Education Law Association's

ED LAW Update

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ELA's 2021 Annual Conference is a hybrid event to be held October 20-23 in San Antonio, Texas and online

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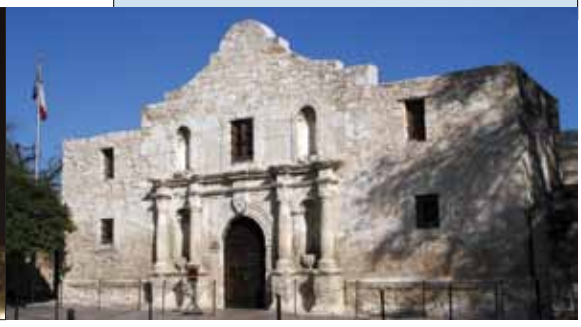

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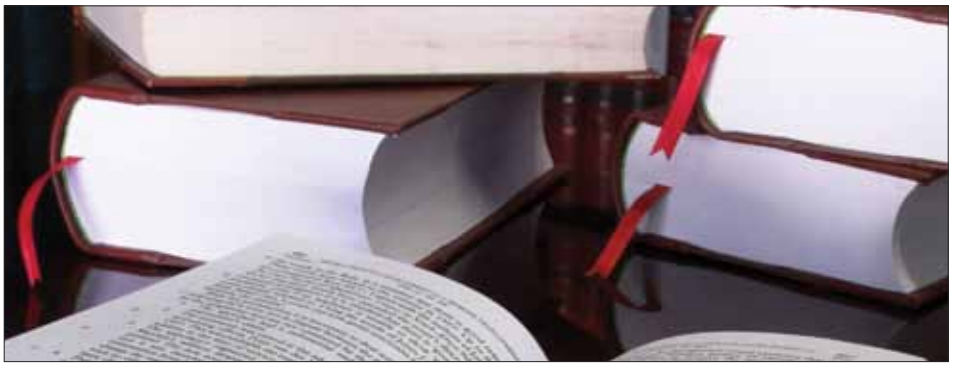

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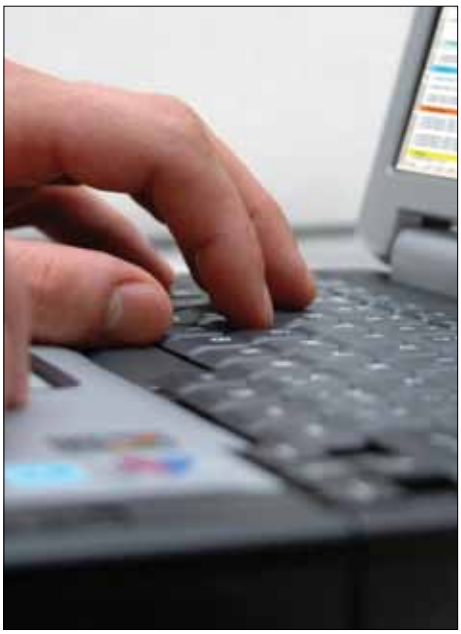

ED LAW Update

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Cases in Point

Summary and brief analysis of noteworthy education law cases

October 2021

Disabilities - ADA/IDEA

Hernandez v. Grisham, 508 F. Supp. 3d 893, 391 Educ. L. Rep. 207, (D. New Mexico 2020).

Students and their parents brought a putative class action suit for injunctive relief against New Mexico's governor and local boards of education members claiming violations of the Fourteenth Amendment's Equal Protection and Due Process clauses in addressing students' IEPs during state-ordered school closures due to COVID. The court dismissed the case, noting that the parents had failed to exhaust administrative remedies under IDEA, and that the state orders to close schools neither violated due process nor breached students' right to education. According to the court, the New Mexico Public Education Department (PED) had a legitimate interest in protecting human life and applied its orders statewide, requiring counties experiencing higher rates of COVID to move to remote instruction.

New Mexico's PED reentry guidance, at issue in this case, was explained by the defendants as aimed at ensuring safety during the pandemic. This was particularly out of concern for the overall higher age of the state's educators as a group at greater risk for COVID—the court pointing out this priority over student safety, acknowledging its inability to judge that decision—and the multigenerational nature of the state's family units. The case concluded with a detailed legislative history of the provision of a least restrictive environment under the IDEA for children identified with special needs. The court reaffirmed the roles of state and local education agencies, as well as the individualized education program team, in ensuring a free appropriate public education for children identified with disabilities.

Recognizing that it is advantageous for children to be present in school, the court also acknowledged both that emergency situations can impact a student's property interest to an in-person education, and that a temporary move away from in-person education does not represent a total exclusion from services and the education system as a whole. The court noted significant limitations in providing virtual education in the state based upon one quarter of New Mexico's population lacking Internet access, including approximately 80% of those living on tribal lands, and 8% of students living in households without computer technology.

Among the keys to the court's decision for the defendants was that the procedures employed for school closures and reentry in response to the pandemic were based on statewide guidance focused on the health and well-being of the state's citizens.

The court commented on USDOE guidance documents advising states on how to address the needs of IDEA-identified students during the pandemic. It noted that this guidance was not legally binding, as the USDOE used a flawed process for preparation lacking "robust analysis or clear conclusions" and without providing enough time for public input. Inconsistencies in the guidance resulted from having to address rapidly changing conditions and sometimes unanticipated challenges brought on by the pandemic.

Although the court agreed with the plaintiffs that social and emotional goals may be included as part of a child's IEP, the court disagreed that socialization is an inherent part of IDEA, as each child's needs are specific to that child. The court recognized that a "regular education environment" could be malleable based upon new uses of technology. Further, the court noted that the provision of a least restrictive environment for students with IEPs in a remote setting, given that students without IEPs had access to the same remote instruction, would quality as a "regular education environment."

The defendants' motion to dismiss was granted, with the court noting that the IDEA does not provide an emergency exemption excusing schools from providing services. The court reminded plaintiffs that any concern regarding a school's provision of services under the IDEA must first be addressed through that statute's administrative framework. – *Beth Godett*

R.B. v. Downingtown Area Sch. Dist., 509 F. Supp. 3d 339, 391 Educ. L. Rep. 634 (E.D. Pa. 2020).

The student in this case was eligible for special education under the eligibility categories of other health impairment for ADHD and speech/language impairment. The student began kindergarten in the Downington Area School District in the 2016-2017 school year and was also enrolled in the district for first grade in 2017-2018. For the 2018-2019 school year (and ESY/summer 2018), the student's parents enrolled their child in a private school and filed this claim that the district denied the student a FAPE in 2016-2017, 2017-2018, and in the May 2018 IEP (for 2018-2019). The student suffered increasing behavioral issues, as well as difficulty reading, that worsened throughout kindergarten and first grade. The parents sought compensatory education, reimbursement for private school placement, and reimbursement for two independent educational evaluations.

The hearing officer decided that the student was entitled to two hours per day of instruction as compensatory education for 2016-2017, and the district court affirmed this ruling. In 2016-2017, the goals IEP did not contain "baseline" data, which the hearing officer found to be a procedural error amounting to a denial of FAPE. Despite the defendant's arguments, the district court affirmed the award of compensatory education because the district did have a legal requirement to include baseline data related to student's present levels of educational performance as a way to make meaning of the progress the student was making toward his goals in the 2016-2017 IEP. The district court noted that procedural errors are not automatically denials of FAPE, citing a three-part test from *Coleman* v. *Pottstown School Dist*rict for determining when a procedural violation amounts to a substantive denial of FAPE: (1) Was the student's right to a FAPE impeded? (2) Was the parent's opportunity to participate in the decision-making process significantly impeded? (3) Was there a deprivation of educational benefit?

The hearing officer decided that the student was also entitled to one hour per day of instruction compensatory education for 2017-2018, and the district court affirmed this ruling. According to the hearing officer, the district's denial of FAPE in the 2017-2018 IEP was based on the fact that the district did not timely address the student's behavioral issues that were present throughout most of first grade.

The parents also argued that the district's reading support was part of the violation of FAPE and warranted more hours of compensatory education, but the hearing officer and the district court rejected this claim because the district did assess the student and provided additional specialized reading instruction according to their multi-tiered systems of support. The district court also noted that it does not have a legal obligation to provide a specific program/methodology for addressing a student's reading needs. There was evidence that the student's reading was assessed and the district provided increasing support from a reading specialist, who used student data to determine the best reading curriculum for the student.

The district did not address the student's behaviors until a functional behavioral assessment was conducted in February 2018 and a revised positive behavior support plan made in May 2018. This meant that most of the 2017-2018 school year had already passed without the district properly addressing the student's behavior, despite having knowledge of the such behaviors in kindergarten and first grade; thus, compensatory education was awarded for 2017-2018.

The hearing officer ruled not to reimburse parents for private school placement for summer 2018 and 2018-2019, nor for two independent educational evaluations (IEEs)—the district court also affirmed these rulings. The parents did not expressly disagree with the district's evaluations, nor did the IEEs contribute to an understanding of the student. Further, there was no evidence that the district's evaluations were flawed.

The parent's request for tuition reimbursement for private school placement was rejected by the district court because the May 2018 IEP contained an offer of FAPE. Under the first-prong "Burlington-Carter test" (whether the district provided FAPE), the district court relied on the hearing officer's determination that the May 2018 IEP did not deny the student FAPE. The district court noted the fact that the May 2018 IEP contained a new PBSP and an offer of social skills in the summer (ESY) to address the student's behavior. It noted that goals a student has not met being repeated from one year's IEP to the next are not necessarily a violation of FAPE. Further, the district court stated that the district's utilization of varied instructional programs (and not the one program the parents requested) to address the student's reading needs was not a violation of FAPE. The school district had evidence on the record from the hearing officer's decision about the work the teacher did with the student (use of standardized test scores, increasing reading instruction time, using elements from seven different reading curricula and a phonics game, recording evidence of student progress) to determine an appropriate reading strategy, which may be an important factor for school districts serving similar students. – *Erin Biolchino*

Fisher v. Basehor-Linwood Unified Sch. Dist. No. 458, 851 F. App'x 828, 391 Educ. L. Rep. 606 (10th Cir. 2021).

Kelsey Fisher was a middle school teacher with the Basehor-Linwood Unified School District for the three school years from 2015–2018. Her employment was terminated in early spring of the 2017-2018 school year due to two previous written reprimands, followed by an incident where she failed to supervise students at a pep rally (in violation of her teaching duties), as well as exceeding the boundaries of the teacher/student relationship by discussing and text messaging students about personal matters and then asking students to lie about their conversations. Fisher sued the district under the Americans with Disabilities Act (ADA), claiming disability discrimination and that the principal made an improper inquiry about her disability. The district court granted summary judgment, and the circuit court affirmed.

Central to the court's rejection of Fisher's ADA discrimination claim was her argument that four other teachers also violated school policy, but were suspended and not terminated. The court said that Fisher failed to show these other teachers were "similarly situated"—she provided no background information about one teacher, and the other three teachers had no prior history of discipline, while Fisher had two written reprimands on file before the incident for which her employment was terminated. This underscores the importance of administrators formally documenting employee discipline and reprimands so that there is evidence in case the discipline progresses to termination.

The court also rejected Fisher's ADA claim that the principal made an improper inquiry about Fisher's disability by asking her during a private meeting how her psychiatric appointment had gone the day before. This inquiry from the principal came after Fisher had demonstrated difficulty with classroom management—including two prior written reprimands and an in-class incident where a student suffered a head injury, allegedly due to Fisher's inability to supervise the class—and just one day after the principal witnessed Fisher suffer a panic attack during class and in the hallway, which rendered the teacher unable to supervise her class. According to the court, the principal's inquiry about Fisher's psychiatric appointment was a "business necessity" since it was connected to her ability to perform the essential functions of her job (i.e., supervising her class). – *Erin Biolchino*

Perez v. Sturgis Pub. Sch., 3 F.4th 236, 391 Educ. L. Rep. 580 (6th Cir. 2021).

