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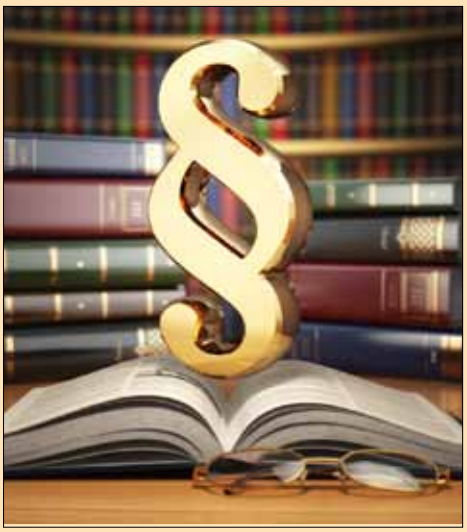
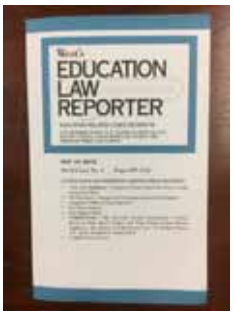


Education Law Into Practice



Education Law Into Practice (ELIP) articles were introduced in 1995 at the ELA annual conference by incoming President Perry Zirkel. Co-editors Joe Beckham and Allan Osborne, with Cliff Hooker's aid, forged an agreement with West Publishing to publish ELIP articles in West's *Education Law Reporter*, with ELA retaining the rights to republish them. More than 300 ELIPs have been published in *ELA Notes* since the first ELIP article was published in *ELR* in June 1997.

Today, Allan Osborne (a retired school administrator and 2003 ELA President) remains an ELIP editor. Joining him as co-editors are Richard Fossey (retired professor and originator of the Case Commentaries, also a blogger on student loan debt) and Christine Kiracofe (current professor at Purdue University and recent ELA board member). The co-editors are authors, editors, or chapter writers for many ELA books. Perry Zirkel is still a major contributor of ELIP articles, as well as sharing monthly Special Education Legal Alerts and periodic special supplements on important litigation with ELA members.

Allan Osborne

Richard Fossey

Christine Kiracofe

Perry Zirkel

All ELIP articles go through a peer-review process. Reviews are conducted by the ELIP co-editors with assistance from the editorial review committee. Following review, articles are either accepted, accepted contingent on revision, or rejected. The review process is expedited, with most publication decisions being made within one week of receiving the article. The co-editors are always more than willing to work with new authors to help them polish articles to put them in a publishable form.

Inasmuch as all articles are peer reviewed and first published in the prestigious *Education Law Reporter,* the opportunity to be published in ELIP can benefit faculty members working toward tenure or promotion. Further, by being published in both *ELR* and *SLR*, ELIP articles enjoy a wider distribution than either publication alone.

The next step for Education Law into Practice content will include easier accessibility by ELA members—also potentially increasing ELIP distribution as articles are cited more frequently—through a new indexing system.

Experienced writers who have not yet submitted an article for ELIP are encouraged to do so, perhaps partnering with an ELA member having less writing experience or representing a different constituency. See instructions for submitting an article on our website.

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Case Commentary

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

Hankins v. Alpha Kappa Alpha Sorority, Inc: Sorority Members Can Be Held Liable for Pledge's Post-Hazing Suicide

Robert C. Cloud, Ed.D., Professor, Baylor University, Waco, TX and
Richard Fossey, J.D., Ed.D., Professor Emeritus, University of Louisiana at Lafayette

In January 2017, Jordan Hankins, a pledge with an undergraduate chapter of Alpha Kappa Alpha sorority, committed suicide in her dorm room at Northwestern University.[1] Her mother, Felicia Hankins, filed suit against her daughter's sorority and individual sorority members under the Illinois Wrongful Death Act. Ms. Hankins alleged that her daughter's suicide was attributable to abusive hazing by Jordan's sorority sisters.

As outlined in Judge Edmond Chang's opinion, Jordan attended a "rush" event and completed the pledge process for membership in her university's chapter of Alpha Kappa Alpha. Thereafter, however, sorority members put her through a "*post*-initiation pledge process" that included hazing.[2] Specifically, Jordan's mother alleged that Jordan was "subjected to several instances of physical abuse including paddling, verbal abuse, mental abuse, financial exploitation, sleep deprivation, items being thrown and dumped on her, and other forms of hazing intended to humiliate and demean her."[3]

In ruling on the defendants' motion to dismiss, Judge Chang identified two critical issues: duty and proximate cause. Regarding duty, the judge ruled that the law was clear. In *Bogenberger v. Phi Kappa Alpha Corporation*, a 2018 decision, the Illinois Supreme Court had ruled that a college fraternity had a legal duty not to engage in hazing, which is prohibited by Illinois law.[4]

> So, applying *Bogenberg*er to this case, the answer is straightforward as to the individual sorority members. Hazing as a general matter is dangerous and likely to lead to injury. There is very little burden in requiring the sorority members to comply with state anti-hazing laws, not to mention the official policy of AKA National, which prohibit both hazing *and* post-initiation pledging.[5]

Regarding proximate cause, the sorority defendants vigorously maintained that the sorority sisters' acts were not the legal cause of Jordan Hankins's death. Indeed, the defendants argued, the Illinois Supreme Court had articulated a "general rule that the injured party's voluntary act of suicide is an independent intervening act, which is unforeseeable as a matter of law."[6]

But Judge Chang disagreed. The Illinois Supreme Court had not ruled that suicide is *always* unforeseeable as a matter of law, he pointed out. Rather the Illinois court set forth a presumption of unforeseeability—a presumption that could be overcome depending on the facts of a particular case.

> To be sure, that is a tall order: the Illinois Supreme Court acknowledged that suicide may result from a complex combination of psychological, psychiatric, chemical, emotional, and environmental factors. As a result, it is the rare case in which the decedent's suicide would not break the chain of causation and bar a cause of action for wrongful death, even where the plaintiff alleges the defendant inflicted severe emotional distress. But rare is not the same as impossible.[7]

Judge Chang then went on to rule that Hankins had adequately pled a cause of action for intentional infliction of emotional distress, noting that Jordan allegedly told the defendants that their conduct was triggering symptoms of post-traumatic stress disorder, severe depression, and anxiety. Jordan's mother also claimed that Jordan had actually told her sorority sisters that she had a plan to commit suicide.[8]

Judge Chang concluded his opinion by allowing Hankins's cause of action against the local sorority chapter and eight sorority members to go forward. He dismissed the national sorority from the suit along with the national sorority's regional director.[9]

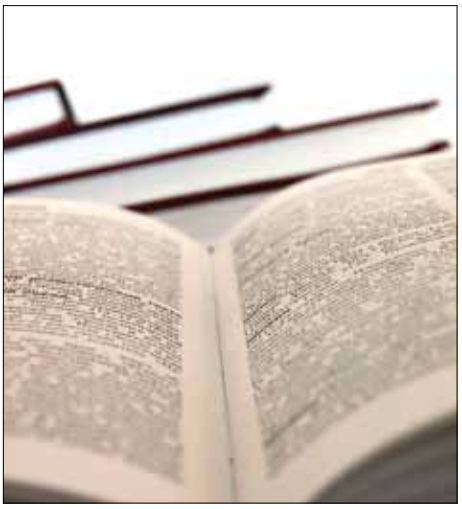
Hankins v. Alpha Kappa Alpha is an important decision because it recognized that sorority members who practice abusive hazing are participating in a dangerous activity. It puts sororities and fraternities and their members on notice that individuals who engage in abusive hazing should foresee serious harm to their victims, even including suicide. Thus, they can be held individually liable for that harm—at least in circumstances where the victim tells the hazers that their actions triggered serious emotional distress and caused her to formulate a plan to commit suicide.

College officials should make their Greek organizations aware of the *Hankins* decision. Fraternity and sorority members need to be regularly reminded that hazing is illegal in most states. Abusive hazers can be charged with a criminal offense,[10] and they can be held personally liable for the harm they cause as well.[11]

Endnotes

1. *Hankins v. Alpha Kappa Alpha Sorority, Inc.*, 447 F. Supp. 3d 672, 379 Educ. L. Rep. 907 (N.D. Ill. 2020).
2. *Id.* at 678.
3. *Id.* (internal punctuation omitted).
4. *Bogenberger v. Phi Kappa Alpha Corp.*, 104 N.E.2d 1110, 357 Educ. L. Rep. 748 (Ill. 2018).
5. *Hankins v. Alpha Kappa Alpha Sorority, Inc.*, 447 F. Supp. 3d at 681.
6. *Id.* at 681, citing *Turcios v. DeBruler Co.*, 32 N.E.3d 1117, 1124 (Ill. 2015) (internal punctuation omitted).
7. *Id.* at 682 (internal punctuation and citations omitted).
8. *Id.* at 683.
9. *Id.* at 692.
10. *See States with Anti-Hazing Laws*, Stophazing.org, https://stophazing.org/issue/states-with-anti-hazing-laws/ (last visited Jan. 26, 2021).
11. *See* Elizabeth Marcuccio & Joseph P. McCollum, *Hazing on College Campuses: Who is Liable?*, 22 NE. J. Legal Studies 26 (2011).

Summaries of ELIP Articles – January 2021



Fair Labor Standards Act in Higher Education

The Fair Labor Standards Act (FLSA) of 1938 is the seminal piece of legislation affecting compensation in the workplace, including institutions of higher learning. The FLSA was an important piece of President Franklin Roosevelt's New Deal, which was a series of federal programs, public work projects, financial reforms, and regulations enacted in the United States throughout the 1930s in response to the economic conditions brought about by the Great Depression.

The FLSA addresses two broad issues germane to higher education: minimum wage and overtime pay. In 2019, the United States Department of Labor issued a final rule decreeing that the new salary threshold of compensation to employees not exempt from the FLSA will be $35,568 per year, up from $23,660, which became effective January 1, 2020.

As of January 1, 2020, employees earning less than $35,568 are considered non-exempt under the FLSA, meaning that they are availed to overtime pay barring certain exemptions, which are germane to higher education institutions, discussed in Section II. This *Education Law into Practice* article focuses on overtime pay and minimum wage provisions and provides guidance for university counsel and administrators on recent developments in law, policy, and best practices in the wake of recent amendments and possible future changes.

See *The Fair Labor Standards Act and Higher Education 2020: An Overview of Recent Developments* by Kerry Brian Melear, Ph.D. and Russell H. Willis, J.D.

Espinoza v. Montana

On June 30, 2020, the Supreme Court delivered a decision of first impression, *Espinoza v. Montana Department of Revenue*. The Montana Supreme Court had invalidated a tax-credit/scholarship program because it allowed state money to flow to religious schools in violation of the state constitution's bar to such use of public funds (no-aid clause). Reversing, the U.S. Supreme Court built on its 2017 decision, *Trinity Lutheran Church v. Comer,* in deciding that application of Montana's no-aid provision to the program abridged the First Amendment's Free Exercise Clause. This article reviews the Montana litigation and the majority, concurring, and dissenting Supreme Court opinions in *Espinoza*. Then it analyzes *Espinoza* in terms of the majority's distinction between religious status and religious use and its position regarding state restrictions on aid to religious schools. The final section explores the implications of this decision for church-state relations and education in the United States.

The author offers several opinions on this litigation: (1) Participation of religious schools in the tax credit/scholarship program in *Espinoza* could have been upheld without announcing a Free Exercise Clause entitlement to such public aid that disregards judicial precedent; (2) The religious pluralism in our nation demands that the government stay out of religious affairs, but the commitment to church-state separation, which has been the strongest in the school context, is no longer the Supreme Court's guiding principle; (3) The Court in *Espinoza* has completed what it started in *Trinity Lutheran* by solidifying a hierarchy between the religion clauses, with free exercise rights dominant; and (4) The Court has negated states' discretion to determine their own level of antiestablishment, and entanglement between church and state will surely follow.

See *Espinoza v. Montana Department of Revenue: The Demise of State No-Aid Clauses* by Martha McCarthy, Ph.D.

School Attendance Issues

School attendance has been an increasingly frequent subject in special education litigation in recent years, and it promises to continue its upward trajectory in the foreseeable future. The contributing factors for the recent ascendance include (1) the attendance accountability in the No Child Left Behind Act, which continued at least in part in the Every Student Succeeds Act, and (2) the simultaneous growth of state laws requiring local district policies to curb student absenteeism. A corresponding major contributing factor for the near future is the likely impact of COVID-19 on K–12 students, including increased dependence on the home environment and accentuated anxiety about resuming in-school attendance.

This brief article provides a representative sample of court decisions illustrating the role of student absenteeism under the Individuals with Disabilities Education Act (IDEA) and Section 504. Although the extent of the linkage between attendance and disability extends more widely, the scope here is specific to the core obligations of identification and free appropriate education (FAPE) under the IDEA and Section 504, particularly during recent years.

See *School Attendance Issues in Special Education Case Law* by Perry A. Zirkel, Ph.D., J.D., LL.M. While responsible for the contents of the article, he acknowledges with appreciation Peter J. Maher, attorney with the Connecticut law firm of Shipman & Goodwin, for his review and suggestions.

School Finance Litigation

This article presents, in tabular form, a canvass of the outcomes of court decisions concerning whether the school finance system in a particular state does or does not pass muster under the respective state constitution. As the table shows, at least 46 states have litigated the constitutionality of their school finance system.

The entries are listed in inverse chronological order in either the "Constitutional" or "Unconstitutional" column, depending on the direction of the judicial outcome. This topographical bird's-eye landscape is both fluid and fascinating, warranting and inviting more in-depth investigation in terms of the course instruction and related research.

See *An Updated Tabular Overview of the School Finance Litigation* by Perry A. Zirkel, Ph.D., J.D., LL.M.

ELIP #66

Higher Ed/Employment

The Fair Labor Standards Act and Higher Education 2020: An Overview of Recent Developments

Kerry Brian Melear, Ph.D., and Russell H. Willis, J.D.

Education Law Into Practice
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Introduction and Brief History of the Fair Labor Standards Act

The Fair Labor Standards Act (FLSA)[1] of 1938 is the seminal piece of legislation affecting compensation in the workplace, including institutions of higher learning.[2] The FLSA was an important piece of President Franklin Roosevelt's New Deal, which was a series of federal programs, public work projects, financial reforms, and regulations enacted in the United States throughout the 1930s in response to the economic conditions brought about by the Great Depression.[3]

The FLSA addresses two broad issues germane to higher education: Minimum Wage and Overtime Pay. In 2019, the United States Department of Labor issued a final rule decreeing that the new salary threshold of compensation to employees not exempt from the FLSA will be $35,568 per year, up from $23,660, which became effective January 1, 2020.

As of January 1, 2020, employees earning less than $35,568 are considered non-exempt under the FLSA, meaning that they are availed to overtime pay barring certain exemptions, which are germane to higher education institutions, discussed in Section II. This *Education Law in Practice* article focuses on Overtime Pay and Minimum Wage provisions and provides guidance for university counsel and administrators on recent developments in law, policy, and best practices in the wake of recent amendments and possible future changes.

Applicability to Employees of Colleges and Universities

The FLSA applies to all enterprises with employees who are engaged in interstate commerce, produce goods for interstate commerce, or handle, sell, or work on goods or materials that have been moved in or produced for interstate commerce. While the FLSA does not apply to businesses that have revenues of less than $500,000, some enterprises are exempt from this revenue threshold including: hospitals, enterprises that care for the sick or mentally ill on premises, K-12 schools, institutions of higher learning, and federal, state, and local governmental agencies.[4]

Exemptions

Some employees are exempt from the minimum wage and overtime pay provisions of the FLSA. In order to be exempt from the provisions of the FLSA, an employee must meet both a salary threshold and a duties test. In 2004, the salary threshold of an annual salary of $23,660 ($455 per week) was added to the duties test in order for an employee to be exempt from the provisions of the FLSA, except for outside sales, teacher, doctor, lawyer, or dentist.[5] On January 1, 2020, the salary threshold was changed to $35,568 ($684 per week).

