broad. The complainant also asked for an order compelling discovery.

In 2015, the University dismissed a sexual assault claim against the plaintiff as unsubstantiated. In 2016, the plaintiff asked an undergraduate student, whom he met at a fitness dance class, on a date, and she declined, but the plaintiff continued to send flirtatious messages, which were rebuffed by the female. The plaintiff also continued to attend the dance class, asked the female for private lessons, and sent her a long letter expressing his romantic feelings.

The federal district court granted the defendant's motion for summary judgment on each claim in the 252-page complaint, which the Eighth Circuit described as a "kitchen sink" approach. On appeal, the Eighth Circuit affirmed finding that the student failed to demonstrate that he was treated differently than other similarly situated students outside his protected class. The court determined that the University policies were specific enough to provide adequate notice and not so broad as to have a substantial effect on protected speech. The plaintiff also failed to establish that the investigation reached an erroneous outcome

on the basis of sex. As to the MHRA claim, the court found that the plaintiff could not show that race was a motivating or contributing factor in the outcome.

This case joins a plethora of others involving allegations of sexual harassment where a university is accused of discriminatory treatment toward males and racial bias in the enforcement of university policy. However, the facts of this case revealed that the plaintiff continued efforts to secure a date with an undergraduate student despite clear and unequivocal rejections. Asking another person on a date is not sexual harassment or stalking. Not taking no for an answer, however, can produce a hostile environment that interferes with another person's ability to participate or benefit from their educational opportunities. The University policy was clear, and the plaintiff should have been familiar with the policy given the prior sexual harassment claim in 2015. – *Joe Dryden*

Messeri v. DiStefano, 480 F.Supp.3d 1157 [385 Educ. L. Rep. 781] (D. Colo. 2020).

An international student at the University of Colorado, who was permanently expelled under allegations of non-consensual sex with an unidentified woman, sued the school's chancellor claiming due process violations. The complainant asserted that the investigators never spoke with him about the allegations, nor did they personally interview the accuser. Instead, they relied on taped interviews of the accuser conducted by the campus police. Without holding a hearing, the Universities Review Committee examined the investigative report and declared the investigation unbiased and ruled that the accused was responsible for committing sexual assault under the preponderance of the evidence standard.

The court considered three factors to determine if the University violated the due process rights of the accused: (1) the interest of the accused and the severity of the injury threatened by the official action, (2) the risk of error and the value of adding additional safeguards, and (3) the added burden on government efficiency. The court described the interest of a student facing permanent expulsion as strong and robust and that requiring a formal hearing would reduce the risk of error without adding much additional burden.

The plaintiff was also denied the opportunity to cross-examine his accuser. The court took notice of cases from other circuits, which held that university students facing disciplinary action should be afforded the opportunity to cross-examine accusers and witnesses and that access to written statements cannot serve as a substitute. The accused also questioned whether the use of the preponderance of the evidence standard resulted in a due process violation, but the court said no, that the University's interest in maintaining a safe learning environment outweighed the student's interest.

The federal district court in Colorado denied the defendant's motion for summary judgment ,finding genuine issues of material fact regarding whether the student had the right to be heard in the proceeding, whether the accused had the right to cross-examine his accuser, and whether the University's decision to withhold the identity of the accuser deprived the accused of his procedural due process rights.

Considerable litigation arose after the implementation of a 2011 Dear Colleague Letter from the Department of Education, which mandated the use of the preponderance of the evidence standard in sexual assault cases. However, the clear and convincing evidence standard is often applied in cases where the interest at stake involves more than just money. When a student is expelled from a university based on allegations of sexual assault, the interest of the accused goes beyond monetary loss and includes damage to a person's reputation and goodwill which can have lifelong repercussions.

In 2020, Secretary DeVos issued new Title IX regulations designed to restore due process in campus sexual assault investigations. The new regulations mandate that the accused shall have written notice of the allegations, the right to an advisor, the right to submit and challenge evidence, and the right to cross-examine the accuser and other witnesses at a live hearing. The new regulations also allow colleges and universities the autonomy to select which standard of proof to apply—only asking that whatever standard is used, that it be applied consistently and not at the expense of due process. – *Joe Dryden*

Trauth v. K. E., 613 S.W.3d 222 [385 Educ. L. Rep. 1000] (Tex. Ct. App. 2020); ***Hartzell v. S. O.,*** 613 S.W.3d 244 [385 Educ. L. Rep. 1022] (Tex. Ct. App. 2020).

Two cases out of Texas examined the statutory authority of school officials to revoke conferred degrees for allegations of unethical or fraudulent academic practices. In *Trauth v. K.E.*, a graduate from Texas State University had her degree revoked after her former doctoral advisor accused her of falsifying research data. She sought a prospective injunction and declaratory relief claiming due process violations and that school officials acted beyond their legal authority. The defendants claimed that sovereign immunity barred the claims because the plaintiff sought to control state activity.

In a companion case, *Hartzell v. S.O.,* a student who earned her doctoral degree from the University of Texas filed a request for declaratory and injunctive relief to prohibit the University from holding an internal disciplinary proceeding for the purpose of deciding whether to revoke her Ph.D. degree. The student alleged that the action was ultra vires and a violation of her due process and equal protection rights. The University argued that they had the authority to conduct internal processes, and as such, their actions were not ultra vires, and the petitioner's claims were an attempt to control state action, which is barred by sovereign immunity.

The analysis in these cases revolves around statutory construction and interpretation, but the underlying education law issue is of import when universities are considering revoking awarded degrees. Multiple states (Ohio, Michigan, New Mexico, Virginia, Maryland, North Dakota) use similar statutory language to that found in the Texas Education Code regarding the authority of the Board of Regents to confer degrees. However, most other state courts have held that implied in this authority is the power to revoke degrees. In both cases, the state court judge, Thomas J. Baker, ruled that implied powers must be construed narrowly only to those necessary to carry out express responsibilities and not those merely expedient. Further, a prospective injunction or request for declaratory relief does not seek retrospective monetary damages or otherwise attempt to control state action, and is therefore not barred by the doctrine of sovereign immunity. – *Joe Dryden*

Interest of C.B., 241 A.3d 677 [384 Educ. L. Rep. 910] (Pa. Super. Ct. 2020).

The state filed a delinquency petition against a juvenile, alleging that juvenile possessed and viewed child pornography on a school-issued computer. The court issued a dispositional order adjudicating the juvenile delinquent on more than 100 counts of possessing and viewing child pornography on his school-issued computer where

"approximately 597 depictions of child pornography, many containing graphic sexual abuse and rape of very young pre-pubescent children," some as young as four years old, "as well as approximately 367 videos depicting the same, [had been downloaded] on his school[-]issued computer" under his unique user ID.

The court determined that the juvenile was in need of supervision and ordered him to serve a period of probation with conditions tailored to the committed offenses because it concluded that there was insufficient credible evidence to rebut the statutory presumption within the Pennsylvania Juvenile Act that the commission of a felony shall be sufficient to sustain the finding that a juvenile is in need of treatment, supervision, or rehabilitation.

The appellate court affirmed, finding that the trial court did not commit a manifest abuse of discretion in ordering continued supervision, even though multiple experts testified that the juvenile was no longer in need of sex offender treatment or rehabilitation because none of those experts testified specifically as to his need for supervision, and the juvenile viewed over 100 items depicting child pornography on school issued computer, told therapist that he did not understand why his actions were inappropriate or illegal, and was obsessed with computers.

This case is a good example of where "legal" interests and "educational" interests are at odds. The law was clear and the court had no choice to maintain supervision over the child. Educators, looking at the situation, felt the opposite. The legal system's first concern is to protect the rights and liberties of society through the rule of law. Educators are concerned with helping an individual grow and change into a responsible citizen. Though similar, when the two factions meet, the small differences sometime appear. – *Bonnie Hoffman*

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Interest of C.B., 241 A.3d 677 [384 Educ. L. Rep. 910] (Pa. Super. Ct. 2020). – *Bonnie Hoffman*

The commentary in Cases in Point is intended only as informational in regard to the subject matter covered and represents the views of the contributing reporter. It does not constitute a legal opinion, and no lawyer-client relationship is established. If legal advice or a legal opinion is desired, private legal counsel should be consulted.

Case Commentary

In-depth explanation and commentary on a case of interest April 2021

Metzner v. Quinnipiac University: A Federal Judge Refuses to Dismiss Coronavirus-Related Tuition Refund Case

Richard Fossey, J.D., Ed.D., Professor Emeritus, University of Louisiana at Lafayette and Todd A. DeMitchell, Ed.D., Professor Emeritus, University of New Hampshire

In response to the COVID-19 pandemic, Quinnipiac University, like virtually every college and university in the United States, closed its campus in March 2020 and shifted all instruction to an online format. Although the university provided housing and dining credits to students who had paid room and board for the 2020 spring semester, it did not offer refunds for tuition and fees.[1]

Zoey Metzner, a student at Quinnipiac University, along with other Quinnipiac students and parents of students, brought a putative class action against Quinnipiac for breach of contract, breach of an implied contract, unjust enrichment, and conversion.[2] Plaintiffs sought a refund of tuition and fees for that portion of the 2020 spring semester when instruction was delivered off-campus and online.

Tuition and fees to attend Quinnipiac as an on-campus student for the 2020 spring semester amounted to approximately $25,000, considerably more than the university charged for its online courses. In fact, an on-campus credit hour cost approximately three times as much as a credit hour for an online course.[3]

Quinnipiac filed a motion to dismiss the lawsuit, arguing that the plaintiffs' claims sounded in educational malpractice, a cause of action that Connecticut courts do not recognize.[4] It also argued that students' parents had no standing to sue since they had no contractual relationship with the university.[5]

United States District Judge Kari Dooley refused to dismiss the students' cause of action. She acknowledged that the Connecticut Supreme Court, in a 1996 decision, had rejected a cause of action for educational malpractice. In *Gupta v. New Britain General Hospital,* the Connecticut high court ruled that a cause of action must be dismissed "[w]here the essence of the complaint is that an educational institution breached its agreement by failing to provide an effective education, [and] the court is asked to evaluate the course of instruction and called upon to review the soundness of the method of teaching that has been adopted by that educational institution."[6]

Nevertheless, Judge Dooley pointed out, the Connecticut Supreme Court recognized an exception to this rule for claims alleging "that the education program failed in some fundamental respect, as by not offering any of the courses necessary to obtain certification in a particular field," or that "'the educational institution failed to fulfil[l] a specific contractual promise distinct from any overall obligation to offer a reasonable program.'"[7]

Plaintiffs argued that the educational malpractice doctrine did not apply to their suit because they were not contesting the manner in which Quinnipiac implemented online learning. Rather, they were challenging "Quinnipiac's decision to retain tuition and fees for educational services that the institution allegedly promised but never provided."[8] The plaintiffs characterized their claims "as commercial as opposed to academic" and did not implicate concerns "regarding improper judicial forays into evaluations of the quality or value of academic instruction . . . ."[9]

In the case at hand, Judge Dooley ruled, the plaintiffs claimed that Quinnipiac breached an express or at least an implied promise to provide in-person instruction and that their claim was one for breach of contract, not for failure to provide an effective education. The judge pointed out that Quinnipiac's website touted "such features as 'state-of-the-art facilities,' 'outdoor spaces,' 'classroom and immersive experiential learning,' and 'the beauty of New England.'"[10] Also, Quinnipiac's 2019-2020 Official Bulletin "describe[d] many of its in-person offerings in such terms as providing a 'hands-on experience,' 'campus laboratory experience,' 'a supportive learning environment characterized by small classes with access to faculty and well-equipped laboratory facilities,' 'state-of-the-art facilities,' and other characteristics that are germane only to on-campus instruction."[11]

Moreover, Quinnipiac charged students significantly less for online courses that for courses taught face-to-face, and plaintiffs had not selected the university's online course offerings. "Such allegations in combination with the parties' alleged course of conduct allow the reasonable inference that the parties may have at least implicitly entered into a specific agreement for on-campus instruction by virtue of the Plaintiffs having been charged under, and paid, the higher of these tuition schemes while attending in-person classes during the first half of the Spring 2020 semester."[12]

Although Judge Dooley allowed the plaintiffs' tuition refund case to go forward, she dismissed the parent plaintiffs from the suit. The parents, she ruled, "have not plausibly alleged any contract between Quinnipiac and the Parent Plaintiffs."[13] Nor, in the judge's view, did they have a viable claim for unjust enrichment.[14]

Conclusion and Implications

Metzner v. Quinnipiac University is one of several court decisions in which a federal court has allowed a COVID-related tuition-refund case to go forward under as breach of contract theory.[15] On the other hand, federal courts in Massachusetts[16] and Rhode Island[17] dismissed similar lawsuits, finding no basis for a claim that the respective universities had breached explicit or implied contractual obligations by switch-

ing from face-to-face learning to an online teaching format.

More than 160 tuition refund cases have been filed against colleges and universities in state or federal courts,[18] and the stakes for these institutions are significant. Quinnipiac University enrolled approximately 10,000 students in the spring of 2020. If forced to give students a partial refund to every student due to its shift to online instruction, the cost would be enormous.

Assessing the litigation landscape one year after universities closed their campuses in March 2020, it is impossible to predict a trend regarding the final outcome in these lawsuits. Some courts have granted universities' motions to dismiss almost out of hand,[19] while others have allowed these causes of action to go forward.[20]

At least one thing is clear, however. Based on the number of tuition refund lawsuits filed against American colleges, students do not believe that online instruction is equivalent to face-to-face learning, and many think they were charged too much to take their classes while sitting in front of a computer at home or in their dorm rooms.

Endnotes

1 *Metzner v. Quinnipiac Univ.,* No. 3:20-cv-00784 (KAD), 2021 WL 1146922, *3 (D. Conn. March 25, 2021).

2 *Id.* at *1.

3 *Id.* at *3 (Students were charged between $515 and $585 per credit for online programs, while students taking on-campus courses were charged between $1,517.50 and $2,023.22 per credit.)

4 *Id.* at *5.

5 *Id.* at *4.

6 *Id.* at *5, quoting *Gupta v. New Britain Gen. Hosp.*, 687 A.2d 111, 119 (Conn. 1996) (internal citation omitted). *See also Lindner v. Occidental Coll.*, Case No. CV – 20-8481-JFW(RAOx), *7 (C.D. Calif. Dec. 11, 2020) (finding that plaintiffs' tuition reimbursement claims would require the court "to make judgements about the quality and value" of education at Occidental College and were "the type of educational claims that California courts, and courts throughout the country, have rejected").

7 *Id.* at *5, quoting *Gupta v. New Britain Gen. Hosp.*, 687 A.2d at 120.

8 *Id.* at *6.

9 *Id.* However, "Plaintiffs further allege that the transition to online learning rendered it difficult to access and communicate with Quinnipiac's professors, many of whom were unprepared to deliver an effective educational experience using remote learning technologies." *Id.* at *2. This allegation would seem to require an analysis of teaching skills, which might reasonably be construed as a claim for educational malpractice

10 *Id.* at *10.

11 *Id.* at *2.

12 *Id.* at *10.

13 *Id.* at *5.

14 *Id.*

15 *See, e.g., Salerno v. Fla. S. Coll.*, 488 F.Supp.3d 1211 (M.D. Fla. 2020).

16 *Chong v. Northeastern Univ.*, C.A. No. 20-10844-RGS, 2020 WL 2020 WL 7338499 (D. Mass. Dec. 14, 2020). *See* Richard Fossey & Todd A. DeMitchell, Chong v. Northeastern University: *No Tuition Refund to College Students Whose Classes Were Switched to Remote Learning Due to COVID-19*, 62(3) Sch. L. Rep. 52 (December 2020) (commentary on court's earlier decision, *Chong v. Northeastern Univ.*, C.A. No. 20-10844-RGS, 2020 WL 5847626 (D. Mass. Oct. 1, 2020).

17 *Burt v. Bd. Of Tr. of Univ. of R.I.*, C.A. No. 20-465-JJM-LDA, C.A. No. 20-295-JJM-LDA, C.A. No. 20-191-JJM-LDA, C.A. No. 20-246-JJM-LDA, C.A. No. 20-226-JJM-LDA, 2021 WL 825398 (D.R.I. March 4, 2021). See Richard Fossey & Todd A. DeMitchell, Burt v. Board of Trustees of University of Rhode Island: *A Federal Judge Dismisses Tuition Refund Claims Against Four Rhode Island Universities*, 63(3) Sch. L. Rep. 3 (March 2021) (writing, "The judge largely supported a decision made by four Rhode Island universities to respond to the coronavirus pandemic by transitioning their academic offerings to an online instructional format—an *academic decision* about how their curricula should be taught.") at *4 (emphasis in original).

18 Author, *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, PIERCE ATWOOD (Nov. 9, 2020), https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases (listing 167 cases as of March 9, 2021).

19 *See, e.g., Gociman v. Loyola Univ. of Chicago*, Case No. 20 C 3116, 2021 WL 243573 (N.D. Ill. Feb. 26, 2021) (dismissing student's breach-of-contract and unjust enrichment claims for tuition refunds under Illinois law).

20 *See, e.g., Gibson v. Lynn Univ.*, Case No. 20-CIV-81173-RAR, 2020 WL 7024463(S.D. Fla. Nov. 29, 2020).

The views expressed are those of the authors and do not necessarily reflect the views of the publisher or the Education Law Association.

Summaries of ELIP Articles – April 2021

Trends in Impartial Hearings

Previous issues of the *Education Law Reporter* tracked the trends of due process hearings (DPH) under the Individuals with Disabilities Education Act (IDEA) for two successive six-year periods. The DPH indicators for each jurisdiction were: (1) filings, which represent the initiation of this hearing process; (2) adjudications, which represent the completion of the process via a final written decision; and, based on their combination, (3) the ratio of filings to adjudications.

As the sequel to a previous analysis, this article provides a reanalysis on a per capita basis; thus, it is comparable not only to the prior, unadjusted analysis in this pair but also the corresponding per capita analysis for the prior period.

See *Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis* by Gina L. Gullo and Perry A. Zirkel. They acknowledge with appreciation the data analysis that Diana Cruz provided on behalf of CADRE, the national Center on Dispute Resolution in Special Education (https://www.cadreworks.org/).