Miguel Perez was a deaf student who moved into the Sturgis Public School District and began attending school when he was nine years old. The district assigned Perez an aide; however, the aide was not trained to work with deaf students nor trained in sign language. Perez earned As or Bs every semester in general education classes, but months before his graduation the district informed his family that he was eligible for a certificate of completion rather than a diploma. Perez filed a complaint alleging a violation of federal and state disability laws, but the parties settled prior to a ruling from the hearing officer; accordingly, the hearing officer dismissed the case with prejudice. Part of the settlement was that the district would pay for Perez to attend the Michigan School for the Deaf, for "any post-secondary compensatory education," for sign language instruction for Perez and his family, and attorney fees.

A few months after the settlement, Perez sued the district in federal court seeking declaratory relief and compensatory damages under ADA and under Michigan law, alleging that the district discriminated against him by not providing resources necessary to enable him to fully participate at school. The district court dismissed Perez's claim, and the circuit court affirmed, stating that "Under the Individuals with Disabilities

Education Act, the decision to settle means that Perez is barred from bringing a similar case against the school district—even under a different federal law." It also acknowledged that while the district court typically does not "graft exhaustion requirements from one law onto another," the exhaustion requirement in IDEA is "not a conventional exhaustion requirement." The court asserted that Perez could only sue under other federal laws after he "completes the IDEA's full administrative process," and that if Perez gave up his IDEA claim in a settlement that he also "gives up his right to seek relief for the denial of an appropriate education under other federal laws."

The takeaway here is that in deciding if a claim is subject to the IDEA's exhaustion provision, the court will ask if the crux of the complaint is the denial of a free appropriate public education. – *Erin Biolchino*

J.N. v. Or. Dept. of Educ., 338 F.R.D. 256, 391 Educ. L. Rep. 850 (D. Or. 2021).

Plaintiffs in this case, four public school children and the Council of Parent Attorneys and Advocates, Inc. (COPAA), were seeking certification in their class action lawsuit against the Oregon Department of Education for alleged violations of IDEA, ADA, and Section 504 stemming from a widespread practice of school districts to shorten the school day for students with disabilities. This case did not decide the merits of any particular claim related to special education; however, the district court did grant the plaintiffs' motion for class certification. Plaintiffs were not alleging "harm from individually faulty IEPs," but were alleging "harm from defendants' statewide policies and practices." The six state policies and practices in the claim were: "(1) failing to 'implement a statewide data collection and monitoring system that would enable it to proactively identify violations of the class members' rights'; (2) failing to 'investigate, monitor, or correct violations of the class members' rights under federal law absent an administrative complaint'; (3) failing to 'investigate, monitor, or correct violations of its own laws and policies concerning reduced school days and instructional time'; (4) failing to 'provide needed technical assistance and resources to local school districts to prevent future noncompliance'; (5) 'ODE's written policy concerning reduced school days'; … and (6) 'ODE's administration of the State's school funding formula.'" – *Erin Biolchino*

Employment

Grant v. Gahanna-Jefferson Pub. Sch. Dist., 850 F. App'x 431, 391 Educ. L. Rep. 147 (6th Cir. 2021).

This case involved a public school employee who brought a retaliation claim under the Fair Labor Standards Act (FLSA) against his school district. The federal trial court granted the defendant's motion for summary judgment based on the conclusion that the plaintiff failed to make a prima facie case that the defendant had engaged in retaliatory conduct under the FSLA, or that the defendant's actions were a pretext for retaliation. Subsequently, the plaintiff appealed to the Sixth Circuit.

The plaintiff worked as a custodian for the defendant for twelve years, and employment records indicated that his performance significantly declined over time. In fact, in the last few months of his employment, he was accused of harassing a coworker, had several complaints filed against him for not doing his job well, and was found to have falsified overtime reporting. Ultimately, the superintendent recommended to the school board that the plaintiff's employment be terminated, and the school board complied. For his part, the plaintiff alleged that he was retaliated against for airing workplace grievances to the human resources department and for raising the possibility of employees forming a union.

On appeal, the Sixth Circuit explained the burden-shifting framework needed to prevail on a retaliation claim under the FLSA. For example, if an employee establishes a prima facie case of retaliation, then the employer must demonstrate that they had a legitimate, nonretaliatory justification for the adverse employment action. If the employer can do this, then it is up to the employee to show that the justification put forth by the employer is not the real reason for the adverse employment action, but simply a pretext. The federal trial court found that the plaintiff failed to show any connection whatsoever between his conversations with the human resources department and his termination. Furthermore, the trial court found that even if the plaintiff had made such a connection, he did not demonstrate that the reasons proffered by the defendant for terminating him were somehow pretextual.

Interestingly, the plaintiff only appealed the lower court's finding that no retaliation took place. He did not appeal the finding that there also was no pretext. This left the Sixth Circuit with no basis to overturn the trial court's order for summary judgment because, even if the court overturned on the grounds that there was a question regarding retaliation that should go to a jury, the plaintiff had not offered anything to overcome the trial court's order for summary judgment. There was no evidence that the defendant's action to terminate was a pretext for retaliation, as opposed to simply a response to the plaintiff's poor performance.

This case demonstrates that a public employee needs more than just accusations, innuendos, and speculation to sustain a retaliation claim under the FLSA. It also serves as a reminder that when, as in this case, a public employee brings a retaliation claim that involves a burden-shifting framework, it will not be enough to merely show that the employer engaged in retaliation in response to the employee's protected expression or conduct. The employee must also be prepared to overcome any evidence that the employer had legitimate, nonretaliatory reasons for the adverse employment action. Without being able to offer some evidence of pretext, a public employee is unlikely to prevail in such a retaliation case. – *Richard Geisel*

First Amendment - Speech

Bushong v. Delaware City Sch. Dist., 851 F. App'x 541, 391 Educ. L. Rep. 599 (6th Cir. 2021).

Viviane Bushong worked for the Delaware City School District in Ohio for 30 years, mostly as a guidance counselor. The working relationship between the plaintiff and the defendant over the last few years had been strained, to say the least. In the 2017-2018 school year, Bushong was involuntarily transferred to an elementary school to teach English as a Second Language (ESL). The next year, she was involuntarily transferred to an ESL position at the high school. Prior to this transfer, the plaintiff expressed concerns to the defendant about classroom control and student discipline, attempted to rearrange the class roster based on skill level, and requested additional curriculum materials from the district. The district denied the request for additional curriculum materials and told her she was not allowed to make changes to her class roster. During that school year, Bushong was involved in some kind of incident with a student that resulted in her being put on administrative

leave while an investigation was launched. Subsequently, she was reprimanded and instructed to meet with the student's father. The plaintiff requested that an administrator attend the meeting as well, but no administrator attended. Finally (and as a result of the incident with the student), the defendant moved the plaintiff to an assignment that entailed mostly supervising study hall (five periods a day), lunch duty, and a bit of work credit counseling. In response to this final move, Bushong sued the district for retaliation in violation of the First Amendment and for violating various state and federal laws prohibiting age discrimination.

A federal trial court granted the defendant a judgment on the pleadings, which the plaintiff appealed to the Sixth Circuit. On appeal, the court made quick work of the age discrimination claims, essentially finding that the plaintiff's pleadings had failed to state essential facts to support her claims. Most of its opinion was reserved for the plaintiff's allegation that the defendant had retaliated against the plaintiff in violation of the First Amendment. While the court noted the various factors a plaintiff would have to prove in order to sustain a First Amendment retaliation case under 42 U.S.C. § 1983, it quickly moved to the threshold matter of whether the plaintiff (because she was a public employee) was speaking as a private citizen on a matter of public importance (which would be constitutionally protected speech) or whether the plaintiff was speaking in her role as a public employee regarding her specific job responsibilities. If the latter, then her speech would not be constitutionally protected speech based on the U.S. Supreme Court's ruling in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). This is often referred to as the *Garcetti* test.

The speech the plaintiff engaged in that she alleged was the basis of unconstitutional retaliation included the following: her expressions to administrators about the concerns she had about classroom discipline and control when she was transferred to the high school, her assertions to administrators that rearranging her class roster based on English skills would be best for students, her request for supplemental curriculum materials, her communications around the incident she had with a high school ESL student, and her request that an administrator be present at the meeting with the student's parent. The court noted that the all the incidents of speech that the plaintiff alleged she was retaliated for involved direct communication with her supervisors over matters related to her work responsibilities and work assignments. As a result, the court held that the plaintiff's "speech was within the scope of her duties, and for that reason, not protected by the First Amendment" (851 F. App'x at 544). The Sixth Circuit affirmed the lower court's dismissal of the plaintiff's First Amendment retaliation claim without going any further than applying the *Garcetti* test.

This case serves as a straightforward reminder that when educators engage in expression regarding their particular students, work assignments, working conditions, or interactions with supervisors, they are most likely expressing a personal grievance that is not protected by the First Amendment. In such instances, relief may be found pursuing other avenues (e.g., whistleblower statutes or rights granted under a collective bargaining agreement), but the First Amendment will not protect public employee speech that is "ordinarily within the scope of an employee's duties" (*Lane v. Franks*, 573 U.S. 228, 240 (2014)). – *Richard Geisel*

Discipline

Castelino v. Rose-Hulman Inst. of Tech., 999 F.3d 1031, 391 Educ. L. Rep. 436 (7th Cir. 2021).

A student in Indiana with a diagnosis of auditory processing disorder and ADHD sued the Rose Hulman Institute of Technology claiming violations of the Americans with Disabilities Act (ADA), breach of contract, defamation, invasion of privacy, and malice. The district court granted the defendant's motion for summary judgment and its request for sanctions because the plaintiff failed to comply with the court's scheduling order. The plaintiff appealed.

According to the defendant's brief, the plaintiff participated in multiple acts of academic dishonesty culminating in a suspension of one quarter, after which the plaintiff could apply for readmission. On the first reapplication, the university's Dean of Students did not recommend readmission, citing the acts of academic dishonesty and other behaviors of concern; these included altercations and complaints from female students, who alleged that the plaintiff had taken their pictures without permission. The second attempt to gain readmission also failed, after an incident came to the attention of the university's admission and standing committee where the plaintiff was arrested and charged with breach of the peace; the cultivation, possession and sale of marijuana; and the operation of a drug factory.

On appeal, the Seventh Circuit affirmed, finding that most of the ADA claims were time-barred by the state's two-year statute of limitations and that the continuing-wrong doctrine did not apply. Of the incidents and claims falling within the two-year limit, the court described the plaintiff's arguments as inscrutable or based on a non sequitur. The court was unable to identify any connections between the suspension and the denial of readmission and the plaintiff's disabilities. It also found that the university provided reasonable accommodations when it permitted the use of typewritten notes on an exam. Consequently, the court determined that the plaintiff's suspension resulted from behavioral misconduct unrelated to the plaintiff's disability.

The plaintiff's breach of contract claim asked the court to conclude that minor deviations from the disciplinary process outlined in the student handbook constituted a breach, but courts are reluctant to interfere with the contractual relationships between universities and students requiring a showing of bad faith or arbitrary and capricious enforcement. The plaintiff did not provide any evidence that the university acted in bad faith, and the court noted that the disciplinary decision was precisely the type of professional judgment to which courts should defer.

The court affirmed the award of summary judgment on the defamation claim, finding that the professor's communication about the incidents of academic misconduct was protected through a qualified privilege. The harassment claim was incomprehensible, and the false advertising claim consisted of legal conclusions without supporting factual details. Finally, the court affirmed the district court's decision to award sanctions to the university because the plaintiff's counsel waited until the night before the hearing to provide opposing counsel with an updated settlement demand, in contradiction to the scheduling order.

The outcome of this case is consistent with established legal precedent related to disciplinary actions against disabled students. Here, the defendants provided reasonable accommodation when it allowed the plaintiff to use typed, as opposed to handwritten, notes as a reference on a test, but all students were prohibited from cutting and pasting PowerPoint slides, which the

plaintiff ignored. The university based its decision to suspend and deny readmission on academic and behavioral misconduct unrelated to the plaintiff's disability. Minor deviations from a university's disciplinary process are not enough to constitute a breach of contract, and professors are entitled to a qualified privilege when communicating concerns about academic misconduct. – *Joe Dryden*

M.J. *ex rel.* S.J. v. Akron City Sch. Dist. Bd. of Educ., 1 F.4th 436, 391 Educ. L. Rep. 474 (6th Cir. 2021).