The main categories for an employee to be exempt from the FLSA applicable to higher education based on duties include the following:

1. Executive

Management of the enterprise or a recognized department or subdivision. Additionally, must direct the work of at least two or more employees and have the ability to hire and fire employees.[6]

2. Administrative

Primary duty must be the performance of office work directly related to the management or general business operation of the employer and have the ability to exercise discretion and independent judgment in matters of significance.[7]

3. Learned Professional

Performing office or non-manual work requiring knowledge of an advanced type in a field of science or learning, customarily acquired by a prolonged course of specialized intellectual instruction, but which also may be acquired by such alternative means as an equivalent combination of intellectual instruction and work experience.[8]

4. Computer

Employed as a computer systems analyst, computer programmer, software engineer, or other similarly skilled worker in the computer field.[9]

5. Outside Sales

Making sales or obtaining orders or contracts for services or future use of facilities for which a consideration will be paid by the client or customer. This includes employees customarily and regularly engaged in work away from the employer's place of business.[10]

Sovereign Immunity

As recent court cases have shown, public universities are successfully asserting sovereign immunity as a defense to violations under the FLSA.[11] Sovereign immunity is defined as the doctrine that precludes litigants from asserting an otherwise meritorious cause of action against a sovereign or a party with sovereign attributes unless the sovereign consents to be sued.[12]

Current Provisions of the Fair Labor Standards Act

There have been many amendments to the FLSA since its original passage in 1938. However, the current provisions of the FLSA relevant to colleges and universities are as follows:

Minimum Wage

The federal minimum wage is $7.25 per hour effective July 24, 2009.[13] Currently, 29 states and Washington, D.C. have a minimum wage above the federal minimum wage, with California being the highest at $10.50 per hour.[14]

Overtime Pay

Covered non-exempt employees must receive overtime pay for hours worked over a 40-hour workweek at a rate of not less than one and one-half times the regular rate of pay. A workweek can be defined by the employer, but it must be fixed, recurring, seven consecutive 24-hour periods over a period of 168 hours. There is no requirement to pay overtime for hours worked on the weekends, holidays, or regular days of rest, unless working on those days pushes an employee over the 40-hour threshold for overtime payment.[15]

Hours Worked

Hours worked ordinarily include all the time during which an employee is required to be on the employer's premises, on duty, or at a prescribed workplace. A compensable hour includes the following: hours worked for the employer's benefit, controlled by the employer, permitted by the employer, and in an activity requested by the employer.[16]

Recordkeeping

Employers must display an official poster outlining the requirements of the FLSA. Employers must also keep employee time and pay records. Most of the information required to be kept is the kind that is generally maintained by employers in ordinary business practice, including items such as hour and day when the workweek begins, total hours worked each week, regular hourly rate of pay, total overtime pay for the workweek, deductions from or addition to wages, total wages of each pay period, and day of payment and pay period covered. The records do not have to be kept in any particular format, nor do time clocks have to be used.[17]

Current Issues Related to the Fair Labor Standards Act and Higher Education

In 2014, President Barack Obama directed the United States Department of Labor to propose a new rule to increase the salary threshold under the FLSA in order for an employee to be exempt. In 2016, the FLSA salary threshold was amended to $47,476 annually ($913 per week).[18] That is, any employee making less than $47,476 would be nonexempt under the FLSA, regardless of duties, and would be eligible for overtime pay. The increased salary threshold would have extended overtime protection to approximately 4.2 million workers across the country.[19] In addition to the salary threshold increasing to $47,476, the new rule would also raise the salary threshold for the highly compensated employee (HCE) to $134,004, from $100,000. The highly compensated employee exemption is one for highly paid workers who do not fully meet one of the duties exemptions.[20] It is now $107,432, and some examples are employees who serve as an athletic coach in some areas on campus, such as football, baseball, and basketball.[21]

The salary threshold change to the FLSA was to become effective December 1, 2016. In order to be exempt under the new rule, an employee must meet both the duties test and the salary test. Simply making more than $47,476 annually does not make an employee exempt. The employee must also meet one of the categories of exemptions under the duties test.[22] For example, administrative assistants who make $50,000 annually are still non-exempt, as they do not meet one of the exemptions under the duties test.

That new salary threshold change would have had a significant impact on higher education, as there are numerous positions on college and university campuses that meet the duties test and make more than $23,660 but less than $47,476. Some examples at most college and universities would include admissions counselors, academic advisors, residence hall managers, and many student affairs professionals. At smaller colleges and universities, this could also include many assistant athletic coaches. Therefore, under the new rule, these employees would be eligible for overtime.

In 2017, a federal district court struck down the Obama administration rule of increasing the salary threshold under the FLSA to $47,476.[23] The court held that the Obama administration rule set the salary threshold excessively high, essentially making an employee's duties, functions, or tasks irrelevant if the employee's salary falls below the new minimum salary level. Even though the decision against the Obama administration rule indicated that the U.S. Department of Labor had the authority to establish a salary threshold, $47,476 was too high.[24] In 2019, the Department of Labor issued a final rule decreeing that the new salary threshold would be $35,568 per year, which became effective January 1, 2020.

Recent Case Law

Recent cases facing colleges and universities have demonstrated that courts focus either on state sovereign immunity or the litigant's status as an employee. While litigants have relied on either of these theories, courts have largely favored institutions of higher learning. The following cases, culled from 2010 to 2020, illustrate that most cases favor colleges and universities, evenly divided by sovereign immunity and employment status arguments.

Sovereign Immunity

The Pennsylvania Higher Education Assistance Agency (PHEAA) services student loans and is organized under Pennsylvania law.[25] The plaintiff, who was employed at its customer service call centers, alleged that PHEAA unlawfully failed to compensate its call center employees for the time spent before their shifts signing into a number of computer applications in preparation for handling calls at the beginning of their shift, in violation of FLSA. PHEAA argued that it was shielded from suit by Eleventh Amendment sovereign immunity, and the district court agreed. However, the United States Court of Appeals for the Third Circuit was unable to determine whether PHEAA established immunity.[26] On remand, the district court concluded that PHEAA did not constitute an arm of the state and denied to grant immunity from suit.

An employee of a public university law school was terminated and argued that she was improperly denied overtime pay for work that she allegedly performed during a 30-minute lunch break that was to be undisturbed and was unpaid.[27] The university argued that it was immune from suit because it was cloaked by sovereign immunity, but the plaintiff asserted that the university waived its immunity. A federal district court

disagreed, concluding that the state of Texas had not waived sovereign immunity through statute incorporating FLSA standards into state employment law.

Employee Status

In *Fernandez v. Zoni Language Centers, Inc.*, the plaintiffs were employed as English-language instructors at the for-profit institution, teaching classes held on the institution's campuses. However, they also worked outside of class on a variety of tasks associated with teaching, such as developing lesson plans, grading papers, and attending professional conferences.[28] They argued that the additional time spent should qualify for overtime under the FLSA. The United States Court of Appeals for the Second Circuit disagreed, affirming the lower court, and concluding that the plaintiffs fell under the FLSA's professional exemption for teachers.

In a case involving cosmetology students at a for-profit institution, the plaintiffs argued that they should be treated as employees for FLSA purposes.[29] A federal district court found two salient reasons that the students should be considered employees. First, the court concluded that the students were treated as employees because they provided cosmetology services to paying customers, often unsupervised. Next, the court concluded that the institution subordinated the plaintiffs' educational needs to its own interest in paying customers. Using these economic factors, the court reasoned that the student-plaintiffs should be considered employees for purposes of FLSA.

In another case involving a cosmetology school student, the plaintiff filed suit against her institution, arguing that she should be eligible for overtime pay for the work that she provided through the course of her training.[30] A federal district court disagreed, however, looking to economic realities under the totality of the circumstances.

The court found that the plaintiff received training in a vocational education setting; the training was for her benefit; she did not displace regular employees, but worked under close supervision; the institution received no immediate benefit from her training; she was not necessarily entitled to employment upon program completion; and that trainees are not entitled to wages during the training period. Thus, the court concluded that because she attended the school as a student and graduated as a student, she was never an employee, and therefore was ineligible for overtime pay under the FLSA.

A former business school writing tutor at a private university filed suit arguing that he should have been eligible for overtime under the FLSA.[31] The university countered that the plaintiff was clearly an exempt employee given his status as a teacher. A federal district court agreed, concluding that because his primary duties of teaching, tutoring, and instructing at an institution of higher education qualified him as an exempt employee under the FLSA.

A public medical school employee whose position was terminated filed suit seeking overtime pay during the period of her employment under the FLSA.[32] A federal district court readily concluded that the duties of her position in the trauma area squared with the administrative professional exemption under the FLSA, and dismissed her claim.

Former athletes sued the University of Pennsylvania and the National Collegiate Athletic Association (NCAA) arguing that student-athletes are employees under the FLSA, and that the failure of NCAA institutions to pay athletes a minimum wage violated the FLSA.[33] The United States Court of Appeals for the Seventh Circuit disagreed, holding that the plaintiffs could not confirm that their sporting activities qualified as work under the FLSA, and, in fact, were completely voluntary. In forceful language, the Seventh Circuit held that student-athletes are not employees and therefore not entitled to minimum wage under the FLSA.

Finally, a group of "field representatives" who served as recruiters for a for-profit institution filed suit arguing that they should be eligible for overtime under the FLSA.[34] However, a federal district court relied upon the FLSA's "outside salesperson" exemption, concluding that each plaintiff's primary duties included "sales" in the sense of recruiting students who would pay tuition and were hired as salespeople, received sales training, were responsible for soliciting new business and worked under minimal supervision, and that their compensation and evaluations were dependent upon their sales activity.

Implications for Practice

The Fair Labor Standards Act is an important and long-standing piece of federal legislation that provides guidance toward numerous issues, including overtime compensation. In 2019, the United States Department of Labor issued a final rule decreeing that the new salary threshold of compensation to employees not exempt from the FLSA will be $35,568 per year, up from $23,660, which became effective January 1, 2020. This change will certainly resonate with institutions of higher learning.

A review of recent higher education cases reveals that plaintiffs do not often prevail in claims against colleges and universities, however. In some circumstances, sovereign immunity prevails;[35] in others, courts have been willing to construe plaintiffs' employment as exempt from the FLSA through an economic analysis of the employment relationship.[36] Recent cases indicate that colleges and universities can be mindful of FLSA provisions with a certain degree of discretion, but should note that employee claims may be on the uptick in future years as federal administrations may shift and adjust the salary threshold for exemption.

Endnotes

1. 29 U.S.C. §201.
2. Prior to the passage of the FLSA, there was no legal requirement to pay workers any type of minimum wage, no prohibition against the number of hours a worker could work in a day or week, and very little protection for child laborers. In the early 20th century, courts often invalidated state and federal legislation that restricted business, including laws on minimum wage, child labor, and health and safety of workers. This was the result of the Supreme Court's decision in *Lochner v. New York*, 29 U.S.C. § 203 (1905), in which the Court concluded that employees possess substantive due process rights supporting contractual arguments. This era of refusal by the courts to uphold minimum wage laws, as well as any other laws restricting the rights of business, was known as the *Lochner* era.
3. Johnathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for Minimum Wage U.S. Department of Labor*, https://www.dol.gov/general/aboutdol/history/flsa1938.
4. Wages and Hours Worked: Minimum Wage and Overtime Pay, Department of Labor, https://www.dol.gov/compliance/guide/minwage.htm. The FLSA is administered by the Wage and Hour Division of the Department of Labor. Wage and Hour Division investigators are authorized to conduct investigations in which they gather data on wages, hours and other employment conditions to determine if an employer is in compliance of the provisions of the FLSA. If violations of the FLSA are proven, then the Department of Labor or an employee can recover back wages and an equal amount in liquidated damages where minimum wage and overtime violations exist. There is a statute of limitations of two years for the recovery of back wages and liquidated damages and a statute of limitations of three years in cases involving willful violations. Remedies can be recovered through administrative procedures, litigation, and/or criminal violations.

[5] Fact Sheet #17S: Higher Education Institutions and Overtime Pay Under the Fair Labor Standards Act (FLSA), United States Department of Labor, https://www/dol.gov/whd/regs/compliance/whdcomp.htm.

[6] Fact Sheet #17A: Exemption from Executive, Administrative, Professional, Computer, and Outside Sales Employee Under the Fair Labor Standards Act (FLSA), United States Department of Labor, https://www.dol.gov/whd/overtime/fs17a_overview.htm.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *See supra* notes 23-25 and accompanying text.

[12] *Black's Law Dictionary*, 1252 (5 ed. 1989).

[13] Joseph Martocchio, *Strategic Compensation* 28-29 (7 ed. 2013).

[14] Janna Herron, *What States Pay Minimum Wage Higher than Federal Government's $7.25 an Hour*, USA Today, 2018, https://www.usatoday.com/story/money/2018/10/02/minimum-wage-states-pay-higher-hourly-rate-than-federal/1497425002/. Five states have not adopted a minimum wage: Alabama, Louisiana, Mississippi, South Carolina and Tennessee.

[15] Wage and Hour Division. *Compliance Assistance-Wages and the Fair Labor Standards Act (FLSA)*, Department of Labor, https://www.dol.gov/whd/flsa/.

[16] *Id.*

[17] *Id.*

[18] Archer, *The Wait is Over-Department of Labor Issues Final Rule That Significantly Expands Employees Eligible for Overtime*, (2016), https://www.archerlaw.com/the-wait-is-over-department-of-labor-issues-final-rule-that-significantly-expands-employees-eligible-for-overtime/.

[19] *See*, for an interesting overview, Andrew Peeling, *Map Shows How FLSA Overtime Rule Changes Affect Each State,* Society for Human Resources Management, 2016, https://www.shrm.org/.

[20] Stephen Miller, *It Takes Two: Exempt Employees Must Meet Both Salary and Duties Tests,* 2016, Society for Human Resources Management, https://www.shrm.org/resourcesandtools/hr-topics/compensation/pages/overtime-salary-duties-tests.aspx.

[21] https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/fs17h_highly_comp.pdf.

[22] *Id.*

[23] *Nevada v. U.S. Dep't of Labor*, 321 F. Supp. 3d 709 (E.D. Tex. 2018).

[24] Paul Davidson, *Judge Strikes Down Overtime Pay Hike for 4.2 Million Workers*, USA Today, 2017. *See also* Jena McGregor, *House Republicans Just Voted to Change Overtime Rule for Workers*, Washington Post, 2017. In 2020, the Department of Labor issued rules regarding flexible worktime that are not germane to most colleges and universities. *See* 29 CFR Part 778.

[25] *Lang v. Pennsylvania Higher Education Assistance Agency*, 201 F.Supp.3d 613 (M.D. Pa. 2016).

[26] *Anthony Lang, Sr. v. PHEAA*, 610 Fed. Appx. 158 (3d Cir. 2015).

[27] *Garcia v. The University of Texas Southwestern Medical Center at Dallas*, 2013 WL 1759421 (N.D. Tex. 2013.

[28] 858 F.3d 45 (2d Cir. 2017).

[29] *Guy v. Casal Institute of Nevada, LLC*, 2016 WL 4479537 (N.D. Nev. 2016).

[30] *Ortega v. Denver Institute, LLC,* 2015 U.S. Dist. LEXIS 101427 (D. Colo 2015).

[31] *England v. Administrators of the Tulane Educational Fund,* 2017 WL 3537126 (E.D. La. 2017).

[32] *Brown v. Indiana University Health Ball Memorial Hospital* , 2015 WL 6142269 (S.D. Ind. 2015). *See also Edelamann v. Keuka College*, No. 16-CV-6293-FPG (W.Dist. N.Y. 2019) (a federal district court concluded that a temporary employee's claim may not meet the technology employee exemption and did not meet the administrative exemption under the FLSA because the employee clearly played a role in managing the online environment at the college.).

[33] *Berger v. NCAA* , 843 F.3d 285 (7th Cir. 2016).

[34] *Burke v. Alta Colleges,* 2015 WL 1399675 (D. Colo. 2015).

[35] *See infra* notes 21-23.

[36] *See infra* notes 24-31.

ELIP #67

First Amendment/Religion

Espinoza v. Montana Department of Revenue: The Demise of State No-Aid Clauses

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On June 30, 2020, the Supreme Court delivered a decision of first impression, *Espinoza v. Montana Department of Revenue*, involving a Montana initiative to increase private school choice.[1] As some commentators predicted,[2] the Supreme Court built on its 2017 decision, *Trinity Lutheran Church v. Comer,*[3] in holding that the First Amendment's Free Exercise Clause precluded using the Montana Constitution's no-aid provision (barring public aid to religious schools) to block implementation of the tax credit/scholarship program. This article reviews the Montana litigation and the majority, concurring, and dissenting Supreme Court opinions in *Espinoza*. Then it analyzes the decision in terms of the religious status/use distinction and state restrictions on aid to religious schools. The final section explores significant implications of this decision for church-state relations and public education in the United States.