Educator Sexual Misconduct

Educator sexual misconduct (ESM) is a phenomenon that includes illegal and inappropriate sexual behaviors of educators. The precise definition of ESM varies widely within the United States. One state may include all sexual crimes such as distribution of pornography, sexual harassment, and relationships with students within the construct of ESM, while another state may limit the description of ESM to sexual contact or intercourse with a minor. The rapid rise of ESM reports has heightened public interest and research attention to the nature of ESM and ways to prevent it. Despite increased legislative efforts to address ESM at both national and state levels, great discrepancies remain in states' definitions of ESM, which contributes to uneven disciplinary practices. The purpose of this exploratory analysis is to consider statewide differences in definitions of educator sexual misconduct (ESM) throughout the United States.

The authors' findings indicate that the most thorough state policies, regulations, and laws include clear access to codes of ethics/conduct; clear links within the codes to criminal codes; explicit language that avoids vague terms; and a boundary standard that establishes a clear line between professional behavior and inappropriate behavior with students. Less inclusive policies are lacking an exact definition of ESM; may extend protection only to minors (not all students); may not fully prohibit and define what constitutes solicitation of an inappropriate relationship; and may

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ELIP #73
Special Ed / IDEA

Trends in Impartial Hearings under the IDEA: A Comparative Enrollments-Based Analysis

Gina L. Gullo, Ed.D., and Perry A. Zirkel, Ph.D., J.D., LL.M.

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Previous issues of the *Education Law Reporter* tracked the trends of due process hearings (DPH) under the Individuals with Disabilities Education Act (IDEA)[1] for two successive six-year periods. The DPH indicators for each jurisdiction were: (1) filings, which represent the initiation of this hearing process;[2] (2) adjudications, which represent the completion of the process via a final written decision;[3] and, based on their combination, (3) the ratio of filings to adjudications.[4]

The first pair of articles analyzed these variables for the period from the school year 2006–07 through 2011–12.[5] The first article examined the annual average per jurisdiction[6] for each indicator on an absolute basis, i.e., without any adjustment for the special education enrollments in the state,[7] whereas the sequel reanalyzed the adjudications and filings on a per capita basis, i.e., with absolute numbers multiplied by 10,000 and then divided by the number of special education students to reflect the number of adjudications and filings per 10,000 students.[8] The principal findings of the combination of this pair of analyses for 2006–11 included the following: (1) adjudications declined overall, while filings remained relatively stable during this period,[9] (2) a relatively small number of jurisdictions accounted for most of the activity for this period, with the District of Columbia being an outlier in this predominant subgroup,[10] and (3) ranks differed pervasively and for some jurisdictions dramatically upon re-calculating to a per capita basis.[11]

For the more recent six-year period, the first of a second pair of articles analyzed the three DPH indicators for 2012–17 on an absolute, or unadjusted, basis, including a comparison to the parallel results for the first of the previous pair of analyses.[12] The major findings included (1) adjudications formed an uneven plateau that remained within the range of the last four years of the prior six-year period,[13] (2) the filings stayed within the same range as the prior period, with a slightly ascending trajectory within this range,[14] (3) with relatively limited changes, the small group of jurisdictions continued to account for the vast majority of both the adjudications and filings,[15] and (4) the filings to adjudications ratio moved from the first half to the second half of the six-year period from a level within to a level higher than the range for the prior period.[16]

As the sequel to first 2011–17 analysis, this article provides a reanalysis on a per capita basis, thus comparable not only to the prior, unadjusted analysis in this pair but also the corresponding per capita analysis for the prior period. Specifically, the research questions were:

For the period from 2012–17, what are the differences, if any, in the jurisdictional rankings for each of the following DPH indicators upon adjustment from an absolute to a per capita basis:[17] (a) adjudications and (b) filings?

On this enrollment-adjusted basis, to what extent, if any, did the rankings for each of the following DPH indicators for 2012-17 change from the prior six-year period: (a) adjudications, (b) filings, and (c) filings-to-adjudications ratios?[18]

Results

In response to question 1(a)-(b), appendices 1 and 2 provide the adjudications and filings on an unadjusted and adjusted basis for all 52 jurisdictions. Additionally, Tables 1 and 2 show the corresponding comparisons for the small predominant group of the top six jurisdictions.

For adjudications, Appendix 1 shows that the clear majority of the jurisdictions differed markedly in their ranking upon adjustment.[19] For example, Texas and Florida dropped more than twenty places in their respective rankings, while Vermont and New Hampshire were among the states that

Table 1. Comparison Between Unadjusted and Adjusted Averages in DPH Adjudications for the Top Jurisdictions, 2012–17

Unadjusted Adjudications			Adjusted Adjudications		
Jurisdiction	Rank	Total	Jurisdiction	Rank	Rate
Puerto Rico	1	1,114	District of Columbia	1	121.9
New York	2	673	Puerto Rico	2	90.1
District of Columbia	3	151	New York	3	13.9
California	4	113	Hawaii	4	3.7
New Jersey	5	56	New Jersey	5	2.4
Pennsylvania	6	55	Pennsylvania	6	1.8
Hawaii	13	7	California	8	1.6

moved up considerably in their position relative to the other jurisdictions. Focused on the top jurisdictions, Table 1 shows the more restricted changes, including the District of Columbia's ascendance to the first position, Hawaii's movement into this group, and California's move out of it.

Appendix 2 shows more moderate ranking differences for filings than adjudications.[20] The jurisdictions with the most dramatic drops in relative rankings included Indiana, while the corresponding marked movements upward included Arkansas. Focused on the top group, Table 2 shows the District of Columbia's and Hawaii's particularly pronounced ascents from positions outside the group into first and sixth positions, respectively, and Pennsylvania's and Massachusetts' less dramatic descents from inside to outside the top group.

In response to question 2(a)-(c), Appendices 3, 4, and 5 list the adjudications, filings, and filings-to-adjudications ratios[21] on an adjusted basis for all 52 jurisdictions, and Tables 3–5 show the corresponding comparisons for the small, but predominant group of the top six jurisdictions. First, for the overall comparison on an enrollment-adjusted basis for all 52 jurisdictions together, the bottom line of Appendices 3–5 shows that adjudications decreased dramatically from an annualized average of 17.1 to 4.9, filings decreased to a lesser but still considerable extent from an annualized average of 49.5 to 22.2, and the resulting ratio increased moderately from 14.6 to 19.3. The reductions in adjudications and filings were largely attributable to a few "top" jurisdictions, particularly the District of Columbia.[22]

For adjudications on the adjusted basis, Appendix 3 reveals that most of the jurisdictions' rankings remained moderately stable, with the most pronounced downward shifts being for Louisiana, Mississippi, and Arizona and the most pronounced upward shifts being for Missouri and Montana. Overall, slightly less than half of the jurisdictions changed more than five places in their ranked position.

A review of Table 3 reveals that for the top jurisdictions: (a) the reduction in the enrollment-based rate for adjudications was modest with the exception of first-place District of Columbia and (b) the shifts in rank were relatively limited.[24]

For filings on the enrollment-adjusted basis, Appendix 4 shows more stability in rankings from the previous period to the most recent period than the corresponding

Table 2. Comparison Between Unadjusted and Adjusted Averages in DPH Filings for the Top Jurisdictions, 2012–17

Unadjusted Adjudications			Adjusted Filings		
Jurisdiction	Rank	Total	Jurisdiction	Rank	Rate
New York	1	6,091	District of Columbia	1	383.8
California	2	4,274	Puerto Rico	2	166.0
Puerto Rico	3	2,040	New York	3	125.2
New Jersey	4	1,157	California	4	58.8
Pennsylvania	5	788	New Jersey	5	49.5
Massachusetts	6	530	Hawaii	6	36.9
District of Columbia	7	476	Massachusetts	8	31.4
Hawaii	19	71	Pennsylvania	9	25.9

Table 3. Comparison Between 2006–11 and 2012–17 in Adjusted DPH Adjudications for the Top Jurisdictions[23]

2006–11			2012–17		
Jurisdiction	Rank	Rate	Jurisdiction	Rank	Rate
District of Columbia	1	736.6	District of Columbia	1	121.9
Puerto Rico	2	91.2	Puerto Rico	2	90.1
Hawaii	3	14.3	New York	3	13.9
New York	4	12.6	Hawaii	4	3.7
New Hampshire	5	4.3	New Jersey	5	2.4
New Jersey	6	2.3	Pennsylvania	6	1.8
Pennsylvania	7	2.3	New Hampshire	7	1.8

results for adjudications. Less than one-fourth of the jurisdictions changed their relative ranking five or more positions, with the most pronounced differences being Idaho's downward shift and Arkansas' upward shift. For the top jurisdictions, as Table 4 displays, the shifts were limited to movement within positions 4–6 attributable to Hawaii's drop from fourth to sixth place. Moreover, although the District of Columbia remained in first place, its precipitous decline in the enrollment-based rate was not only the major contributing factor to the overall reduction in adjusted filings[25] but also counter to the direction of two other members of the top group.

For the resulting filings-to-adjudications ratios on an adjusted basis, Appendix 5 reveals that, within the aforementioned moderate overall increase,[27] the differences in rankings were considerable, with slightly more than half of the jurisdictions shifting up or down by five or more positions.[28] The leading examples of upward shifts included Indiana and West Virginia, while the leading examples of downward shifts included Montana, Missouri, and Kansas. For the top group, Table 5 further reflects and reinforces this considerable fluctuation in both directions, with only three jurisdictions remaining in the top six and, within the three of them, Tennessee moving into first place.

Discussion

This follow-up analysis on an enrollment-adjusted basis provides a reexamination of the previous three "snapshots" of DPH indicators in two identified ways—comparing the corresponding unadjusted data for the 2012–17 period and comparing the equivalent adjusted data for the prior period. These two comparisons represent the results for questions 1 and 2. However, the interpretation of these findings warrant one major caveat: the data from which these analyses derive may not be 100% accurate. This potential inaccuracy derives from: (1) dependence on jurisdiction self-reporting of data,[29] and (2) for adjudications, the ambiguity and broadness of the USDE definition of "fully adjudicated" cases.[30] Self-reported data risks inaccuracies due to both human error and self-interest while ambiguous definitions can lead to reporting of subjective, rather than objective, data indicators.[31] Nonetheless, the current data were deemed reliable for government reports examining equity[32] and performance measures[33] related to DPH indicators; thus, indicating data use in this examination as appropriate.

Table 4. Comparison Between 2006–11 and 2012–17 in Adjusted DPH Filings for the Top Jurisdictions[26]

2006–11			2012–17		
Jurisdiction	Rank	Rate	Jurisdiction	Rank	Rate
District of Columbia	1	1,791.8	District of Columbia	1	383.8
Puerto Rico	2	166.4	Puerto Rico	2	166.0
New York	3	134.2	New York	3	125.2
Hawaii	4	62.9	California	4	58.8
California	5	40.0	New Jersey	5	49.5
New Jersey	6	36.4	Hawaii	6	36.9

Table 5. Comparison Between 2006–11 and 2012–17 in Adjusted DPH Filings-to-Adjudications Ratios for the Top Jurisdictions

2006–11			2012–17		
Jurisdiction	Rank	Rate	Jurisdiction	Rank	Rate
Nevada	1	44.4	Tennessee	1	93.3
Tennessee	2	34.1	Nevada	2	56.5
Montana	3	33.9	Massachusetts	3	50.3
Missouri	4	31.1	Arizona	4	45.2
Alabama	5	28.4	Alabama	5	43.7
California	6	28.9	Connecticut	6	37.8
Massachusetts	7	28.4	California	7	37.7
Connecticut	18	14.9	Missouri	35	10.1
Arizona	23	13.3	Montana	38	9.7

Question 1

For the first comparison, the primary finding was the marked difference in adjudications, upon adjustment for the special education enrollments in each jurisdiction. Although the unadjusted averages are analogous, for example, to the overall levels of automobile fatalities, the adjusted averages reveal the rate of these fatalities upon taking the extent of traffic into direct consideration. Both are important factors, but the adjusted figures further equalize the basis for comparisons among jurisdictions.

Given the continuing distinction between the two worlds of DPH activity,[34] the focused view of the top jurisdictions in Table 1 shows that upon enrollment-based adjustment, the District of Columbia replaces Puerto Rico as the leader in adjudications. This ascendance of the District of Columbia parallels its emergence to first place upon the enrollments-based adjustment for the prior period.[35] This persisting premier position of the nation's capital in the rate of adjudications is likely attributable to the high concentration of attorneys, the continuing cadre of those attorneys specialized in representing parents at DPHs, and the special structure of this jurisdiction.[36] On the other hand, the reported improvements in the District of Columbia dispute resolution system,[37] which may extend to its local schools and its supervising state education agency, have not changed its overall rank in adjudications from the prior to the most recent six-year period.

For filings, the first comparison reveals a more moderate change in rankings upon enrollments-based analysis, but, as Table 2 illustrates, with an even more dramatic ascendance of the District of Columbia. This distinctive emergence of the District upon enrollment-based calculation also parallels the results for the prior period.[38]

Aside from the confirmation of two worlds and the non-state jurisdiction pattern, the volatility of ranks upon adjustment reflects the continued importance of per capita analyses. For both filings and adjudications, over half of the jurisdictions shifted five or more ranks upon adjustment. These rank changes are indicative of the impact of population size on DPH indicators, thus making the longitudinal analysis by adjusted DPH indicators provided in this article of paramount importance to an in-depth understanding of litigious trends in special education by jurisdiction.

Question 2

For the second comparison, which examines both of the successive six-year periods on an enrollment-adjusted basis, the primary findings started with the overall dramatic reductions in the respective averages for adjudications and, to a lesser extent, filings, with a corresponding moderate increase in the resulting ratios. These overall trends suggest that for both worlds of DPH activity, the alternate dispute resolution activities, which started with changes in the 2004 IDEA amendments[39] and which gathered momentum with implementation and expansion at the state level,[40] might have changed the previous trend in adjudications.[41] If so, they contributed to the resolution of disputes not only before the complaint stage, as reflected in the reduced level of filings, but also, as reflected in the rising filings-to-adjudications ratio, between the complaint and decision stages.

The remaining findings derive from the stability of the relative rankings for both adjudications and filings on the enrollment equalizing basis within these overall directional trends. For the dominant top group, the District of Columbia and Puerto Rico remained in first and second place in 2012–17, and the rest of these active jurisdictions remained within one or two positions of their rank in 2006–11.[42] The much more numerous and quiescent group of jurisdictions, with occasional exceptions, also largely stayed in the same overall order. Yet, the jurisdictional rankings for the resulting ratios varied much more widely between the two periods. Many rank shifts stemmed from the magnitude of change in a small number of jurisdictions. Of particular note, Montana and Missouri dropped from third and fourth, respectively, in 2006–11, to 38th and 35th in 2012–17. This drop caused many other jurisdictions to shift upwards in rank despite negligible differences between their own ranks with similar ranking jurisdictions as compared to the prior period. The remaining rank changes are probably attributable to the volatile effect of the relatively small *n*'s in the numerator and denominator for most jurisdictions. In contrast, the District of Columbia, who was in the top position for both adjudications and filings, was in the bottom position for the ratio indicator.

As seen in the prior longitudinal analysis, the District of Columbia served as an outlier for both adjusted adjudications and filings.[43] The District's outlier status continued into the present period, but at a much less pronounced level,[44] stemming from a massive decrease in adjudications and filings in the District of Columbia. Indeed, this decline largely accounts for the decreases in adjudications and filings across the combined 52 jurisdictions.[45] Decreases in the adjusted adjudications and filings and increases in filings-to-adjudications ratios for the District of Columbia might be attributable to previously noted[46] improvements in the District of Columbia dispute resolution system, such as the establishment of the State Advisory Panel on Special Education for the District of Columbia in April 2012.[47]

Further Considering High-Ranking Jurisdictions per Question 2

The inclusion of the District of Columbia and Puerto Rico in the top three ranking DPH adjudications and filings when adjusted and unadjusted (despite their smaller population sizes) suggests something insular about these non-state jurisdictions leading to more filings and adjudications. Earlier findings, where non-state and non-contiguous jurisdictions ranked in the top groups for adjusted adjudications,[48] also indicated insularities. The shift in the percentage of students served under Part B of the IDEA as it relates to the changes in adjusted adjudications and filings between the two six-year periods from 2006–11 and 2012–17 indicates continued anomalies in these non-state jurisdictions. While the District of Colombia had a massive decrease in filings and adjudications between the two periods, the jurisdiction experienced only a moderate decrease in the percentage of students served.[49] Conversely, Puerto Rico had a minimal change in adjudications and filings between 2006–11 and 2012–17, but had a drastic increase in the percentage of students served under Part B of the IDEA;[50] thus, the District of Columbia's decreases and Puerto Rico's increases were not a matter of a growing percentage of students served, but rather changes in the use of due process in each jurisdiction.

New York, another jurisdiction where adjusted adjudications and filings remained high between the two time periods, follows the pattern seen in Puerto Rico where the percentage of students served under Part B of the IDEA increased, but the average annual filings decreased; however, in New York the average annual adjudications increased.[51] Logically, an increase in adjudications but not filings would indicate that the

ratio of filings-to-adjudications is decreasing, as is demonstrated in the present data.[52] However, many filings are miscategorized as withdrawals when cases are settled prior to hearings.[53] As such, this ratio might reflect a change in adjudication trends, improving reporting standards, the impact of litigious challenges such as long wait times until hearings or inefficient IHO appointments,[54] to change. Thus, trend data for New York remains interpretable only under this caveat.

Further complicating the interpretation of trends stemming from New York, the majority of DPH indicators for the jurisdiction reflect filings and adjudications from New York City alone.[55] This value is so high that the adjusted filings for New York City in 2017–18 are greater than that of the combined lower 35 jurisdictions for that year.[56] Without New York City, New York would rank around 17th for filings per capita rather than its current 3rd place position. Thus, interpretations stemming from New York must consider the influence of New York City on the greater New York jurisdictional area.