The Sixth Circuit had the opportunity to examine the application of the state-created danger exception to government immunity from liability arising from the actions of private parties under the substantive component of the Fourteenth Amendment in a bizarre case where a resident of Akron, Ohio, impersonated a police officer and convinced school employees to provide access to an elementary school for the purpose of reviving a Scared Straight Program. Once access was secured, the impersonator roamed the halls, seized students, placed them in handcuffs, made them exercise, and assaulted them. When the Akron police department finally realized what was happening, the impersonator was arrested and charged with over 50 crimes. Parents of the students who participated in the involuntary Scared Straight Program sued the school district, school board, school employees, and the impersonator, claiming violations of substantive due process, equal protection, Title VI, the Americans with Disabilities Act, false imprisonment, assault and battery, and supervisory liability for failure to train.

The Federal District Court awarded summary judgment for the defendants on all counts and dismissed the state-law claims. The plaintiffs appealed, and the Sixth Circuit affirmed.

Before it analyzed the substantive due process claim, the court had to determine if statements included in the defendant's motion for summary judgment constituted hearsay and whether they were permitted at the summary judgment stage. The court ruled in the affirmative, noting that statements made by school employees to the Akron Police Department during the investigation arose out of the scope of employment and satisfied the hearsay exception as a statement of an opposing party within the scope of their employment. However, the Sixth Circuit Panel ruled that the exclusion of the transcripts did not prejudice the plaintiffs in any way, since the plaintiffs deposed or could have deposed the same witnesses.

As to the substantive due process claim, the Sixth Circuit Panel ruled that a failure to act by one of the teachers, and the school principal, did not constitute an affirmative act that increased the danger faced by the students, nor could the failure to act be characterized as conscience-shocking. Given the elaborate steps the impersonator utilized, it was reasonable for school employees to believe he was a legitimate law enforcement officer. The defendants were unaware that the impersonator posed a substantial risk of serious harm or would act in a manner that shocked the conscience. Further, a failure to act is not an affirmative act under the state-created danger theory when there is little time for reflection.

The Sixth Circuit Panel agreed with the district court that the school board was not liable under Section 1983 for failure to train, based on the determination that there was no underlying unconstitutional act by school employees. The panel also found no evidence, either direct or indirect, that the students were mistreated because of their disability, or that there were any nondisabled comparators who were treated more favorably. Finally, even though all the involuntary participants in the Scared Straight Program were African American, there was no evidence of intentional discrimination on the basis of race.

This unusual case is an excellent demonstration that the Constitution does not provide a remedy for every wrong. The holding in *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), stands as an edifice of government immunity with limited exceptions. School officials cannot guarantee student safety against the actions of third-party miscreants with ill intentions. The actions of the police impersonator were egregious, but school officials were entitled to immunity based upon the three-part, state-created danger test. There must be an affirmative act by school officials that created or increased the risk of a specific danger toward students, and that school officials were aware of a substantial risk yet responded in a manner characterized as conscience-shocking. Case history is replete with examples where third-party intervenors committed atrocious acts against classmates, yet school officials were not liable for substantive due process claims. – *Joe Dryden*

T.O. v. Fort Bend Indep. Sch. Dist., 2 F.4th 407, 391 Educ. L. Rep 534 (5th Cir. 2021).

Parents of a first-grade student in Fort Bend ISD who suffered from attention deficit hyperactivity disorder (ADHD) and oppositional defiant disorder (ODD) sued the Fort Bend Independent School District and a teacher alleging disability discrimination plus violations of substantive due process and the Fourth Amendment. The student's IEP called for oral redirection, placement in a quiet area for de-escalation, and praise for appropriate behavior. The incident which gave rise to this suit occurred when a behavioral aide moved the student to the hallway for being disruptive. While in the hallway, the student attempted to reenter the classroom, but a fourth-grade teacher who happened to be in the hallway intervened by standing in front of the classroom door. The frustrated student then pushed the teacher, who reacted by wrestling the student to the floor and administering a chokehold. The district court adopted the recommendations of a magistrate judge, granting the defendant's motion to dismiss and denying the plaintiff's request to file a second amended complaint.

On appeal, the Fifth Circuit considered whether the teacher was entitled to qualified immunity and determined that she was, finding adequate traditional common law remedies available, and that the student was not subjected to an unprovoked, random attack. Relying on *Ingraham v. Wright*, 430 U.S. 651 (1977), the Fifth Circuit Panel concluded that the teacher's actions, while ill-advised, were not arbitrary or capricious and thus not subject to liability under the substantive due process umbrella. As to the Fourth Amendment claim, the court identified several cases where liability under the Fourth Amendment was both permitted and denied. Consequently, the law in this area was not well-established at the time the teacher physically restrained the student, and the teacher was entitled to qualified immunity. Corporal punishment in Texas and other states is permissible and not subject to constitutional scrutiny where other remedies are available in the form of civil and criminal liability.

As to the ADA and Rehabilitation Act claim, the court could not find any factual allegations that the student was disciplined because of his disability. Nor was the court able to identify any factual allegations related to the district's failure to train, coupled with the fact that the school district

conducted multiple investigations into the incident. The court also affirmed the district court's decision to deny leave to file a second amended complaint, noting that good cause did not exist and that seven months had elapsed after the scheduling order's deadline for filing amended pleadings.

It is understood that teachers should utilize de-escalation approaches when dealing with upset students, especially those who have been diagnosed with ODD. This does not mean that students with ODD can do whatever they want, but the use of physical restraint must be measured and administered in a manner that comports with restraint protocols. I may be wrong, but I know of no restraint training approaches that recommend choking students into submission. While the parents' suit against school officials for substantive due process violations failed, other civil remedies were available. – *Joe Dryden*

Caldwell v. Univ. of N.M. Bd. of Regents, 510 F. Supp. 3d 982, 391 Educ. L. Rep. 770 (D.N.M. 2020).

A member of the University of New Mexico men's basketball team sued the school's athletic director for imposing an indefinite ban from the campus and the team after a nonstudent accused the player of an off-campus battery. Despite concluding that the athletic director participated in the decision to ban the player from campus and that the ban interfered with the player's property right, the district court granted the athletic director's motion for a judgment on the pleadings.

The court spent considerable time discussing the parameters that must be considered when deciding a motion for judgment on the pleadings, followed by a discussion of substantive due process, the exceptions for third-party liability (special relationship and state-created danger), and what constitutes conscience-shocking behavior. It then examined each component of the Section 1983 claim and the parameters of the qualified immunity defense.

The court concluded that the athletic director participated in the decision to ban the student from campus, which implicated a clearly established property right, and that the actions of the athletic director set in motion a series of events that resulted in deprivation of the plaintiff's constitutional rights. The same property right, however, does not exist when it comes to the student's participation on the basketball team, and the court concluded that the plaintiff failed to allege a liberty interest in a future career as a professional basketball player. The court also dismissed the plaintiff's due process claim, noting that the player had four meetings with campus administrators and received adequate notice detailing the allegations

In analyzing the initial ban, the court recognized the university had to balance the student's interest against the university's need to maintain discipline and order, but concluded that the procedures employed reduced the risk of erroneous deprivation. The court also concluded that the athletic director was entitled to qualified immunity because it could find no Supreme Court or Tenth Circuit cases clearly establishing the appropriate process level due to a student accused of an off-campus battery.

This case is significant because the plaintiff was removed from campus after an allegation of an off-campus assault against a nonstudent. Certainly, there are circumstances where there is danger in allowing students to remain on campus after they have committed felonies off-campus, but such removal must be accompanied by adequate due process and a determination that the student's continued presence poses a danger to other students. This case also supports the notion that students have a property interest in continuing their education under the contract they sign with a university, but not a property interest in continuing to participate in athletic endeavors. – *Joe Dryden*

A.J.R. v. Lute, 163 Ohio St.3d 172, 390 Educ. L. Rep. 1182 (Ohio 2020).

Bullying is a serious issue and one not yet well-defined by the courts. This case, as it moved through the courts, shows the interplay between the requirements of immunity of a political subdivision (the school district) and this definition of bullying.

In Ohio, a political subdivision enjoys a presumption of immunity from liability for an act that is negligent, but not for one that is reckless. Recklessness requires the "actor must be conscious that his conduct will in all probability result in injury." To prevail, plaintiffs must overcome this hurdle with a showing that defendants acted not just negligently, but recklessly. The trial court found the district immune. The appellate court reversed and found for the student. The supreme court reinstated the original ruling, finding that the actions of the district had not reached the level of recklessness and, hence, the district was immune.

This case involved two kindergarten students, one of whom stabbed the other in the face with a sharpened pencil. The students had prior altercations consisting of verbal remarks and pushing in the cafeteria line. Subsequently, the two students were seated at the same table with the sharpened pencils, and parents argued that this act was reckless. The parents had notified the school after each incident, while the school staff had counseled the students and checked on the victim student periodically. The court cited these acts when finding the district had not acted recklessly: "There can be no finding of reckless conduct or perverse disregard of a known risk where the record establishes that in response to reports of student teasing, educators promptly speak with the students about the teasing, frequently ask the students how they are doing, and regularly monitor the students in the lunchroom and classroom. Under these circumstances, if a student with no history of violence later pokes another student with a pencil, [state law] shields these educators from liability." – *Cheryl Sattler*

Case Commentary

In-depth explanation and commentary on an issue of interest October 2021

Storino v. New York University – Students' Summer Fun Leads to Fall Term Suspensions for Violating COVID Code

Joe Dryden, J.D., Ed.D.

In October 2020, a New York trial court granted petitions for relief from three students who were suspended from New York University (NYU) for attending pre-semester social gatherings without face masks and without practicing 6-foot social distancing requirements. The court held that the suspensions were arbitrary, capricious, and an abuse of discretion, and ordered the removal of the suspensions from each petitioners' record and their immediate reinstatement.[1] NYU appealed.

According to the evidence presented, all three students appeared in pictures posted on social media that showed them spending time with friends off campus and without masks. The New York Supreme Court, Appellate Division, analyzed the appeal from a hands-off, laissez-faire approach, noting that the disciplinary actions of a private university will only be disturbed when its decisions are arbitrary, when it fails to follow its own disciplinary processes, or when the punishment is so excessive that it is conscience-shocking.[2] The court noted that NYU's student code of conduct specifically prohibited conduct that substantially disrupts or poses a danger to the health and safety of the community, and that NYU officials sent more than one email to all students outlining the university's COVID-19 policies.

The appellate court recognized that the policies in question allowed for broad interpretation that did not take into account every possible eventuality. Here, the students thought they were complying with New York state and city regulations, which allowed gatherings of up to 50 people, but failed to comply with additional stipulations associated with enhanced preventive measures, i.e., masks and social distancing. The court concluded that NYU's broad policy provided sufficient pre-conduct notice that hanging out with friends without a mask could result in a one-semester suspension. The court also took note of several emails that were sent to NYU's student body outlining the university's evolving COVID-19 protocols. These email messages stated that students might face discipline for repeated or egregious behavior. One email and video sent to all NYU students expressly disallowed attendance at bars and parties.

The court recognized that the suspensions were very harsh, but made the mistaken interpretation that because the petitioners had notice of potential student code of conduct violations for attending off-campus social gatherings that the semester-long suspensions were not shockingly disproportionate to the offense.[3]

I respectfully disagree with the New York appellate court's opinion. Notice has very little to do with whether or not the consequences are disproportionate to the offense. Otherwise, any draconian punishment could be made wholesome merely by providing notice.

It is in times of crisis that civil liberties, rights, and freedom are at their greatest peril. When policies are based on fear, even legitimate fear, policy makers run the risk of overreacting—in so doing, they can end up violating the rights of their constituents. The events in question took place prior to the emergency approval of the COVID vaccines, but tests were available. NYU could have required the offending students to take a simple COVID-19 test, which would have assured school officials that the students posed no danger to the health and safety of the campus. Instead, the university imposed what can only be described as draconian penalties.