Procedural History[4]

The program that led to the recent Supreme Court decision, adopted in 2015 by the Montana legislature, provided taxpayers a dollar-for-dollar tax credit up to $150.00 for donations to an Student Scholarship Organization (SSO), which funds scholarships to offset part of the tuition for students to attend qualifying private schools.[5] Only one SSO, Big Sky Scholarships, participated in the program.[6] Almost all the private schools registered for the program's scholarship funds were religiously affiliated.

The Montana Department of Revenue enacted a rule excluding religious schools from participation to comply with the Montana Constitution's no-aid clause. The no-aid provision states:

> The legislature, counties, cities, towns, school districts, and public corporations shall not make any direct or indirect appropriation or payment from any public fund or monies or any grant of lands or other property for a sectarian purpose or to aid any church, school, academy, seminary, college, university or other literary or scientific institution, controlled in whole or in part by any church, sect, or denomination.[7]

Parents of children attending a faith-based private school brought suit, asserting that the rule abridged the free exercise clauses of the Montana and U.S. Constitutions. The state district court ruled that the tax credit program was constitutional without the department's rule and granted summary judgment to the plaintiffs.[8] Reversing, the Montana Supreme Court concluded that the program violates the state's no-aid pro-

vision,[9] which is "more stringent" than the federal Establishment Clause.[10] The court relied on the Supreme Court's rationale in *Locke v. Davey* that "a state's constitutional prohibitions against aid to sectarian schools may be broader and stronger than the First Amendment's prohibition against the establishment of religion."[11] The court reasoned that the program itself was unconstitutional by providing "the precise type of indirect payment" to schools controlled by religious institutions in violation of the Montana Constitution.[12]

The Montana Supreme Court declared that although "there may be a case" where prohibiting the indirect payment of state aid to religious schools "would violate the Free Exercise Clause, this is not one of those cases."[13] Thus, the court rejected the Free Exercise Clause rationale for overriding the state's antiestablishment provision. Given that the program abridged the state constitution, the court found that the Department of Revenue exceeded its rulemaking authority in enacting the rule that was contrary to legislative intent.[14]

The Montana high court decision included two concurring and two dissenting opinions. The concurrences agreed that the program violated the state constitution and also argued that it violated the First Amendment's religion clauses because it allowed taxpayers to direct part of their taxes to support private school tuition by diverting the money before it reaches the public coffers, which reduces the money in the public treasury.[15] They rejected any discrimination under the Free Exercise Clause: "The right to freely exercise religious beliefs without governmental interference or impediment cannot be reasonably stretched to require the state and its taxpayers to help pay for the exercise of that right through the diversion of otherwise earmarked and accrued government tax revenue."[16]

The two dissenting justices argued that the Department's rule was unnecessary since the tax credit/scholarship program was constitutional without it.[17] They contended that the donated money is never technically in the state treasury so it could not abridge the no-aid clause.[18] They made other arguments for upholding the program, including rights under the Free Exercise Clause[19] and the assertion that parents who are relieved of part of their tuition obligation are the beneficiaries of the tax benefit and not the school or the taxpayer.[20]

Supreme Court Majority Opinion

In a precedent-setting decision, the U.S. Supreme Court majority in *Espinoza* held that applying the Montana Constitution's no-aid provision to the tax credit/scholarship program discriminated against religious schools and their patrons in violation of the First Amendment's Free Exercise Clause.[21] The Justices did not speak with a single voice as there were three concurrences and three dissents in addition to the majority opinion, which was written by Justice Roberts and signed by five Justices.

The majority relied heavily on its 2017 ruling in *Trinity Lutheran*, where the Court for the first time ruled that religious institutions have a Free Exercise Clause right to participate in a generally available government program.[22] In *Trinity Lutheran*, the Court held that the state's discriminatory policy of not allowing a church to apply for a government grant to resurface its daycare program's playground was "odious to our Constitution."[23]

The majority recognized that there was no claim that the tax credit/scholarship program violated the Establishment Clause, noting that various aid programs allowing funds to flow to religious institutions have survived Establishment Clause challenges.[24] Thus, the majority focused on the Free Exercise Clause's protection of "'religious observers against unequal treatment'" and against "'laws that impose special disabilities on the basis of religious status.'"[25] The majority applied strict judicial scrutiny in assessing the tax credit/scholarship program under Montana's no-aid provision, emphasizing that if "otherwise eligible recipients are disqualified from a public benefit" based on religious status, the Free Exercise Clause is abridged.[26] The majority acknowledged that to satisfy strict scrutiny, the government activity "must advance 'interests of the highest order' and must be narrowly tailored in pursuit of those interests."[27] It declared that Montana's desire to create greater separation of church and state than required by the First Amendment was not a compelling interest that justifies an infringement of the Free Exercise Clause.[28]

The *Espinoza* majority removed any doubt left by *Trinity Lutheran* that the Free Exercise Clause trumps no-aid clauses found in most state constitutions. Even though Montana's entire tax credit/scholarship program was eliminated for secular and sectarian schools, the Court majority still found religious discrimination and reasoned that the Montana Supreme Court should have initially disregarded the state's no-aid provision and decided this case in conformance with the Free Exercise Clause.[29] The majority equated most no-aid provisions in state constitutions with the failed Blaine Amendment to the U.S. Constitution that allegedly "'arose at a time of pervasive hostility to the Catholic Church and to Catholics in general.'"[30]

The majority did not accept the Court's conclusion in *Locke v. Davey* that states can adopt more stringent anti-establishment provisions than included in the First Amendment. The majority made an effort, as it did in *Trinity Lutheran*, to distinguish *Locke* where the plaintiff was denied a scholarship to study for the ministry. It concluded that the denial in *Locke* was upheld because it was based on what the student proposed to do, and not on who he was.[31] The *Espinoza* majority reasoned that Montana's no-aid provision bars religious schools from participating in the tax credit/scholarship program simply because of what they are. It rejected the Department's contention that *Trinity Lutheran* involved a distinction based on religious status whereas *Espinoza* dealt with religious use of the funds for sectarian instruction. The majority further declared that in *Locke* the decision was based on a "'historic and substantial' state interest in not funding the training of clergy," whereas there is no comparable tradition supporting the disqualification of religious schools from government aid.[32]

The majority also rejected the Montana Department of Revenue's contention that the no-aid clause protects public education by ensuring that government support is not diverted to private education, reasoning that the provision burdens only religious and not other private schools. Toward the end of its opinion, the majority recognized that states do not have to provide any funds for private education, but if they do, they cannot discriminate against religious schools.[33]

Concurring Opinions

Justice Thomas, joined by Justice Gorsuch, wrote separately to emphasize that the Court's interpretation of the Establishment Clause continues "to hamper free exercise rights."[34] He argued that the establishment of religion should be understood only as protecting against "'coercion of religious

orthodoxy and . . . financial support by force of law and threat of penalty.'"[35] He claimed that the proper understanding of the Establishment Clause is that it "does not prohibit states from favoring religion."[36] He also faulted the Court's historical incorporation of First Amendment guarantees into the Fourteenth Amendment, making them applicable to the states. He found *Locke* to be wrongly decided and asserted that the government does not have a compelling interest in avoiding an Establishment Clause violation, which could justify curtailing free exercise rights. He also reiterated his disdain for the stringent *Lemon* test to assess Establishment Clause claims and characterized the Court's prior emphasis on church-state separation as bordering on hostility toward religion.[37]

Justice Alito also joined the majority in full but discussed at length his concern about the origin of Montana's no-aid provision, which he contended was grounded in the failed Blaine Amendment that represented bigotry toward Catholics.[38] He posited that Montana's no-aid provision similarly reflected such bias.

Justice Gorsuch wrote a separate concurrence, claiming that if it were not for the Montana Constitution's "impermissible discrimination" in its no-aid clause, the tax credit program would "be still operating for the benefit of Ms. Espinoza and everyone else."[39] He faulted the status/use distinction, finding it even more troublesome to apply in *Espinoza* than it was in *Trinity Lutheran*.[40] He said it seems logical that the aid in question was denied for being used in religious education. But he opined that the First amendment does not care about this distinction as "the Constitution forbids laws that prohibit the free exercise of religion."[41] He cited cases barring religious discrimination based on actions, reasoning that the right to be religious and to act are both protected by the Free Exercise Clause.[42]

Dissenting Opinions

Justice Ginsburg, joined by Justice Kagan, argued that the Montana program did not discriminate based on religion, so she would have rejected the petitioners' free exercise claim.[43] Since the entire tax credit/scholarship program was struck down, she found no differential treatment based on religion or pressure for individuals to abandon their religious faith or practice. In short, sectarian and secular private schools were treated the same in the invalidated program; there was no benefit denied only to religious schools.[44] She reiterated that the Free Exercise Clause protects individuals from government interference but does not entitle them to government benefits.[45] She also contended that the Court should not have reversed the Montana Supreme Court because the petitioners disavowed a facial challenge to the program, which the majority wrongly addressed.[46]

Justice Breyer, joined by Justice Kagan in part, argued that the majority's conclusion risked entanglement and conflict between church and state, which the religion clauses were designed to prevent.[47] He called for flexibility in applying the religion clauses, noting the Court had previously recognized that some state action to aid religious entities might be allowed under the Establishment Clause but not be required under the Free Exercise Clause.[48] He found the scholarship program in *Locke* similar to the Montana tax credit/scholarship program, because both dealt with how the funds would be used, so he had difficulty distinguishing the contrary holdings.[49]

Justice Breyer further reviewed the bitter lessons of religious conflict that inspired the Establishment Clause and state bans on compelled support of religion. He asserted that "these 'historic and substantial' concerns" about state involvement with religion "have consistently guided the Court's application of the Religion Clauses."[50] He claimed that especially in the tax credit/scholarship program, where only a handful of religious denominations are benefited, there might be political conflict based on religion.[51] He opined that Montana's no-aid clause does not punish religious exercise and argued against the majority's use of strict scrutiny in favor of more flexible judicial reasoning, because church-state issues require interpretations "of a delicate sort."[52]

Justice Sotomayor, dissenting separately, agreed with other dissents that the Court should not have accepted the case; the majority opinion implicated federalism and the separation of powers by finding religious discrimination in allocating a tax benefit that has been eliminated.[53] She underscored that Montana was not required to maintain a tax credit/scholarship program, so removing it did not abridge constitutional rights.[54] She further faulted the majority for finding the state's no-aid clause facially invalid under the Free Exercise Clause even though the plaintiffs "disavowed bringing such a claim."[55] In short, the majority transformed an "as applied" challenge into a facial challenge. Calling the majority opinion "perverse," she declared that it slights precedent by requiring a state to subsidize religious schools in a program enacted for secular private schools, even though a religious distinction is required by the Establishment Clause.[56] She emphasized that the religion clauses demand treating religious entities differently.

Analysis

I agree with the *Espinoza* dissenting Justices that there was no discrimination based on religion since the entire tax credit/scholarship program for all private schools was invalidated.[57] I further contend that the Court could have upheld the tax credit program in its original form that included religious schools by simply ruling that there was not a conflict with the state's no-aid provision. The Court could have applied one of the rationales it has used to uphold various types of government support as well as voucher systems under which some public funds go into religious school coffers.[58] The *Espinoza* majority even recognized that more than half of the states with no-aid provisions allow some type of public aid to religious schools.[59] Indeed, both participation in the grant program in *Trinity Lutheran* and in the tax credit/scholarship program in *Espinoza* could have been upheld without establishing a sweeping Free Exercise Clause entitlement to such government aid that disregards judicial precedent and negates the government's capacity to stay out of sectarian matters.

Instead of basing its decision on the narrow grounds above, the Court's reliance

on the Free Exercise Clause in *Espinoza* has significant implications for constitutional doctrine, federalism, and education in our nation. The majority broadened *Trinity Lutheran*'s prohibition on religious discrimination and further limited what would be considered a compelling government interest to justify such differential treatment based on religion.[60] This section initially analyzes the majority's opinion in connection with the religious status/use distinction and state constitutional restrictions on aid to religious entities. Then the next section addresses the impact of the *Espinoza* decision on church-state relations and education, particularly public education, in our nation.

Distinction Between Religious Status and Religious Use

The *Espinoza* majority took great pains to distinguish and narrow, rather than overturn, its 2004 holding in *Locke v. Davey* by focusing on the difference between religious status and religious use. But this distinction, which was difficult for the majority to argue in *Trinity Lutheran*,[61] simply does not hold up in *Espinoza*. Religious schools use tuition money to advance their faith throughout the curriculum, and they are considered sectarian because of *what they do*. The *Espinoza* tax credit/scholarship program definitely focuses on *use* of the money as did use of the state scholarship to study for the ministry in *Locke*.[62]

Even Justice Gorsuch, who does not favor church-state separation, found the use/status distinction to be unworkable. He declared in his *Espinoza* concurrence that it is "equally, and maybe more, natural to say that the state's discrimination focused on what religious parents and schools *do*—teach religion."[63] If the majority is hanging its hat on the religious status/use distinction for its decision in *Espinoza*, then the Montana Supreme Court ruling should have been affirmed.

The majority hinted that perhaps if sectarian instruction in the religious schools had been targeted, this might have been considered religious use, which could be subject to restrictions.[64] However, it avoided this issue by finding discrimination clearly based on religious status in *Espinoza*.[65] Unlike Justice Gorsuch, who argues that conditioning public aid on either use of the funds or religious status would be discriminatory under the Free Exercise Clause,[66] I contend that distinctions based on either one would respect the state's authority to reserve public money for public use.

State Restrictions on Aid to Religious Schools—Baby Blaine Amendments?[67]

Forty-eight states currently place constitutional limits on government funding of religious activity.[68] Almost three fifths (29) of the states have prohibitions on compelling individuals to attend or support places of worship, and twenty-seven states restrict use of public funds to public purposes or require the funds to remain under public control. Thirty-eight state constitutions contain no-aid provisions that prohibit public monies to be spent in religious institutions or for religious education.[69] Montana's no-aid clause at issue in *Espinoza* and similar clauses across states have become impotent as a result of the Court's decision, and the other constitutional provisions limiting sectarian use of public funds are likely in jeopardy as well.

The Supreme Court majority in *Espinoza* eliminated any ambiguity left by *Trinity Lutheran*[70] in terms of its sentiment that state no-aid provisions abridge the Free Exercise Clause. The majority reiterated that a state's interest "'in achieving greater separation of church and state than is already ensured under the Establishment Clause. . . is limited by the free Exercise Clause.'"[71] The Court has set a very "disturbing trend that devalues a core aspect of our religious liberty tradition – the ban on government aid to religion."[72]

The *Espinoza* majority's reference to state constitutional no-aid provisions as Blaine Amendments is not correct. Representative James Blaine from Maine proposed a constitutional amendment in 1875 that would in part have barred use of public funds in religious schools.[73] Even accepting that the failed Blaine amendment reflected anti-Catholic bias, fifteen state no-aid provisions were enacted prior to 1875, and subsequent no-aid clauses were modeled after the earlier ones and not the ill-fated Blaine Amendment.[74] Several courts have interpreted such no-aid clauses adopted *after* 1875 as protecting religious liberty and reserving government funds for public purposes.[75] Moreover, the Supreme Court in *Locke* found no connection between the Blaine Amendment and the state of Washington's no-aid provision, asserting that it did not find in its history or text "anything that suggests animus toward religion."[76] It also is difficult to argue that Missouri's no-aid provision at issue in *Trinity Lutheran* reflects religious bias as it contains an explicit ban on discrimination against religious institutions.[77] And ministers of all faiths supported Montana's revision of its no-aid provision in 1972, which was intended to reserve government funds for public education.[78] So it is quite a leap to conclude that Montana's no-aid provision and similar clauses in other states are all intended to discriminate against religion.

The Tenth Amendment principle that the states or the people retain any powers not specifically delegated to the U.S. government or prohibited by the Constitution means that the federal government defers to states in deciding how to handle their affairs if federal constitutional rights are not implicated.[79] Before 2017, states assumed that they could adopt stricter provisions in requiring church-state separation than demanded by the Supreme Court's interpretations of the Establishment Clause and could decide *not* to allow state funds to flow to religious institutions. This was affirmed in *Locke*,[80] and many lower courts have voiced similar sentiments.[81] For example, the First Circuit declared in 2004 "that state entities . . . may act upon their legitimate concerns about excessive entanglement with religion, even though the Establishment Clause may not require them to do so."[82] The majority and concurring *Espinoza* opinions "have now tainted all no-aid provisions, and the more general principle against government funding of religion, with the aura of discrimination."[83] Equating these no-aid provisions with religious discrimination simply is not accurate.