Conclusions

The results reinforce the conclusions of the earlier adjusted analysis such that litigiousness remains seemingly attributable to several factors rather than primarily population density. These factors, subject to further research, bear repeating here:

> (1) the particular culture within each jurisdiction, (2) the availability of specialized attorneys representing parents, (3) the nature of both the education governance structure and the IDEA administrative adjudicatory system, (4) the level of quality and compliance of the jurisdiction's special education system, (5) the effect of the outcome trend of not only the hearing/review process but also the court decisions under the IDEA in each jurisdiction, and (6) the socioeconomic level of the jurisdiction. . . . [57]

Further reinforced is the importance of analyzing DPH filings and adjudications using both an unadjusted and adjusted calculation:

> [H]igh numbers of DPH filings and adjudications requires attention in terms of both the system. . . and resources for its transaction costs. . . On the other hand, the per capita rate requires attention to the jurisdictions otherwise hidden, or masked, by their relatively low overall numbers but that have relatively high numbers in relation to their special education enrollments.[58]

Once again, the supported factors and the necessity of such a dual-analysis reflect the previous conclusion:

> Progress toward more precise and nuanced research on dispute resolution under this leading statutory source of education litigation, including the nature and interactions of the contributing factors, is both necessary and appropriate for policymakers and practitioners.[59]

In addition to the repeated conclusions, major findings of the present analysis include: (1) several changes in jurisdictional ranks upon enrollment-based adjustment of adjudications and, to a lesser extent, filings; (2) a decrease in adjusted adjudications and filings in the present period highly influenced by a respective drop in the District of Columbia, (3) overall stability in jurisdictional ranks by adjusted adjudications and filings over time, and (4) a moderate increase in filings-to-adjudications ratios between the 2006–11 and 2012–17 time periods. These trends indicate a shifting landscape in special education law, where progress towards alternatives to DPHs such as mediation and resolution meetings potentially becomes a reality.[60] While some stakeholders have emphasized the problems in the due process system in proposals for change[61] and others have emphasized alternative dispute resolution without changing the DPH avenue,[62] these overall decreases could indicate the start of a less litigious approach to special education complaints. Further research should explore the continued trends and patterns at the DPH and interrelated judicial levels with more depth, including the contributing factors, to determine the need and direction for systemic improvements.

In any event, this follow-up analysis of adjusted DPH indicators serves to reinforce the importance of both overall and per capita analyses. While absolute comparisons offer a gateway into understanding trends in filing and adjudication patterns, enrollment-adjustment allows for comparison between jurisdictions based on activity levels rather than sheer numbers. Continued study of trends using this more precise and individualized method of analysis and interpretation remains necessary especially in light of the continually changing representation of students receiving special education services in each jurisdiction.[63] With this nuanced measure, policy makers and practitioners progress towards a more thorough understanding of the litigation process and contributing factors.

Appendix 1. Annual DPH Adjudications for 52 Jurisdictions in 2012–17: Unadjusted and Adjusted Averages*

	Unadjusted		*Adjusted*	
Jurisdiction	Rank**	Average	Rank**	Average
Puerto Rico	1	1,114	2	90.1
New York	2	673	3	13.9
District of Columbia	3	151	1	121.9
California	4	113	8	1.6
New Jersey	5	56	5	2.4
Pennsylvania	6	55	6	1.8
Maryland	7	14	9	1.4

Texas	8	13	29	0.3
Massachusetts	9	11	17	0.6
Florida	10	9	32	0.3
Illinois	10	9	27	0.3
Washington	10	9	16	0.7
Hawaii	13	7	4	3.7
Ohio	13	7	30	0.3
Virginia	13	7	23	0.4
Connecticut	16	6	12	0.9
Arkansas	17	6	13	0.9
Missouri	17	6	21	0.5
Georgia	19	6	31	0.3
New Hampshire	20	5	7	1.8
Alabama	21	4	22	0.4
Colorado	21	4	24	0.4
Maine	23	4	11	1.1
Michigan	23	4	39	0.2
Indiana	25	3	36	0.2
Wisconsin	26	3	33	0.3
New Mexico	27	3	18	0.6
Rhode Island	28	3	10	1.1
Minnesota	29	2	41	0.1
South Carolina	29	2	38	0.2
Delaware	31	2	14	0.8
Idaho	31	2	19	0.6
Nevada	31	2	28	0.3
Arizona	34	2	45	0.1
North Carolina	34	2	48	0.1
Kansas	36	1	37	0.2
Kentucky	36	1	43	0.1
Mississippi	38	1	40	0.2
Oregon	38	1	42	0.1
Alaska	40	1	20	0.5
Vermont	40	1	15	0.7
West Virginia	40	1	34	0.2
Louisiana	43	1	47	0.1
Iowa	44	1	46	0.1
South Dakota	44	1	26	0.3
Tennessee	44	1	50	0.1
Oklahoma	47	1	51	0.0
Utah	47	1	49	0.1
Wyoming	47	1	25	0.4
Montana	50	< 1	35	0.2
Nebraska	51	< 1	52	0.0
North Dakota	51	< 1	44	0.1
All Jurisdictions		**45**		**4.9**

*The unadjusted and adjusted averages are respectively rounded to the nearest whole number and nearest tenth, but the rankings for each are based on their exact values.

**When jurisdictions' exact averages were equal, tied ranks are represented by using the same rank number.

Appendix 2. Annual DPH Filings for 52 Jurisdictions in 2012–17: Unadjusted and Adjusted Averages*

	Unadjusted		*Adjusted*	
Jurisdiction	Rank**	Average	Rank**	Average
New York	1	6,091	3	125.2
California	2	4,274	4	58.8
Puerto Rico	3	2,040	2	166.0
New Jersey	4	1,157	5	49.5
Pennsylvania	5	788	9	25.9
Massachusetts	6	530	8	31.4
District of Columbia	7	476	1	383.8
Texas	8	333	20	7.2
Illinois	9	300	17	10.2
Maryland	10	240	10	22.8
Connecticut	11	240	7	32.3
Florida	12	200	24	5.4
Alabama	13	161	11	19.2
Ohio	14	153	22	5.9
Georgia	15	114	23	5.7
Washington	16	114	19	8.4
Nevada	17	95	12	17.4
Indiana	18	74	29	4.3
Hawaii	19	71	6	36.9
Michigan	20	71	32	3.6
Arizona	21	68	26	5.1
Virginia	22	66	31	4.0
Tennessee	23	62	27	4.8
Missouri	24	59	28	4.6
North Carolina	25	55	35	2.8
Maine	26	46	13	13.9
Arkansas	27	36	25	5.3
New Hampshire	28	34	14	11.7
Colorado	29	33	33	3.5
New Mexico	30	32	21	6.5
Rhode Island	31	27	15	11.4
Minnesota	32	24	42	1.9
Oregon	33	23	36	2.7
Wisconsin	34	22	43	1.9
Kentucky	35	21	39	2.1
Delaware	36	19	18	9.1
South Carolina	36	19	44	1.8
West Virginia	36	19	30	4.1
Iowa	39	17	38	2.6
Oklahoma	40	16	47	1.5
Vermont	41	16	16	11.4
Louisiana	42	14	45	1.7
Mississippi	43	14	40	2.0
Kansas	44	11	48	1.5
Utah	45	7	51	0.8

Alaska	46	6	34	3.2
Idaho	47	5	46	1.7
Wyoming	48	4	37	2.6
Montana	49	3	41	1.9
Nebraska	50	3	52	0.6
South Dakota	50	3	49	1.5
North Dakota	52	2	50	1.1
All Jurisdictions		**352**		**22.1**

* The unadjusted and adjusted averages are respectively rounded to the nearest whole number and nearest tenth, but the rankings for each are based on their exact values.

** When jurisdictions' exact averages were equal, tied ranks are represented by using the same rank number.

Appendix 3. Annual DPH Adjudications Per Capita for 52 Jurisdictions: 2006–11 and 2012–17*

	2006–11		*2012–17*	
Jurisdiction	Rank	Average	Rank	Average
District of Columbia	1	736.9	1	121.9
Puerto Rico	2	91.2	2	90.1
Hawaii	3	14.3	4	3.7
New York	4	12.6	3	13.9
New Hampshire	5	4.3	7	1.8
New Jersey	6	2.3	5	2.4
Pennsylvania	7	2.3	6	1.8
Alaska	8	2.3	20	0.5
Rhode Island	9	2.1	10	1.1
Connecticut	10	2.1	12	0.9
Maryland	11	2.0	9	1.4
California	12	1.4	8	1.6
Massachusetts	13	1.2	17	0.6
Vermont	14	1.2	15	0.7
Delaware	15	1.1	14	0.8
Maine	16	1.1	11	1.1
Washington	17	0.8	16	0.7
New Mexico	18	0.7	18	0.6
Wyoming	19	0.7	25	0.4
Illinois	20	0.7	27	0.3
Virginia	21	0.6	23	0.4
Idaho	22	0.6	19	0.6
Texas	23	0.6	29	0.3
West Virginia	24	0.5	34	0.2
Mississippi	25	0.5	40	0.2
Alabama	26	0.4	22	0.4
Indiana	27	0.4	36	0.2
Louisiana	28	0.4	47	0.1
Arizona	29	0.3	45	0.1
Arkansas	30	0.3	13	0.9
Colorado	31	0.3	24	0.4
South Dakota	32	0.3	26	0.3

Nevada	33	0.3	28	0.3
South Carolina	34	0.3	38	0.2
Ohio	35	0.3	30	0.3
Wisconsin	36	0.2	33	0.3
Michigan	37	0.2	39	0.2
Kansas	38	0.2	37	0.2
Georgia	39	0.2	31	0.3
Florida	40	0.2	32	0.3
Minnesota	41	0.2	41	0.1
North Carolina	42	0.2	48	0.1
Missouri	43	0.2	21	0.5
Oregon	44	0.1	42	0.1
Tennessee	45	0.1	50	0.1
Oklahoma	46	0.1	51	0.0
Iowa	47	0.1	46	0.1
Montana	48	0.1	35	0.2
Kentucky	49	0.1	43	0.1
Nebraska	50	0.1	52	0.0
Utah	51	0.1	49	0.1
North Dakota	52	0.0	44	0.1
All Jurisdictions		**17.1**		**4.9**

*The adjusted averages are rounded to the nearest tenth, but the rankings are based on their exact values.

Appendix 4. Annual DPH Filings Per Capita for 52 Jurisdictions: 2006–11 and 2012–17*

	2006–11		*2012–17*	
Jurisdiction	Rank	Average	Rank	Average
District of Columbia	1	1,791.8	1	383.8
Puerto Rico	2	166.4	2	166.0
New York	3	134.2	3	125.2
Hawaii	4	62.9	6	36.9
California	5	40.0	4	58.8
New Jersey	6	36.4	5	49.5
Massachusetts	7	34.8	8	31.4
Connecticut	8	30.8	7	32.3
Maryland	9	26.7	10	22.8
Pennsylvania	10	26.3	9	25.9
New Hampshire	11	19.3	14	11.7
Vermont	12	15.6	16	11.4
Alabama	13	12.8	11	19.2
Nevada	14	12.2	12	17.4
Rhode Island	15	11.8	15	11.4
Maine	16	10.9	13	13.9
Illinois	17	10.9	17	10.2
Washington	18	8.9	19	8.4
Delaware	19	8.3	18	9.1
Alaska	20	8.2	34	3.2

Texas	21	7.0	20	7.2
New Mexico	22	6.8	21	6.5
Ohio	23	5.9	22	5.9
Missouri	24	5.5	28	4.6
Georgia	25	5.5	23	5.7
Tennessee	26	4.7	27	4.8
Arizona	27	4.5	26	5.1
Florida	28	4.4	24	5.4
Virginia	29	4.3	31	4.0
Indiana	30	4.2	29	4.3
Mississippi	31	3.6	40	2.0
Idaho	32	3.5	46	1.7
Oregon	33	3.4	36	2.7
West Virginia	34	3.4	30	4.1
Michigan	35	3.3	32	3.6
Kansas	36	3.2	48	1.5
Montana	37	3.1	41	1.9
North Carolina	38	3.1	35	2.8
Arkansas	39	2.9	25	5.3
Louisiana	40	2.7	45	1.7
Oklahoma	41	2.7	47	1.5
Colorado	42	2.6	33	3.5
Minnesota	43	2.5	42	1.9
Wisconsin	44	2.3	43	1.9
Kentucky	45	2.1	39	2.1
Wyoming	46	2.0	37	2.6
Iowa	47	1.4	38	2.6
South Dakota	48	1.4	49	1.5
South Carolina	49	1.4	44	1.8
Utah	50	0.9	51	0.8
Nebraska	51	0.8	52	0.6
North Dakota	52	0.1	50	1.1
All Jurisdictions		**49.5**		**22.1**

*The adjusted averages are rounded to the nearest tenth, but the rankings are based on their exact values.

Appendix 5. Annual DPH Adjudications-to-Filings Ratios Per Capita for 52 Jurisdictions: 2006–11 and 2012–17*

	2006–11		*2012–17*	
Jurisdiction	Rank	Average	Rank	Average
Nevada	1	44.4	2	56.5
Tennessee	2	34.1	1	93.3
Montana	3	33.9	38	9.7
Missouri	4	31.4	35	10.1
Alabama	5	29.4	5	43.7
California	6	28.9	7	37.7
Massachusetts	7	28.4	3	50.3

Georgia	8	27.6	16	21.0
Kentucky	9	26.5	23	15.9
Oklahoma	10	25.5	10	31.7
Oregon	11	23.3	19	19.4
Ohio	12	23.2	15	21.1
Florida	13	22.7	14	21.4
North Carolina	14	17.3	8	36.8
Illinois	15	16.5	9	32.1
New Jersey	16	15.7	17	20.5
Kansas	17	15.6	43	7.8
Connecticut	18	14.9	6	37.8
Michigan	19	14.9	18	20.3
Iowa	20	14.4	11	25.2
Minnesota	21	13.7	28	12.9
Maryland	22	13.4	22	16.7
Arizona	23	13.3	4	45.2
Vermont	24	13.1	24	15.8
Utah	25	12.1	29	12.6
Texas	26	12.0	12	24.9
Pennsylvania	27	11.6	26	14.4
Washington	28	11.6	30	12.2
New York	29	10.7	41	9.0
Wisconsin	30	10.4	44	7.5
Maine	31	10.1	27	13.1
Nebraska	32	10.1	25	15.7
Indiana	33	10.0	13	22.1
Colorado	34	9.2	42	8.9
New Mexico	35	9.2	33	11.3
Arkansas	36	8.7	47	6.2
Louisiana	37	7.8	21	17.2
Delaware	38	7.4	32	11.6
Mississippi	39	7.3	31	11.7
Virginia	40	6.9	40	9.2
West Virginia	41	6.7	20	18.6
Idaho	42	5.8	51	2.9
Rhode Island	43	5.6	36	10.1
South Carolina	44	5.4	34	10.2
South Dakota	45	5.0	49	4.2
New Hampshire	46	4.5	46	6.6
Hawaii	47	4.4	37	9.9
Alaska	48	3.6	48	6.1
Wyoming	49	2.9	45	7.5
District of Columbia	50	2.4	50	3.1
Puerto Rico	51	1.8	52	1.8
North Dakota	NA**	NA**	39	9.5
All Jurisdictions		**14.6**		**19.3**

*The adjusted averages are rounded to the nearest tenth, but the rankings are based on their exact values.
**The lack of adjudications for North Dakota precluded calculation of its ratio.

Endnotes

1 20 U.S.C. §§ 1400–82 (2017). The corresponding regulations are at 34 C.F.R. Parts 300 and 303 (2018). For the provisions for DPHs, see 20 U.S.C. § 1415(f)–(g) (2017); 34 C.F.R. §§ 300.507–300.514 (2018).

2 This variable is rather clear-cut, representing a count of the written complaints requesting a DPH per the applicable regulatory requirements. 34 C.F.R. §§ 300.507–300.508 (2018).

3 "Adjudications" herein is a short form of "fully adjudicated hearings," as used in the U.S. Department of Education (USDE) annual survey of state education departments, which is the source of the data in the successive analyses of CADRE and this article. U.S. Department of Education, E*MAPS* User Guide: IDEA Part B Dispute Resolution Survey (2019), https://www2.ed.gov/about/inits/ed/edfacts/index.html.Although not as precise as applied as it appears on its face, the unchanged definition of "fully adjudicated" that USDE has provided to the state education agencies for this annual collection is as follows: "[the] hearing officer conducted a DPH, reached a final decision regarding matters of law and fact and issued a written decision to the parties." *Id.* For this same variable, the various CADRE national reports https://www.cadreworks.org/resources/data-resources/national-data sometimes use the alternative shorthand term "hearings held."

4 This calculation of dividing the number of filings by the number of adjudications serves an indicator of the completion rate or, obversely and more significantly, the proportion of cases that do not reach the end of this process due to withdrawal/abandonment, settlement, or summary decision, such as dismissal without a hearing for lack of jurisdiction.

5 For simplicity, the remaining references to the respective six-year periods will be via the first of each academic-year pair, thus being 2006–11 and 2012–17.

6 The jurisdictions consisted of the 50 states plus the District of Columbia, Puerto Rico, and the Virgin Islands. For overall comparison purposes, the analysis included the respective cumulative total in addition to the annual average per jurisdiction for each of the three designated variables.

7 Perry A Zirkel, *Longitudinal Trends in Impartial Hearings under the IDEA,* 302 Educ. L. Rep. 1 (2014).

8 Perry A Zirkel, *Trends in Impartial Hearings under the IDEA: A Follow-up Analysis,* 303 Educ. L. Rep. 1 (2014).

9 Leading examples include and the District of Columbia dropping from about 1,900 adjudications in 2006–07 to under 300 in 2011–12, Puerto Rico dropping from nearly 1,300 adjudications in 2006–07 to under 400 in 2011–12, and New York dropping from just over 800 adjudications in 2006–07 to under 700 total adjudications in 2011–12. *See* Zirkel, *supra* note 7, at 6.

10 The top six jurisdictions—in alphabetical order being California, the District of Columbia, New Jersey, New York, Pennsylvania, and Puerto Rico—accounted for 90% of adjudications and 80% of filings for 2006–11, representing a continuation of the "two worlds" of DPHs. As the outlier, the District of Columbia alone accounted for 71% of the adjudications). *Id.* at 7.

11 For adjudications, for example, the top six jurisdictions all changed their rankings, with the most dramatic change being for California dropping from fourth to thirteenth position and Pennsylvania dropping from fifth to eighth. *See* Zirkel, *supra* note 8, at 19. For filings, the top six jurisdictions also all changed positions, with California dropping from second to sixth and Pennsylvania from sixth to eleventh. *Id.* at 16.

12 Perry A Zirkel & Gina L. Gullo, *Trends in Impartial Hearings under the IDEA: A Comparative Update,* 376 Educ. L. Rep. 870 (2020).