Endnotes

1 Storino v. N. Y. Univ., 146 N.Y.S. 3d 594, 595, 391 Educ. L. Rep. 927 (N.Y. App. Div. 2021).
2 *Id.*, 146 N.Y.S. 3d at 596.
3 *Id.* at 598.

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

T.S.H. v. Green – 'Peeping Tom' Possibility Results in Students' Expulsion from Football Camp

Joe Dryden, J.D., Ed.D.

The Eighth Circuit accepted an interlocutory appeal from two university police officers at Northwest Missouri State after a federal district court denied their request for qualified immunity in a Fourth Amendment case involving high school football players expelled from a summer camp.[1]

Concurrently with the football camp, the university hosted a cheerleading camp and housed the cheerleaders in a dormitory adjacent to the dormitory where the football players were assigned. The dormitories were not equipped with blinds or curtains. On the last day of cheer camp, a cheerleading sponsor reported to a resident assistant that on the previous night, the sponsor might have seen figures in the windows of the adjacent dormitory who may have watched and taken pictures as the cheer sponsor undressed.

After receiving the sponsor's uncertain report, a resident assistant contacted the

university police officers, who initiated an investigation despite the fact that the cheer sponsor did not want to submit a formal complaint. The university police officers directed the high school football coach to gather seven players in a room, where the players were accused of committing a crime and questioned for hours while their cell phones were searched. The interrogation and cell phone search proved fruitless, revealing no pictures, and when the students refused to confess, they were summarily expelled from the camp.

Two of the players sued the university and the two university police officers under Section 1983 alleging Fourth Amendment violations, a conspiracy to deny civil rights, violations of statutory rights afforded to juveniles in federal proceedings, and breach of contract. Viewing the allegations in a light most favorable to the appellees, the federal district court in the Western District of Missouri denied the university's motion to dismiss the Section 1983 claim on Eleventh Amendment grounds, as well as the breach of contract claim. The university officers' request for qualified immunity was also denied, as the court noted multiple allegations of possible constitutional violations which it felt were clearly established. The university police officers appealed, and the Eighth Circuit reversed and remanded.

The circumstances surrounding this case raise several important Fourth Amendment questions. Was the coach who interrogated the players for hours acting as a K-12 public school official or as an agent of the university police? What level of suspicion was required before the search and seizure could occur—reasonable suspicion or probable cause? Was the search and seizure justified and reasonable under the circumstances? Was the players' right to be free from unreasonable searches and seizures while attending an off-campus summer camp clearly established at the time of the incident? Did Title IX regulations require school officials to initiate an investigation when the allegations did not involve university students or employees? Do individuals have a reasonable expectation of privacy when they undress in a room without blinds or curtains?

The Eighth Circuit Panel began its analysis by describing the parameters of the reasonable suspicion standard, acknowledging that public school officials can initiate a student seizure and search under a lower standard of suspicion than law enforcement officials due to the special nature of the learning environment.[2] It is generally accepted that the reasonable suspicion standard applies when students attend school-sponsored events, field trips, or organized camps.[3] Here, the coach acted at the behest and under the direction of university police officers, and the court concluded that the coach was acting as an agent of the police, not as a school employee. Nevertheless, the court determined that the law was not well settled as to whether the reasonable suspicion standard applied to student seizures under these circumstances,[4] and that it was reasonable for the appellants to believe that probable cause was not required. The court also noted prior cases where the lower standard of suspicion was applied, despite the fact that police officers and school officials worked in coordination.[5]

Intersecting the Fourth Amendment analysis was previous guidance from the Department of Education mandating that colleges and universities investigate allegations of sexual discrimination. Under that guidance, university officials have an affirmative duty to eliminate, prevent, and address student-on-student harassment, and this affirmative duty extends to visitors staying in an on-campus dormitory or residence hall.[6] In light of the application of the reasonable suspicion standard and the affirmative duty on colleges and universities to investigate allegations of sexual harassment, the Eighth Circuit Panel concluded that it was reasonable to conduct an investigation, and the defendants' actions did not violate clearly established rights under the Fourth Amendment. As a result, the defendants were entitled to qualified immunity on the Fourth Amendment claim. Despite the court's holding, the record shows that university police officers never contacted the school's Title IX coordinator, and the cheer sponsor never filed a formal Title IX complaint, so using the Title IX guidance to justify the seizure and search in this case raises some concerns. Furthermore, there was no corroborating evidence to support this level of intrusion.

Under Missouri law, it is an offense to photograph another person without that person's consent when they are in a state of nudity and located in a place where a person would have a reasonable expectation of privacy.[7] Based on the statute and the informal complaint from the cheerleading sponsor, the court concluded that it was reasonable for the officers to believe that questioning the students might produce evidence of a violation of the state's privacy statute. However, is it reasonable for a person to have an expectation of privacy when they undress in a room with no window coverings in view of an adjacent dormitory? The students' claim involving potential violations of the statutory rights of juveniles in federal proceedings was inapplicable since the students were not charged with a federal crime, nor were there any juvenile delinquency proceedings. Finally, the defendants were entitled to qualified immunity on the conspiracy claim because the court concluded that the students were not deprived of any constitutional rights.

This case reinforces prior holdings in many jurisdictions where courts have applied the reasonable suspicion standard to student searches and seizures which occurred at school-sponsored, overnight field trips or camps. However, it raises several areas of concern. There is a distinct difference between a student search that takes place at school versus one that occurs on a field trip or at a summer camp. If the genesis for the reasonable suspicion standard emerged out of recognition for the special purpose served by public schools, then that standard should be limited to the protection of that special purpose. Here, the football players' alleged actions did not pose a threat to the learning environment or an immediate threat to student safety.

Another area for concern involves the application of the reasonable suspicion standard in circumstances where law enforcement and school officials worked in a cooperative investigation. Public officials must take care to avoid what has been described as the silver-platter doctrine, where law enforcement officials use the lower standard available for school officials to initiate an investigation, hoping to find additional evidence that can then be used to establish probable cause.[8]

One might also question whether it was appropriate to expel all the players from the camp when the only evidence was an allegation from a person who claimed that photographs might have been taken. Granted, photographs could easily be deleted, but one could also argue that it would be reasonable to expect a coach or sponsor to recognize potential opportunities for inappropriate behavior and to take reasonable steps to mitigate the likelihood of such an occurrence. Both the football coach and cheerleader sponsor could have

recognized the likelihood for inappropriate juvenile behavior given the proximity and characteristics of the attendees, and then reminded students to respect the privacy of others while protecting their privacy at the same time.

Endnotes

1 S.H. v. Green, 996 F.3d 915, 389 Educ. L. Rep. 713 (8th Cir. 2021).

2 New Jersey v. T.L.O., 469 U.S. 325 (1985).

3 *See* Lopera v. Town of Coventry, 640 F.3d 388 (1st Cir. 2011) (First Circuit Panel held that it was reasonable to search a visiting high school boys' soccer team looking for missing items); Rhodes v. Guarricino, 54 F. Supp. 2d 186 (S.D.N.Y. 1999) (defendant's motion for summary judgment was granted as the court found it reasonable for the school principal to ask hotel security to open students' rooms so they could be searched).

4 K.W.P. v. Kan. City Pub Schs., 931 F.3d 813 (8th Cir. 2019).

5 *See* Milligan v. City of Slidell, 226 F.3d 652 (5th Cir. 2000); Shade v. City of Farmington, 309 F.3d 1054 (8th Cir. 2002).

6 U.S. Dept. of Educ., *Dear Colleague Letter* (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

7 Mo. Rev. Stat. § 565.252.1(1).

8 *See* Elkins v. United States, 364 U.S. 206 (1960).

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Special Education Legal Alert

By Perry A. Zirkel October 2021

Another Example of the Possible Difference Between Agency Guidance and Court Decisions

In its unpublished decision in *Csutoras v. Paradise High School* on September 7, 2021, the Ninth Circuit Court of Appeals addressed the issue of school district liability for alleged bullying of a student with disabilities. The student in this case was a ninth-grader with a 504 plan for ADHD. The agreed-upon accommodations were limited to extra time when needed to complete work and assisted review of his notes to help keep him organized. At a high school football game, when he was talking with a female classmate, a male student suddenly approached and punched him in the face several times, causing serious injury. The reason for the assault was jealousy, which was not connected at all with his ADHD. The school's investigation revealed that the other student had hit him on the shoulder during the lunch period a few days earlier, but that school personnel had no knowledge of it or any other harassment or bullying prior to the punching incident. His parents filed suit for money damages in federal court, citing Office for Civil Rights (OCR) guidance that interpreted Section 504 as requiring districts to engage in antibullying actions based on what amounts to a negligence standard starting with reason to know (i.e., constructive knowledge) of harassment of students with disabilities. The district court granted the defendant's pretrial motion for summary judgment, and the parents appealed to the Ninth Circuit.

First, the parents argued that the court should adopt the four-factor test set forth in OCR's 2014 Dear Colleague Letter for peer harassment under Section 504: 1-disability based; 2-sufficient for hostile environment; 3-constructive or actual knowledge; and 4-lack of appropriate response.	Affirming the lower court, the Ninth Circuit roundly rejected the proposed adoption because (1) the Letter makes clear that it does not apply to suits for liability, and (2) the Letter lacks any force as the authoritative or official position of the U.S. Department of Education via its OCR.
Alternatively, the parents argued that the four successive OCR letters, starting in 2000, put districts on notice that students with disabilities need social accommodations, even if never requested, to prevent bullying and other harassment.	"[S]uch an expansive interpretation is foreclosed by the law governing private suits for damages, which requires that plaintiffs meet the high bar of deliberate indifference—i.e., where 'the school's response to the harassment or lack thereof was clearly unreasonable in light of the known circumstances.'"
If these Dear Colleague Letters are not applicable, what are the standards that are the essential elements in Section 504 suits for money damages arising from peer harassment?	Starting with the Supreme Court's *Davis v. Monroe County Board of Education* (1999) decision, the key standards are disability-based, actual knowledge, and deliberate indifference—all missing in this case.

Although reminding interested individuals that U.S. Department of Education guidance is sometimes distinctly different from case law, the Ninth Circuit noted that "we need not decide whether all Dear Colleague Letters, or similar documents, are or are not eligible for deference or can or cannot create legal obligations." This issue poses particular significance in relation to the various Departmental guidance documents that continue to come forth as a result of the COVID-19 pandemic. Remember, too, that the channels of administrative enforcement, such as the IDEA state complaint procedures and OCR's corresponding complaint investigation process, may not answer this issue the same as hearing officers or courts.

ELIP #90
Admin/Employment

The Ten Commandments of Documentation: Principals Threading the Eye of the Needle[1]

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There are few tangible rewards associated with the remediation and/or dismissal of an incompetent teacher, except the knowledge that you are working to provide your students and community with the best professional services. . . . Teachers have just as much a vested interest in quality schools as administrators and parents. They want to work with competent colleagues.[1]

Introduction: Teachers are Central to the Goals of Education

"Who shall teach our children?" is one of the great recurring and important questions in education. Teachers occupy the pivotal position in the school. At the core of their work, they provide instruction, structure learning activities, and assess the work of students.[2] All other activities at the school are primarily designed to support, augment, and extend the primacy of the essential teacher-student instructional interaction. "It is well established that teacher quality makes a difference in student learning."[3] The teacher working with students in the classroom is the core function of a school, as most of what is of sustained value that happens in a school occurs through interactions between students and educators. Indeed, as Joseph M. Carroll writes, "nothing, absolutely nothing has happened in education until it has happened to a student."[4] Therefore, what teachers do in their classrooms is central to the effectiveness of the state's system of public education, as well as in private education.