Implications

Implications of *Espinoza*, coupled with *Trinity Lutheran*, are profound indeed. This section explores the impact of the change in constitutional doctrine for church-state relations and education in our nation.

Church-State Relations

The Supreme Court has transformed the First Amendment by totally altering the relationship between the Establishment and Free Exercise Clauses. No longer is there a wall of separation between church and state, and it appears that the history of our nation in terms of government relations with religion has been forgotten or dismissed.

After all, the U.S. was the first nation to adopt an Establishment Clause in its Constitution.[84] The First Amendment built on James Madison's *Memorial and Remonstrance Against Religious Assessments*, where he argued against any requirement for citizens to support religion or religious institutions.[85] Thomas Jefferson was the architect for Virginia's Statute for Religious Freedom, which also reflected a strong separationist position by stating that only if the government leaves religion alone can religion be preserved.[86] These documents indicated that compelling state sponsorship of religion signaled persecution of nonsponsored faiths. Prohibition of government establishment of religion has been an important principle to protect religious liberty throughout our nation's history, and courts until recently have held that the state cannot tax citizens to support religious institutions.[87]

In the first major Establishment Clause case, *Everson v. Board of Education,* the Supreme Court took a strong stand in defending church-state separation—a sentiment that prevailed for decades:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. . . No tax in any amount, large or small, can be levied to support any religious activities or institutions . . . to teach or practice religion. . . . In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."[88]

In recent years, however, the Supreme Court has more leniently interpreted the Establishment Clause as allowing various types of public aid to religious schools, using the "child benefit" rationale[89] or concluding that the indirect aid to sectarian schools was based on parental decisions or was confined to secular purposes in the religious institutions.[90] But in none of these cases did the Court hold that religious schools were entitled under the Free Exercise Clause to such government aid available to secular schools.[91] Although Justice Thomas asserted in his *Espinoza* concurrence that the Free Exercise Clause has rested on "the lowest rung of the Court's ladder of rights,"[92] that clearly is not true today. The Free Exercise Clause trumps states' rights to preserve their funds for public rather than religious purposes and raises the Free Exercise Clause above the Establishment Clause.

The innate tension between the religion clauses caused the Supreme Court to note in 1970 that if the Establishment and Free Exercise Clauses are carried to a logical extreme, they clash with each other.[93] According to the Supreme Court in *Locke*, the "play in the joints" between the clauses means that some activities may be permitted under the Establishment Clause, which are not required by the Free Exercise Clause.[94] This tension has never before meant that the Free Exercise Clause is dominant or that the state's interest in guarding against religious establishment means that the government is discriminating against religion.

Justice Sotomayor, dissenting in *Espinoza*, reiterated that "'the Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.'"[95] Judge Sandefur, concurring in the Montana Supreme Court's *Espinoza* decision, similarly declared that while the Establishment Clause provides an explicit prohibition on government action, "the Free Exercise Clause is nothing more than a protective shield against government *interference* in the free exercise of a citizen's chosen religion. . . . The Free Exercise Clause is not, nor did the Framers intend it to be, a sword or affirmative right to receive government aid."[96] The current Supreme Court position negates this longstanding principle by considerably weakening the Establishment Clause, and the Free Exercise Clause has indeed become a sword.

The Court majority appears to have disregarded that the Establishment Clause *requires* religious institutions to be treated differently to respect this constitutional provision and preserve religious liberty. A majority of the Justices now seem to consider such differential treatment *discriminatory*, at least in terms of eligibility for government benefits, so the distinctions demanded by the Establishment Clause have been nullified and its religious "freedom-enhancing aspect" has been ignored.[97] If those drafting the First Amendment had intended for the government to treat religious and secular entities similarly, then they would not have included the Establishment Clause. One is tempted to interpret the *Espinoza* and *Trinity Lutheran* decisions as adopting the position that differential treatment on the basis of religion always constitutes discrimination.[98]

However, it appears that this is not the case if the special treatment advantages religion. In two decisions rendered only a week after *Espinoza*, the Supreme Court required differential treatment of religion under the banner of protecting religious liberty. In *Our Lady of Guadalupe School v. Morrissey,* the Court expansively interpreted the ministerial exception in concluding that religious schools must be treated differently from secular schools in being exempt from federal civil rights laws in dismissing their employees.[99] On the same day, in *Little Sisters of the Poor v. Pennsylvania*, the Court supported differential treatment by holding that employers can refuse to support contraception coverage in employee health plans for religious or moral reasons.[100] So different treatment based on religion was required in these cases but not in *Espinoza* and *Trinity Lutheran* involving the receipt of government benefits.

Impact on Education

The *Espinoza* decision will encourage states to enact provisions that allow public funds to go to private, primarily religious, schools and will make parents more likely to enroll their children in private education. This has major implications for the nature and structure of education in the United States.

Since the 1920s, it has been accepted in our nation that parents have a right to select private education for their children,[101] but this has *not* meant that the government must foot the bill. The Supreme Court declared in 1973 that private schools are not entitled to a portion of public funds allocated for educational textbooks in secular subjects.[102] State courts until recently had similarly upheld restrictions on loaning textbooks to sectarian schools.[103] Most recently, the New Mexico Supreme Court ruled in 2015 that the state constitution's no-aid clause precluded loaning textbooks to students attending religious institutions. Yet, this court changed its mind and rejected the challenge to this practice after its earlier decision was sent back for reconsideration in light of *Trinity Lutheran*.[104] Other states will likely drop such restrictions on public aid to religious schools, given the *Espinoza* decision.

As noted, the *Espinoza* majority waited until very late in its opinion to recognize that the state does not have to provide funds for *any* private schools;[105] such money can be reserved for public education. But if a state wants to increase parental choice through a voucher or tax benefit program, it cannot exclude religious schools.

Already litigation is in progress in Maine, strongly supported by the Justice Department, challenging the exclusion of religious schools from the state's tuition reimbursement program under which students in districts without high schools are provided funds up to a cap to pay high school tuition in neighboring public school districts or in secular private schools.[106] Even though this program has been upheld by both state and federal courts,[107] plaintiffs now are asserting a free exercise right for religious schools to participate in the program. The outcome of this decision will affect tuition reimbursement programs in other New England states as well.

Perhaps constitutional provisions reserving public funds for public purposes or state education clauses could still be used to challenge private school choice initiatives. All states have clauses that require the state legislature to make provisions for a uniform, thorough and efficient, or adequate system of free public education. However, most challenges to school choice strategies have relied on state constitutions' no-aid clauses at least in part.[108] State high court decisions to date have been mixed on voucher programs,[109] but prior to the Montana Supreme Court decision,[110] no tax credit/scholarship program had been invalidated by a state's highest court. The non-religious grounds do not seem very promising to challenge such initiatives, even though the Florida Supreme Court concluded that a voucher program abridged the state constitution's education clause in 2006,[111] and a few other state courts have used nonreligious grounds to strike down voucher programs.[112]

Espinoza's implications for public education extend far beyond taking government funds away from public schools. Might other free exercise clause entitlements be asserted in the public school context under the umbrella of alleged religious discrimination? For example, could staff members claim a free exercise right to express their religious views in public schools? Teachers and coaches have not been successful in this regard previously, but they did not have an elevated Free Exercise Clause in their arsenal.[113] Students might also assert a free exercise right to voice their religious views, even if such expression conflicts with the school district's antibullying policy.

As mentioned, *Espinoza* provides an incentive for states to expand private school choice options that are funded in part with public money or funds that would be in the public coffers if tax credits were not taken. And if our education system becomes primarily privatized as the Trump administration advocates,[114] education in our nation will change dramatically. Perhaps more importantly, the values guiding education will be quite different than they were in the common school movement of the 1800s that focused on the common good and general welfare. Privatization strategies focus on individual advancement, and families are likely to select schools with students who look and think like them, ensuring that they interact with a homogeneous group. The students in public schools may disproportionately be those with special needs that private schools are not obligated to accept. Randi Weingarten, President of the American Federation of Teachers, called the *Espinoza* decision "a seismic shock that threatens both public education and religious liberty."[115]

With the current heightened awareness of and commitment to increasing inclusion in our schools and advancing social justice goals, the privatization movement seems counterproductive by nurturing segregation along several dimensions. Instead of reducing inequities in education, it may be taking us in the opposite direction. Studies have reported that religious schools receiving vouchers do not protect students against discrimination based on religion, race, national origin/ethnicity, disability, sex, and sexual orientation.[116] A Century Foundation Study reported in 2017 that voucher schools do not target disadvantaged students and are exacerbating socioeconomic and racial segregation.[117] In addition, the dramatic impact of COVID-19 on state and school district budgets may further reduce the money available for financially strapped public schools that will continue to serve students with the greatest needs.

Conclusion

Many of those involved in drafting the First Amendment knew of the religious persecution and discrimination resulting from a comingling of church and state. However, one need not go back in history to find injuries associated with the merger of church and state; the world today has many examples of major conflicts between countries based on religion. The U.S. was attempting to avoid such struggles by including an Establishment Clause in the First Amendment to keep church and state separate. Indeed, the religious pluralism in our nation demands that the government stay out of religious affairs. But the national commitment to church-state separation, which has been the strongest in the school context, is no longer the Supreme Court's guiding principle. As Justice Sotomayor has declared, the separation of church and state has become just a slogan and "not a constitutional commitment."[118]

The Supreme Court in *Espinoza* has completed what it started in *Trinity Lutheran* by solidifying a hierarchy between the religion clauses, with free exercise rights dominant. The Court has negated states' discretion to determine their own level of anti-establishment, and entanglement between church and state will surely follow. This departure from judicial and historical precedent is one our nation will surely regret.

Endnotes

1 435 P.3d 603, 363 Educ. L. Rep. 850 (Mont. 2018), *rev'd*, 140 S. Ct. 2246 (2020).

2 *See, e.g.,* Brief of the Becket Fund for Religious Liberty, et al. as Amicus Curiae Supporting Petitioners in *Espinoza v. Mont. Dep't of Rev.*, Sept. 2019; Rick Garnett, *Symposium: Principles or Improvisations? Why (and How) the Justices Should Reject Anti-religious Discrimination*, SCOTUSblog, Sept. 19, 2019, https://www.scotusblog.com/2019/09/symposium-principles-or-improvisations-why-and-how-the-justices-should-reject-anti-religious-discrimination/; Martha McCarthy, *Espinoza v. Montana Department of Revenue: Tuition Tax Credits on Trial*, 365 Educ. L. Rep. 20-37 (2019).

3 137 S. Ct. 2012 (2017).

4 Discussion of the state-level litigation draws in part on a more extensive analysis of the Montana Supreme Court decision in McCarthy, *supra* note 2.

5 Mont. Code Ann. § 1-30-3111 (2015); § 12-30-3101.

6 *Id.* at § 15-30-3104(1). The scholarship recipient selects a private school (qualifying education provider) that satisfies state education, health, and safety standards, and the scholarship money is paid directly to the receiving private schools. *Id.* at §15-30-3102(7); §15-30-3104(1).

7 Mont. Const. art. X, § 6(1).

8 No. DV-15-1152C (11th Judicial Dist., Cty. of Flathead. 2017) (finding the Department's rule ultra vires as it contradicted the will of the legislature and was not constitutionally required).

9 435 P.3d at 609-10 (citing Mont. Const. art. X, § 6 (1)).

10 *Id.* at 609.

11 *Id.* at 608-09 (quoting *Locke v. Davey*, 540 U.S. 712, 722, 185 Educ. L. Rep. 30 (2004)).

12 *Id.* at 614. The court reasoned that the tax credit/scholarship program subsidized tuition payments and indirectly subsidized the sectarian school's educational program. *Id.* at 613.

13 *Id.* at 614.