13 *Id.* at 872.

14 *Id.*

15 On the same unadjusted basis as the corresponding analysis for the earlier period, for adjudications, Puerto Rico stayed in the top position, with the rest of the top six remaining within one rank of their prior position. For filings, New York and California retained their first and second positions, although among the rest the District of Columbia dropped out of the group to nearby seventh place, and Massachusetts became the new member of the group, moving into sixth place. *Id.* at 873.

16 *Id.* at 872.

17 For simplicity, the remainder of this article will refer to the absolute basis as "unadjusted" and the per capita basis as "adjusted."

18 This follow-up analysis for the enrollment-adjusted comparison dropped the original 53rd jurisdiction, the U.S. Virgin Islands, because its adjudications had been negligible for the 2012–17 period.

19 More specifically, almost two thirds, specifically 65%, of the jurisdictions changed five or more ranks for adjudications upon adjustment.

20 For filings, in comparison to adjudications (*supra* note 19), 54% of the jurisdictions shifted five or more ranks upon adjustment.

21 The adjustment comparisons do not include filings-to-adjudications ratios because enrollment adjustment of both the filings and adjudications applies the same calculation to each indicator, thus maintaining the exact same ratio value.

22 The table below shows that successive removals of the most active jurisdictions resulted in successively smaller decreases for adjudications and filings, with an ultimate reversal of the direction upon removal of four of the top jurisdictions:

23 The Virgin Islands ranked third in the enrollment-adjusted analysis for 2006-11, but it was not included in the analyses for 2012-17. *See supra* note 18.

24 Except for the aforementioned outlier of the Virgin Islands (*supra* note 18), the only shift in rank of more than one position in the top group was the reduction for New Hampshire from fifth to seventh place.

25 *See supra* note 23 and accompanying text.

26 For the change in jurisdictional scope, see *supra* note 18.

27 Rank shifts are more common in ratio data due to the very small values of each ratio, resulting in rank changes due to minor numerical differences.

28 Across the 52 jurisdictions, 37 increased and 15 decreased in adjusted filings-to-adjudications ratios.

29 *See* 20 U.S.C. § 1418(a)(1)(F)-(G) (providing requirement for reporting of filings and adjudications). The IDEA requires SEAs to report annual data on due process hearings and adjudications to OSEP.

30 *See supra* note 3.

31 *E.g.,* U.S. Government Accountability Office (GAO), Education Needs to Address Significant Quality Issues with its Restraint and Seclusion Data 24–25 (2020), https://www.gao.gov/assets/710/706269.pdf (noting the risk of inaccuracies related to human error and interpretation in self-reported data).

32 GAO, IDEA Dispute Resolution Activity in Selected States Varied Based on School Districts' Characteristics 2 (2019), https://www.gao.gov/assets/710/702514.pdf (concluding, based on interviews and data comparisons, that the data from 2004–05 to 2017–18 were acceptably reliable).

33 GAO, Improved Performance Measures Could Enhance Oversight of Dispute Resolution 3 (2014), https://www.gao.gov/assets/670/665434.pdf (concluding, based on electronic testing of required data elements, interviews and other information, that the data from 2004–05 to 2011–12 were acceptably reliable).

34 *See supra* note 10.

35 *See* Zirkel, *supra* note 8, at 6. However, for the prior period, the seeming outlier before adjustment in relation to enrollments was New York rather than Puerto Rico. *Id.*

36 This special structure includes not only the more direct role of Congress and the significant overlap between the Office of the State Superintendent and the District of Columbia Public Schools (DCPS). Although the second feature is shared even more distinctively in Hawaii, the advent of charter schools in the District of Columbia that are not within the umbrella of DCPS has introduced another contributing variable, because these schools often lack the institutionalized component of established procedures for special education compliance.

37 *See* Zirkel, *supra* note 7, at 8 n.31.

38 *See* Zirkel, *supra* note 8, at 6.

39 *E.g.*, 20 U.S.C. §§ 1415(e)(1) (mediation prior to filing), 1415(e)(2)(B) (alternative of another disinterested party), and 1415(f)(1)(B) (resolution session).

40 *E.g.*, CADRE's Exemplar Collection, https://www.cadreworks.org/resources/cadre-materials/cadres-exemplar-collection (identifying illustrative state mechanisms and practices for alternate dispute resolution in special education).

(Endnote 22)	Adjudications		Filings	
	2006–11	2012–17	2006–11	2012–17
All Jurisdictions	17.1	4.9	49.5	22.1
Without DC	3.0	2.6	15.3	15.0
Without DC and PR	1.2	0.8	12.3	12.0
Without DC, PR, NY	1.0	0.6	9.8	9.7
Without DC, PR, HI, NY	0.7	0.5	8.7	9.2

[41] *E.g.*, Perry A. Zirkel & Karen Gischlar, *Due Process Hearings under the IDEA: A Longitudinal Frequency Analysis*, 21 J. Special Educ. Leadership 21 (2008) (finding that the total number of adjudications rose during the first six years followed by a relative plateau for the remainder of the period 1991–2005, but limited to the 50 states, thus not including the District of Columbia or Puerto Rico).

[42] *See supra* Tables 3 and 4.

[43] *See* Zirkel, *supra* note 8, at 6-7.

[44] In the period from 2006–12, the adjusted adjudications and filings for the District of Columbia exceeded eight and ten-times, respectively, that of second-place Puerto Rico. From 2012–17, the District of Columbia surpassed Puerto Rico by 1.4 times for adjudications and 2.3 times for filings.

[45] *See supra* note 23.

[46] *See supra* note 38 and accompanying text.

[47] Mayor's Order 2012-48, Establishment of State Advisory Panel on Special Education for the District of Columbia (2012), https://osse.dc.gov/sites/default/files/dc/sites/osse/publication/attachments/2012-48%20Establishment%20-%20State%20Advisory%20Panel%20on%20Special%20Education%20for%20the%20District%20of%20Columbia.pdf

[48] *See* Zirkel, *supra* note 8, at 4 (finding that the top jurisdictions include, in alphabetical order, the District of Columbia, Hawaii, Puerto Rico, and the Virgin Islands).

[49] NCES, Digest of Educational Statistics, Annual Report Table 204.70, https://nces.ed.gov/programs/digest/ (reporting a decrease for the District of Columbia from 16.1% in 2006–11 to 15.3% in 2012–17).

[50] *Id.* (reporting an increase for Puerto Rico from 22.7% in 2006–11 to 30.9% in 2012–17).

[51] *Id.* (reporting an increase for New York from 16.4% in 2006–11 to 17.7% in 2012–17).

[52] The filings-to-adjudications ratio for New York decreased from 10.7 in 2006–11 to 9.0 in 2012–17.

[53] Gilbert K. McMahon, NYS Special Education Impartial Hearing Outcomes (2011), http://www.specialedlawadvocacy.com/NYS%20Special%20Education%20Impartial%20Hearing%20Outcomes.pdf (noting that many cases in New York City are settled and improperly classified as "Withdrawn").

[54] Deusdedi Merced, External Review of the New York City Impartial Hearing Office 42–44 (2019), https://www.spencerwalshlaw.com/wp-content/uploads/2019/05/External-Review-of-the-New-York-City-Impartial.pdf (noting timely appointment of IHOs but subsequent recusals, questionable extensions, and late decision issuance in the IDEA impartial hearing process in New York City).

[55] *Id.* at 11 (finding that New York City accounted for 91% of filings for the entire population of New York in 2018).

[56] Jurisdictions ranking 18th through 52nd summed to an annual average 123.4 filings per capita. Moreover, 91% of New York State's 145.6 filings per capita resulted in 132.5 filings per capita in New York City.

[57] *See* Zirkel, *supra* note 8, at 8–9 (omitting footnotes from this quoted source).

[58] *Id.*, at 9.

[59] *Id.*

[60] *See supra* note 41 and accompanying text.

[61] *E.g.*, Sasha Pudelski, Rethinking Special Education Due Process (2016), https://www.aasa.org/uploadedFiles/Policy_and_Advocacy/Public_Policy_Resources/Special_Education/AASARethinkingSpecialEdDueProcess.pdf (noting several negative impacts such as teacher stress, inappropriate accommodations, and excessive legal fees as reasons to consider an alternative to the traditional due process systems and proposing research-based alternative).

[62] *E.g.*, Tracy Gershwin Mueller, *Litigation and Special Education: The Past, Present, and Future Direction for Resolving Conflicts Between Parents and School Districts*, 26 J. Disability Pol'y Stud. 135 (2015).

[63] *See supra* notes 50–53.

ELIP #74

Employment / Misconduct

Educator Sexual Misconduct: A Review of Definitions in the United States

Catherine Robert, Ed.D., Alejandra Gonzalez-Mejia, Ph.D., Elisabeth M. Krimball, Ed.D., and David P. Thompson, Ph.D.

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Educator sexual misconduct (ESM), a topic that "continues to be woefully understudied,"[1] is a phenomenon that includes illegal and inappropriate sexual behaviors of educators[2] directed "generally" toward students.[3] We intentionally use the word "generally" to illustrate that the definition of ESM varies among the United States. For example, one state may include a host of criminal and civil infractions such as distribution of pornography, sexual harassment, and relationships with students within the construct of ESM, while another state may limit the description of ESM to sexual contact or intercourse with a minor.[4] In addition, prohibitions against ESM are found in various types of states' legal provisions, including statutes, regulations, and/or codes of ethics or conduct.

Despite increased legislative efforts to address ESM at both national and state levels, great discrepancies remain in states' definitions of ESM, which contribute to uneven disciplinary practices. For example, if a state does not consider an educator having a sexual relationship with a seventeen-year-old student a crime or a contract violation, then that teacher will not have an arrest record to flag potential future employers. If a hiring district does an incomplete reference check and is not aware of the sending state's ESM definition, then an offender could easily gain employment in another state. Inconsistent definitions of ESM also hinder comprehensive statistical analysis at the national level. Recent research[5] into Texas ESM offenders demonstrates that demographic profiles of offenders whose certificates sanctioned for ESM vary based on the type of ESM behavior.

Accordingly, the purpose of this exploratory analysis is two-fold: (1) to examine statewide differences in definitions of educator sexual misconduct (ESM) throughout the United States, and (2) to assess the quality of definitions according to research-based criteria.

Review of Literature

Reports and compilations of offenses completed by news organizations are the primary source of ESM quantitative data prior to the 2010s.[6] ESM research concerning secondary student perceptions[7] and post-secondary student perceptions[8] of ESM provide some estimation of the number of occurrences, though these are estimates at best. Recently, large-scale data analyses have been conducted using state-level data obtained through public information requests[9] or nationally using Google Alerts.[10] Important to these analyses, however, are the definitions of ESM used in literature. Researchers most commonly cite two sources

for their ESM definitions-- the Ontario College of Teachers[11] and from Shakeshaft.[12]

Ontario College of Teachers

As Shakeshaft[13] identifies, early empirical analysis of sexual misconduct in schools focused on reports of sexual harassment[14] or child sexual abuse.[15] Content analysis of cases in Ontario provided vital case details for identifying and describing ESM.[16] The Ontario College of Teachers, in utilizing the recommendations from Robins, issued guidance coining the term "sexual misconduct" meaning "any behaviour of a sexual nature which may constitute professional misconduct."[17] In turn, "Professional misconduct of a sexual nature could involve a member's own students, other students or children, or even adults…"[18] This advisory document, despite its date of publication, remains a primary source of guidance for regulation of ESM behaviors.

Shakeshaft's Interpretation of the OCT's Definition

Shakeshaft coined the term "educator sexual misconduct"[19] in her 2004 literature synthesis of existing ESM research. Despite the government's charge to conduct a study of sexual abuse in schools, Shakeshaft argued that the more inclusive term of ESM was important to capture all forms of sexual misconduct. Acknowledging potential confusion with the use of both terms in her report, Shakeshaft chooses to use both terms interchangeably. Citing the Ontario College of Teachers,[20] Shakeshaft defines ESM as the following:

1. Any conduct that would amount to sexual harassment under Title IX of the (U.S.) Education Amendments of 1972;
2. Any conduct that would amount to sexual abuse of a minor person under state criminal codes;
3. Any sexual relationship by an educator with a student, regardless of the student's age; with a former student under 18; with a former student (regardless of age) who suffers from a disability that would prevent consent in a relationship. All students enrolled in the school and in any organization in which the educator holds a position of trust and responsibility are included;
4. Any activity directed toward establishing a sexual relationship such as sending intimate letters; engaging in sexualized dialogue in person, via the Internet, in writing or by phone; making suggestive comments; dating a student.[21]

This definition remains the most commonly cited source for our understanding of the ESM construct.

Methodology

We selected Shakeshaft's definition[22] of ESM to use in this 50 state review of ESM regulations and laws. This selection is primarily due to its popular use in ESM literature and does not imply this is the single best definition. Shakeshaft[23] defined four primary categories of ESM: sexual harassment, sexual abuse of a minor or student, sexual relationship with a student, and solicitation of a relationship. We also created a subcategory for solicitation specific to electronic solicitation, largely because this is an area of research interest, and due to the use of electronic communication to accelerate the grooming process.[24]

Next, we searched each state to determine if it had criminal codes, administrative regulations, codes of ethics, and/or policies that specifically prohibit ESM as defined within the four categories.[25] We started with each state's education agency website to first locate an educator's code of ethics or certification specifications that provided a definition of ESM. We either followed links as provided in education code or searched for each state's criminal code definition of child abuse. If we could not locate a code of ethics/conduct that defined ESM (either explicitly or by listing ESM behaviors within its prohibitions), we searched for licensing regulations/standards that detailed causes for certificate sanctions or removals. The research team performed member checks for each state to confirm if the first coding accurately captured the definitions of ESM. Finally, results were tallied and further sorted to identify consistent terminology, common variations, and unique outliers.

Findings

The preliminary results of the fifty state review of ESM policies are organized first based on Shakeshaft's[26] four categories of ESM. Following the initial coding, we identified a group of states with comprehensive ESM policies and laws and a group of states lacking basic ESM prohibitions. Table 1 displays results of the search. Sexual harassment was the term used least frequently within descriptions of ESM. Only fifteen states specifically refer to sexual harassment as defined by Title IX as an element of ESM. States generally prohibit sexual harassment, though this prohibition is more frequently found in the context of behavior with coworkers or behavior of supervisors with employees.

Sexual abuse of a minor is criminally prohibited in all states, though the definition of "minor" varied.[27] Fewer states[28] prohibit sexual abuse of a student by an educator. Several states, when referring to reasons for sanction of licenses in the ECE and/or administrative code[29] do not list specific crimes as cause, but instead broadly refer to "any conviction under [a specific statute]" as cause for certificate sanction.

Table 1[30]

Elements of U.S. Department of Education's Definition in States' ESM Laws & Regulations

State	Sexual harassment	Sexual abuse of a minor or student under state criminal codes	Sexual relationship with student regardless of age (criminal or civil)	Solicitation of relationship (any method) (criminal or civil)	Solicitation of relationship (electronic) (criminal or civil)
Alabama	Y	Y	Y		
Alaska		Y	Y	Y	Y
Arizona		Y	Y		
Arkansas		Y	Y		
California		Y			
Colorado		Y			

Connecticut	Y	Y			
Delaware		Y	Y		
Florida		Y	Y		
Georgia	Y	Y	Y		
Hawaii		Y			
Idaho	Y	Y	Y	Y	Y
Illinois		Y			
Indiana		Y	Y	Y	Y
Iowa	Y	Y	Y		
Kansas		Y	Y	Y	
Kentucky		Y	Y	Y	
Louisiana	Y	Y	Y	Y	Y
Maine	Y	Y			
Maryland		Y			
Massachusetts		Y			
Michigan		Y	Y		
Minnesota		Y			
Mississippi	Y	Y	Y	Y	Y
Missouri		Y		Y	Y
Montana	Y	Y		Y	Y
Nebraska	Y	Y			
Nevada		Y			
New Hampshire		Y	Y	Y	Y
New Jersey		Y			
New Mexico	Y	Y	Y		
New York		Y			
North Carolina	Y	Y	Y		
North Dakota		Y			
Ohio		Y	Y		
Oklahoma		Y			
Oregon		Y			
Pennsylvania		Y	Y		
Rhode Island		Y			
South Carolina		Y	Y		
South Dakota		Y			
Tennessee	Y	Y		Y	Y
Texas		Y	Y	Y	Y
Utah	Y	Y	Y	Y	Y
Vermont		Y			
Virginia	Y	Y			
Washington		Y	Y		
West Virginia		Y			
Wisconsin		Y			
Wyoming		Y	Y		

Less than half of the states (24) prohibit a sexual relationship between educators and students and/or a sexual relationship between adults and minors.[31] While there is a difference between using the term "minor" instead of "student," we focused the search in this category to the use of the term "relationship." In the next category, the term "solicitation" created additional confusion. Solicitation is used in many states to define crimes related to prostitution and/or pornography. We broadened the application of this term to include several related concepts to solicitation of relationships including: "luring a minor," "illicit sexual communication," "solicitation to engage in sexual conduct/contact," and "encouragement." Using these synonyms, we found fourteen states[32] prohibiting an educator from soliciting a relationship (or sexual conduct/contact). When looking at electronic communication, we found eleven states[33] that specifically prohibit educators using electronic communication as a means to solicit/engage in an inappropriate relationship.

Leaders in ESM Policies and Laws

After conducting the initial search for state policies within the four categories of ESM, we then identified commonalities of the most complete states' policies and laws. These states first provide a specific definition of ESM in an educator's code of ethics/conduct document. The code is publicly available and easily found on each state's department of education website. Next, the code is further codified within state administrative regulations and makes specific references to related criminal codes. The code gives clear descriptions of "relationships" and educators' attempts to create relationships, mentions the use of technology in inappropriate communication, and criminal codes specify heightened penalties for educators and use the term "student" instead of just minors. The seven identified states (Georgia, Iowa, Louisiana, Mississippi, North Carolina, Ohio, and Texas) did not necessarily define all of the four categories of ESM, though transparency and clarity of their policies overruled any missing elements.