Dan C. Lortie, in his classic work, *Schoolteacher: A Sociological Study*, characterized teaching as the "root status of educational practice."[5] For educators, their relationship with their students is an article of faith. This is what teachers do and what defines them as professionals. It also forms the basis for holding them accountable for their actions.[6]

Teachers make a difference in the education of students. That difference cuts both ways; an effective teacher makes a difference in a student's learning and an ineffective teacher also makes a difference—just the wrong difference. As Harvard professor Susan Moore Johnson wrote almost three decades ago, but with the same salience today, "Who teaches matters."[7] While the great majority of teachers are dedicated, accomplished professionals who serve the best interests of their students, there are some teachers who are not effective. Therefore, whom to place in front of students in a classroom, how to assist that teacher to reach higher levels of performance, when and how to identify deficiencies, and when to dismiss are critical decisions.

The U.S. Supreme Court in 1952 declared that "school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of schools as a part of ordered society cannot be doubted."[8] If teachers matter, then the policies and practices that structure their recruitment, selection, and retention matter.

Evaluation, remediation, and possible dismissal of a teacher requires a quality documentation system that substantiates the underlying decision. The evaluation of teachers calls for transparent, rigorous, and fair systems. The Joint Committee on Standards for Educational Evaluation developed four standards (propriety, utility, feasibility, and accuracy) that should guide evaluations.[9] The records that we keep affect people in powerful ways. Documents written regarding employee performance are statements that stand alone and speak independently from the principal/administrator. "Memories inevitably fade over time, but documentation is the best way to preserve a record of the steps you have taken and the reasons for your actions, [and] decisions, preparing you to defend them should the need arise."[10] Memorializing information in the written word, or through an organized system, mitigates this issue. Moreover, documentation created contemporaneously to any incident has evidentiary value, if an adverse employment decision is challenged.

This article reviews a critical and often difficult component concerned with placing competent professional educators in classrooms—documentation. Given the space restrictions, we will focus our discussion on our Ten Commandments of Documentation as an overview of the documentation process.

Teachers stand at the crossroads of students' education, helping to move them onto the freeways of life or shunting them to the byways of life. Part II discusses the challenges that face principals in evaluating, identifying deficiencies, remediating those deficiencies, or dismissing teachers who do not meet standards of the profession. Part III reviews due process and the structuring role it plays in the remediation and dismissal process. Part IV concludes with a discussion of the authors' Ten Commandments of Documentation and some summary comments.

The Challenge for the Principal

In sum, the power that a principal wields when it comes to evaluations is substantial not only for the teacher, but for the school, its students, and its community. The actions of the principal on critical issues communicates the values of the school.[11]

Principals are responsible for their school. They are the instructional leaders and are often the school law leaders of their school. Their responsibilities involve the sometimes-conflicting roles of supporting and evaluating teachers. Teacher evaluation is a significant part of their duties. DiPaola and Hoy note that "[a]lthough principals may be supportive and helpful to teachers, they also have the burden of making organizational decisions about competence."[12]

The emphasis on increasing the principal's attention to instruction has created time management problems that affect the principal's already stressed day.[13] Mayor Michael R. Bloomberg aptly summed the central role that principals play in teacher evaluation systems. In an interview on teacher evaluations, Mayor Bloomberg asserted, "The principal's job is to decide who's good, who's bad. It's their judgment, that's their job."[14]

A key element in the supervision and evaluation process is the documentation of what has been observed or the facts that have been discovered. Instances involving a lack of appropriate documentation to support dismissal underscore the importance of proper documentation. For example, in 2011, the New York Supreme Court held, "However, [the teacher] submitted evidence that the principal who made the determination to award the 2008-09 [unsatisfactory rating] did not observe [the teacher's] teaching during either of the final two years at the school."[15] Similarly, the Supreme Court of Illinois, in a 2016 teacher dismissal case, ordered reinstatement with back pay to a tenured high school math teacher.[16] The teacher had been dismissed for cause citing three causes of action, including being late for school while attending to declining health issues of a parent, failure to submit lesson plans, and "generally slow progress" of her first hour of her first period geometry class.[17] The court found that two of the three complaints were not supported "by the weight of the evidence."[18] In other words, the documentation did not support the conclusion.

Due Process

"You can't go out, you are arrested." "So it seems," said K. "But what for?" he added. "We are not authorized to tell you that. Go to your room and wait there. Proceedings have been instituted against you, and you will be informed of everything in due course."

Franz Kafka – *The Trial*[19]

An effective documentation system utilizing legally defensible memoranda to employees is an essential tool that can be used to protect legitimate employee due process rights and assists in the accountability and improvement of the delivery of professional services to students. The United States Supreme Court stated almost 50 years ago, "The touchstone of due process is the protection of the individual against the arbitrary action of government."[20] It is not a technical conception, unlike some legal rules;[21] it remains flexible, responding to the procedural protections as necessitated by the demands of the particular circumstances of the issue. Once it has been determined that the state's action implicates an individual's life, liberty, or property interests, the question of what process is due remains.[22]

At its core, due process means fundamental fairness.[23] To a large extent, due process is an exercise in applied ethics; justice is, in the long run, intended to be fair.[24] Due process requires government to implement fair laws in a fair manner if it infringes upon an individual's life, liberty, or property. As a Texas federal district court observed in a teacher evaluation case, "In short, due process is designed to foster government decision-making that is both fair and accurate."[25]

Due process is rooted in common law running back to the Magna Carta in 1215. There are two elements that comprise due process—procedural due process and substantive due process, which are guaranteed in the U.S. Constitution's Fifth and Fourteenth Amendments. However, "[i]t is important to remember that the due process rights of employees do not shield them from termination. Incapable or insubordinate employees can and should be terminated."[26] For tenured teachers, as often stated in collective bargaining agreements, the process of documentation, notice, and hearing must meet the standard of just cause.[27]

Procedural due process guarantees that persons who are deprived of their life, liberty, or property are entitled to a fair process. The procedures for possibly taking away a person's life, liberty, or property must meet the requirements of a fair notice and a fair hearing. Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner."[28] The notice must contain specific information about the day, time, and place of the hearing. It must also include, with sufficient specificity, notice of the charges against the person so that he/she can prepare an adequate defense. The U.S. Supreme Court, in a non-education case, held that a proper notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."[29]

The hearing must be held before a neutral tribunal with authority in the matter. A "fair trial in a fair tribunal is a basic requirement of due process."[30] School boards and boards of trustees are presumed to be impartial, and the plaintiff carries the burden of proving otherwise.[31] The Fifth Circuit, in a dismissal case of a tenured medical school professor, wrote, "We have held that procedural due process requires proof of actual bias."[32] Mere speculation is unpersuasive.

The tribunal is responsible for providing an orderly proceeding in which the "accused" must have the opportunity to cross-examine witnesses. The hearing, except in the matter of exigency of immediate harm, must be held prior to the implementation of discipline. Notice must precede the hearing. Procedural due process is "tailored" according to the extent of the deprivation a person may suffer at the hands of government.[33] In other words, the greater the deprivation, the greater the procedural protections.

Substantive due process is concerned with the substance of the law, rule, or regulation. The law, rule, or regulation that deprives an individual of life, liberty, or property must be reasonable and consistent with the American sense of fairness. It must be clearly and rationally related to a lawful state function (unless the issue involves a fundamental interest, as education has not been declared a federal constitutional fundamental interest). The reasonable person test is used when the issue involves substantive due process. The test asks: "Could a reasonable person understand what to do or not do after reading the law, rule, or regulation?" The U.S. Supreme Court, in *FCC v. Fox Television Stations, Inc.*, stated that the vagueness doctrine addresses "[a] fundamental principle in our legal system ... that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[34] Substantive due process challenges involve questions of vagueness or overbreadth, as well as questions about fundamental fairness (e.g., conscience-shocking behavior).

Vague rules fail to provide adequate notice of what is impermissible, and they invite uneven, biased, and variable application.[35] An overbroad rule does more than necessary to achieve the desired ends and, in so doing, infringes on constitutionally protected rights. Most overbreadth issues arise in connection with the regulation of speech. Overbroad regulations prohibit types of conduct, but unconstitutionally sweep constitutionally protected activities into its ambit. The U.S. Supreme Court described the shocks-the-conscience standard

as government conduct that "offend[s] those canons of decency and fairness."[36]

In *Cleveland Board of Education v. Loudermill*, the Court captured the high stakes of due process hearings. Writing in a public education case involving dismissal based on dishonestly filling out an employment application, the Court stated, "First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood."[37] This admonition must ground the due process procedures and protections that we employ in ascertaining whether our fair and accurate investigation based on our documentation merits disciplinary action. Justice Brennan, in his concurrence and dissent, wrote, "Today the Court puts to rest any remaining debate over which whether public employers must provide meaningful notice and hearing procedures before discharge for cause."[38]

Conclusion: The Ten Commandments of Documentation[39]

"It takes careful and dedicated hard work and documentation to remove a teacher who is detrimental to the well-being of the school."[40]

As stated above, "Who teaches matters"[41] is a simple truth, but a complex, imperative call for action. Educational leaders have a commitment to provide and sustain conditions in which teacher professionalism can flourish to the benefit of students. Part of this commitment involves staff development, supervision, and evaluation. The evaluation of teachers calls for transparent, rigorous, and fair systems.[42]

While the challenges that educational leaders face in properly supervising, evaluating, and documenting employee performance are real, as Professor Larry E. Frase stated decades ago, administrators must "keep in mind their primary goal: putting only competent teachers in contact with students."[43] Concomitantly, employees' right and desire to receive accurate feedback on their professional efforts argues for the employment of an effective, valid, and fairly implemented supervision system. Teachers have just as much of a vested interest in quality schools as administrators and parents. They want to work in a good school with competent colleagues.

Employees should expect to have ongoing conversations on their instruction and student interactions, and to receive reviews based on observations in a supportive, safe environment of mutual respect, with a focus on student achievement. They should expect to receive timely notice of concerns about their professional practice so as to be able to respond to the concerns and make appropriate adjustments. School administrators should expect that employees will engage with the school administrator and respond at a professional level to the concerns, recommendations, and requirements regarding the employee's position. The teacher and administrator's community of interests—a focus on the best interests of their students—must guide the supervision and evaluation process.

We recommend the following Ten Commandments for Documentation[44] to help to steady the principal's hand as the needle of supervision, evaluation, and documentation is threaded.

THE TEN COMMANDMENTS OF DOCUMENTATION

1. Documentation affects people in powerful ways.

- It is a statement that stands alone and speaks independent of the administrator.
- "Spoken words are easily forgotten."[45]

2. Documentation is written for three parties.

- The supportive party—e.g., school administrators
- The adversarial party—e.g., the union and other employees
- The neutral party—This can be a school board, an arbitrator, or a judge—someone who will consider your documentation and render a decision. What does the neutral party need to know?
- Provide documentation to only those who need to know. Employees have the right to a confidential process.
- If the document is placed in the personnel file, notice of the placement must be written on the document including time for the educator to append written comments to the document. Provide a place for the employee to sign, acknowledging receipt of the document. If the employee chooses not to sign it, do not press the issue, just have an assistant whom you have brought with you sign a copy of the document that it was presented to the employee and date it, adding the time and a list of those present.

3. Conference first, write second.[46]

- Documents are best written in the first person.
- Conferencing first allows you to gather the facts and a possible explanation for the behavior.
- Be clear about the issue during the conference, the employee's behavior, and stay on the issue. Do not become sidetracked.

4. Establish the facts.

- Documentation must be accurate, using observed behavior and/or artifacts.
- The facts must lead to and support the conclusion.

5. Apply the facts.

- Apply the facts to the expected standard of conduct.
- "Conclusory statements, inflammatory language, and/or opinions not supported by the facts should be avoided."[47]

6. Documentation must be objective.

- Use legal authority, such as school policies, collective bargaining agreements, board policy, state statutes, and federal statutes when appropriate.[48]
- Do not draw conclusions that are not supported by the evidence presented in the documentation.

7. Documentation must be complete, but concise and clear.

- Review past observations, evaluations, and documentation to ascertain if the behavior in question is part of a pattern.
- Only use documentation that the employee has already had access to and has had a chance to respond to its content.

8. Documentation must provide clear directions and communicate expectations by coming to the point.

- Directions to the employee must be clear and not vague.[49]
- A good rule of thumb comes from substantive due process: Would the reasonable person (teacher) know what to do or what not to do upon reading the directions?[50]
- Be mindful of our natural tendency to be supportive, often overlooking and or minimizing inappropriate behaviors.