[14] *Id.* at 615 (holding that "an agency cannot transform an unconstitutional statute into a constitutional statute with an administrative rule").
[15] *Id.* at 615-622 (Gustafson, J., concurring, joined by McGrath, C.J., and Sandefur, J.)
[16] *Id.* at 624 (Sandefur, J., concurring).
[17] *Id.* at 625 (Baker, J., dissenting, joined by Rice, J.); *id.* at 631 (Rice, J., dissenting).
[18] *Id.* at 628 (citing *Ariz. Sch. Christian Tuition Org. v. Winn*, 563 U.S. 125, 265 Educ. L. Rep. 855 (2011)).
[19] *Id.* at 630 (citing *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2024 (2017)).
[20] *Id.* at 631-32 (Rice, J., dissenting) (citing *Zelman v. Simmons-Harris*, 536 U.S. 639, 649, 166 Educ. L. Rep. 30 (2002)).
[21] *Espinoza v. Mont. Dep't of Rev.*, 140 S. Ct. 2246 (2020).
[22] *Id.*, at 2255 (citing *Trinity Lutheran*, 137 S. Ct. 2012 (2017)).
[23] 137 S. Ct. 2012, 2024-25 (2017).
[24] *Espinoza,* 140 S. Ct. at 2254 (citing *Locke v. Davey*, 540 U.S. 712, 719, 185 Educ. L. Rep. 30 (2004); *Rosenberger v. Rector & Visitors*, 515 U.S. 819, 839, 101 Educ. L. Rep. 552 (1995)).
[25] 140 S. Ct. at 2254 (quoting *Trinity Lutheran*, 137 S. Ct. at 2021)).
[26] *Id.* at 2260.
[27] *Id.* (quoting *Church of Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520, 546 (1993), quoting *McDaniel v. Paty*, 435 U.S. 618, 628 (1978) (plurality opinion)).
[28] 140 S. Ct. at 2260.
[29] *Id.* at 2262.
[30] *Id.* at 2259 (quoting *Mitchell v. Helms*, 530 U.S. 793, 828-29, 145 Educ. L. Rep. 44 (2000) (plurality opinion). *See infra* text accompanying note 73 for a discussion of the Blaine Amendment.
[31] *Id.* at 2257-58 (citing *Locke v. Davey*, 540 U.S. 712, 185 Educ. L. Rep. 30 (2004)).
[32] *Id.* at 2257 (quoting *Locke*, 540 U.S. at 725).
[33] 140 S. Ct. at 2261.
[34] *Id.* at 2263 (Thomas, J., concurring, joined by Gorsuch, J.)
[35] *Id.* (quoting *Town of Greece v.Galloway*, 572 U.S. 565, 608 (2014) (Thomas, J., concurring), quoting *Lee v. Weisman*, 505 U.S. 577, 640, 75 Educ. L. Rep. 43 (1992) (Scalia, J., dissenting)).
[36] 140 S. Ct. at 2263.
[37] *Id.* at 2265-66 (also lamenting application of the Establishment Clause to state action by incorporating it in the Fourteenth Amendment's restrictions on states, *id.* at 2264).
[38] 140 S. Ct. at 2268-74 (Alito, J., concurring). *See infra* text accompanying note 73.
[39] *Id.* at 2275 (Gorsuch, J., concurring).
[40] *Id.*
[41] *Id.* at 2276.
[42] *Id.* at 2276-77 (citing cases barring discrimination based on religious activities, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (holding that Amish children could not be required to attend school beyond eight grade); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (reversing criminal conviction of Jehovah's Witnesses for their door-to-door solicitation without a license).
[43] 140 S. Ct. at 2278 (Ginsburg, J., dissenting, joined by Kagan, J.).
[44] *Id.* at 2279.
[45] *Id.* (citing *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).
[46] *Id.* at 2281.
[47] *Id.* at 2281 (Breyer, J., dissenting, joined in part I by Kagan, J.).
[48] *Id.* at 2282 (citing *Locke v. Davey*, 540 U.S. 712, 185 Educ. L. Rep. 30 (2004)).
[49] *Id.* at 2283-84.
[50] *Id.*at 2287 (quoting *Locke,* 540 U.S. at 725)).
[51] *Id.* (also raising the concern that the program would pay salaries of religious teachers).
[52] *Id.* at 2290 (quoting *Abington Township v. Schempp*, 374 U.S. 203, 226 (1963)).
[53] 140 S. Ct. at 2292-95 (Sotomayor, J., dissenting).
[54] *Id.* at 2292-93
[55] *Id.* at 2292.
[56] *Id.* at 2297.
[57] *See id.* at 2278 (Ginsburg, J., dissenting, joined by Kagan, J.); *id.* at 2292 (Sotomayor, J., dissenting).
[58] *See, e.g., Ariz. Sch. Christian Tuition Org. v. Winn*, 563 U.S. 125, 265 Educ. L. Rep. 855 (2011) (rejecting taxpayer standing to challenge a tax credit/scholarship program because the credits were not in the state treasury); *Zelman v. Simmons-Harris*, 536 U.S. 639, 166 Educ. L. Rep. 30 (2002) (finding no Establishment Clause violation in a voucher program under which almost all voucher students attended religious schools due to parental decisions); *Mitchell v. Helms*, 530 U.S. 793, 145 Educ. L. Rep. 44 (2000) (upholding federal aid to purchase instructional materials, library books, and equipment for student use in sectarian schools as long as the aid is distributed based on secular criteria in a nondiscriminatory manner and flowed to religious schools because of parents' choices); *Agostini v. Felton*, 521 U.S. 203, 119 Educ. L. Rep. 29 (1997) (overturning a precedent in holding that public school personnel can provide remedial instruction in religious schools); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 83 Educ. L. Rep. 930 (1993) (allowing use of public funds to support sign language interpreters in religious schools because the child is the primary beneficiary of the aid).
[59] 140 S. Ct. at 2259.
[60] *Id.* at 2259-60.
[61] *See Trinity Lutheran*, 137 S. Ct. 2012, 2025-26 (2017) (Gorsuch, J., concurring).
[62] *See Locke,* 540 U.S. 712, 185 Educ. L. Rep. 30 (2004).
[63] 140 S. Ct. at 2275 (Gorsuch, J. concurring).
[64] *Id.* at 2256-57.
[65] *Id.* at 2256.
[66] *Id.* at 2276 (Gorsuch, J., concurring).
[67] *See* Jill Goldenziel, *Blaine's Name in Vain?: State Constitutions, School Choice, and Charitable Choice*, 83 Denver U. L. Rev. 57 (2005) (noting that state provisions are often called "Little Blaines" or "Baby Blaines").
[68] *See* Steven K. Green, *Symposium: RIP State "Blaine Amendments" – Espinoza and the "No-Aid" Principle*, SCOTUSblog, June 30, 2020, https://www.scotusblog.com/2020/06/symposium-rip-state-blaine-amendments-espinoza-and-the-no-aid-principle/.
[69] Only three states have neither no-aid nor compelled support clauses in their state constitutions: Louisiana, Maine, and North Carolina. *See* Lindsey M. Burke, & Jarrett Stepman, *Breaking Down Blaine Amendments' Indefensible Barrier to Education Choice*, 8 J. Sch. Choice 637, 642 tbl.1 (2014).
[70] Four Justices in *Trinity Lutheran* endorsed a footnote that limited its decision to "discrimination based on religious identity with respect to playground resurfacing," specifying that "we do not address religious uses of funding or other forms of discrimination." 137 S. Ct. at 2024 n.3. The majority in *Espinoza* placed no such limitation on the breadth of its opinion.
[71] 140 S. Ct. at 2260 (quoting *Trinity Lutheran*, 137 S. Ct. at 2024, quoting *Widmar v. Vincent*, 454 U.S. 263, 276, 1 Educ. L. Rep. 13 (1981)).
[72] Holly Hollman, *Symposium: What's "The Use" of the Constitution's Distinctive Treatment of Religion If It Is Disregarded as Discrimination?* SCOTUSblog, July 2, 2020, https://www.scotusblog.com/2020/07/symposium-whats-the-use-of-the-constitutions-distinctive-treatment-of-religion-if-it-is-disregarded-as-discrimination/.
[73] *See The Blaine Amendment*, Berkley Ctr. for Religion, Peace & World Affairs, https://berkleycenter.georgetown.edu/quotes/the-blaine-amendment (last visited July 20, 2020); U.S. Commission on Civil Rights, *School Choice: The Blaine Amendments & Anti-Catholicism* (2007), at 13–14.
[74] Green, *supra* note 68.
[75] *See, e.g., Kotterman v. Killian*, 972 P.2d 606, 621, 132 Educ. L. Rep. 938 (Ariz. 1999) (en banc); *Simmons-Harris v. Goff*, 711 N.E.2d 203, 208, 135 Educ. L. Rep. 596 (Ohio 1999); *Jackson v. Benson*, 578 N.W.2d 602, 126 Educ. L. Rep. 399 (Wis. 1998).
[76] 540 U.S. 712, 724 (2004).
[77] Mo. Const. Art. I, § 7. *See Trinity Lutheran Church v. Pauley*, 788 F.3d 779, 786 (8th Cir. 2015).
[78] Mont. Const. Art. X, § 6(1).
[79] *See* George C. Roche, III, *American Federalism: Origins*, Found. for Economic Educ., Dec. 1, 1966, https://fee.org/articles/american-federalism-origins/.
[80] *Locke,* 540 U.S. 712, 185 Educ. L. Rep. 30 (2004).
[81] *See, e.g., Espinoza v. Mont. Dep't of Rev.*, 435 P.3d 603, 363 Educ. L. Rep. 850 (Mont. 2018); *Trinity Lutheran Church v. Pauley*, 788 F.3d 779 (8th Cir. 2015); *In re Certification of a Question of Law from the U.S. Dist. Ct.*, 372 N.W.2d 113, 26 Educ. L. Rep. 1232 (S.D. 1985) (striking down a textbook loan program to religious schools because the state constitution is more restrictive than the Establishment Clause); *Bloom v. Sch. Comm. of Springfield*, 379 N.E.2d 578 (Mass. 1978) (finding that a statute requiring school committees to loan textbooks to students at nonpublic schools violated the state constitution); cases in *infra* note 87.
[82] *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 355, 192 Educ. L. Rep. 651 (1st Cir. 2004).
[83] Green, *supra* note 68.
[84] *See* Martha M. McCarthy, A Delicate Balance: Church, State, and the Schools (1983) (discussing the history of the religion clauses).
[85] *See* James Madison, Memorial and Remonstrance Against Religious Assessments (1785); The Founders' Constitution (Philip B. Kurland & Ralph Lerner, eds., 1987), at 83.
[86] Thomas Jefferson, An Act for Establishing Religious Freedom (1786); Leo Pfeffer, Church, State and Freedom (1967), at 111–12.
[87] *See, e.g., Rosenberger v. Rector & Visitors*, 515 U.S. 819, 842, 101 Educ. L. Rep. 552 (1995), (recognizing "special Establishment Clause dangers where the government makes direct

money payments to sectarian institutions"); *Comm. For Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973) (striking down a state law providing grants for maintenance and repair of nonpublic schools, private school tuition reimbursement grants for low-income parents, and state tax deductions for private school tuition as violating the Establishment Clause); *Lemon v. Kurtzman*, 403 U.S. 602 (1971) (invalidating under the Establishment Clause laws in two states that provided salary supplements or reimbursement for teachers and instructional materials in secular subjects in religious schools).

[88] 330 U.S. 1, 15–16 (1947) (quoting *Reynolds v. United States*, 98 U.S. 145, 164 (1878)) (nonetheless upholding transportation aid for religious school students, equating it with fire and police protection that benefits the child rather than the church).

[89] *See, e.g.*, *Bd. of Educ. v. Allen*, 392 U.S. 236 (1968) (allowing a state to loan secular textbooks for use by secondary parochial school students).

[90] *See supra* cases in note 58.

[91] Most courts, whether upholding or striking down a practice under the Establishment Clause, have not even mentioned free exercise rights, but the First Circuit recognized that the Free Exercise Clause was not violated in excluding religious schools from Maine's tuition reimbursement program, noting that any minor free exercise interference would be justified by the state's overriding antiestablishment concern, *Strout v. Albanese*, 178 F.3d 57, 65, 135 Educ. L. Rep. 398 (1st Cir. 1999). *But see infra* text accompanying note 106.

[92] 140 S. Ct. at 2267 (Thomas, J., concurring).

[93] *Walz v. Tax Comm'n*, 397 U.S. 664, 668–69 (1970).

[94] 540 U.S. 712, 718-719, 185 Educ. L. Rep. 30 (2004) (citing *Walz*, 397 U.S. at 669).

[95] 140 S. Ct. at 2293 (Sotomayor, J., dissenting) (quoting *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988), quoting *Sherbert v. Verner*, 374 U.S. 398, 412 (1963) (Douglas, J., concurring)).

[96] 435 P.3d at 624 (Sandefur, J., concurring).

[97] *See* Green, *supra* note 68.

[98] *See* Nomi Stolzenberg, *Religious Liberty Used to Weaken Other Rights*, L.A. Times, July 9, 2020, at A11.

[99] 140 S. Ct. 2049 (2020) (rejecting religious school employees' claims of discrimination under the Americans with Disabilities Act and the Age Discrimination in Employment Act).

[100] 140 S. Ct. 2367 (2020) (exempting employers from the provision of the Patient Protection and Affordable Care Act requiring such no-cost coverage).

[101] *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925) (recognizing private schools' rights to exist and parents' rights to select private education for their children).

[102] *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

[103] *See supra* note 81.

[104] *Moses v. Skandera,* 367 P.3d 838, 328 Educ. L. Rep. 440 (N.M. 2015), *vacated sub nom. N.M. Ass'n of Nonpublic Schs. v. Moses*, 137 S. Ct. 2325 (Mem.) (2017) (granting *cert.*, vacating judgment, and remanding to the Supreme Court of New Mexico for reconsideration in light of *Trinity Lutheran*, 137 S. Ct. 2012), *on remand sub nom. Moses v. Ruszkowski*, 458 P.3d 406, 374 Educ. L. Rep. 1113 (N.M. 2018).

[105] 140 S. Ct. at 2261.

[106] *See* Thomas Harrison, *Maine Ban on Religious School Funding May Survive Appeal*, Courthouse News Service, Jan. 8, 2020, https://www.courthousenews.com/maine-ban-on-religious-school-funding-may-survive-appeal/.

[107] *See Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 192 Educ. L. Rep. 651 (1st Cir. 2004); *Stout v. Albanese*, 178 F.3d 57, 135 Educ. L. Rep. 398 (1st Cir. 1999); *Anderson v. Durham*, 895 A.2d 944, 207 Educ. L. Rep. 978 (Me. 2006); *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127, 134 Educ. L. Rep. 226 (Me. 1999).

[108] *See e.g.*, *Taxpayers for Pub. Educ. v. Douglas Cty. Sch. Dist.*, 351 P.3d 461, 319 Educ. L. Rep. 537 (Colo. 2015) (en banc) (striking down a school district's voucher program as abridging the state's anti-establishment provision), *vacated,* 137 S. Ct. 2325 (Mem.) (2017) (granting *cert.,* vacating judgment, and remanding to the Colorado Supreme Court for reconsideration in light of *Trinity Lutheran*, 137 S. Ct. 2012), *dismissed as moot* (after the school board eliminated the voucher program), 2018 WL 1023945 (Colo. Jan. 25, 2018).

[109] For a discussion of litigation involving voucher and tax credit programs, see Edchoice, *The ABCs of School Choice*, 2019, https://www.edchoice.org/wp-content/uploads/2019/01/The-ABCs-of-School-Choice-2019-Edition.pdf. A challenge currently is being mounted to Ohio's voucher program that allegedly redirects tax funds from public to private schools. *See* Council of School Attorneys, *Advocacy Group Plans to File Suit Challenging the Legality of Ohio's Voucher Program*, July 12, 2020.

[110] 435 P.3d 603, 363 Educ. L. Rep. 850 (Mont. 2018), *rev'd*, 140 S. Ct. 2246 (2020).

[111] *See Bush v. Holmes*, 919 So. 2d 392, 206 Educ. L. Rep. 756 (Fla. 2006).

[112] *See La. Fed'n of Teachers v. Louisiana*, 118 So. 3d 1033, 296 Educ. L. Rep. 666 (La. 2013) (reasoning that the voucher program abridged the state constitutional requirement for the legislature to equitably distribute education funds under a minimum foundation program; it diverted funds intended for public education into private schools); *Owens v. Colo. Cong. of Parents, Teachers, & Students*, 92 P.3d 933, 189 Educ. L. Rep. 395 (Colo. 2002) (striking down a pilot voucher program under the local control provision of the state constitution because the program took control away from local school districts). Also, a Davidson County Chancery Court ruled that the Tennessee Education Savings Account pilot program violates the Home Rule Amendment, Art. XI, Sect. 9 of the Tennessee Constitution, *Metro. Gov't of Nashville and Davidson Cty. v. Tenn. Dep't of Educ.*, No. 20-0143-11 (Ch. Ct., 20th Jud. Dist., Davidson Cty. May 4, 2020). The state has petitioned the Tennessee Supreme Court to intervene and bypass the appeals court to stay this order so the program can be implemented in the fall. *See* Council of School Attorneys, *Tennessee Asks State Supreme Court to Assume Jurisdiction in School Voucher Case*, June 6, 2020.

[113] *See Kennedy v. Bremerton Sch. Dist.*, 869 F.3d 813, 347 Educ. L. Rep. 10 (10th Cir. 2017), *cert. denied*, 139 S. Ct. 634 (2019) (holding that a public school coach was speaking as an employee when he prayed on the football field immediately after games and thus his speech was not constitutionally protected). In a concurring opinion to the denial of review, Justice Alito (joined by Thomas, Gorsuch, and Kavanaugh, J.J.) noted that the lower courts did not address the religious rights potentially at stake, 139 S. Ct. 634 (2019). Justice Thomas mentioned again in his *Espinoza* concurrence that courts should reconsider such free exercise rights of school coaches and teachers, 140 S. Ct. at 2265 (Thomas, J., concurring); *see also* McCarthy, *supra* note 2.

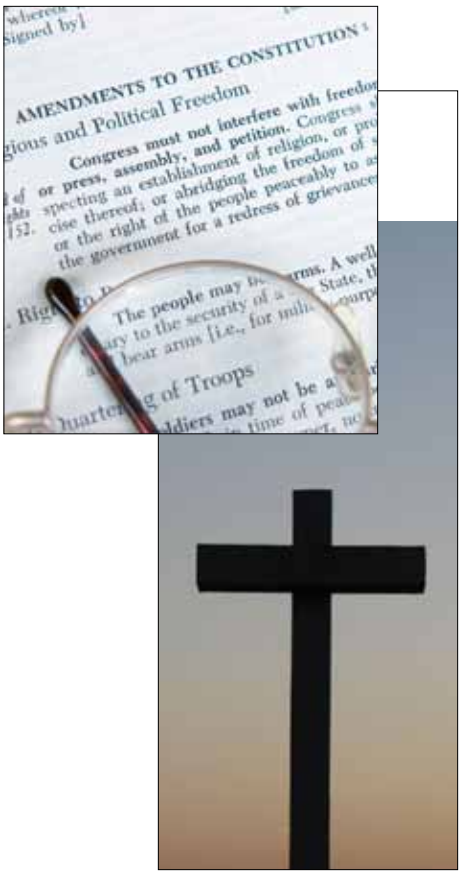
[114] Education Secretary DeVos, called the *Espinoza* decision "a historic victory for America's students," which "marks a turning point in the sad and static history of American education," *quoted in* Mark Walsh, *U.S. Supreme Court Rejects Prohibition on Tax-Credit Scholarships for Religious Schools*, Educ. Wk, July 15, 2000, at 8.

[115] Randi Weingarten, *quoted in* Walsh, *supra* note 114.

[116] *See, e.g.,* Aria Bendix, *Do Private-School Vouchers Promote Segregation?* The Atlantic, Mar. 22, 2017; Julie Donheiser, *Choice for Most: In Nation's Largest Voucher Program, $16 Million Went to Schools with Anti-LGBT Policies*, Chalkbeat, Aug. 10, 2017, https://www.chalkbeat.org/posts/us/2017/08/10/choice-for-most-in-nations-largest-voucher-program-16-million-went-to-schools-with-anti-lgbt-policies/; Suzanne E. Eckes, Julie Mead, & Jessica Ulm, *Dollars to Discriminate: The (Un)intended Consequences of School Vouchers,* 91 Peabody J. Educ. 537 (2016).

[117] Halley Potter, *Do Private School Vouchers Pose a Threat to Integration?* Century Found., Mar. 21, 2017, https://tcf.org/content/report/private-school-vouchers-pose-threat-integration/?agreed=1.

[118] *Trinity Lutheran*, 137 S. Ct. 2012, 2041 (Sotomayor, J., dissenting).