In Texas, for example, the Educator's Code of Ethics is found with a Google search as the first selection or within three clicks on the Texas Education Agency website. Within the prohibited behavior, Standard 3.6 states, "The educator shall not solicit or engage in sexual conduct or a romantic relationship with a student or minor."[34] Standard 3.8 states, "the educator shall maintain appropriate professional educator-student relationships and boundaries based on a reasonably prudent educator standard,"[35] and Standard 3.9 states, "the educator shall refrain from inappropriate communication with a student or minor, including, but not limited to, electronic communication such as cell phone, text messaging, email, instant messaging, blogging, or other social network communication."[36] This standard also elaborates on six factors considered in disciplining educators for inappropriate communication.[37] The Educator's Code of Ethics is codified within the Texas Administrative Code; further, the Texas Penal Code further assigns felony penalties for improper relationships between educators and students for educators employed in public or private schools.[38]

States Needing ESM Policy Development

For states with growth opportunities, we found the following commonalities: there was no code of ethics or professional standards document or the code uses positive language only (thus omitting specificity of ESM); state criminal codes prohibiting sexual conduct with minors do not encompass students of all ages; there is no reference to ESM in administrative regulations or laws; there may be only broad reference to license removal for conviction of crimes which does not capture attempted relationships and the higher standard used in investigations; there is no higher level of criminal penalties for educators; and existing criminal codes may not extend beyond age sixteen. These states include: Hawaii, Illinois, Maine, Maryland, Massachusetts, New York, Rhode Island, and Vermont. Many of these states are currently actively engaging in policy reform. Vermont, for example, posted new rules dated August 21, 2018, that were not available at the time of our initial review.[39] It is important to consider this list as a representative sample within a narrow window of time as ESM policies are rapidly evolving.

As one example, Maine's policies governing ESM are found within Chapter 115,[40] Part I of the Department of Education Rule Chapters, by navigating from the Department of Education main page, to Certification and Credentialing, then Authority and Forms, and finally to the list of chapters which includes the chapter specifying Standards and Procedures for Credentialing. Within this chapter, under grounds for revocation, Standard A specifies:

> Evidence that a holder has injured the health or welfare of a child through physical, or sexual abuse or exploitation shall be grounds for revocation or suspension of a credential. Notwithstanding Title 5, Chapter 341, a certified court record that a person certificated under this Title was convicted in any state or federal court of a criminal offense involving the physical or sexual abuse or exploitation of a child within the previous five (5) years shall be sufficient grounds for revocation or suspension of that person's certificate.[41]

Note the difference between Texas and Maine regarding the standard for sanction. In Maine, the ESM standard could be interpreted as requiring a conviction for sexual abuse or exploitation of a child (not inclusive of all students), while in Texas, an educator can lose certification for the much lower standard of misconduct.[42]

Discussion

This study represents the first of which we are aware that examines how educator sexual misconduct is defined, operationalized, and prohibited in the fifty United States.[43] The most thorough state policies, regulations, and laws include clear access to codes of ethics/conduct; clear links within the ethics codes to relevant criminal statutes; explicit language that avoids vague terms; prohibitions against "sexual relationships," inappropriate communication, enticement/solicitation/attempts (including electronic), sexual activity, and immoral conduct/lewd and lascivious behavior with students; and a boundary standard that establishes a clear line between professional behavior and inappropriate behavior with students. Less inclusive policies lack an exact definition of ESM; may only extend protection to minors (not all students); may not fully prohibit and define what constitutes solicitation of an inappropriate relationship; and may not have visible policies that the general public and educators can easily access.

While ESM policies are evolving rapidly throughout the United States, the snapshot provided with this work demonstrates the wide variation of ESM terminology even within states that have engaged in policy reform. Pennsylvania, for example, was a leader in ESM policy with the 2014 Educator Discipline Act[44] and dedicates an entire webpage[45] to a description of ESM derived from Shakeshaft's report,[46] and the development of the Pennsylvania "Educator Ethics and Conduct Toolkit."[47] Louisiana's ESM definition,[48] developed in 2012, provides additional clarity to prohibited practices and prohibits relations between educators and students in all types of schools.

There are several limitations to this analysis of ESM policies. First, this research was conducted entirely through review and analysis of legal documents, and did not include interviews with state officials to gain a more nuanced understanding of each state's laws and regulations; this may be a direction in future research. In addition, states with new legislation and/or regulations that were not yet fully incorporated into online documentation (such as Vermont) may not be fully represented in these results. Finally, this analysis specifically looks for policies and laws defining and prohibiting ESM, but does not review reporting requirements, sanctions for ESM, and criminal penalties for ESM.

The Purpose and Need for a Common Definition of ESM

We argue the need for a common or model definition is to prevent additional ESM offenses and interstate movement of offenders. Prior to engaging in further review and identifying sanctions and penalties, it is critical to assess the overall purpose for a common definition of ESM. Other professional fields have confronted similar challenges when mitigating state-to-state differences. When creating guidelines for the new field of telepsychology , the developers determined their guidelines were to assist professional practice.[49] If we similarly consider the needs to assist state investigators with a definition for identifying ESM and hiring managers with a consistent assessment of an educator's status, then both groups of professionals should ideally participate in the development of a common definition.

Further, there is statutory precedent for providing a model definition of child abuse and neglect to inform states in the development of their policies, specifically found in the Child Abuse Prevention and Treatment Act,[50] and a similar model definition could serve at least two purposes. First, a model definition could result in a more consistent understanding of ESM offenses across states, addressing such differences, for example, that we noted between Maine and Texas.[51] Second, this consistent understanding would aid hiring managers when evaluating candidates from other states whose certificates/licenses have been sanctioned for ESM.

Endnotes

1 Billie-Jo Grant, Charol Shakeshaft & Jessica Mueller, *Sexual Abuse and Exploitation of PreK-12 Students by School Personnel*, 28 J. Child Sexual Abuse 2 (2019).

2 U.S. Dep't of Educ, Doc # 2004-09, *Educator Sexual Misconduct: A Synthesis of Existing Literature*, (2004). https://www2.ed.gov/rschstat/research/pubs/misconductreview/report.pdf.

3 In some states, including Texas, sexual harassment of colleagues can also reasonably constitute educator sexual misconduct. *See* 19 Tex. Admin. Code § 247.2 (2)(H) (2018).

4 *Cf.* 7-3 Miss. Code R. § 14-18 (4)(b)(iii), (vi) (2016) (the state's educators' code of ethics, articulating nearly 15 examples of sanctionable conduct), and Miss. Code Ann. § 37-3-51 (2) (2013), specifying 8 criminal offenses, the conviction of which for an educator requires a report to the state department of education for further action, *with* 19 Tex. Admin. Code § 249.3 (25) (2018), defining "inappropriate relationship" as a violation of TEX. PENAL CODE § 21.12 (a) (the state's improper educator-student relationship criminal statute), or of 19 Tex. Admin. Code § 247.2(3)(F) (2018) (Standard 3.6 of the Educators' Code of Ethics).

5 Catherine Robert & David P. Thompson, *Educator Sexual Misconduct and Texas Educator Discipline and Database Construction*, 28 J. Child Sexual Abuse 7 (2019).

6 *See*, e.g., Martha Irvine & Robert Tanner, *Sex Abuse: A Shadow over U.S. Schools*, 27 Ed. Week 1 (Oct. 16, 2007); Diane Jennings & Robert Tharp, *Teachers Are Entrusted with Our Children, But What Happens When That Faith is Broken*, Dallas Morning News (May 4, 2013), at 1A; U.S. Dept. of Educ, *supra* note 2.

7 Frank Hernandez, Jonathon McPhetres & Jamie Hughes, *Adolescent's Perceptions of Sexual Relationships Between Students and Teachers*, 28 J. Child Sexual Abuse 67 (2019).

8 Mary Ellen Fromuth & Aimee R. Holt, *Perception of Teacher Sexual Misconduct by Age of Student,* 17 J. Child Sexual Abuse 163 (2008).

9 *See, e.g.*, Robert & Thompson, *supra* note 5; Jennifer S. Walter, *Teacher License Revocation and Surrender in North Carolina due to Sexual Misconduct*, J. Music Teacher Educ. 40 (2018).

10 See Molly M. Henschel & Billie-Jo Grant, *Exposing School Employee Sexual Abuse and Misconduct: Shedding Light on a Sensitive Issue*, 28 J. Child Sexual Abuse 26, 29 (2019)(acknowledging the limitations of employing media reports to examine educator sexual misconduct); Brandon M. Tate, *Educator Sexual Misconduct: A Quantitative Newsmaking Criminology Study* (Aug. 15, 2000) (Ph.D. Dissertation, The University of Texas at San Antonio) (on file with author).

11 Ontario College of Teachers, *Professional Advisory: On Professional Misconduct Related to Sexual Abuse and Sexual Misconduct* (Oct. 8, 2002).

12 U.S. Dep't of Educ., *supra* note 2.

13 *Id.*

14 American Association of University Women, *Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools* (1993, 2001).

15 Sherry B. Bithell, *Educator Sexual Abuse: A Guide for Prevention in the Schools* (1991).

16 Syndey L. Robins, Protecting *Our Students: A Review to Identify and Prevent Sexual Misconduct in Ontario Schools* (2000), https://www.attorneygeneral.jus.gov.on.ca/english/about/pubs/robins/.

17 Ontario College of Teachers, *supra* note 11, at ii.

18 *Id.*, at 2.

19 U.S. Dep't of Educ., *supra* note 2, at 2.

20 *See supra* note 11.

21 *Id.*

22 *Id.*

23 *Id.*

24 *See*, e.g., Pamela L. Black, Melissa Wollis, Michael Woodworth, & Jeffrey T. Hancock, *A Linguistic Analysis of Grooming Strategies of Online Child Sex Offenders: Implications for Our understanding of Predatory Sexual Behavior in an Increasingly Computer-Mediated World*, 44 Child Abuse & Neglect 140 (2015).

25 Our searches were conducted from May 2019 through September 2019, inclusive. Final verification was completed in 2020.

26 U.S. Dep't of Educ., *supra* note 2.

27 *See, e.g.*, Ind. Code Ann. § 35-42-4-3 (2015), defining child molestation as committed against a person under the age of 14, with certain exceptions; cf. NY CLS Penal § 130.05 (2018), defining the age of consent as 17 years of age; see also NY CLS Penal § 130.55 (2001).

28 Ala. Code § 13A-6-81 (2019), Ala. Code § 13A-6-82 (2019); Fla. Stat. § 1012.35 (2018); Iowa Code § 709.15 (2019); Nev. Rev. Stat. Ann. § 201.555 (2017); 18 Pa. Cons. Stat. § 3124.2 (2020); Tex. Penal Code § 21.12 (2017); Wis. Stat. § 948.095 (2009); Wyo. Stat. Ann. § 6-2-303 (2018). The following states criminally prohibit sexual abuse by persons in "positions of trust" or with "supervisory authority" over children: Colo. Rev. Stat. § 18-3-405.3 (2017); Del. Code. Ann. tit. 11, § 1102 (a)(1) (2019); Ga. Code. Ann. § 16-6-5.1 (2019); Tenn. Code Ann. § 39-13-509 (2016).

29 Ala. Admin. Code r. 290-3-2-.4(1)(A)(A) (2020); Alaska Stat. § 14.20.030 (2004); Ark. Code Ann. § 6-17-428 (2019), Ark. Code Ann. § 12-18-103 (2019); Ga. Comp. R. & Regs. r. 505-6-.01 (2019); Ind. Code Ann. § 35-42-4-9 (2019), Ind. Code Ann. § 20-28-5-8; Iowa Code § 272C.10 (2019), 282 Iowa Admin. Code. r. 282-25.3 (2019); La. Stat. Ann. § 14:81.4 (2009), La. Admin. Code tit. 28, § CXXXI.907 (2019), La. Admin. Code tit. 28, § CXXXI.904 (2019); Me. Rev. Stat., tit. 20-A, § 13020 (2019), Mont. Code Ann. § 20-4-110 (1995), Mont. Admin. R. 10.57.601A (2012); N.M. Code. R. 6.68.3.8 (2005), N.M. Stat. Ann. § 28-2-4 (1997); N.Y. Comp. Codes R. & Regs. tit. 8, § 83.4 (2013); N.C. Gen. Stat. § 115C-270.35 (2018); Ohio Rev. Code Ann. § 3319.31 (2014); S.C. Code Ann. Regs. 43-58 (2006), S.D. Codified Laws § 13-42-9 (2015), Utah Code Ann. § 53E-6-603 (2020), Wis. Admin. Code PI 34.098 (2018).

30 Because of the perceived proliferation of electronic communication as a tool used by adults to gain access to children, we further classified electronic solicitation of students and/or minors into non-electronic and electronic.

31 Drawing on Shakeshaft's definition, we distinguish between all states' criminal prohibition of adult sexual abuse of minors (specified in part one of the definition), and part three of this same definition that defines ESM as "any sexual relationship by an educator with a student, regardless of the student's age…" *Supra* note 21. Part one of the definition clearly specifies that the victim must be a minor, while part three contemplates that the student victim could be an adult.

32 20 Alaska Admin. Code § 10.020 (2018), 20 Alaska Admin. Code § 10.900 (2018); Idaho Admin. Code r. 08.02.02.076(03)(e) (2014), Ind. Code Ann. § 20-28-5-8 (2019); Kan. Stat. Ann. § 72-2165 (2015); La. Stat. Ann. § 14:81.3 (2020); 7-3 Miss. Code R. § 14-18 (4)(b)(vi) (2020); Mo. Rev. Stat. § 168.071 (6)(2) (2017), Mo. Rev. Stat. § 566.151 (1) (2017), Mont. Admin. R. 10.57.601A (2012); N.H. Code Admin. R. Ann. Ed. 510.04 (b) (2018), N.H. Code Admin. R. Ann. Ed. 510.02 (b) (2018); Tenn. Code Ann. § 49-5-1003 (b) (15) (2018), 19 Tex. Admin. Code § 247.2(3)(F) (2018); Utah Admin. Code r. 277-515-3(4)(n) (2020).

33 20 Alaska Admin. Code § 10.020 (2018), 20 Alaska Admin. Code § 10.900 (2018); Idaho Admin. Code r. 08.02.02.076 (03)(3); Ind. Code Ann. § 20-28-5-8 (2019); Ind. Code Ann. § 35-42-

4-6 (2014); La. Admin. Code tit. 28, § CXXXI.907 (2019), La. Admin. Code tit. 28, § CXXXI.094 (2019); 7-3 Miss. Code R. § 14-18 (4)(b)(vi) (2016); Mo. Rev. Stat. § 168.071 (6)(2) (2017); Mont. Admin. R. 10.57.601A (1) (f) (2012); N.H. Code Admin. R. Ann. Ed. 510.04 (b) (2018); Tenn. Code Ann. § 49-5-1003 (b)(15) (2018); 19 Tex. Admin. Code § 247.2(3)(I) (2018); Utah Admin. Code r. 277-515-3(4)(q) (2020).

[34] 19 Tex. Admin. Code § 247.2 (3) (F) (2018).

[35] 19 Tex. Admin. Code § 247.2 (3) (H) (2018).

[36] 19 Tex. Admin. Code § 247.2 (3)(I) (2018).

[37] *Id.* The factors are (i) the nature, purpose, timing, and amount of the communication; (ii) the subject matter of the communication; (iii) whether the communication was made openly, or the educator attempted to conceal the communication; (iv) whether the communication could be reasonably interpreted as soliciting sexual contact or a romantic relationship; (v) whether the communication was sexually explicit; and whether the communication involved discussion(s) of the physical or sexual attractiveness or the sexual history, activities, preferences, or fantasies of either the educator or the student

[38] Tex. Penal Code § 21.12 (2017); which criminally prohibits any school employee from engaging in an improper relationship with a student who is enrolled at the employee's campus, and prohibits an educator who is certified or licensed or whose position requires licensure or certification from engaging in an improper relationship whom the educator knows is enrolled in any public or private school.

[39] 22-10 Vt. Code R. § 5100 *et seq.* (2019).

[40] 05-017-115 Me. Code R. § (7)(1))(A) (2018).

[41] *Id.*

[42] For example, a Texas educator can have his/her teaching certificate sanctioned, up to and including revocation, for "solicitation of a romantic relationship" by "violating [prior] written directives from school administrators regarding the educator's behavior toward a student" (19 Tex. Admin. Code § 249.3 [51] [J] [2018]). Thus, it is conceivable that both a Maine (see *supra* note 38) and a Texas educator could have their certificates suspended for "educator sexual misconduct," while engaging in qualitatively different levels of the same.

[43] Mia J. Abboud, Guangzhen Wu., Amelie Pednault, Mary K. Stohr, & Craig Hemmens, *Educator Sexual Misconduct: A Statutory Analysis*, 31 Crim. Justice Policy Rev. 133 (2018).

[44] 24 Pa. Cons. Stat. § 2020.1 *et seq.* (2014)

[45] Pennsylvania Professional Standards and Practices Division, *Sexual Misconduct*, https://www.pspc.education.pa.gov/Educator-Discipline-System-and-Reporting/Overview-Discipline-System/Pages/Sexual-Misconduct.aspx

[46] U.S. Dep't of Educ.,, *supra* note 2.

[47] Pennsylvania Professional Standards and Practices Commission, *Educator Ethics and Conduct Toolkit*, https://www.pspc.education.pa.gov/Promoting-Ethical-Practices-Resources/Ethics-Toolkit/Pages/default.aspx

[48] La. Admin. Code tit. 28, § CXV.502 (a)(7) (2012).

[49] American Psychological Association, *Guidelines for the Practice of Telepsychology*. 68 Am. Psychologist 791 (2013).

[50] 42 U.S.C. § 5101 *et seq.* (2010)

[51] *See supra* notes 38-40.

ELIP #75
Higher Ed / Finance

COVID-19, Online Learning, and Students' Demands for Tuition Refunds: An Overview of Litigation in the Federal Courts

Richard Fossey, J.D., Ed.D., and Todd A. DeMitchell, Ed.D.