- What does the employee need to do or not do to improve her/his professional practice to bring it to an acceptable level?
- Come to a conclusion.

9. Statutory deadlines must be met.

- If state law requires that notice of a nonrenewal (part of due process) must be received by a specific date, the administration must meet that deadline.
- Failure to meet the deadline may result in the school board's intended action being voided.
- The failure of an administrator's organizational skills can have real consequences; an incompetent teacher may be retained or tenure may be inappropriately granted.

10. Documentation must be fair.

- Employees deserve a fair process.
- A fair process, applying fair laws, communicated and enforced in a fair manner are not only critical—they comprise due process.
- Expect fairness from everyone, including yourself.
- Be firm, but fair.
- A fair process of judging professional competence is "measured against the standard required of others performing the same or similar duties"; it is not measured against a standard of perfection.[51]

Ethical teacher evaluation policies, coupled with the ethical application of those policies through the use of these principles, should be an important part of the evaluation system and its documentation component. As noted above, teachers are the core of the school's relationship with their students. Because of this role, teachers must be treated in an ethical manner. Placing and retaining effective teachers in classrooms, as well as removing ineffective teachers, must be grounded in an ethical approach.

Given the importance of education to our nation and to its people,[52] staffing classrooms with highly qualified teachers "is a critical national concern."[53] As Jennifer Rice observed, "Teacher quality matters. In fact, it is the most important school-related factor influencing student achievement."[54] Proper supervision that assists with strengthening the instructional skills of the teacher and maintaining a professional classroom is an important responsibility of the principal. Knowledge of how to fairly and properly document performance is an important, if not critical, skill for school leaders.

The evaluation process cannot just be a ceremonial congratulation, the awarding of a certificate of participation in the school's activities. Whom we place and retain in our classrooms is a challenge demanding an imperative of action for school leaders. The task must be undertaken with the application of skills and knowledge and pursued with a high-level professional responsibility. "When principals establish trusting school spaces, serious school improvement and success can occur."[55]

School principals are central figures in the school tasked with the supervision and evaluation of teachers. With the use of proper documentation practices, principals and supervisors "can increase morale and minimize future legal problems."[56] Principals must possess and consistently apply the appropriate level of skill and knowledge of documentation in order to fulfill their duty to support and implement with fidelity the use of effective supervision and evaluation techniques, including documentation. Teachers, students, and the community deserve nothing less.

APPENDIX A: DUE PROCESS—JUST CAUSE FOR DISCIPLINE

Administrators should be able to answer the following questions with "YES."

1. Was the statute, rule, order, policy, regulation, or expected conduct known to the individual?
2. Does the rule, order, policy, regulation, or expected conduct relate to the efficient and orderly operation of the school or educational program?
3. Has the rule been consistently and recently enforced?
4. Was the individual informed that noncompliance could have disciplinary consequences?
5. Was there a fair and objective investigation of the circumstances and facts prior to any disciplinary action?
6. Does the documentation substantiate by substantial and credible evidence that a violation has occurred?
7. Was the individual given sufficient explanation of the charges and allowed to be heard and explain his/her actions prior to any disciplinary action?
8. Were extenuating, mitigating, and aggravating circumstances considered in making the disciplinary decision?
9. Was there substantial evidence presented to support a finding to sustain the charges?
10. Has available assistance been provided to help the individual succeed or correct unacceptable behavior within a reasonable timeframe?
11. Does the disciplinary action taken reflect a degree that is consistent with the seriousness and nature of the offense (progressive discipline)?
12. Was the disciplinary action taken consistent with the treatment of others in a similar situation, including the individual's previous record?
13. Were all proper and timely procedures followed?
14. Has an attitude of "help, assist, and correct," rather than a vendetta to "get rid of," and "punish," prevailed?

Endnotes

1 Todd A. DeMitchell, *Competence, Documentation, and Dismissal: A Legal Template*, Int'l J. of Educ. Reform 88, 94 (1995).

2 *See* James H. Strong, Thomas J. Ward, & Leslie W. Grant, *What Makes Good Teachers Good? A Cross-case Analysis of the Connection Between Teacher Effectiveness and Student Achievement,* 62 J. of Tchr. Educ. 339 (2011) (synthesizing their review of the literature into four dimensions: Instructional Delivery, Student Assessment, Learning Environment, and Personal Qualities). Furthermore, they write, "The common denominator in school improvement and student success is the teacher." *Id*. at 351.

3 Patricia H. Hinchey. (December 2010). *Getting Teacher Assessment Right: What Policymakers Can Learn from Research.* Boulder, CO: National Education Policy Center, at 1. *See also* Eric Hanushek. (December 2010). *The Economic Value of Higher Teacher Quality*. Washington, D.C.: National Center for Analysis of Longitudinal Data in Education Research, Calder The Urban Institute. ("First, teachers are very important; no other measured aspect of schools is nearly as important in determining student achievement.") at 3; Jian Wang, Emily Lin, Elizabeth Spalding, Cari L. Klecka, & Sandra J. Odell, *Quality Teaching and Teacher Education: A Kaleidoscope of Notions*, 62 J. of Tchr. Educ. 338 (2011) ("It is generally assumed that quality teaching plays a major, if not the most important, role in shaping students' academic performances.") at 338.

4 Joseph M. Carroll, The Copernican Plan Evaluated: The Evolution of a Revolution 87 (1994).

5 Dan C. Lortie, Schoolteacher: A Sociological Study (1975) at vii. In addition, teachers/educators are expected to act in a

professional (see various state and professional organizations code of ethics) and moral manner (defining immorality as "conduct which is hostile to the welfare of the school community"—*Morrison v. State Board of Education*, (1969) 1 Cal.3d 214, 224). *See Crawford v. Comm'n on Prof. Competence*, 267 Cal.Rptr. 3d 520, 381 Educ. L. Rep. 939 (Cal. App. 4 Dist. 2020) for an application of *Morrison* to a school counselor's email negative comments about a student protest about immigration policy which went viral, which formed the basis for her dismissal.

[6] *See* Charlotte Danielson's framework for teaching. The four domains are 1) Planning and Preparation, 2) Classroom Environment, 3) Instruction, and 4) Professional Responsibilities. Charlotte Danielson, *The Framework*, The Danielson Group (2017), https://www.danielsongroup.org/framework/.

[7] Susan Moore Johnson, Teachers at Work: Achieving Success in our Schools xii (1990).

[8] Adler v. Bd. of Educ., 342 U.S. 485, 493 (1952).

[9] Joint Committee on Standards for Educational Evaluation, the Personnel Evaluation Standards (1988), available at http://www.jcsee.org/personnel-evaluation-standards.

[10] Kimberly M. Bandy, Natalie C. Schaefer, & Roberta F. Green, *Teacher Evaluation: The Legal Factors*, 36 Communicator (February 2013), https://www.naesp.org/communicator-february-2013/teacher-evaluation-legal-factors.

[11] DeMitchell & Paige, *supra* note 1 at 29.

[12] Michael F. Dipaola & Wayne K. Hoy, Principals Improving Instruction: Supervision, Evaluation, and Professional Development 24 (2008), stating "[t]he principal is responsible for the removal of incompetent, ineffective teachers from the profession." *Id.* at 165.

[13] Denise R. Superville, *Teacher Evaluations Have Dramatically Changed the Principal's Job*, Educ. Week (Nov. 13. 2018), https://www.edweek.org/ew/articles/2018/11/14/teacher-evaluations-have-dramatically-changed-the-principals.html.

[14] Colin Campbell, *Bloomberg: Principals Should Remain in Full Control of Teacher Evaluations*, Observer (Jan. 6, 2012), https://observer.com/2012/01/bloomberg-opposes-independent-commission-evaluating-teachers-2/.

[15] Kolmel v. City of N.Y., 930 N.Y.S.2d 573, 574, 272 Educ. L. Rep. 595 (A.D. 1 Dept. 2011).

[16] Beggs v. Brd. of Educ. of Murphysboro Cmty. Unit Sch. Dist., 72 N.E.3d 288 (2016).

[17] *Id.* at 293.

[18] *Id.* at 309. The court found that the third charge was supported, but was minor. *Id.*

[19] Franz Kafka, The Trial 6 (1953).

[20] Cnty. of Sacramento v. Lewis, 523 U.S. 833, 845 (1998) quoting Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

[21] Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961).

[22] Morrissey v. Brewer, 408 U.S. 471, 481 (1972).

[23] *See* Matthews v. Eldridge, 424 U.S. 319, 333 (1976) (writing, "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.").

[24] Michael Scriven, *Due Process in Adverse Personnel Action*, 11 J. Personnel Eval. in Educ. 127, 128 (1997).

[25] Houston Fed'n of Teachers, Local 2415 v. Houston Indep. Sch. Dist., 251 F. Supp. 3d 1168, 1176, 347 Educ. L. Rep. 943 (S.D. Tex. 2017) (quoting Carey v. Piphus, 435 U.S. 247, 262 (1978).

[26] Kelly Frels, Janet L. Horton, Lisa McBride & Ilya Feldsherov, A Documentation System for Teacher Improvement or Termination (2nd ed.) 7 (2014).

[27] The Seven Tests of Just Cause are generally recognized by arbitrators in adverse employment issues: Fair Notice, Reasonable Rule, Investigation, Fairness, Proof, Consistency of Treatment, and Appropriate Discipline. Appendix A applies these tests to educational organizations.

[28] Armstrong v. Manzo, 380 U.S. 545, 552 (1965).

[29] Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

[30] Withrow v. Larkin, 421 U.S. 35, 46 (1975).

[31] *See, e.g.*, Hortonville Joint Sch. Dist. No. 1 v. Hortonville Educ. Ass'n, 426 U.S. 482 (1976).

[32] Walsh v. Hodge, 975 F.3d 475, 482, 382 Educ. L. Rep. 32 (5th Cir. 2020).

[33] Goldberg v. Kelly, 397 U.S. 254, 268-69 (1970) (footnote omitted).

[34] FCC v. Fox Television Stations, Inc., 567 U.S. 239, 253 (2012).

[35] For example, a rule against "misconduct" is vague; what constitutes misconduct? (Soglin v. Kauffman, 295 F.Supp. 978 (W.D. Wis. 1968); A rule forbidding "inappropriate actions" or "unacceptable behavior" (Galveston Indep. Sch. Dist. v. Boothe, 590 S.W.2d 553 (Tex. Ct. App. 1979).

[36] Rochin v. California, 342 U.S. 165, 169 (1972); government officials', including public school officials, conduct that reaches "a demonstrable level of outrageousness." *Hampton v. United States*, 425 U.S. 484, 495 n.7 (1976). Similarly, due process is violated when government conduct reaches "a demonstrable level of outrageousness." *Hampton v. United States*, 425 U.S. 484, 495n.7 (1976).

[37] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 543 (1985). Writing further, "The hearing should be an initial check against mistaken decisions — essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Id.* at 546.

[38] *Id.* at 551-52.

[39] DeMitchell & Paige, *supra* note 1 at 61-67.

[40] Steve Permuth & Robert Egley, *Letting Teachers Go—Legally* Principal Leadership, 3 (September 2002): 22-26, 26.

[41] Johnson, *supra* note 8.

[42] Vincent J. Connelly, Todd A. DeMitchell, & Douglas Gagnon, *Teacher Evaluation: Principal Perceptions of the Barriers to Dismissal. Research, Policy, and Practice*. 1 Educ. L. & Pol'y Rev. 172, 175 (2014).

[43] Larry E. Frase, Maximizing People Power in Schools: Motivating and Managing Teachers and Staff 72 (1992) (emphasis in original).

[44] DeMitchell & Paige, *supra* note 1 at 62-64.

[45] Jeff Horner, *Fifteen Tips for Better Documentation of Employee Performance*, 146 Educ. L. Rep. 613, 614. (2000).

[46] "The cardinal rule of effective communication and documentation is to hold a conference first and write second." Frels, et. al, *supra* note 27 at 17.

[47] *Id.* For example, to write, "Ms. Smith is a liar" is different than writing, "Ms. Smith was caught lying ten times."