ELIP #68

Special Ed/Attendance

School Attendance Issues in Special Education Case Law

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School attendance has been an increasingly frequent subject in special education litigation in recent years, and it promises to continue its upward trajectory in the foreseeable future. The contributing factors for the recent ascendance include (1) the attendance accountability in the No Child Left Behind Act,[1] which continued at least in part in the Every Student Succeeds Act,[2] and (2) the simultaneous growth of state laws requiring local district policies to curb student absenteeism.[3] A corresponding major contributing factor for the near future is the likely impact of COVID-19 on K–12 students, including increased dependence on the home environment and accentuated anxiety about resuming in-school attendance.[4]

This brief article provides a representative sample of court decisions illustrating the role of student absenteeism under the Individuals with Disabilities Education Act (IDEA)[5] and Section 504.[6] Although the extent of the linkage between attendance and disability extends more widely,[7] the scope here is specific to the core obligations of identification[8] and free appropriate education (FAPE)[9] under the IDEA and Section 504, particularly during recent years.

Identification: Child Find and Eligibility

Individuals with Disabilities Education Act

As the gateway issue prior to the various procedural and substantive requirements for FAPE, the IDEA requires districts to conduct a comprehensive initial evaluation for students reasonably suspected of qualifying under the specified eligibility criteria.[10] Thus, IDEA identification consists of the successive obligations of child find and eligibility determination, with evaluation being at the overlapping juncture.[11] Examined more closely, child find consists of two similarly overlapping components— reasonable suspicion of eligibility and reasonable time to initiate the evaluation.[12] Similarly, eligibility consists of two causally connected components —meeting the criteria for one or more of the specifically identified classifications, such as autism or specific learning disability, and having a resulting need for special education.[13]

In recent years, courts are increasingly recognizing excessive absenteeism as a factor for both child find and eligibility under the IDEA. As this case law shows, the most directly applicable classifications are emotional disturbance (ED) and other health impairment (OHI).[14] The key appears to be the extent that courts examine the underlying linkages of attendance (a) within these and the other less obviously pertinent classifications and (b) with the requisite need for special education.

A leading example is the Eighth Circuit's recent officially published decision in *Independent School District No. 283 v. E.M.D.H.*[15] In this case, the parents of a gifted high school student with a panoply of diagnoses, including school phobia, generalized anxiety disorder, severe depression, ADHD and panic disorder with agoraphobia, challenged the district's determination that she was not eligible under the IDEA. The student had increasing absenteeism since the elementary grades, including treatment in psychiatric facilities in grades 8 and 9. In grade 11, upon the parents' request, the district conducted an evaluation, concluding that she was not eligible because, despite her mental health problems, she excelled academically when she attended school. The Eighth Circuit ruled, in upholding the lower court, that the district violated both its child find and eligibility evaluation obligations under the IDEA. The child find violation was based on the finding that the district had continuing reasonable suspicion since the child's known psychiatric treatment at the end of grade 8. The eligibility evaluation obligation was based on the court's conclusions that (1) she met the criteria of both ED and OHI; (2) her absenteeism wad not attributable to "'bad choices' causing her to 'fail in school' . . . but rather [was] a consequence of her compromised mental health;"[16] (3) her resulting need for special education was evident in her falling behind in graduation credits despite her high intellect and "the positive results of the private tutoring and online learning indicate that the nearly three years where the Student foundered were not inevitable but the direct result of insufficient individualized attention under an appropriate IEP."[17] The resulting remedies consisted of reimbursement for the parents' independent educational evaluation and compensatory education in the form of "a private tutor . . . until the Student earns the credits expected of her same-age peers."[18]

Conversely, the traditional case law largely lays attendance issues at the feet of parents (or older students) rather than doing a manifestation-determination type of analysis[19] for more rigorously applying districts' child find and eligibility obligations. For example, in another recent case arising at the high school level, the Fourth Circuit affirmed the lower court's rulings that (a) the district violated child find, which was based on the lack of the requisite response to repeated parental referrals rather than the child's absenteeism,[20] and (b) the result of this procedural violation was harmless because even though the district belatedly determined that the child was eligible as ED, his culminating complete absenteeism after the IEP—along with his previous failure to do his homework for class, pay attention in class, and come to school regularly—countered the requisite denial of FAPE. The two judges in the panel majority placed the blame explicitly on the student (and, arguably, implicitly on the parents), not the school,[21] albeit based on partially conflicting rationales.[22] The concurring judge agreed with the result, but his reasoning was different in the allocation of fault[23] and at least potentially more penetrating in terms of potential attendance linkages.[24]

Overall, the split line of other relatively recent child find and eligibility court decisions similarly appears to show an uneven but gradual recognition of the disability hypotheses that may amount, depending on the evidence of the individual case,[25] to the requisite linkage to the need for evaluation or a determination of eligibility. Whether viewed under the lens of child find or eligibility,[26] the various factors in determining the role of attendance include not only the level of scrutiny the court accords to the disability-absenteeism link,[27] but also whether the court regards the scope of educational performance and special education need as academic or more broadly encompassing the child's social-emotional dimension and, sometimes simultaneously, whether the child's attendance problems amounted to inability or unwillingness to attend school.[28] Finally, absenteeism standing alone is generally not sufficient for reasonable suspicion, much less a definitive determination, of eligibility.[29]

Section 504

School attendance is also a potential factor in child find and eligibility under Section 504. The difference is that, although child find is at least as strong under the Section 504 regulations,[30] the overlapping and ultimate issue of eligibility is based on a broader scope than under the IDEA.[31] The major attendance issue that Section 504 added to the aforementioned factors under the IDEA is the breadth of other major life activities beyond the specified examples.[32]

The major court decision specific to Section 504 identification and school attendance is *Weixel v. Board of Education of the City of New York*.[33] The child in this case was a seventh grader who was absent for two months starting in the middle of the school year after falling ill with various symptoms, including muscle and joint pains, headaches, nausea, abdominal pains, and exhaustion. The principal then threatened the parents with filing child neglect charges with the child welfare agency if they did not return the child to school. The parents complied, relying on the principal's agreement to allow their daughter rest breaks in the classroom and in climbing the school stairs when she felt tired or sick. When her mother visited the school, she found the child crying, reporting severe abdominal pain and the lack of the agreed-upon accommodations. She took her home and followed up with a pediatrician's diagnosis of chronic fatigue syndrome (CFS) and fibromyalgia. The principal responded by fulfilling her threat to initiate child neglect proceedings, which subjected the family to an investigation.

The child completed the seventh grade at home, receiving outstanding grades from the home school instructor whom the district belatedly provided during the summer. However, the school resisted promoting her to grade 8 due to her absences, relenting months later only on the condition that she forfeit her right to be in advanced classes. She finished grade 8 at home, earning excellent scores in the state's proficiency exams for promotion to high school.

After receiving no resolution of their formal complaint to the district, the parents filed suit pro se in federal court under Section 504 and the ADA. The court dismissed the case, concluding that the parents had not shown their daughter met the eligibility criteria under this pair of statutes. After obtaining the pro bono services of a large New York City law firm, they filed an appeal with the Second Circuit. The appellate court reversed the dismissal, concluding that the lower court had failed to provide the more liberal standards afforded to pro se litigants to withstand dismissal. For the eligibility-specific element of the prima facie case, the court concluded that the lower court erred by focusing on the major life activity of learning: "In requiring plaintiffs to show that [the child] was 'learning disabled,' the district court erroneously ignored the numerous allegations in the amended complaint which demonstrated that [her] CFS substantially limited . . . the major life activities of walking, exerting herself, and *attending classes at school*."[34] The Second Circuit's various other rulings were not specific to Section 504 eligibility directly connecting to school attendance.[35]

Subsequent Section 504 child find or eligibility court rulings have only peripherally addressed attendance or were subsumed within corresponding IDEA rulings. For example, in an unpublished decision, the Third Circuit upheld a child find violation under both the IDEA and Section 504 for a tenth-grader with Crohn's Disease that clearly accounted for his academic decline, with absences being only one of the contributing factors.[36] The reasons for the thinness of case law on point likely include the effects of the exhaustion doctrine and the deliberate indifference or similar heightened standard for Section 504 claims.[37] Moreover, specific to the arguable interpretation that *Weixel* established "attending school" as a major life activity under Section 504 rather than serving merely serving as dicta,[38] the subsequent case law has been negligible in both number and strength.[39]

FAPE

Individuals with Disabilities Education Act

FAPE, as duly developed and documented in the eligible child's individualized education program (IEP), is the core obligation under the IDEA.[40] Its primary dimensions are procedural and substantive.[41] The procedural dimension, as codified in the 2004 amendments of the IDEA generally requires a second step if the district has engaged in one or more procedural violations, which amounts to a substantive loss to the child or the parents.[42] More recently, the Supreme Court refined its original formulation of the substantive dimension,[43] resulting in the following standard: "Is the IEP reasonably calculated to enable the child to make progress appropriate in light of the child's circumstances?"[44]

For the increasing frequency of attendance-related FAPE cases in recent years, the focus appears to be shifting from the traditional view that emphasizes the parents' responsibility to the extent and effectiveness of the district's attendance-related efforts via the IEP.[45] As an example of the residual effect of the traditional view, the Fifth Circuit recently ruled in favor of the defendant district for the parents' "school refusal" FAPE claim, attributing the bullying-related absenteeism of the child, an eighth grader with autism, more to the parents than the district.[46] The court did so by (1) citing the various district efforts to ease the student back to the school environment;[47] (2) pointing to the parents' delay in providing more detailed medical documentation of the student's mental health diagnoses;[48] and (3) the relatively relaxed substantive standard for FAPE.[49]

Subsequently, a series of federal court decisions in the District of Columbia reflect the gradual, albeit uneven, shift from the traditional view. In 2014, the court concluded, in reliance on the hearing officer's findings, that the student's lack of progress "was due to his frequent absences and not bullying or school avoidance."[50] In 2016, the court ruled that the IEP's functional behavioral assessment (FBA) and behavior interven-

tion plan (BIP) sufficiently addressed the student's truancy problems, although not reaching the sexual assault that triggered these problems.[51] In a more recent decision, observing that the "disability-related truancy cannot be viewed in isolation," the court ruled that the child's attendance problems were primarily attributable to his inappropriate placement and that although the district had taken some proactive steps, including an FBA and BIP, "[its] behavioral interventions were insufficient under the circumstances."[52]

A final illustration of the increasingly applicable approach is a Rhode Island case in which a high school student with a complex array of mental health issues had a record of therapeutic hospitalizations and other absenteeism.[53] In relevant part, the parents challenged two successive IEPs. The court concluded that the first of these two IEPs contained substantively fatal procedural deficiencies, such as vague goals about her need for coping and problem-solving skills without a reasonably defined path to improved school attendance,[54] whereas the subsequent IEP sufficiently corrected these deficiencies with more specific goals and more extensive services, including a multi-stepped "reintegration plan."[55]

Yet, attendance may play various roles in FAPE cases, defying a simplistic or limited characterization of its IEP-linkage or of the parents' corollary partnering responsibilities.[56] Parent-plaintiffs continue to face an uphill slope for attendance-based claims, as they do in FAPE cases generally,[57] with the variance attributable not only to the court's level of recognition and scrutiny of the disability connection but also the factual contours of the case.

For example, in an unpublished FAPE ruling in favor of the defendant district, the Ninth Circuit observed that (a) the student's erratic attendance during the family's limited period of residency impeded the district's ability to assess and refine its initial IEP for him, and (b) the parent rejected the district's attempts to include mental health services in his IEP.[58] More recently, although acknowledging that "[a]t some point the failure to address consistent absences . . . *would* constitute denial of a FAPE," a federal court in Alabama rejected the parents' attendance-based FAPE claim based on their insufficient evidence of a disability-absenteeism connection.[59] Similarly engaging in a rather cursory analysis, the Third Circuit recently rejected a substantive FAPE claim of a high school student with specific learning disabilities, concluding that "[he] kept pace with his grade level, went from failing several of his classes to passing all of them, and increased his GPA . . . . despite missing dozens if not hundreds of classes each year."[60]

Conversely, in an earlier decision a federal court in Massachusetts ruled that a school district denied FAPE to an eighth-grade student with cognitive impairment and behavioral problems upon failing to take any timely steps in response to the student's chronic absenteeism during his single semester before moving out of the district.[61] However, the court did not address the appropriateness of his IEP likely due to the parties' narrow framing of the issues. Moreover, the court avoided a nuanced analysis to formulate the requisite affirmative steps and the specific corresponding relief. The several reasons, included the following: (1) "neither [Massachusetts] nor federal regulations directly address a school's duty to examine a student's chronic absenteeism in the context of his or her IEP;"[62] (2) the relevant period before the child's move outside the district was narrowly limited,[63] and (3) compensatory education was no longer at issue.[64] Instead, the court only ruled that the district had an affirmative duty to respond to the student's truancy.[65] Finally, although reciting that the student had 33 absences during the limited period in question, the court added this caveat:

> [T]he court is not suggesting that there is a specific number of days . . . which triggers a school district's obligation to determine whether and how an absent student is to continue receiving a FAPE. Until there is more specific statutory or regulatory guidance, each student's case must turn on its own facts.[66]

Finally, in a more recent IDEA FAPE ruling in favor of the parents, the federal district court in New Mexico upheld the hearing officer's finding of insufficient evidence to support the district's contention that the student's lack of progress was attributable to her absences rather than to her IEP.[67]

Section 504

The procedural and substantive requirements for FAPE under Section 504 are more relaxed than under the IDEA. Although subject to some variance,[68] the prevailing substantive standard that courts use in FAPE cases is reasonable accommodation.[69]

In the aforementioned *Weixel* decision, the Second Circuit seemed to suggest the possibility of denial of FAPE upon broadly interpreting, at the pro se dismissal stage, the discrimination, or denial of benefit, element, as follows: "Read liberally, plaintiffs' amended complaint also alleges that they refused to make reasonable accommodation of [the child's] disability by providing her any meaningful public education for much of the seventh grade, and refused to provide [her] with the home instruction necessitated by her disability."[70]

However, the attendance-related FAPE claims have been infrequent and largely unsuccessful in recent years.[71] In addition to the relatively relaxed substantive standard, the reasons, paralleling the aforementioned identification cases,[72] include the threshold application of the exhaustion doctrine[73] and the increasing culminating use of an intent-based proxy, such as deliberate indifference.[74]

Conclusions and Recommendations

School districts need to be especially attuned to students' excessive absenteeism in relation to the identification and FAPE obligations under the IDEA and Section 504 in light of changes in societal conditions and legal responses. These responses include not only federal and state legislation but also and ultimately litigation. The attendance-related litigation under the IDEA and Section 504 is increasing in quantity and shifting in scrutiny.

The school districts' enhanced attunement warrants carefully considered and customized action at two levels. First, the minimum level of legal requirements suggests the need to adopt refined child find and eligibility practices and, for IDEA- or Section 504-eligible students FAPE compliance with special attention to the following:

- the role of state laws[75]
- avoidance of knee-jerk reactions of truancy or child neglect proceedings[76]
- corresponding avoidance of either under- or over-responsiveness to attendance issues in the context of the IDEA and Section 504[77]

Similarly, applying legal lenses to the recent litigation trends shows the customary factors that contribute to judicial outcomes, including the particularly significant roles of

the attorneys and expert witnesses in influencing the judge's receptivity and sensitivity to the nuanced issues in examining the extent of disability linkages to absenteeism.

Second, extending beyond the minimum legal requirements, districts should give careful consideration to proactive strategies that focus on evidence-based best practices and extensive collaboration with parents and social service agencies.[78] These practices include effective FBAs and BIPs[79] that carefully examine and address not only direct disability-attendance linkages but also intervening variables, such as bullying.[80] In addition, school districts should not overlook the need to consider parent training as a related service within an IEP to address student attendance issues. Providing training to parents on effective home-based strategies to support attendance may increase the likelihood of improved attendance, and, at the very least, will demonstrate districts' attempts to provide a comprehensive response to attendance concerns. The normative frame of reference is the shared goal of optimal, not just reasonable, education that extends beyond academic progress to social-emotional well-being.

In most cases, after paying more careful attention to these issues, many districts will likely manage to select a level between the legal "shall" and the professional "should" levels. In any event, more fully "attending" is a matter for schools, not just students.

Endnotes

1 20 U.S.C. § 6311(b)(2)(C)(vii) (2001).

2 20 U.S.C. §§ 6311(c)(4)(B)(v)(VII) and 6311(h)(1)(C)(viii)(I) ("chronic absenteeism") (2017).