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> *"COVID-19 has placed universities in a no-win position. If they implement remote instruction as a substitute for the in-person classes traditionally offered, complaints about the quality of instruction are inevitable. However, if they bring students back to campus, they face the risk that COVID-19 infections can escalate rapidly."*
>
> Hancock Estabrook, Law Firm[1]

The COVID-19 Storm Breaks Over Higher Education

As the spring of 2020 approached, university[2] students turned their thoughts toward the upcoming March Madness, spring break, and their midterm exams, not to mention a little weekend partying. COVID-19 rolled over these expectations. All these time-honored activities faded into the background or were canceled altogether, as dorms closed, universities became all but deserted, and classes moved online, seemingly within the blink of an eye. Despite the efforts of universities to thoroughly plan during the summer for the return of their students in the fall, restrictions on university life continued in many institutions.[3] For example, Notre Dame University started the 2020 fall semester early. However, after seeing a spike in positive COVID-19 tests, the university responded by reverting to online instruction, closing public spaces, and restricting access to residence halls to only those living in them. Off-campus students were banned from campus for a two-week period. The Reverend John I. Jenkins, Notre Dame's president, said, "The goal is to tame the spread of the virus so that the university can resume in-person instruction. But if the steps aren't successful, Notre Dame will send students home."[4]

The impact of the virus is not confined to disruptions to student life such as the cancellation of in-person instruction and restrictions on student housing and reduced access to recreation facilities and athletic programs. Universities' revenues are also negatively impacted, which will likely have ripple effects.[5] Michigan State leaders estimate a loss of $300 million for the fiscal year.[6] *New York Times* reporter Anemona Hartcollis, during the summer of 2020, offered the following gloomy financial outlook for the fall 2020 impact of COVID-19 on universities:

> Lucrative spring sports seasons have been canceled, room and board payments have been refunded, and students at some schools are demanding hefty tuition discounts for what they see as a lost spring term. Other revenue sources like study abroad programs and campus bookstores have dried up, and federal research funding is threatened.[7]

Promises Kept? Lawsuits Filed

> *"Sitting in my own home, and not in a gorgeous classroom paid for by rich donors and students' tuition — that's not what I was promised."*
>
> University of Chicago Student[8]

In response to the pandemic disruption, dissatisfied students across the nation peti-

tioned their universities to cut tuition prices. Many students filed lawsuits demanding a refund of tuition and fees. They argued that the quality of online teaching was inferior to classroom instruction, and that they were denied the full-value of an in-person education that they expected and paid for. They wanted their money back. A law firm's website listed more than 160 lawsuits filed against institutions of higher education brought by students who believe they were shortchanged when their universities switched to online instruction last spring.[9] While a survey of tuition reimbursement litigation in the state courts is beyond the scope of this article, a few selected cases, all decided in the federal courts, are briefly discussed below.

Chong v. Northeastern University

In a recent case on the East Coast a judgment was entered by a federal judge in Boston. The judge ruled in favor of Northeastern University in a putative class action brought by students who demanded a refund of tuition and fees they paid for the 2020 spring semester.[10] The plaintiffs argued that the online instruction they received was inferior to the face-to-face learning experience they expected when they paid their tuition bills. But Judge Richard Stearns disagreed. He ruled that Northeastern had no contractual obligation to deliver its spring courses on its Boston campus, and he also rejected the plaintiffs' unjust enrichment claims as well.

Manny Chong and Thane Gallo, the named plaintiffs in the lawsuit, had each paid more than $20,000 in tuition and fees to take courses during the spring semester. Judge Stearns rejected the plaintiffs' contractual claim for a partial tuition refund on the grounds that the complaining students could not show that the Student Responsibility Agreement contractually obligated Northeastern to provide in-person instruction. "[B]ecause the SAC [Second Amended Complaint] does not plausibly establish that the parties' contract included any right to in-person instruction, plaintiffs have failed to state a claim for breach of contract."[11] Thus, Judge Stearns dismissed this claim.

Judge Stearns also rejected the plaintiffs' breach of contract claim pertaining to most of Northeastern's undergraduate and graduate student fees. In the judge's view, students paid a student activity fee, a student center fee, and the undergraduate student fee to "support" certain facilities while students are enrolled at Northeastern, but the fees did not give students a contractual right "to gain access to any on-campus facility or resource . . . ."[12] Although Judge Stearns rejected their claim for a tuition refund, he allowed their suit to go forward to recover their recreation fee. In the judge's opinion, Northeastern arguably promised to grant access to its recreation facilities in return for the students' $70 fee, but the university closed these venues in mid-semester.

Salerno v. Florida Southern College

Contrary to the ruling in *Chong*, a federal judge in Florida refused to dismiss a lawsuit brought by a student seeking a tuition refund against Florida Southern College.[13] Lindsay Murillo, an undergraduate at Florida Southern, brought a putative class action against the college claiming the online instruction she received after the campus was closed due to the coronavirus was "subpar in practically every aspect."[14] She also claimed that no classes were held (either in-person or online) for ten days in March.

Florida Southern moved to dismiss Murillo's complaint, but Judge James A Moody, Jr., unlike Judge Stearns in the *Chong* case, allowed Murillo's breach of contract claim and her unjust enrichment claims to go forward. Under Florida law, the judge ruled, a student and a private university are in a contractual relationship. In Judge Moody's view, Murillo's allegation that Florida Southern's publications and materials implied "in-person participation" was sufficient to support her breach of contract claim.

Rosado v. Barry University

In another Florida case—this one against Barry University—Judge José Martinez denied the university's motion to dismiss Marlena Rosado's lawsuit for a tuition refund. Judge Martinez flatly rejected Barry's argument that any diminution in the quality of instruction that resulted from switching from a person-to-person format to online teaching was *de minimis*:

> The Court . . . rejects Barry's materiality and damages arguments. Both arguments are predicated on the notion that, if a breach existed with respect to the transition to online teaching, it was *de minimis*, since Rosado would still earn credits toward a diploma. This is kind of like purchasing a Cadillac at full price and receiving an Oldsmobile. Although both are fine vehicles, surely it is no consolation to the Cadillac buyer that the "Olds" can also go from Point A to Point B. That is Barry's argument and the Court declines to consider it further.[15]

Lindner v. Occidental College

Chloe Lindner, a student at Occidental College, and Steven Lindner, Chloe's father, sued Occidental, arguing that Chloe is entitled to a partial refund of her tuition for the spring 2020 semester because Occidental transitioned from face-to-face teaching to virtual learning in mid-semester in response to the coronavirus.[16] Occidental moved to dismiss the lawsuit, which Judge John F. Walter granted.

Judge Walter dismissed Mr. Lindner's claims for lack of standing and dismissed Chloe Lindner's claims on the merits. Although the judge analyzed all of Chloe's claims in some detail, he essentially concluded that they all fell into the category of educational malpractice. "Courts in California and across the country have repeatedly rejected claims that seek damages for an allegedly 'subpar' education, or 'educational malpractice' claims, whether those claims sound in contract or tort," Judge Walter ruled.[17]

As the judge explained:

> [T]he theory underlying all of Plaintiffs' claims is that the education Chloe received once Occidental transitioned to remote instruction in response to the COVID-19 global pandemic was not "worth the amount charged" or "in [any] way the equivalent of [an] in-person education." Indeed, Plaintiffs allege that Occidental's Spring 2020 programs were "sub-par" and that online classes lacked "collaborative learning and . . . dialogue, feedback, and critique."[18]

In Judge Walter's view, the resolution of Chloe's claims would require him "to make judgments about the quality and value of the education that Occidental provided in the Spring 2020 semester."[19] This Judge Walters declined to do, citing California precedent, regardless of how Chloe framed her cause of action.[20] "Accordingly," the judge ruled, Chloe's "first claim for breach of contract, second claim for breach of implied contract,

third claim for unjust enrichment, fourth claim for conversion, and fifth claim for money had and received are dismissed."[21]

Moreover, Judge Walter continued:

> Chloe's course schedule and syllabi do not promise in-person instruction or that the courses will always meet in the specific rooms stated on the course schedule or syllabi. In addition, although the course schedule and syllabi may state a specific room where each class will meet, the 2019-2020 Catalog specifically states that "[f]ees, tuition, programs, courses, course content, instructors, and regulations are subject to change without notice," and that Occidental has "reserve[d] the right to change fees, modify its services, or change its program should economic conditions or national emergency make it necessary to do so."[22]

Brandmeyer v. Regents of the University of California

In *Brandmeyer v. Regents of the University of California*,[23] Judge Sallie Kim of the Northern District of California dismissed a proposed class action against the University of California on the grounds that the university was immune from suit under the Eleventh Amendment. Like other plaintiffs in the cases discussed in this commentary, the plaintiffs filed suit to recover tuition and fees due to the fact that the University moved from in-person teaching to an online format in the spring of 2020 in response to the coronavirus pandemic.

Because the court concluded that the State of California was the "substantial party" in the lawsuit and entitled to invoke its sovereign immunity, Judge Kim ruled that she need not consider the plaintiffs' arguments.[24] The judge also dismissed President Napolitano on the grounds that she was entitled to qualified immunity from being sued in her individual capacity.[25]

Saroya v. University of the Pacific

Viney Saroya, a student at the University of the Pacific (UOP), filed a class action lawsuit against the university, seeking a partial refund of his tuition money due to the fact that UOP ceased in-person instruction in March 2020 due to the coronavirus pandemic. [26] Saroya paid $15,000 to attend UOP and she wanted part of that money back.[27] In a decision issued on November 27, 2020, Judge Edward Davila ruled on UOP's motion to dismiss. The university argued that Saroya's claims essentially amounted to an educational malpractice action, which most courts refuse to recognize.[28] Judge Davila rejected UOP's argument, concluding that Davila's action was not grounded in educational malpractice. Rather it was a suit for breach of contract.

> Here, [Saroya alleges] that he "entered into a contractual agreement where [he] would provide payment in the form of tuition and fees and UOP, in exchange, would provide in-person educational services, experiences, opportunities, and other related services." The rights asserted include access to campus buildings, including the buildings where classes were scheduled to meet, participation in on-campus activities, hands-on training and face-to-face instruction as promised by UOP.[29]

In Judge Davila's view, ruling on Saroya's claim "would not require an inquiry into pedagogical methods, the quality of [UOP's] instructors and curriculum, or an evaluation of [Saroya's] "progress or achievement, or the reasons for their success or failure."[30] Thus, he declined to rule that Saroya's claims were barred under the educational malpractice doctrine.

Regarding Saroya's breach of contract claim, UOP argued that it had made no express promise to offer its instruction in a face-to-face format. Indeed, Saroya "[did] not identify any express or specific promise that was breached."[31] Nevertheless, Judge Davila ruled, Saroya had sufficiently alleged that UOP breached an implied-in-fact contract. Saroya maintained that the tuition he paid to attend UOP in the spring of 2020 covered more than just academic instruction. In addition, it encompassed "face-to face interaction with professors, mentors, and peers; access to facilities such as libraries, laboratories, computer labs, and study rooms; extracurricular activities, groups, and intramural sports; hands on learning and experimentation; and networking and mentorship opportunities among other things."[32] In short, Judge Davila ruled:

> [I]t was reasonable for [Saroya] to expect that when he was billed for the Spring 2020 semester, he would receive all of the services that were allegedly promised to him. When UOP changed the nature of the educational services students reasonably expected to receive in exchange for his tuition and fees payments, it arguably breached its contract with [Saroya].[33]

While Judge Davila declined to dismiss Saroya's breach of contract claim, he rejected Saroya's other theories of recovery. Thus, the judge dismissed Saroya's unjust enrichment claim as well as his claim for conversion, money had and received, and his demand for punitive damages.[34]

Gibson v. Lynn University

Judge Rodolfo Ruiz II, a federal judge in the Southern District of Florida, ruling on a tuition-refund case against Lynn University, began his opinion with a pithy quote: "Far from Pink Floyd's admonition, that 'we don't need no education,' students across the country are vehemently challenging universities' decisions to shut down campuses and move courses online in the face of the COVID-19 pandemic."[35]

In this class action lawsuit, the plaintiffs sued Lynn University for breach of contract for shutting its campus down in the 2020 spring semester and moving to online instruction. The university moved to dismiss the lawsuit on the grounds that it was not contractually obligated to offer in-person instruction. Lynn pointed to boilerplate language in its University Policies stating that "there will be no refund of tuition, [or] fees . . . in the event the operation of the University is suspended at any time as a result of an act of God, strike, riot, disruption or for any other reasons beyond the control of the university."[36] And it put forth the novel argument that its students ratified any contractual obligation on Lynn's part by continuing to take classes online.

Judge Ruiz denied Lynn's motion to dismiss on the grounds that the plaintiffs had adequately pled their breach of contract claim and their unjust enrichment claim. Moreover, the judge rejected Lynn's argument that any change in its mode of instruction was immaterial.

> Lynn argues that if it breached its contractual duty by transitioning to remote learning, the breach was minimal and did not go to the essence of the bargain because students still received education and credits. . . . Borrowing Judge Martinez's apt analogy from *Rosado*, "This is kind of like purchasing a Cadillac at full price and receiving an Oldsmobile. Although both are fine

vehicles, surely it is no consolation to the Cadillac buyer that the 'Olds' can also go from Point A to Point B."[37]

Judge Ruiz also rejected Lynn's argument that the plaintiffs' claims were based on the discredited theory of educational malpractice. "The Court emphasizes that this is not a case about the quality of the education Lynn provided students during the Spring 2020 semester," Judge Ruiz wrote.[38] "Rather, Plaintiff's claim is based on Lynn's alleged failure to provide in-person, on-campus instruction and access to campus facilities and resources."[39] Judge Ruiz emphasized that he was not ruling on the merits of the plaintiffs' breach of contract claim. Rather, he was simply ruling that the plaintiffs' complaint adequately alleged the elements of a breach of contract claim, particularly "considering that Florida law recognizes an implied contractual relationship between a university and its students derived from the university's publications."[40]

A Safe Harbor for Higher Education in the Coronavirus Storm?

> This case [*Murrillo v. Florida Southern University*] is novel in the sense that there is no legal precedent involving a pandemic's impact on a school's promise to provide in-person learning when doing so would be unsafe and/or against government mandates. And so, like the ripple in a pond after one throws a stone, the legal system is now feeling COVID-19's havoc with the current wave of class action lawsuits that seek tuition reimbursement related to forced online tutelage.[41]

As of December 27, 2020, the *New York Times* reported 397,000 COVID-19 cases (students & employees) with over 90 deaths at 1,800 colleges, with New Hampshire having 658 cases at 14 schools.[42] Clearly the pandemic is not receding in our nation's institutions of higher education. Higher education will continue to respond aggressively to the surge. Classes will continue to be offered in a variety of formats: in-class, hybrid, or online instruction. Student gathering events will be curtailed. The college life of just a year ago will become a fond memory, at least for several more months, maybe for much longer.[43]

Lawsuits filed against universities and colleges will most likely continue as they struggle to keep their students, faculty, and staff safe. In our view, decisions aimed at limiting the face-to-face classroom instruction, especially in large lecture halls and the close confines of seminar rooms, are reasonable. Nevertheless, these decisions leave higher education institutions vulnerable to litigation.

Safe harbor legislation, designed to extend protection to healthcare workers and other businesses from crippling lawsuits, has been proposed.[44] Should immunity be extended to institutions of higher education if immunity is given to businesses other than frontline medical personnel?[45] While colleges and universities have called for statutory immunity from liability for their COVID-related activities,[46] some commentators have urged caution. For example, three university professors warned against a rush to granting immunity to schools and colleges for the unintended consequences of their efforts to respond to the coronavirus. They write:

> Expanded immunity for COVID-19 legal challenges would significantly limit students' and employees' abilities to hold P-20 educational leaders accountable for injurious decisions. The threat of lawsuits serves as a counterweight to hold in check educational leaders' potential abuse of authority.[47]

While their caution is well intended, we believe that higher education institutions should be statutorily immune from damages arising from any actions they take that are reasonably calculated to protect students, faculty, staff, and the wider public. Universities are similar to other businesses in many respects but significantly different in others. Universities are local employers, often the largest in the community. Their losses due to crippling lawsuits would have an adverse impact not only on the financial viability of the institutions themselves, but also on the surrounding community.

Statutory Immunity for Colleges and Universities

Some state legislatures have passed immunity laws for the specific purpose of protecting colleges and universities from liability for actions they take in responding to the coronavirus. This commentary does not survey legislation in all fifty states. Rather, it identifies legislation in two states, North Carolina and Louisiana, that granted statutory immunity to colleges and universities in their respective jurisdictions.

In the spring of 2020, the North Carolina legislature passed legislation protecting colleges and universities from liability for actions they took in response to the coronavirus. The statute is set forth below:

> **N.C. GEN. STAT. §116.311 (2020). Institutions of higher education; tuition liability limitation**
> (a) Notwithstanding any other provision of law and subject to G.S. 116-312, an institution of higher education shall have immunity from claims by an individual, if all of the following apply:
> (1) The claim arises out of or is in connection with tuition or fees paid to the institution of higher education for the spring academic semester of 2020.
> (2) The claim alleges losses or damages arising from an act or omission by the institution of higher education during or in response to COVID-19, the COVID-19 emergency declaration, or the COVID-19 essential business executive order.
> (3) The alleged act or omission by the institution of higher education was reasonably related to protecting the public health, safety, or welfare in response to the COVID-19 emergency declaration, COVID-19 essential business executive order, or applicable guidance from the Centers for Disease Control and Prevention.
> (4) The institution of higher education offered remote learning options for enrolled students during the spring academic semester of 2020 that allowed students to complete the semester coursework.
> (b) Subsection (a) of this section shall not apply to losses or damages that resulted solely from a breach of an express contractual provision allocating liability in the event of a pandemic event.
> (c) Subsection (a) of this section shall not apply to losses or damages caused by an act or omission of the institution of higher education that was in bad faith or malicious.[48]

In March 2020, Louisiana adopted similar immunity legislation. The Louisiana statute provides:

> **LA. STAT. ANN. §17: 3392 (2020). Immunity from claims or causes of action related to the COVID-19 public health emergency**
> A. Notwithstanding any other provision of law to the contrary, public and non-

public postsecondary education systems, public and nonpublic postsecondary education institutions, and public and nonpublic postsecondary education management boards, and the officers, employees, and agents thereof shall not be held liable for any civil damages for injury or death resulting from or related to actual or alleged exposure to COVID-19 or acts undertaken in the effort to respond or adapt to the COVID-19 public health emergency.

B. There shall be no cause of action related to a person contracting COVID-19 at a public or nonpublic postsecondary education institution, other public or nonpublic postsecondary education facility, or at a public or nonpublic postsecondary education institution sponsored event, which is based on the actions or failure to act by the institution's officers, employees, or agents in response to the COVID-19 public health emergency.

C. This Section shall not affect the right of any person to receive benefits provided under the Louisiana Workers' Compensation Law.