[48] See below for three examples citing to authority in documentation.

- "Furthermore, leaving a required meeting without prior permission is a violation of your job description as contained in Board Policy 4180 (D) and page 12 of the Faculty Handbook (copies are appended to this memorandum)."
- "Failure to heed this directive will result in further disciplinary action up to and including dismissal or non-renewal of your contract. Please see NRS 391.750 Grounds for suspension, demotion, dismissal, and refusal to reemploy teachers and administrators; consideration of evaluation and standards of performance as authority in this serious matter, a copy is appended."
- "This is the third time that you have arrived late at your classroom for your first period class in the last two weeks. I discussed your previous tardy attendance with you informally. You assured me that the problem would be addressed and that you would not leave your class unattended in the hallway. Article 4.4.2 of the collective bargaining agreement requires that you must be in your class for the start of school at least 15 minutes before the first period. You must follow the requirements of the collective bargaining agreement. Failure to follow this requirement may lead to a deficiency notice as well as a notice of insubordination. These notices may lead to further disciplinary action."

[49] *See* Freshwater v. Mt. Vernon City Sch. Dist., 1 N.E.3d 335, 343, 300 Educ. L. Rep. 452 (Ohio 2013) for an example of a directive regarding religious material in a public middle school science classroom that the Supreme Court of Ohio stated was "clear and unequivocal." The memorandum concludes, "Unless a particular discussion about religion or religious decorations or symbols is part of a Board approved curriculum, you may not engage in religious discussions with students while at school or keep religious materials displayed in the classroom."

[50] A New York Supreme Court, Appellate Division held that the documentation supporting a finding of unsatisfactory performance was neither "arbitrary nor capricious" thus upholding the dismissal. *See* Meyers v. Dep't of Educ. of City of New York, 55 N.Y.S.3d 17, 17 (A.D. 1 Dept. 2017) (writing, "The determination is rationally supported by the principal's detailed descriptions of petitioner's difficulties in developing learning objectives, using lesson plans, maintaining academic rigor, meeting students' varying needs, facilitating 'accountable talk' through 'higher order thinking questions,' and actively engaging students, among other things as well as managing her classroom, and petitioner's persistent failure to improve despite the ongoing individualized professional development support she received.").

[51] Sanders v. Bd. of Educ., 263 N.W. 2d 461, 465 (Neb. 1978).

[52] "Today, education is perhaps the most important function of state and local governments . . . . In these days, it is doubtful that any child may reasonably be expected to succeed in life if he [or she] is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right, which must be made available to all on equal terms." Brown v. Bd. of Educ., 347 U.S. 484, 491 (1954); "[E]ducation

provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society." Plyler v. Doe, 457 U.S. 202, 221, 4 Educ. L. Rep. 953 (1982).

[53] Marco A. Munoz & Florence C. Chang, *The Elusive Relationship Between Teacher Characteristics and Student Academic Growth: A Longitudinal Multilevel Model for Change*, 20 J. of Pers. Eval. in Educ. 147, (2007). *See, also*, ("[A] teacher serves as a role model for [his/her] students, exerting a subtle but important influence over their values and perceptions. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of a democracy." Ambach v. Norwick, 441 U.S. 68, 78-9 (1979).

[54] Jennifer K. Rice, *Teacher Quality: Understanding the Effectiveness of Teacher Attributes* (Washington, D.C. Economic Policy Institute 2003) at v, http://www.epi.org/publications/entry/books_teacher_quality_execsum_intro/#ExecSum.

[55] Heather E. Price, *Principal–Teacher Interactions: How Affective Relationships Shape Principal and Teacher Attitudes*, 48 Educ. Admin. Quarterly 39, 42 (2012).

[56] Horner, *supra* note 46, at 616.

ELIP #91
Admin/Liability

Liability for Student Suicide: The Latest Case Law

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Suicide rates among public school students have continued to increase in recent years, especially at the secondary level. For example, for youth ages 10 to 14, according to the Centers for Disease Control and Prevention, suicide is the second leading cause of death, and the rate has increased 61% from 2009 to 2018.[1]

The case law in which parents seek compensatory damages from school districts in the wake of their children's suicide also continues apace. Two successive, brief, table-based analyses canvassed the cases until early 2018.[2] Both were limited to liability cases against public school defendants arising from actual, not attempted, suicide.

Preceding Analyses

The first analysis found eighteen student-suicide cases against school defendants from 1991 to early 2005.[3] Of the eighteen cases, thirteen included rulings on tort claims, primarily the negligence theory articulated in *Eisel v. Board of Education of Montgomery County*.[4] On an overlapping but lesser frequency were rulings on constitutional claims in eight cases and rulings on federal statutory claims in two cases.[5] The primary constitutional claim was based on Fourteenth Amendment substantive due process.[6] Overall, the outcomes strongly favored the school defendants, with the overall outcomes distribution of the twenty-three rulings being as follows: partially in favor of the plaintiffs – 4%; inconclusive – 13%; and conclusively in favor of defendants – 83%.[7]

The sequel analysis found forty-one cases for the period from early 2005 to early 2018.[8] The frequency distribution of the seventy-five broad category rulings within these cases was as follows in descending order: torts – 27; Constitution – 26; federal legislation – 19; and state legislation – 3.[9] The corresponding outcomes distribution was as follows on a best for plaintiff approach:[10] conclusively in favor of the plaintiffs – 0%; inconclusive – 33%; conclusively in favor of the defendants – 67%.[11]

Purpose and Method

The purpose of this article is to provide an update of the previous table-based overview to determine the frequency and outcome trends of the student suicide cases for the subsequent three-year period. More specifically, the pertinent decisions are from early 2018, when the preceding article's coverage ended, until early 2021, when the data collection ended. The selection criteria and table-based approach remained basically the same as the earlier analyses. For example, the exclusions extended to decisions specific to the private school context[12] and, in some cases much closer to the boundary, those limited to attempted suicide[13] or in which the student's death may have been accidental.[14]

Results

The table provided summarizes the results of the current analysis. The format provides the various categories of information reported in the previous analysis, but in this more compact format: (a) the case name; (b) the rest of the case citation; (c) each of the broad categories of the claims; and (d) the outcome for each of these claim categories on a best-for-plaintiff approach, with D=for defendant and Inc.=inconclusive.[15] The sequence is generally in chronological order of the decisions, with an asterisk designating those cases that appeared in the second of the preceding analyses.

Review of the table reveals that the latest three years account for eighteen liability cases based on student suicide. The frequency distribution of the thirty-seven claim category rulings in these cases were as follows in descending order: torts – 14; federal legislation – 10; Constitution – 9; and state legislation – 4. The corresponding outcomes distribution of these thirty-seven claim category rulings was as follows: conclusively in favor of the plaintiffs – 0%; inconclusive – 49%; and conclusively in favor of the defendants – 51%.[16]

Closer scrutiny of the court decisions beyond the entries in the table reveals that (a) the students were at the high school level in eleven (61%) of the cases, with all of the others but three being at the junior high school level; (b) the students were also male in all but three (17%) of the cases; (c) bullying was part of the plaintiff's allegations in eleven (61%) of the cases; and (d) within the broad claim categories, the most frequent legal bases were negligence (n=13),

Table: Overview of Student Suicide Cases: Early 2018 To Early 2021

Case Name	Citation	Claims	Outcome
Ramos v. Webb Consol. Indep. Sch. Dist.	724 F. App'x 338 (5th Cir. 2018)	Const'n	D
		Fed. Leg.	D
Lansberry v. Altoona Area. Sch. Dist.	318 F. Supp. 3d 739 (W.D. Pa. 2018) 356 F. Supp. 3d 486 (W.D. Pa. 2018)	Const'n	D
		Fed. Leg.	D
		Tort	Inc.
Palosz v. Town of Greenwich	194 A.3d 885 (Conn. App. Ct. 2018)	Tort	Inc.
*Estate of D.B. v. Thousand Islands Cent. Sch. Dist.**	327 F. Supp. 3d 477 (N.D.N.Y. 2018)	Fed. Leg.	D
		Tort	Inc.
Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ.	341 F. Supp. 3d 793 (S.D. Ohio 2018)	Const'n	Inc.
		Fed. Leg.	Inc.
		Tort	Inc.
		State Leg.	D
Meyers v. Cincinnati Bd. of Educ.	343 F. Supp. 3d 718 (S.D. Ohio 2018) 983 F.3d 873 (6th Cir. 2020)	Const'n	Inc.
		Tort	Inc.
		State Leg.	D
Stopford v. Milton Town Sch. Dist.	343 F. Supp. 3d 718 (S.D. Ohio 2018)	Tort	D
*Beam v. W. Wayne Sch. Dist.**	2018 WL 6567722 (M.D. Pa. Dec. 13, 2018)	Fed. Leg.	Inc.
Walgren v. Heun	2019 WL 265094 (N.D. Ill. Jan. 11, 2019)	Const'n	D
		Tort	D
Baab v. Medina City Sch. Bd. of Educ.	130 N.E.3d 1106 (Ohio Ct. App. 2019)	Tort	Inc.
Collazo v. Hicksville Union Free Sch. Dist.	108 N.Y.S.3d 708 (Sup. Ct. Nassau Cnty. 2019)	Const'n	D
		Fed. Leg.	Inc.
		Tort	D
Whooley v. Tamalpais Union High Sch. Dist.	399 F. Supp. 3d 986 (N.D. Cal. 2019)	Fed. Leg.	Inc.
		Tort	Inc.
		State Leg.	Inc.
Feucht v. Triad Local Schs. Bd. of Educ.	425 F. Supp. 3d 914 (N.D. Ohio 2019)	Const'n	D
		Fed. Leg.	D
		Tort	Inc.
Piechowicz v. Lancaster Cent. Sch. Dist.	2019 WL 6463402 (W.D. Pa. Dec. 2, 2019)	Const'n	Inc.
		Fed. Leg.	Inc.
Doe v. Bedford Cent. Sch. Dist.	2019 WL 6498166 (S.D.N.Y. Dec. 3, 2019)	Const'n	D
		Fed. Leg.	Inc.
Hauburger v. McMane	__ N.Y.S. 3d __ (Sup. Ct. Rockland Cnty. May	Tort	D
		State Leg.	D
Neeley v. San Mateo Union High Sch. Dist.	2020 WL 3479132 (Cal. Ct. App. June 26, 2020)	Tort	D
Berthiaume v. Waterbury Bd. of Educ.	2021 WL 761795 (Conn. Super. Ct. Jan. 6, 2021)	Tort	D

* Further decisions in cases reported in the immediately previous analysis.