3 *E.g.,* Conn. Gen. Stat.§ 10-198c (2019) (requiring attendance review teams for schools or districts with a specific chronic absenteeism rate); Neb. Rev. Stat. § 79-209 (2018) (requiring school districts to have an attendance policy that includes specified features, including a team meeting and collaborative plan); N.J. Rev. Stat. § 18A:38-25.1 (2018) (requiring corrective action plan for chronically absent students); N.M. Stat. Ann. § 22-12A-6 (2018) (specifying various requirements for district attendance policies, including early warning system and positive intervention strategies); W.Va. Code § 18-8-11(c) (2017) (providing for suspension of driver's license upon dropping out of school).

4 *E.g.,* Valerie J. Calderon, U.S. Parents Say COVID-19 Harming Children's Health, Gallup News (June 16, 2020), https://news.gallup.com/poll/312605/parents-say-covid-harming-child-mental-health.aspx (reporting national survey of parents); Carolyn Jones, Student Anxiety, Depression Increasing During School Closures, Survey Finds, Education Source (May 18, 2020), https://edsource.org/2020/student-anxiety-depression-increasing-during-school-closures-survey-finds/631224 (reporting survey of students in southern California).

5 20 U.S.C. §§ 1401–1439 (2017).

6 29 U.S.C. § 794 (2017). "Section 504" herein refers generically to extend to its "sister statute," the Americans with Disabilities Act (ADA). 42 U.S.C §§ 12101–12110 (2017). For the close interrelationship between these two statutes, see, e.g., Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Educ. L. Rep. 886 (2017).

7 *E.g., In re C.M.T.*, 861 A.2d 348, 355–56, 193 Educ. L. Rep. 805 (Pa. Super. Ct. 2004) (recognizing the overlap with the IDEA, ruling that "evidence concerning the relationship between [the child's] disabilities and her absenteeism, including evidence as to the availability of services that would facilitate her ability to attend school, are not only relevant but necessary to any determination of dependency" under the state's truancy law).

8 "Identification" here refers to the two overlapping components of child find and eligibility, which apply under the IDEA and Section 504. *E.g.*, Perry A. Zirkel, *An Adjudicative Checklist for Child Find and Eligibility under the IDEA*, 357 Educ. L. Rep. 30 (2018); Perry A. Zirkel, *Avoiding Under- and Over-Identification of 504-Only Students*, 359 Educ. L. Rep. 715 (2018).

9 For the respective regulatory definitions of FAPE under the IDEA and Section 504, see 34 C.F.R. §§ 300.17 and 104.33 (2018).

10 *E.g., id.* §§ 300.8 (eligibility), 300.111 (child find), and 300.301 (initial evaluation).

11 *See, e.g.,* Perry A. Zirkel, *Through a Glass Darkly: Eligibility under the IDEA—The Blurry Boundary of the Special Education Need Prong,* 49 J.L. & Educ. 149 (2020) (focusing on IDEA eligibility); Perry A. Zirkel, *The Law of Evaluations under the IDEA: An Annotated Update*, 368 Educ. L. Rep. 594 (2019) (focusing on IDEA evaluation); Perry A. Zirkel, *"Child Find:" The Lore v. the Law*, 307 Educ. L. Rep. 574 (2014) (focusing on child find).

12 For the latest case law specific to the two components of this ongoing affirmative obligation of school districts under the IDEA, see Perry A. Zirkel, *Child Find under the IDEA: An Updated Analysis of the Judicial Case Law*, 48 Communiqué 14 (June 2020).

13 Some courts and commentators add the intervening causal connector of "affecting educational performance" which is actually part of the classification step, being expressly specified in the regulatory definition of each non-combined one except specific learning disability, which implicitly incorporates it. For the split of judicial interpretations of the scope of "educational performance, *compare, e.g., Mr. I. v. Maine Sch. Admin. Dist. No. 55*, 480 F.3d 1, 217 Educ. L. Rep. 60 (1st Cir. 2015) (broadly extending to social skills), *with C.B. v. Dep't of Educ.*, 322 F. App'x 20, 246 Educ. L. Rep. 58 (2d Cir. 2009) (academics only).

14 For the definitional criteria of these and the other IDEA classifications, see 34 C.F.R. § 300.8(c) (2018).

15 *Indep. Sch. Dist. No. 283 v. E.M.D.H.*, 960 F.3d 1073, 377 Educ. L. Rep. 539 (2020).

16 *Id.* at 1081.

17 *Id.* at 1082.

18 *Id.* at 1085.

19 As a prerequisite for disciplinary changes in placement, the IDEA expressly mandates a determination whether the "conduct at issue was caused by, or had a direct and substantial relationship to, the child's disability." 34 C.F.R. § 300.530(e) (2018). As an extension of this logic, the IDEA implicitly allows such a linking consideration for other issues, including the threshold steps of child find and eligibility.

20 The IDEA requires the district to respond to a parental request for evaluation by either moving forward to obtain the requisite informed consent or to provide prior written notice explaining the basis for not proceeding with an evaluation. *See, e.g.,* 71 Fed. Reg. 46,636 (Aug. 14, 2006); Letter to Anonymous, 20 IDELR 998 (OSEP 1998).

21 *T.B. v. Prince George's Cty. Bd. of Educ.*, 897 F.3d 566, 578, 356 Educ. L. Rep. 977 (4th Cir. 2019).

22 *Compare id.* at 577 ("[the student] had no disability that special education would have remedied; he was simply unwilling to take his education seriously"), *with id.* at 578 ("the record is devoid of any credible evidence that an unaddressed disability caused [his] educational difficulties and replete with credible evidence that [he] himself was the cause").

23 *Id.* at 579 ("While I am constrained to conclude that the plaintiffs have failed to demonstrate that the school division's egregious child find violations actually interfered with the provision of FAPE, I cannot agree that the blame lies with [the student] and his parents, and that [the district] should bear little or no responsibility for a student in its care").

24 The concurring judge relied on burden of proof, while pointing in the direction of underlying linkages: The unfortunate reality of this case, however, is that the evidence presented at the due process hearing fails to answer the obvious question: "Why?" In the special education context, the answer is rarely that a student "simply does not want to go to school." … While one could certainly argue that the ALJ's conclusion that [the student] would not have come to school even with an appropriate IEP was speculative, the plaintiffs' evidence offered nothing to counter it.... Educational experts who could have supported the IEE's finding that [he] had a previously undiagnosed learning disability, and established a link between the long-term denial of special education services and T.B.'s failure to attend school due to frustration and anxiety, either failed to provide helpful testimony or did not testify at all. *Id.* at 581.

25 *E.g., Loch v. Edwardsville Sch. Dist. No. 7,* 327 F. App'x 647, 651, 247 Educ. L. Rep. 642 (7th Cir. 2010) (ruling that the student did not qualify as OHI based on failure to prove the resultant need for special education, including any relationship between her medical conditions and her non-attendance).

26 Although generally regarded as overlapping but separable, with eligibility being the ultimate consideration such that a child find violation for a child determined not to be eligible may be without a remedy, in an occasional case, the court has conflated the two by addressing a child find claim as an eligibility issue. *E.g., M.S. v. Randolph Bd. of Educ.*, 75 IDELR ¶ 103 (D.N.J. 2019).

[27] *Compare Doe v. Cape Elizabeth Sch. Dist.*, 382 F. Supp. 3d 83, 101, 367 Educ. L. Rep. 767 (D. Me. 2019) (finding no violation of child find for student eventually determined to be eligible as OHI, concluding that under Maine's rather unusual specific standard for absenteeism triggering child find "while the sheer number of absences certainly set off alarm bells, I am not persuaded by Plaintiffs' position that [this state regulation] compelled a different conclusion") and *Nguyen v. D.C.*, 681 F. Supp. 2d 49, 52, 255 Educ. L. Rep. 233 (D.D.C. 2020) (rejected ED eligibility based on attribution of academic failure to non-attendance rather than disability), with *Bd. of Educ. of Montgomery Cty. f. S.G.*, 230 F. App'x 330, 334–35, 222 Educ. L. Rep. 119 (4th Cir. 2007) (ruling that the student was eligible as ED based in part on her absenteeism) and *A.W. v. Middletown Area Sch. Dist.*, 65 IDELR ¶ 16 (E.D. Pa. 2015) (finding child find violation for student eventually determined to be eligible as ED based on school phobia, concluding that the district unreasonably delayed obtaining the requisite consent for evaluation pending a psychiatric report despite increasing school avoidance).

[28] *Compare M.S. v. Randolph Bd. of Educ.*, 75 IDELR ¶ 103 (D.N.J. 2019) (ruling that teenager diagnosed with generalized anxiety disorder and with excessive absenteeism was not eligible as ED based on findings that his absenteeism was voluntary and that his grades and standardized test scores showed that he did not need special education) and *J.S. v. Scarsdale Union Free Sch Dist*., 826 F. Supp. 2d 635, 663–64, 279 Educ. L. Rep. 229 (S.D.N.Y. 2011) (finding no child find violation for student eventually determined to be eligible as ED, concluding that her renewed attendance problems were gradual, she had bounced back after a similar bout with absenteeism the prior year, and she continued to do relatively well academically), *with M.M. v. N.Y.C. Dep't of Educ*., 26 F. Supp. 3d 249, 256, 311 Educ. L. Rep. 792 (S.D.N.Y. 2014) (reversing the review officer's ruling of non-eligibility as ED based on grades without giving proper consideration to the student's related absenteeism, concluding instead that "[f]ew things could be more indicative of an emotional problem that 'adversely affected' a student's education than one that prevented her from attending school.").

[29] *E.g., Karissa G. v. Pocono Mountain Sch. Dist*., 71 IDELR ¶ 90 (E.D. Pa. 2017).

[30] 34 C.F.R. § 104.35 (2018) (requiring an evaluation for "any person, who because of [disability] needs or *is believed to need*, special education or related services). In comparison, the corresponding IDEA regulation only makes the reasonable-suspicion element explicit for limited groups of students. *Id.* § 300.151(c) (clarifying that child find extends to students "suspected of being a child with a disability under [the IDEA eligibility definition]" even though they are advancing from grade to grade or highly mobile).

[31] The IDEA definition of eligibility, to which its child find component of reasonable suspicion is keyed, consists of meeting the criteria for at least one of the enumerated classifications and having a resulting need for special education. *See supra* note 13 and accompanying text. In contrast, the applicable Section 504 definition of eligibility extends to any physical or mental impairment that substantially limits at least one of a similarly broad range of major life activities that go far beyond learning. 34 C.F.R. § 104.3(j) (2018).

[32] The examples identified in the original regulations largely overlapped with IDEA eligibility although extending to employment and other non-student coverage: learning, performing manual tasks, seeing, hearing, speaking, walking, breathing, caring for one's self, and working. *Id.* § 104.3(j)(2)(ii). However, the 2008 ADA amendments and the resulting 2016 ADA regulations extended the list considerably, including various health conditions such as bowel functions and immune system functions. 42 U.S.C §§ 12101–12102 (2017); 28 C.F.R. § 35.108 (2018).

[33] *Weixel v. Bd. of Educ. of N.Y.C.*, 287 F.3d 138, 163 Educ. L. Rep. 640 (2d Cir. 2002).

[34] *Id.* at 147 (emphasis added). The court's elaboration provides a similar but slightly broader variation of this attendance-specific major life activity: "Because, read liberally, the amended complaint pleads that [the child] was substantially [limited in] the major life activities of walking, exerting herself, *and attending school*, we find that plaintiffs have [sufficiently] alleged that she was 'disabled' within the meaning of the Section 504/ADA." *Id.* at 147–48 (emphasis added).

[35] These other rulings included reversing dismissal of the Section 504 retaliation claim (*id.* at 148) and the related Section 1983 damages claim (*id.* at 151) and affirming dismissal of the FERPA and equal protection claims (*id.*). The Second Circuit also addressed the following attendance-related IDEA claim, which the preceding section of this article does not address due to relatively extensive more recent case law: the court reversed dismissal in light of possible IDEA eligibility under the classification of other health impairment arguably needing special education in the form of "instruction … in the home." *Id.* at 150 (citing 20 U.S.C. § 1401(25)(A)).

[36] *Culley v. Cumberland Valley Sch. Dist*., 758 F. App'x 301, 364 Educ. L. Rep. 83 (3d Cir 2018).

[37] *See, e.g., Pocono Mountain Sch. Dist. v. T.D.*, 790 F. App'x 387, 373 Educ. L. Rep. 510 (2019) (upholding compensatory education award in attendance-related case under Section 504 based on district's waiver of the deliberate indifference defense); *S.D. v. Haddon Heights Sch. Dist.*, 722 F. App'x 119, 354 Educ. L. Rep. 658 (3d Cir. 2018) (affirming dismissal of Section 504 claims in attendance related claims, which at least peripherally encompassed child find, for failure to exhaust IDEA impartial hearing process).

[38] *Supra* note 34 and accompanying text. The interpretation of its independent status as a major life activity is based on its express inclusion in the Second Circuit's analysis. However, the alternative interpretation that it is merely dicta is attributable to the unusually relaxed pro se dismissal standard and the accompanying identification of two other activities that included one expressly included in the examples under Section 504. *Supra* note 32 (walking).

[39] *E.g., C.B. v. Bd. of Sch. Comm'rs of Mobile Cty*., 24 IDELR 350 (S.D. Ala. 2008) ("assuming attending school is a major life activity, plaintiff fails to present sufficient evidence from which a jury could find that plaintiff is substantially limited from attending school due to his impairment"), *aff'd on other grounds*, 261 F. App'x 192 (11th Cir. 2008)

[40] *E.g., Sytsema v. Acad. Sch. Dist*., 538 F.3d 1306, 1312, 236 Educ. L. Rep. 94 (10th Cir. 2008) (characterizing FAPE as the "central pillar of the IDEA"); *Murray v. Montrose Cty. Sch. Dist. RE-1J*, 51 F.3d 921, 923 n.3, 99 Educ. L. Rep. 126 (10th Cir. 1995) (referring to the IEP as the "cornerstone" of this central pillar).

[41] *Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176, 206–07 (1982) (formulating the foundational two-fold inquiry as "has the State complied with the procedures set forth in the Act?" and "is the [IEP] developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits"). More recently, in addition to refining these two basic dimensions, the courts have developed implementation-related dimensions concerning whether the district fully delivered the IEP previously and whether it is capable of doing so prospectively. *See, e.g.,* Perry A. Zirkel, *An Adjudicative Checklist of the Four Dimensions of FAPE under the IDEA*, 346 Educ. L. Rep. 18, 20 (2017). For one of the rare attendance-related cases to date based on the implementation dimension of FAPE, see *L.J. v. Sch. Bd. of Broward Cty*., 927 F.3d 1203, 1218–20 (11th Cir. 2019) (distinguishing denial of FAPE in cases where the implementation failure was a causal factor to the absenteeism from the non-connection in this case).

[42] 20 U.S.C. § 1415(f)(3)(E)(ii) (2017). As a limited exception in the absence of such loss, the adjudicator still has authority to order prospective procedural relief. *E.g.*, *Dawn G. v. Mabank Indep. Sch. Dist*., 63 IDELR ¶ 63 (N.D. Tex. 2014) (citing 20 U.S.C. § 1415(f)(3)(E)(iii)); *see generally* Perry A. Zirkel, *Safeguarding Procedures under the IDEA: Restoring the Balance in the Adjudication of FAPE*, 29 J. Nat'l Ass'n Admin. L. Judiciary 1 (2020).

[43] *Supra* note 41.

[44] *Endrew F. v. Douglas Cty. Sch. Dist. RE*-1, 137 S. Ct. 988 (2017). The impact of this refined standard on the outcomes of substantive FAPE cases has been limited. *See, e.g.*, Perry A. Zirkel, *The Aftermath of* Endrew F.*: An Outcomes Analysis Two Years Later*, 364 Ed. Law Rep. 1 (2019); William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. Legal & Pub. Pol'y 495 (2020).

[45] For the occasional earlier recognition of the overall issue and emerging approach, see, e.g., *Lamoine Sch. Comm. v. Mrs. Z*., 353 F. Supp. 2d 18, 195 Educ. L. Rep. 161 (D. Me. 2004):[The child's] tardiness and attendance failures are clearly not the sole responsibility of [the district]. The [IEP team] cannot rouse [him] out of bed or escort him to school on time. But, this Court is not called upon to decide the fruitless and unanswerable question of fault. In this case, [his] absence was linked to his disability, and it is unarguable if [he] was not in school, he could not be said to be receiving "a [FAPE]." Recognizing the inherent limitations of [the district] …, the focus of the inquiry is what, if anything, [it] did and what, if anything, should it have done to address his attendance failure. If the record reflected the more active intervention of [the district during the pertinent period], a different conclusion might be mandated. *Id.* at 33–34.