D. The provisions of this Section shall be limited to claims related to the COVID-19 public health emergency.

E. The public and nonpublic postsecondary education systems, public and nonpublic postsecondary education institutions, and public and nonpublic postsecondary education management boards, and the officers, employees, and agents thereof may not avail themselves of the immunity provided for by this Section if the action or failure to act was in violation of a policy, rule, or regulation adopted by the public or nonpublic postsecondary education system, public or nonpublic postsecondary education institution, or public or nonpublic postsecondary education management board or was in violation of any procedure mandated by law or by rule or regulation adopted by a federal or state agency in accordance with the Administrative Procedure Act, and such action or inaction is determined to be grossly negligent or wanton or reckless misconduct.[49]

In our view, the North Carolina and Louisiana statutes are sensible legislative responses to protect colleges and universities in their respective states from liability for the actions they took in the spring of 2020 in response to the coronavirus pandemic. Most higher education institutions closed all or at least some of their face-to-face classes and transitioned to online instruction. Under the provisions of the North Carolina statute, postsecondary institutions cannot be held liable for these decisions so long as classes continued in some form that allowed students to complete their courses and receive academic credit for them.[50] Both the North Carolina statute and the Louisiana statute immunize universities for their coronavirus responses as long as they acted in good faith and without malice.[51]

If immunity statutes similar to the ones approved by the North Carolina and Louisiana legislatures were in force in all 50 states, colleges and universities would be fully protected from lawsuits like the one that was filed against Northeastern University and the more than 160 suits that have been filed in state or federal courts across the United States.

Conclusion

Higher education institutions provide a critical function in American society. Their exposure to the pandemic is arguably greater than most businesses. Like other employers, they provide a workspace for their employees; but, unlike most other businesses, they also provide significant social and cultural activities for the benefit of their students and the surrounding community—activities that increase their legal exposure to civil liability. Large lecture halls for classes, housing, food services, entertainment, athletics, and social events make up the very essence of university life, and these services and activities increase their potential liability in the event a student, staff member or member of the public contracts the coronavirus after participating a college function or activity.

As discussed above, American colleges and universities have been sued for transitioning to online instruction in response to the coronavirus pandemic that swept the nation in the spring of 2020. Students have filed class actions seeking partial refunds for the tuition and fees they paid when their universities transitioned to online instruction as a means of protecting students and staff from contracting COVID-19. These lawsuits have proceeded under a variety of theories, including breach of contract, unjust enrichment, and conversion.

This commentary only examined a small slice of this litigation: federal court decisions on student claims that were issued as of mid-December 2020. As we have seen, courts have not ruled consistently in these lawsuits. One court dismissed a student's complaint on the grounds that the allegations sounded in educational malpractice, a theory of recovery that has been rejected by most courts.[52] Other courts ruled that students' allegations were not based on educational malpractice, but were claims for damages for breach of contract.[53] A federal judge in California ruled that claims against the University of California were barred under the Eleventh Amendment.[54] As noted, well over one hundred lawsuits have been filed in state courts for tuition refunds, and we anticipate that these courts will rule inconsistently as well.

Public policy will be well served if state legislatures provide some statutory immunity for universities that implement reasonable and good-faith decisions to protect students, employees, and community members from contracting COVID-19. A safe harbor provides needed protection from the pandemic storm.

Endnotes

1 Author, *Education and Litigation Alert: COVID-19 Lawsuits Against Colleges for Opening or Closing During the Pandemic,* HANCOCK ESTABROOK (Aug. 28, 2020), https://www.hancocklaw.com/publications/education-and-litigation-law-alert-covid-19-lawsuits-against-colleges-for-opening-or-closing-during-the-pandemic/.

2 This article uses the term university to include four-year colleges as well.

3 For Centers for Disease Control and Prevention guidance, see Author, *Colleges & Universities: Plan, Prepare, and Respond*, CTRS FOR DISEASE CONTROL AND PREVENTION (Nov. 16, 2020).

4 Rick Seltzer, *Michigan State, Notre Dame Back Off from Fall Reopening Plans*, INSIDE HIGHER ED (Aug. 19, 2020), https://www.insidehighered.com/news/2020/08/19/michigan-state-scraps-person-undergraduate-classes-fall-notre-dame-suspends-2-weeks.

5 *See* Conrad Hughes, *COVID-19 Higher Education and the Impact on Society: What We Know So Far and What Could Happen*, WORLD ECONOMIC FORUM (Nov. 3, 2020), https://www.weforum.org/agenda/2020/11/covid-19-higher-education-and-the-impact-on-society-what-we-know-so-far-and-what-could-happen/ (writing, "If we let COVID-19 destroy universities, we will lose much more than we could have imagined.").

6 *Id.*

7 Anemona Hartcollis, *After Coronavirus, Colleges Worry: Will Students Come Back?* N.Y. TIMES (Aug 15, 2020), https://www.nytimes.com/2020/04/15/us/coronavirus-colleges-universities-admissions.html (writing, "Some institutions are projecting $100 million losses for the spring, and many are now bracing for an even bigger financial hit in the fall, when some are

planning for the possibility of having to continue remote classes.").

[8] Greta Anderson, *Feeling Shortchanged*, INSIDE HIGHER ED (April 13, 2020), https://www.insidehighered.com/news/2020/04/13/students-say-online-classes-arent-what-they-paid.

[9] Author, *Class Action Litigation Related to COVID-19: Filed and Anticipated Cases*, PIERCE ATWOOD (Nov. 9, 2020), https://www.pierceatwood.com/alerts/class-action-litigation-related-covid-19-filed-and-anticipated-cases.

[10] *Chong v. Northeastern Univ.* No. 20-10844-RGS, __ F. Supp. 3d__, 2020 WL 5847626 (D. Mass. Oct. 1, 2020).

[11] *Id.* at *3.

[12] *Id.* at *4.

[13] *Salerno v. Florida Southern Coll.*, Case No. 8:20-cv-1494-30SPF, _____F. Supp. 3d _____, 2020 WL 5583522 (M.D. Fla., Sept. 16, 2020).

[14] *Id.* at *2.

[15] *Rosado v. Barry Univ.*, Case NO. 1:20-CV-21813-JEM, ___F.Supp. 3d _____, 220 WL 6438684, *4 (M.D. Fla. Oct. 30, 2020).

[16] *Lindner v. Occidental Coll.*, Case No CV-20-8481-JFW(RAOx), (C.D. Calif. Dec. 11, 2020).

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[18] *Id.* at *7.

[19] *Id.*

[20] *Id.*, citing *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 814, 824 (1976).

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[51] N.C. GEN. STAT. ANN. § 116-311 (4) (West 2020) (immunity does not apply "to losses or damages caused by an act or omission of the institution of higher education that was in bad faith or malicious"); LA. STAT. ANN. §3392(E) (2020) (no immunity action or inaction that is determined to be "grossly negligent or wanton or reckless misconduct").

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ELIP #76
Special Ed / FAPE

Providing a FAPE During the COVID-19 Pandemic

Allan G. Osborne, Jr., Ed.D., and Charles J. Russo, J.D., Ed.D.

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Introduction

It goes without saying that the COVID-19 pandemic has caused a significant disruption to K-12 educational systems throughout the United States. The pandemic has been particularly challenging to school leaders attempting to meet their dual obligations of keeping students and staff safe while providing a free appropriate public education (FAPE) to students with disabilities who qualify for services under the Individuals with Disabilities Education Act (IDEA).[1] While many school boards have resorted, at least in part, to remote learning, this is not always a viable option for students with disabilities. Meeting the unique needs of special education students, particularly those with severe disabilities, has proven to be challenging, not only for school officials, but also for parents.[2]

As an initial response to the health crisis created by the pandemic, the vast majority of both public and private schools across the country closed down completely. In March Education Week reported that over 55 million students in 124,000 schools in the U.S. were affected by school closures.[3] Amid debates over whether they should remain open,[4] officials in almost all states either ordered or recommended that schools remain closed to in-person instruction, instead recommending virtual learning, for the rest of the school year.

When the 2020-21 school year began, school systems across the country employed various options along the continuum from complete remote learning to full in-person classes. Where feasible, local school boards in many states adopted blended or hybrid models calling for a combination of remote and in-person schooling. Remote learning can be difficult for students with disabilities and their parents, especially those children whose unique needs make it challenging for them to use technology. Further, many special education and related services cannot effectively be delivered remotely because they require intense one-on-one interactions between students and educational staff.

The U.S. Department of Education (USDOE) made it clear that despite the model in use at a particular time, boards are still required to provide FAPEs to students with disabilities during the pandemic.[5] While the services outlined in students' individualized education programs (IEPs) may need to be delivered by alternate means, the bottom line is that their IEPs must still meet the standards of the IDEA as interpreted by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*[6] and *Endrew F. ex rel. Joseph F. v. Douglas County School District RE-1*.[7]

Somewhat surprisingly in light of how much case law ordinarily involves disputes over the IDEA, the amount of litigation addressing the IDEA's FAPE requirement for students with disabilities during the current COVID-19 health crisis has been limited.[8] Nevertheless, given the importance of the topic, this article examines the scant case law to date plus the guidance provided by the USDOE. Following this introduction, the article provides an overview of the portions of the IDEA with direct implications for school closures. In the next sections, the article examines the guidance provided by the USDOE and the litigation to date. The article ends with recommendations for practice and a brief conclusion.

IDEA Requirements

Free Appropriate Public Education

The cornerstone of the IDEA is its requirement that states, and by delegation, local educational agencies such as school boards, must provide FAPEs to all eligible students with disabilities between the ages of three and twenty-one.[9] In providing FAPEs school officials must provide eligible students with needed special education and related services.[10] The IDEA defines special education as specially designed instruction[11] that conforms to students' individualized education programs (IEPs)[12] and related services as developmental, corrective, and other supportive services.[13] The Supreme Court has interpreted the IDEA as requiring boards to provide students with disabilities with personalized instruction, including support services, sufficient to permit them to benefit from the educations they receive.[14] More recently, the Court clarified that in order to pass muster under the IDEA, students' IEPs should be appropriately ambitious in light of their individual circumstances.[15]

Least Restrictive Environment

The IDEA regulations require school boards to ensure that a "continuum of alternative placements" exists to meet the needs of students with disabilities for special education and related services.[16] This continuum must range from placements in general education to private residential facilities and includes homebound services and instruction in hospitals and institutions. Moreover, the placements chosen for all students must be in the least restrictive environment (LRE) for each child and removal from general education can occur only to the extent necessary to provide special education and related services.[17]

Extended School Year Services

The IDEA and its regulations require school boards to provide extended school year services if IEP teams determine that this programming is necessary for the provision of FAPEs.[18] It is important to keep in mind that boards and IEP teams must offer extended school year programs only to prevent regression, not to advance skills in IEPs that students have not yet mastered. Extended school year programs are necessary when students regress, and the

time needed to recoup lost skills interferes with their overall progress toward attaining their IEP goals and objectives. In order for students to qualify for extended school year placements, the regression they experience must be greater than that which normally occurs during school vacations.

Change in Placement

Congress included an elaborate system of due process safeguards within the IDEA to make sure that students with disabilities are properly identified, evaluated, and placed according to its mandates.[19] One of the safeguards, known as the stay-put or status-quo provision, states that after children have been placed in special education, parents are entitled to proper notice before school boards initiate any changes in placement.[20] When placement disagreements occur between parents and school personnel, school boards may not change students' placements without parental consent,[21] hearing officers' orders,[22] or court decrees[23] while any administrative or judicial actions are pending. Even so, it is fairly well settled that placement is defined in terms of the services provided rather than the location where they are offered.[24]

Exhaustion of Administrative Remedies

In passing the IDEA, Congress envisioned cooperative efforts to develop IEPs but recognized that disagreements between school officials and parents were inevitable. Thus, Congress incorporated a detailed mechanism within the IDEA to resolve disputes between the parties that includes administrative due process hearings with the right of appeal to state or federal courts.[25] However, all administrative remedies must be exhausted prior to resorting to the courts unless it is futile for an aggrieved party to do so.

USDOE Guidance

In March 2020, the USDOE issued a set of informal guidelines in question and answer format addressing school boards' obligations to provide FAPEs to students with disabilities under various situations possibly occurring due to the pandemic.[26] The USDOE provided additional guidelines in a second document issued in September 2020.[27] The major provisions of those documents are summarized below.

Providing FAPEs During School Closures

The USDOE advises that if local boards close their schools and do not provide any educational services to their general student populations, they are not required to provide services for students with disabilities during the same time period. If, on the other hand, boards do continue to provide educational services to the general population, they must ensure that students with disabilities have equal access to those same opportunities. In this respect, boards must, to the greatest extent possible, provide the special education and related services outlined in students' IEPs.[28]

Providing Services to Students Diagnosed with COVID

As noted, the IDEA requires school boards to offer a continuum of services including homebound instruction and instruction in hospitals.[29] During normal non-pandemic times school boards must provide homebound instruction to students with disabilities who may be absent from school for ten days or more due to illness. The USDOE guidance makes it clear that this requirement is in force during the pandemic if schools remain open. When children are absent because of COVID, the IEP teams need to determine whether they are available for instruction and would benefit from receiving homebound services. The services may be delivered online, virtually, or by other means but should be provided in accordance with health guidelines in force addressing the risk of transmitting COVID-19. If services cannot be provided during absences from school, IEP teams should consider whether compensatory educational services are warranted to make up for lost educational opportunities.[30]

Providing Services When Special Education Programs are Closed

Many students, particularly those with severe disabilities, may have underlying health issues putting them at higher risk for infection or more serious consequences if they are infected. Consequently, public schools or programs exclusively serving students with disabilities may need to be closed when other public schools remain open. When programs are halted in these situations, the USDOE advises school board officials that they must determine whether affected students would benefit from some type of alternative instruction.

Again, if providing alternative services is not feasible, such as, for example, when high rates of COVID-19 infections exist in an area, then children's IEP teams should consider whether students are entitled to compensatory educational services[31] such as extended school year services,[32] particularly when the lack of assistance may result in regression that will substantially thwart the goal of meaningful progress. By the same token, if boards are unable to deliver extended school year services because of school closures, the USDOE advises that school officials should consider offering compensatory services during the normal school year or other school breaks.[33]

Providing Services to Individually Excluded Students

Even if entire schools or programs are not closed, individual students who may have higher risks of infection or even death may need to be excluded. In such situations the IDEA's normal procedures for instituting a change in placement may apply. If an exclusion is short-term, such as ten consecutive school days or less, it would not be considered a change in placement. However, exclusions of more than ten school days would trigger the IDEA's change in placement protocol.[34] Thus, the students' IEP teams would need to determine alternate placements, such as homebound instruction, and revise their IEPs. The USDOE instructs that such decisions to exclude children must be based on each individual child's circumstances and cannot be made because of perceptions founded on stereotypes or generalizations.[35]

Contingency Plans

Finally, while not specifically mandating it, the USDOE guidance encourages local boards to consider having their IEP teams develop contingency plans to be included in the IEPs of students with disabilities.[36] Developing contingency plans would afford IEP teams and parents an opportunity to agree on alternatives before they are needed, and hopefully, avoid later conflict. The USDOE guidance recognizes that as conditions change, instructional options will need to adapt and that the services outlined in students' IEPs may need to be provided in a different manner.[37] Thus, IEP teams will need to determine how those

services will be provided by considering a variety of instructional methods and settings so that students will continue to receive FAPEs and have opportunities to meet challenging objectives.[38]

Evaluations and IEP Team Meetings

The pandemic creates unique challenges for school personnel who must evaluate students suspected of having disabilities or those due for re-evaluations. Evaluators typically utilize multiple forms of assessment, including the administration of formal tests, usually given face-to-face, and classroom observations. The USDOE guidance advises school officials to investigate whether assessment instruments can be administered remotely without significantly affecting the validity and reliability of the results.[39]

Although most IEP conferences are also held face-to-face, the IDEA already includes provisions for conducting these meetings via alternate means such as via telephone and/or video conferencing.[40] Technology available today provides even more options for holding IEP team meetings remotely.

Litigation

As noted, to date there has been little litigation regarding the provision of educational services to students with disabilities during the pandemic. Nevertheless, the cases decided thus far provide some guidance.

L.V. ex rel. J.V.2 v. New York City Department of Education[41]

The mother of a young child with autism spectrum disorder from New York City filed a due process complaint contesting a proposed IEP. The mother successfully obtained an order outlining services to which her son was entitled, including applied behavioral analysis therapy, occupational therapy, speech and language therapy, and physical therapy. At the onset of the COVID-19 pandemic, the child was not receiving consistent services. Officials of the city's Board of Education (BOE) provided the child with a tablet for remote learning sessions, but he was unable to use it effectively because he could not sit still, and his internet connection was unreliable. Moreover, school personnel unsuccessfully tried to troubleshoot the technology. The mother filed suit seeking immediate injunctive relief while continuing on the merits of her claims of the denial of a FAPE for her child. A magistrate judge recommended that the mother be granted an injunction ordering immediate in-person services for her son.[42]

A federal trial court adopted the magistrate judge's recommendation and granted the injunction, noting that the hearing officer's order contemplated delivery of in-person services. Further, the court determined that school officials had not adequately explained how their computer-based services were a satisfactory substitute during the pandemic nor had they conducted an evaluation of how remote services could be provided to meet the child's needs. The court not only ordered BOE officials to provide in-person services to the extent that they could be performed safely in light of the pandemic but also directed them to conduct an assistive technology evaluation to assess the child's needs and the technology needed to deliver it remotely if it cannot be provided in-person.

Hernandez v. Grisham[43]

A local school board member and parents, including the mother of a student with learning disabilities, filed suit against state officials challenging New Mexico's school closure orders in response to the COVID-19 pandemic. More specifically, the parents challenged the governor's order declaring a public health emergency on March 11, 2020, directing all public schools to close from March 16 to April 6. However, on March 26 the governor ordered officials to keep the schools closed for the rest of the academic year due to the increase in COVID cases. The plaintiffs contended that the closure orders violated their rights under a variety of theories, the most important of which for this article is the IDEA.

On April 1, 2020, the New Mexico Department of Education (NMDOE) issued guidance advising school board officials not to provide face-to-face special education services. At the same time, consistent with federal guidance, NMDOE officials advised local educators that if they provided educational opportunities to their general populations, they must ensure that students with disabilities also had equal access to the same opportunities, including the provisions of FAPEs. In this respect, the state-level guidance added that to the greatest extent possible, school officials should provide the special education and related services outlined in students' IEPs. In June, the NMDOE issued reentry guidance for the 2020-21 school year that, along with establishing the minimum requirements for reentry, allowed schools to operate in three modalities: remote, hybrid, and full reentry.