Fourteenth Amendment substantive due process (n=9), Section 504/ADA (n= 5), and Title IX (n=5).[17]

Discussion

The trajectory of student suicide litigation continues upward despite the generally district-skewed outcomes. More specifically, the most recent three years averaged almost seven cases per year, which is the next level above the averages of approximately 1.5 and three per year for each of the two prior periods. Partially explaining the continuing growth is the increasing proportion of inconclusive outcomes—13+% for the first period, 33% for the second period, and 49% here.[18] These outcomes, which are almost all at the pretrial level, provide leverage for settlements. However, this leverage is not necessarily sufficient for this ultimate outcome.[19] Moreover, even when the outcome is settlement, the terms are often shrouded in confidentiality.[20] Against the backdrop of the two previous analyses, the current frequency distribution among the broad claim categories continues the consistent first-place position of torts, but federal legislation has steadily moved up to second place.[21] The ascendance of Title IX and Section 504/ADA is likely attributable to the frequent nexus to bullying based on gender or disability. On the other extreme, state legislation remains in the least frequent position, probably due in significant part to the lack of a private right of action in most antibullying laws.[22]

Similarly in the context of the successive earlier analyses, the outcomes distribution showed a continuing moderation of the pro-district skew in favor of increasing proportions of inconclusive rulings—13+%, 33%, and 49%.[23] This trend may be more attributable to the gradual increase in the so-called "spaghetti" litigation strategy of raising multiple claims in hopes that something sticks.[24] The ratio of the broad claim categories successively moved from 1.3 to 1.8 in the previous two longer periods to 2.1 for this three-year period,[25] and the increased diversification was even more pronounced upon differentiating the claims within each category.[26] In light of the pretrial posture of most of these decisions, the expansion in the number of alternative claims, by category or subcategory, increased the likelihood of inconclusive rulings. Yet, the relatively remote position of the majority of these inconclusive rulings, such dismissals without prejudice of ancillary state claims in federal court and denials of motions for dismissal for prima facie elements or threshold defenses, poses an uphill slope for a plaintiff-favorable outcome, whether by settlement[27] or verdict.[28]

Finally, the closer-scrutiny factual features of the age range and gender of the students went in the same general direction as the demographics for student suicides, although various differences in the context for and period after each of these tragic events account for lack of full alignment with these resulting court decisions.[29] The predominance of males and adolescents for this limited three-year period of case law appears to be more pronounced than for the underlying incidence of student suicides, although the age range and time period are not identical.[30] Similarly, the notable conjunction of bullying and suicidal behaviors fits with the pattern in the education literature generally[31] and the case law analyses specifically.[32] On an overlapping basis, the increasing frequency of federal statutory claims under Section 504/ADA and Title IX is associated with both bullying victimization and legal protection.[33]

This objective overview of the case law is far removed from the parents' devastating sense of loss from the tragedy of their child's suicide. Despite the ponderous litigation process and generally adverse outcome odds, parents increasingly resort to the courts seeking compensatory relief from school district defendants. The reasons probably include the cathartic value of litigation and the limited transparency of the ultimate outcomes. The increasing proportion of inconclusive rulings emphasizes the iceberg effect, which leaves much of the litigation process under the surface of generally reported court decisions.[34] This brief update reinforces the need and direction for more in-depth research and, concomitantly, for more effective school proactivity in relation to student suicidal behaviors.

Endnotes

1 Asha Z. Ivey-Stephenson et al., *Suicidal Ideation and Behaviors Among High School Students: Youth Risk Behavior Survey, United States, 2019*, 69 CDC Morbidity & Mortality Wkly. Rep. (Aug. 2020), http://dx.doi.org/10.15585/mmwr.su6901a6. Within this age group, the rate for males is considerably higher than that for females, although the ratio dropped to approximately 2:1 near the end of this period. Sally C. Curtin & Holly Hedegard, *Suicide Rates for Females and Males by Race and Ethnicity: United States, 1999 and 2017* (2019), https://www.cdc.gov/nchs/data/hestat/suicide/rates_1999_2017.htm.

2 *See* "Preceding Analyses" *infra*.

3 Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide*, 197 Educ. L. Rep. 489 (2005).

4 597 A.2d 447, 70 Educ. L. Rep. 544 (Md. 1991).

5 Zirkel & Fossey, *supra* note 3, at 491–92.

6 *Id.*

7 *Id.* The inconclusive rulings were denials of defendant motions for dismissal or summary judgement, thus preserving the claim for further proceedings, which could be in favor of either party if not settled or withdrawn or abandoned. The ruling that was partially in favor of the plaintiffs was for the tort, not constitutional, claim in *Wyke v. Polk County. School Board*, 129 F.3d 560, 122 Educ. L. Rep. 118 (11th Cir. 1997). For that claim, the court upheld the one-third comparative negligence ruling against the school district, amounting to a judgment of $165,000.

8 Perry A. Zirkel & Richard Fossey, *Liability for Student Suicide: An Update of the Case Law*, 354 Educ. L. Rep. 628 (2018).

9 *Id.* at 634. The miscellaneous other claim was based on the state constitution. *Id.* The federal statutory claims were largely based on Title IX or Section 504/Americans with Disabilities Act (ADA). *Id.*

10 In accordance with a cited previous line of outcome analyses, for those categories that encompassed more than one specific legal claim (e.g., Fourteenth Amendment substantive due process and equal protection in the constitutional category, or negligence and intentional infliction of emotional distress in the tort category) that had different outcomes, the entry was for the one that was most favorable to the plaintiff. *Id.* at 630 n.24.

11 *Id.* at 634 .

12 Wartluft v. Milton Hershey Sch. & Sch. Tr., 844 F. App'x 499 (3d Cir. 2021).

13 *E.g.*, Black v. Littlejohn, 2020 WL 469303 (N.D. Ill. Jan. 28, 2020) (resulting in chronic vegetative state).

14 Zuchowski v. Alpena Pub. Schs., 2018 WL 1947277 (E.D. Mich. Apr. 25, 2018)

15 *Supra* note 10.

16 The inconclusive rulings constituted the majority for the torts claims (58%) and for those based on federal statutes (55%), whereas they accounted for only limited proportions for those based on the Constitution (30%) and state legislation (25%).

17 In contrast, the single, inconclusive claim ruling based on the Individuals with Disabilities Education Act was an outlier. Doe v. Bedford Cent. Sch. Dist., 2019 WL 6498166 (S.D.N.Y. Dec. 3, 2019). The reason is because almost all jurisdictions have rejected the availability of money damages under the IDEA, either directly or via Section 1983. *See, e.g.*, Perry A. Zirkel, *Monetary Liability of Public School Employees under the IDEA or Section 504/ADA*, 2019 BYU Educ. & L.J. 1, 11 (canvassing the case law for monetary relief under the IDEA directly and via Section 504).

18 For the prior analyses (including the "+" for the partial outcome in *Wyke*), see *supra* text accompanying notes 7 and 11.

19 *See, e.g.,* Perry A. Zirkel & Diane M. Holben, *Spelunking in the Litigation Iceberg: Exploring the Ultimate Outcomes of Inconclusive Rulings*, 46 J.L. & Educ. 195, 209 (2017) (finding that the known ultimate outcomes of inconclusive bullying were mostly as follows: settlement – 65%, abandonment/withdrawal – 21%, or decisions conclusive for the defendants – 12%).

20 *E.g.*, Lewis v. Blue Springs Sch. Dist., 2018 WL 1126751 (W.D. Mo. Mar. 3, 2018) (approving confidential settlement of student suicide case in the wake of inconclusive pretrial rulings).

21 *Supra* text accompanying notes 5 and 9.

22 *E.g.,* Maryellen Kueny & Perry A. Zirkel, *An Analysis of School Anti-Bullying Laws in the United States,* 43 Middle Sch. J. 22 (Mar. 2012). Among the limited alternatives, parent-plaintiffs sought but did not obtain traction via state child abuse reporting laws. *E.g.,* Meyers v. Cincinnati Bd. of Educ., 343 F. Supp. 3d 718, 733, 361 Educ. L. Rep. 657 (S.D. Ohio 2018) (concluding that the child abuse reporting does not apply to peer bullying); Estate of Olsen v. Fairfield City Sch. Dist. Bd. of Educ., 341 F. Supp. 3d 793, 361 Educ. L. Rep. 156 (S.D. Ohio 2018) (concluding that this statutory duty does not apply to school boards, in contrast with school employees).

23 *Supra* text accompanying note 17.

24 Zirkel & Fossey, *supra* note 8, at 635.

25 *Supra* notes 4, 7–9.

26 The tort claims, for instance, included negligence, negligent infliction of emotional distress, recklessness, intentional infliction of emotional distress, and breach of fiduciary duty.

27 *See, e.g.*, Diane M. Holben & Perry A. Zirkel, *Bullying Litigation: An Empirical Analysis of the Dispositional Intersection Between Inconclusive Rulings and Ultimate Outcomes*, 42 Haw. L. Rev. 76 (2020) (finding that the inconclusive bullying rulings that had progressed closer to a decision on the merits were more likely to end in settlement than those that were remote, such as those that federal courts dismissed without prejudice as a matter of discretionary ancillary jurisdiction for possible re-filing in state court).

28 For tort claims, such dismissals without prejudice or denials of dismissal based on factual questions as to governmental immunity, did not at all equate to likelihood of a favorable verdict, as the single posttrial decision illustrated. Neeley v. San Mateo Union High Sch. Dist., 2020 WL 3479132 (Cal. Ct. App. June 26, 2020) (upholding jury verdict for the defendant). For federal statutory and constitutional claims, the difficulties included the respectively high applicable hurdles, such as deliberate indifference or state-created danger.

29 For the "closer scrutiny" findings, see *supra* text accompanying note 17.

30 *Supra* note 1.

31 *See, e.g.*, Scott Poland, *The Phenomenon Known As Bullicide*, 47 Dist. Admin. 92 (May 2011) (describing the confluence between student bullying and student suicide).

32 *See, e.g.,* Perry A. Zirkel, *Public School Student Bullying and Suicidal Behaviors: A Fatal Combination?* 42 J.L. & Educ. 633 (2013) (finding frequent concomitance but pro-district outcomes in the case law at the intersection of students' bullying and suicidal behaviors).

33 *See, e.g.,* Diane M. Holben & Perry A. Zirkel, *Bullying of Students with Disabilities: An Empirical Analysis of Court Claim Rulings*, 361 Educ. L. Rep. 498 (2019) (finding a predominance of Section 504/ADA rulings in bullying litigation, with the inconclusive outcomes tending to be remote from a definitive decision on the merits).

34 *See* Zirkel & Holben, *supra* note 19, at 195 (exploring the iceberg metaphor of litigation, citing, inter alia, Perry A. Zirkel & Amanda Machin, *The Special Education Case Law "Iceberg": An Initial Exploration of the Underside*, 41 J.L. & Educ. 483 (2012)).

Special Education Legal Alert

By Perry A. Zirkel October 2021

Is the Absence of an IEP for at Least Half a Year Any Loss?

In its September 10, 2021 officially published decision in *J.N. v. Jefferson County Board of Education*, the Eleventh Circuit Court of Appeals addressed the IDEA issue of whether a child-find violation results in a compensatory remedy and attorney fees. The student in this case received a diagnosis of ADHD at an early age. In approximately grade 5 or 6, the parent discontinued the student's ADHD medication. The student's report card in grade 6 consisted mostly of As and Bs, with a C in math. However, in grades 7 and 8, (a) her academic performance dropped significantly, especially in math; (b) her problematic behaviors escalated notably; and (c) her mother asked about special education. Meanwhile, the math teacher gave the student extra help in class. In early October of grade 8, the school activated its problem-solving team. Two months later, the school initiated a referral for an eligibility evaluation. A week later, the parent filed for a due process hearing, seeking compensatory education. In mid-March, after completing the evaluation, the team determined that the student was eligible for an IEP under the IDEA. The hearing officer ultimately ruled that the district violated child find by not evaluating the student more promptly after having reasonably clear suspicion of eligibility, but, based on the parent's failure to provide requisite proof, declined to award any compensatory education. Both sides appealed. The federal district court affirmed the hearing officer's decision and rejected the parent's request for attorney fees. The parent appealed to the Eleventh Circuit.

Did the Eleventh Circuit agree with the school district's argument that it did not violate child find?	The court concluded that it was not necessary to address this argument in light of its ruling about the remedy.
Did the Eleventh Circuit agree with the parent's claim that she was entitled to compensatory education to remedy the child-find violation for her eligible child?	No, for this substantive remedy the court ruled that the parent failed to meet her burden to prove substantive harm resulting from this procedural violation.
More specifically, what was the requisite substantive harm that the parent failed to prove?	"[T]he services that the school provided were worse than what [the child] would have received …. from a more timely IEP."
Did the Eleventh Circuit affirm the denial of prevailing party status that would qualify the parent for attorney fees?	Yes, because the district set in motion the evaluation leading to the IEP before she filed for the hearing, and she did not receive the remedy.

Although raising questions about the consequences of child-find violations, especially for a child determined eligible under the IDEA, and the difference between general education interventions and special education, the otherwise high potential precedential weight of this decision is limited by not only the three-state (AL, GA, and FL) boundary of the Eleventh Circuit, but also the court's repeated reliance on the broad discretionary latitude for (a) hearing officers for remedies and (b) lower court decisions upon appellate review.

See past monthly issues of Perry Zirkel's *Special Education Legal Alert* blog posted in the Member Materials Section of the ELA website, or visit his blogsite at perryzirkel.com.