The mother of the student with learning disabilities alleged that her daughter had not been provided with many of her IEP services since schools were closed, causing her child to regress.[44] Insisting that school boards must be allowed to offer at least some in-person learning, the plaintiffs sought a temporary restraining order prohibiting the governor and defendant from denying in person learning. In response, state officials argued that there needed to be some flexibility regarding students' FAPEs due to the exceptional and ever-changing nature of the pandemic.[45] The defendants did, though, concede that not all students with disabilities will succeed in remote learning environments.[46] The defendants also moved to dismiss the suit because the plaintiffs had not exhausted their administrative remedies under the IDEA.[47]

As an initial matter, the court observed that only students with disabilities and their parents or guardians have standing to bring suit under the IDEA. Thus, the court ruled that the plaintiff school board member and the parents of children who did not have disabilities lacked standing.[48] However, the court was satisfied that the parent of the student with disabilities satisfied the standing requirements of the IDEA.

The court also held that the parent did not have to exhaust administrative remedies under the IDEA before bringing suit.[49] The court explained that the student's IEP misrepresented state health regulations as forbidding in-person instruction when the guidance, in fact, allowed such instruction for students with disabilities. Further, the court interpreted the IEP as prioritizing the school board's preference for fully remote instruction over developing a program that would enable the student to make academic progress. Under these circumstances, the court pointed out that exhaustion would have been futile.

Next, the court decided that New Mexico did not have sovereign immunity from suit because a state may not assert this defense where Congress has abrogated its immunity. Congress abrogated Eleventh Amendment immunity in IDEA suits for states that accept federal funds under the statute. Inasmuch as New Mexico has accepted IDEA funds, the court found that

it had waived sovereign immunity under the IDEA.[50]

The court was convinced that the severe learning loss the student experienced was an irreparable harm under the IDEA, which requires the school board to provide her with a FAPE enabling her to progress. In the court's view the threatened injuries to the child outweighed possible damage to the defendants. The court next postulated that a temporary restraining order requiring the state to ensure that the school board provided the child with a FAPE would not be adverse to the public interest. Despite the ongoing pandemic, the court acknowledged that the state must provide the student with a FAPE as the IDEA requires. While this might include in-person instruction provided in small groups, with appropriate health precautions, the court reasoned that the educational benefit to the student would outweigh the relatively low risk of contagion.[51]

Finally, the court viewed the school closure as having denied the child a FAPE. The court found that the child was not making progress and did not have access to sufficiently specialized instruction and services while she learned remotely. In this respect, the court noted that her IEP did not provide her with any in-person services due to a misinterpretation of state health regulations. In view of her lack of progress under remote instruction, the court maintained that her IEP was not reasonably calculated to ensure that she received educational benefit. The court ordered the state to direct the board to amend the child's IEP to ensure that it provided a FAPE.[52]

J.T. ex rel. D.T. v. de Blasio[53]

Multiple parents of students with disabilities filed suit against the City and State of New York as well as the City's BOE and various officials alleging that school closings, and the consequent change from in-person to remote learning, altered the pendency placements of their children, thereby denying them their FAPEs.[54] The litigation arose when New York's governor issued an executive order closing schools in response to the COVID-19 pandemic and the City's mayor moved all instruction to remote learning for the remainder of the 2019-2020 school year.[55]

The governor later modified his order, thereby allowing schools to reopen during the summer to provide in-person extended school year services. The BOE developed a plan to provide in-person therapy services, but did not provide transportation.[56] The City's schools reopened in September 2020 offering all students a choice between complete remote learning or a blended model allowing them to attend school some days during the week with remote learning the other days. For those special education students electing remote learning, related services are provided remotely but some may receive in-person services, depending on demand and provider availability. Students with severe disabilities have the option to attend classes more frequently and even full time.[57]

In their suit, the plaintiffs alleged that the school closures violated the IDEA's status quo provision because the City BOE unilaterally altered the frequency and duration of the students' services and, in some cases, failed to provide any services. In doing so, the plaintiffs complained that the BOE failed to comply with the IDEA's procedural requirement to maintain students' placements, denied them FAPEs, and unilaterally modified their programs.[58] Among other things, the plaintiffs sought the reopening of schools, reimbursement for privately-obtained services, independent evaluations to determine regression, and compensatory services.[59]

In its defense, City officials claimed that when schools closed, they created a remote learning plan covering 98% of students with disabilities and that parents were consulted in the development of these plans. The BOE also implemented teletherapy to provide students with therapeutic and clinical services. School officials maintained that they offered in-person extended school year services, a choice between remote learning and a blended model, and in-person education for students with severe disabilities.[60]

The court refused to grant the motion City officials entered to dismiss for failure to exhaust administrative remedies because an action alleging a violation of the IDEA's stay-put provision fell within the exceptions outlined in the statute. On the other hand, the court did grant the city's motion to dismiss the parents' denial of FAPE claims for failure to exhaust. The court pointed out that a valid stay-put claim did not excuse FAPE-based claims from exhaustion. Also, the court rejected the plaintiffs' contention that an administrative backlog of appeals, which would result in an untimely resolution, demonstrated futility.[61]

The court denied the parents' requested injunction to require the BOE to provide in-person education.[62] The court indicated that it could not square the guidance provided by the USDOE with the plaintiffs' claim that the City's switch to remote learning constituted a change in placement. The court found that the plaintiffs failed to sufficiently allege that a change in placement that triggers the IDEA's status-quo provision occurred. Inasmuch as the USDOE did not consider the provision of remote learning to students with disabilities during a pandemic to be a change in placement, the court declared that it would not second guess the agency. An order shutting schools during an unprecedented and life-threatening health crisis, if applied equally to all students, in the court's opinion, did not amount to a change in placement.[63] Undaunted, the plaintiffs appealed this order to the Second Circuit.[64] It remains to be seen whether the court will intercede on behalf of the plaintiffs.

Recommendations for Practice

The USDOE emphasized that school boards "are not relieved of their obligation to provide a FAPE to each child with a disability under the IDEA" because of the pandemic.[65] School officials and IEP teams are thus charged with the Herculean task of providing special education and related services in environments that are safe for both students and service providers. During this uncertain time, then, boards and IEP teams need to be proactive in having plans and procedures in place to serve students with disabilities regardless of whether their schools are fully open, fully closed, or using a hybrid option.

Months into the pandemic that, to date, has stretched over portions of two school years, boards should, by now, have devised clearly written, up-to-date policies. These policies must comply with the IDEA and relevant state laws protecting the rights of students with disabilities as they outline how boards will serve eligible students and their families during the pandemic. These plans must remain flexible so that they can be adapted to the inevitable changing circumstances of the pandemic.

Given the unique needs of students with disabilities, a one-size-fits-all model of service delivery is unrealistic and inappropriate. Consequently, IEP teams need to be prepared to develop various options for

addressing the needs of students with disabilities during the COVID-19 pandemic. In formulating these options, teams should consult all stakeholders, including, but not necessarily limited to, the parents of students with disabilities, the school system's Director of Special Education Services, building-level administrators, general and special education teachers, providers of related services, and, where appropriate, students. Still, it is important to remember that even during the pandemic, IEPs must meet the needs of students, and not be written to fit eligible children into available instructional options. Service providers must tailor instruction to meet the needs of their students.

In developing policies and procedures for providing FAPEs to students with disabilities during the pandemic, school officials and IEP teams should keep the following points in mind:

- To keep students and service providers safe, policies and practices should address such issues as whether boards can facilitate rapid response testing for students and their parents, as well as staff, experiencing COVID-19 related symptoms, and how soon after testing positive for coronavirus students can resume classes or staff can return to work, whether in person or remotely.
- To keep all in schools, whether students or staff members, safe when in-person learning options are implemented, officials must comply with all state and local orders regarding group gatherings and social distancing. Safety must be the first priority.
- When proposing remote learning options, be prepared to show that such a model is a satisfactory substitute for in-person learning during the pandemic.
- When considering remote learning options, conduct assistive technology evaluations to determine not only students' needs, but their ability to access and use technology at home.
- If school officials are unable to deliver essential services to students with disabilities during the pandemic due to closures or the inability to provide remote services, officials should be proactive in providing compensatory educational services such as additional tutoring to make up for the lost educational opportunities.
- When it is necessary to adjust how services are delivered, IEP teams should make efforts to engage parents in meaningful communication to ensure their full participation in the decision-making process. IEP teams should never unilaterally amend IEPs.
- While the focus of school boards may understandably be on students who currently have IEPs, officials should keep in mind that their child-find obligations have not been waived during the pandemic. Boards should develop plans for evaluating newly-referred students, taking into consideration IDEA requirements and assessment protocols.
- Board policies should include professional development for all involved in the IEP process to ensure compliance with the IDEA's provisions during the pandemic.
- Schools should provide information sessions for parents and older students, particularly those approaching their sixteenth birthdays who will require transition plans as they prepare to exit school and leave their IEPs behind.
- If they have not already done so, boards should revise their policies as reasonably quickly as possible to ensure compliance with the USDOE guidance and/or similar state directives.

Conclusion

As far reaching as the COVID-19 pandemic has been, educators cannot allow it to serve as an excuse to deny or limit services to students eligible for IDEA services. As such, educators must continue to strive to provide FAPEs for all eligible students in the least restrictive environment as the Nation awaits a return to the post-COVID-19 "new normal" at which time school officials should have a much better understanding of serving the needs of children with disabilities whose services were curtailed during the pandemic.

Endnotes

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5 U.S. Department of Education, *Part B Implementation of IDEA Provision of Services in the Current COVID-19 Environment*, (September 2020). Available at https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf. U.S. Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, (March 2020). Available at https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.

6 458 U.S. 176, 5 Educ. L. Rep. 34 (1982) (declaring that FAPE requires a program reasonably calculated to provide educational benefit). *See* Kathleen Conn, *Rowley and Endrew F.: Discerning the Outer Bounds of FAPE?* 345 Educ. L. Rep. 597 (2017).

7 137 S. Ct. 988 (2017) (clarifying that IEPs must be appropriately ambitious in light of each child's circumstances). For a commentary on this case, see Allan G. Osborne & Charles J. Russo, *Some Educational Benefit or Meaningful Educational Benefit and Endrew F.: Is There a Difference or is it the Same Old Same Old?* 340 Educ. L. Rep. 1 (2017).

8 Due to the unique nature of the COVID-19 pandemic and consequent actions taken to stop the spread of the virus, there is no judicial precedent addressing the effect of widespread school closings on students with disabilities. The most analogous case is *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 255 Educ. L. Rep. 537 (9th Cir. 2010), where the court affirmed that the state's shutting down of schools on seventeen Fridays during one school year due to a fiscal crisis did not constitute a change in placement for students with disabilities.

9 20 U.S.C. § 1412(a)(1)(A).

10 20 U.S.C. §§ 1401(9), 1412(a)(1)(A).

11 20 U.S.C. § 1401(29).

12 20 U.S.C. §§ 1401(14), 1414(d).

13 The IDEA's full definition of related services is: The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children. 20 U.S.C. § 1401(26).

14 *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 5 Educ. L. Rep. 34 (1982).

15 *Endrew F. ex rel. Joseph F. v. Douglas Cty. Sch. Dist. RE-1*, 137 S. Ct. 988 (2017).

16 34 C.F.R. § 300.115.

17 20 U.S.C. § 1412(a)(5).

[18] 20 U.S.C.A. § 1412(a)(1), 34 C.F.R. § 300.106(a)(2).
[19] 20 U.S.C. § 1415.
[20] 20 U.S.C. § 1415(b)(3)(A).
[21] 20 U.S.C. § 1415(j).
[22] 20 U.S.C. § 1415(k)(3)(B)(ii).
[23] *Honig v. Doe*, 484 U.S. 305, 43 Educ. L. Rep. 857 (1988).
[24] For a discussion of this litigation, see Allan G. Osborne. *Are School Districts Required to Identify Placement Locations for the Delivery of Services in IEPs?* 261 Educ. L. Rep. 497 (2010). *See also*, *N.D. v. Hawaii Dep't of Educ.*, 600 F.3d 1104, 255 Educ. L. Rep. 537 (9th Cir. 2010) (affirming that the term *educational placement* in the IDEA refers to the general educational program of the student).
[25] 20 U.S.C. §§ 1415(f), (g).
[26] U.S. Department of Education, *Questions and Answers on Providing Services to Children with Disabilities During the Coronavirus Disease 2019 Outbreak*, (March 2020). Available at https://sites.ed.gov/idea/files/qa-covid-19-03-12-2020.
[27] U.S. Department of Education, *Part B Implementation of IDEA Provision of Services in the Current COVID-19 Environment*, (September 2020). Available at https://sites.ed.gov/idea/files/qa-provision-of-services-idea-part-b-09-28-2020.pdf.
[28] *Id.* at 2.
[29] 34 C.F.R. § 300.115(b)(1).
[30] USDOE (March 2020), *supra* note 26 at 3.
[31] *Id.* at 3-4.
[32] 20 U.S.C. § 1412(a)(1), 34 C.F.R. § 300.106.
[33] USDOE (September 2020), *supra* note 27 at 5.
[34] *See* notes 18-21 and accompanying text.
[35] USDOE (March 2020), *supra* note 26 at 4-5.
[36] *Id.* at 5.
[37] USDOE (September 2020), *supra* note 27 at 3.
[38] *Id.*
[39] *Id.* at 6.
[40] 20 U.S.C. § 1414(f).
[41] *L.V. ex rel. J.V.2 v. New York City Dep't of Educ.*, No. 19 Civ. 5451 (AT) (KHP), 2020 WL 4040958 (S.D.N.Y. July 17, 2020).
[42] *L.V. ex rel. J.V.2 v. New York City Dep't of Educ.*, No. 19-CV-05451 (AT) (KHP), 2020 WL 4043529 (S.D.N.Y. July 8, 2020).
[43] *Hernandez v. Grisham*, No. CIV 20-0942 JB\GBW, WL 6063799 (D.N.M. Oct. 14, 2020).
[44] *Id.* at *3.
[45] *Id.* at *21.
[46] *Id.*
[47] *Id.* at *30.
[48] *Id.* at *56-58.
[49] *Id.* at *66-69.
[50] *Id.* at *58.
[51] *Id.* at *67.
[52] *Id.* at *67-68.
[53] *J.T. ex rel. D.T. v. de Blasio*, No. 20 Civ. 5878 (CM), 2020 WL 6748484 (S.D.N.Y. Nov. 13, 2020), *appeal filed*, case No. 20-4128 2d Cir. Dec.14, 2020.
[54] The plaintiffs attempted to file a class action suit on behalf of students with disabilities against all states, but the court dismissed complaints against all but the City of New York.
[55] 2020 WL 6748484 at *3-4.
[56] *Id.* at *6-7
[57] *Id.* at *7.
[58] *Id.*
[59] *Id.* at *32.
[60] *Id.* at *34-5.
[61] *Id.* at *41-3.
[62] *Id.* at *40-1.
[63] *Id.* at *38-40.
[64] 2020 WL 6748484 (S.D.N.Y. 2020), *appeal filed*, case No. 20-4128 2d Cir. Dec.14, 2020.
[65] USDOE (Sept. 2020), *supra* note 27 at 2.

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not have visible policies that the general public and educators can easily access.

See *Educator Sexual Misconduct: A Review of Definitions in the United States* by Catherine Robert, Ed.D., Alejandra Gonzalez-Mejia, Ph.D., Elisabeth M. Krimbill, Ed.D., and David P. Thompson, Ph.D.

COVID and Online Learning

As the spring of 2020 approached, university students turned their thoughts toward the upcoming March Madness, spring break, and their midterm exams, not to mention a little weekend partying. COVID-19 rolled over these expectations. All these time-honored activities faded into the background or were canceled altogether, as dorms closed, universities became all but deserted, and classes moved online, seemingly within the blink of an eye. Despite the efforts of universities to thoroughly plan during the summer for the return of their students in the fall, restrictions on university life continued in many institutions. The impact of the virus is not confined to disruptions to student life such as the cancellation of in-person instruction and restrictions on student housing and reduced access to recreation facilities and athletic programs. Universities' revenues are also negatively impacted, which will likely have ripple effects.

In response to the pandemic disruption, dissatisfied students across the nation petitioned their universities to cut tuition prices. Many students filed lawsuits demanding a refund of tuition and fees. They argued that the quality of online teaching was inferior to classroom instruction, and that they were denied the full value of an in-person education that they expected and paid for. They wanted their money back.

After examining selected litigation and safe harbor legislation, the authors conclude that public policy will be well served if state legislatures provide some statutory immunity for universities that implement reasonable and good-faith decisions to protect students, employees, and community members from contracting COVID-19. A safe harbor provides needed protection from the pandemic storm.

See *COVID-19, Online Learning, and Students' Demands for Tuition Refunds* by Richard Fossey, J.D., Ed.D. and Todd A. DeMitchell, Ed.D.

FAPE and COVID

It goes without saying that the COVID-19 pandemic has caused a significant disruption to K-12 educational systems throughout the United States. The pandemic has been particularly challenging to school leaders attempting to meet their dual obligations of keeping students and staff safe while providing a free appropriate public education (FAPE) to students with disabilities who qualify for services under the Individuals with Disabilities Education Act (IDEA). While many school boards have resorted, at least in part, to remote learning, this is not always a viable option for students with disabilities. Meeting the unique needs of special education students, particularly those with severe disabilities, has proven to be challenging, not only for school officials, but also for parents.

Somewhat surprisingly, in light of how much case law ordinarily involves disputes over the IDEA, the amount of litigation addressing the IDEA's FAPE requirement for students with disabilities during the current COVID-19 health crisis has been limited. Nevertheless, given the importance of the topic, this article examines the scant case law to date plus the guidance provided by the U.S. Department of Education. Following this introduction, the article provides an overview of the portions of the IDEA with direct implications for school closures. In the next sections, the article examines the guidance provided by the Department of Education and the litigation to date. The article ends with recommendations for practice and a brief conclusion.

See *Providing a FAPE During the COVID-19 Pandemic* by Allan G. Osborne, Jr., Ed.D. and Charles J. Russo, J.D., Ed.D.