[46] *Renee J. v. Houston Indep. Sch. Dist*., 913 F.3d 523, 531–32, 361 Educ. L. Rep. 925 (5th Cir. 2019). In analyzing this claim, the court seemed to confuse

the diagnostic category of school refusal, which focuses on the child, with the limited case law specific to a school IEP team's refusal to discuss bullying. *Id*. at 531 (citing *T.K. v. N.Y.C. Dep't of Educ*., 810 F.3d 869 (2d Cir. 2016)).

[47] *Id*. at 531. However, these efforts neither focused on directly addressing the bullying nor on providing proactive IEP services.

[48] *Id*. at 532. Yet, the court arguably appears to confuse the parents' obligations under state law to obtain homebound instruction, which is a general education issue, and the districts' obligations under the IDEA to conduct an evaluation for the purpose of providing an appropriate IEP, not just to determine initial or continuing eligibility.

[49] *Id*. Again, however, the neglected aspect is the ultimate individualized focus on "the child's circumstances," for what is the requisite reasonable calculation. *Supra* text accompanying 44.

[50] *S.S. v. D.C.*, 68 F. Supp. 3d 1, 16, 318 Educ. L. Rep. 230 (D.D.C. 2014).

[51] *Garris v. D.C.*, 210 F. Supp. 3d 187, 191–92, 341 Educ. L. Rep. 695 (D.D.C. 2014).

[52] *Middleton v. D.C.*, 312 F. Supp. 3d 113, 145–46, 356 Educ. L. Rep. 551 (D.D.C. 2018).

[53] *S.C. v. Chariho Reg'l Sch. Dist.*, 298 F. Supp. 3d 370, 354 Educ. L. Rep. 295 (D.R.I. 2018).

[54] *Id*. at 389.

[55] *Id*. at 390.

[56] Courts have directly addressed this implicit obligation only in the infrequent cases of extreme and persistent parental noncooperation. *E.g.*, *Horen v. Bd. of Educ. of Toledo Pub. Sch. Dist.*, 948 F. Supp. 2d 793, 805, 299 Educ. L. Rep. 613 (N.D. Ohio 2013) ("[T]he parents failed to fulfill their duty to participate in the IEP process, and thereby impaired that process irredeemably. They cannot contend they did not have such duty, or that they were unaware that they did, in light of my decision in *Horen I*, … 655 F. Supp.2d at 805 (N.D. Ohio 2009)").

[57] *See, e.g.*, William Moran, Note, *The IDEA Demands More: A Review of FAPE Litigation after* Endrew F., 22 N.Y.U. J. Legal & Pub. Pol'y 495 (2020) (finding a pronounced district-favorable skew in courts' substantive FAPE rulings both before and after the Supreme Court's refinement of the applicable standard); *see also* Perry A. Zirkel & Allyse Hetrick, *Which Procedural Parts of the IEP Process Are the Most Judicially Vulnerable?* 83 Exceptional Child. 219 (2016) (finding similar outcomes skew in courts' procedural FAPE rulings).

[58] *Mendoza v. Placentia Yorba Linda Sch. Dist*., 278 F. App'x.737, 739, 235 Educ. L. Rep. 808 (9th Cir. 2008).

[59] *Rosaria v. Madison City Bd. of Educ*., 325 F.R.D. 429, 441, 355 Educ. L. Rep. 1081 (N.D. Ala. 2018).

[60] *S.C. v. Oxford Area Sch. Dist*., 751 F. App'x 220, 223, 362 Educ. L. Rep. 789 (3d Cir. 2018).

[61] *Springfield Sch. Comm. v. Doe*, 623 F. Supp. 2d 150, 153, 161–62, 246 Educ. L. Rep. 780 (D. Mass. 2009).

[62] *Id*. at 160.

[63] The child's IEP services started in May 2007, and the period at issue was from the start of the following school year until his residence changed in January 2008. *Id*. at 154.

[64] The hearing officer's remedy was for twenty-three days of special education services. The court observed that not only had the district originally offered this amount, but also "[t]he student] has (assumedly) been provided the compensatory education ordered by the hearing officer." *Id*. at 155 and 157.

[65] *Id*. at 161. In the circumstances of this case, timely reconvening of the IEP team appeared to be the missing step. Without specifically making it part of its ruling, the court observed: "as [the district] has acknowledged, a Team needs to consider whether school truancy is related to a student's disability and, if it is, address it through the IEP." *Id*.

[66] *Id*. at 161–62.

[67] *Preciado v. Bd. of Educ. of Clovis Mun. Sch*., 443 F. Supp.3d 1289, 1307–08, __ Educ. L. Rep. __ (D.N.M. 2020).

[68] *E.g.*, *M.R. v. Ridley Sch. Dist.*, 680 F.3d 260, 280, 280 Educ. L. Rep. 37 (3d Cir. 2012) (reasonable accommodation in combination with meaningful benefit); *Mark H. v. Hamamoto*, 620 F.3d 1090, 1101–02, 261 Educ. L. Rep. 48 (9th Cir. 2010) (meaningful access in combination with deliberate indifference)

[69] *E.g.*, *A.G. v. Paradise Valley Unified Sch. Dist*., 815 F.3d 1195, 1206, 328 Educ. L. Rep. 495 (9th Cir. 2016); *CTL v. Ashland Sch. Dist.*, 743 F.3d 524, 529, 302 Educ. L. Rep. 31 (7th Cir. 2014*); R.D. v. Lake Washington Sch. Dist.*, 74 IDELR ¶ 203 (W.D. Wash. 2019); *Zandi v. Fort Wayne Cmty. Sch.*, 59 IDELR ¶ 283 (N.D. Ind. 2012).

[70] *Weixel v. Bd. of Educ*., 287 F.3d at 148.

[71] *See, e.g., H.D. v. Kennett Consol. Sch. Dist.*, 75 IDELR ¶ 94 (E.D. Pa. 2018) (upholding the appropriateness of a 504 plan for a high school student with anxiety disorder that affected his sleeping and timely attendance). For a similar relatively relaxed application of FAPE in combination with the overlapping least restrictive environment requirement under Section 504 for a student with attendance problems due to chronic migraine headaches, see *S.P. v. Fairview Sch. Dist*., 64 IDELR ¶ 99 (W.D. Pa. 2014).

[72] *Supra* note 37 and accompanying text.

[73] *E.g.*, *Nelson v. Charles City Cmty. Sch. Dist.*, 900 F.3d 587, 357 Educ. L. Rep. 605 (8th Cir. 2018) (requiring exhaustion of parents' Section 504 claim relating to enrollment in a district online program for student with truancy-related diagnoses); *Dizio v. Manchester Essex Reg'l Sch. Dist*., 74 IDELR ¶ 289 (D. Mass 2019) (requiring exhaustion of Section 504 FAPE and retaliation claims).

[74] *See generally* Perry A. Zirkel, *Do Courts Require a Heightened Intent Standard for Students' Section 504 and ADA Claims Against School Districts?* 47 J.L. & Educ. 109 (2018).

[75] *See supra* note 3. For illustrative cases, see *supra* note 27 (*Doe v. Cape Elizabeth Sch. Dist*.) and *Indep. Sch. Dist. No. 413 v. H.M.J.*, 123 F. Supp. 3d 1100, 327 Educ. L. Rep. 213 (D. Minn. 2015) (ruling that district's eligibility evaluation for student with absenteeism due to various physical illnesses and anxiety was not appropriate in light of state law requirement for medical examination for OHI-suspected students who meet at least three of eight specified factors, including excessive absenteeism).

[76] As the allegations in the *Weixel* case (*supra* text accompanying note 33) suggest, such a response is likely to not only escalate the dispute but provide the foundation for a retaliation claim under Section 504. Yet, as a counterbalancing caveat, such claims face a rather daunting series of hurdles. *E.g., Genn v. New Haven Bd. of Educ*., 219 F. Supp. 3d 296, 322–23, 342 Educ. L. Rep. 971 (D. Conn. 2016); *T.F. v. Fox Chapel Sch. Dist*., 62 IDELR ¶ 74 (W.D. Pa. 2013), *aff'd on other grounds*, 589 F. App'x 594, 313 Educ. L. Rep. 34 (3d Cir. 2014).

[77] *E.g., see supra* note 27 and accompanying text.

[78] For the extensive literature concerning school refusal without the specific linkage to disability law, see, e.g., Julian G. Elliott & Maurice Place, *School Refusal: Developments in Conceptualisation and Treatment Since 2000*, 60 J. Child Psychol. & Psychiatry 4 (2019); Carolina Gonzalvez et al., *A Cluster Analysis of School Refusal Behavior*, 90 Int'l. J. Educ. Res. 43 (2018); Trude Havik et al., *School Factors Associated with School Refusal and Truancy-Related Reasons for School Non-Attendance*, 18 Soc. Psychol. Educ. 221 (2015); Clare Nuttall & Kevin Woods, *Effective Interventions for School Refusal*, 29 Educ. Psychol. Prac. 237 (2013).

[79] For the difference between the legal minima and the normative desiderata for FBAs and BIPs, see Lauryn Collins & Perry A. Zirkel, *Functional Behavior Assessments and Behavior Intervention Plans: Legal Requirements and Professional Recommendations*, 19 J. Positive Behav. Interventions 180 (2017).

[80] For examples of the potential intervening role of bullying see *supra* text accompanying notes 46 and 57.

ELIP #69

School Finance

An Updated Tabular Overview of the School Finance Litigation

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As a resource for graduate courses in School Law and School Finance, an article in 2005[1] featured a box-score table that showed the outcomes of the school finance litigation at the state level in the wake of the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*.[2] The table below provides an update reflecting the additional case law during the last several years.

The table is organized to canvass the outcomes of court decisions concerning whether the school finance system in a particular state does or does not pass muster under the respective state constitution. As the table shows, at least 46 states have litigated the constitutionality of their school finance system.

The entries are listed in inverse chronological order in either the "Constitutional" or "Unconstitutional" column, depending on the direction of the judicial outcome. Those entries in brackets represent decisions that are notably limited, in contrast with a decision on the merits. The endnotes provide the legal citations, with parenthetical notes as to limitations or labels. Finally, those decisions that do not conclusively fit in either of the two outcome columns are listed in the endnotes for the identified state.

This topographical bird's-eye landscape is both fluid and fascinating, warranting and inviting more in-depth investigation in terms of the course instruction and related research.[3] Faculty, practitioners, and other interested individuals are welcome to cut and copy the chart and its endnotes, with due acknowledgement, for academic and related practical professional purposes.

Outcomes of Court Decisions Concerning State School Funding Systems

STATE	CONSTITUTIONAL	UNCONSTITUTIONAL
Alabama	*I.L.* (2014)[4] [*James II* (2002)][5]	*James I* (1997)[6] *Pinto* (1995)[7] *Opinion of the Justices* (1993)[8]
Alaska[9]	[*Moore* (2007)][10] *Mantanuska-Susitna* (1997)[11]	
Arizona[12]	*Roosevelt II* (2003)[13]	*Hull* (1998)[14] *Roosevelt I* (1994)[15] *Shofstall* (1973)[16]
Arkansas	*Lakeview IV* (2007)[17]	*Lakeview III* (2002)[18] *Lakeview I* (2000)[19] *Dupree* (1983)[20]
California[21]	*Cal. Sch. Bds. Ass'n* (2019)[22] *Campaign* (2016)[23]	*Serrano III* (1986)[24] *Serrano II* (1977)[25] [*Serrano I* (1971)][26]
Colorado	*Lobato* (2013)[27] *Lujan* (1982)[28]	
Connecticut[29]	*Conn. Coalition* (2018)[30]	*Horton III* (1985)[31] *Horton II* (1982)[32] *Horton I* (1977)[33]
Delaware[34]		
Florida[35]	*Citizens* (2019)[36] *Schroeder* (2009)[37] *Coalition* (1996)[38] *Fla. Dep't* (1993)[39] [*St. Johns County* (1991)][40]	[*Haridopolos* (2011)][41]
Georgia[42]	*McDaniel* (1981)[43]	[*Consortium* (2008)][44]

Idaho[45]	*Joki v. State* (2017)[46] *Idaho Sch. for Equal Educ. Opportunity* (1993)[47] *Thompson* (1975)[48]	
Illinois	[*Carr v. Koch*, 2011][49] *Lewis E.* (1999)[50] *Comm. for Educ. Rights* (1996)[51] *Blase* (1973)[52] [*McInnis* (1968)][53]	
Indiana	[*Bonner* 2009)][54]	
Iowa	*King* (2012)[55]	
Kansas	*Petrella* (2015)[56] *Unified Sch. Dist.* (1994)[57]	*Gannon III* (2017)[58] *Gannon II* (2016)[59] *Gannon I* (2014)[60] *Montoy* (2005)[61]
Kentucky	*Young* (2007)[62]	*Rose* (1989)[63]
Louisiana	*Jones* (2006)[64] *Charlet* (1998)[65] *Louisiana Ass'n* (1988)[66] [*Livingston* (1987)][67] [*Scarnato* (1976)][68]	
Maine	*Sch. Admin. Dist.* (1995)[69]	
Maryland[70]	*Hornbeck* (1983)[71]	[*Parker* (1972)][72]
Massachusetts	*Hancock* (2005)[73]	*McDuffy* (1993)[74]
Michigan[75]	*Durant* (2002)[76] *E. Jackson* (1984)[77] *Milliken* (1973)[78]	
Minnesota	*Skeen* (1993)[79]	[*Cruz-Guzman* (2017)][80] [*Van Dusartz* (1971)][81]
Mississippi	*Clarksdale* (2017)[82]	
Missouri	*Comm. for Educ. Equality* (2009)[83] *Comm. for Educ. Equality* (1998)[84]	
Montana[85]	*Woodahl* (1974)[86]	*Columbia Falls* (2005)[87] *Helena* (1990)[88]
Nebraska[89]	*Citizens for Equal Educ.* (2007)[90] [*Nebraska Coalition* (2007)][91] [*Gould* (1993)][92]	
New Hampshire	[*Londonderry* (2008)][93]	*Londonderry* (2006)[94] *Claremont V* (2002)[95] *Claremont IV* (2000)[96] *Claremont III* (1998)[97] *Claremont II* (1997)[98] *Claremont I* (1993)[99]
New Jersey	*Abbott v. Burke* (2009)[100]	[*Abbott v. Burke* (2011)][101] *Abbott V* (1998)[102] *Abbott IV* (1997)[103] *Abbott III* (1994)[104] *Abbott II* (1990)[105] *Abbott I* (1985)[106] *Robinson IV* (1976)[107] *Robinson III* (1975)[108] *Robinson II* (1975)[109] *Robinson I* (1973)[110]

New York	[*Maisto* (2017)][111] [*NYSASCSD* (2007)][112] *NYCLU* (2004)[113] *REFIT* (1995)[114] *Levittown* (1983)[115] [*Spano* (1972)][116]	[*Aristy-Farer* (2017)][117] [*Hussein* (2012)][118] [*CFE* (2003)][119]
North Carolina	*Britt* (1987)[120]	*Hoke Cty.* (2004)[121]
North Dakota		[*Bismarck* (1994)][122]
Ohio	[*DeRolph III* (2001)][123] *Cincinnati* (1979)[124]	*DeRolph IV* (2002)[125] *DeRolph II* (2000)[126] *DeRolph I* (1997)[127]
Oklahoma	[*Okla. Educ. Ass'n.* (2007)][128] *Fair Sch. Fin. Council* (1987)[129]	
Oregon	*Pendleton* (2009)[130] *Withers II* (1999)[131] *Withers I* (1995)[132] *Coalition* (1991)[133] *Olsen* (1976)[134]	
Pennsylvania	[*CG* (2008)][135] *PARSS* (1999)[136] [*Marrero* (1999] [137] *Bensalem* (1987)[138] *Danson* (1979)[139]	[*William Penn. Sch. Dist.* (2017)][140]
Rhode Island	*Woonsocket* (2014)[141] *Pawtucket* (1995)[142]	
South Carolina	*Richland Cty.* (1988)[143]	*Abbeville* (2014)[144]
South Dakota	*Davis* (2011)[145]	[*Olson* (2009)] [146]
Tennessee		*Small Sch. III* (2002)[147] *Small Sch. II* (1995)[148] *Small Sch. I* (1993)[149]
Texas	*Morath* (2016)[150] [*Rodriguez* (1973)][151]	*Neeley II* (2007)[152] *Neeley I* (2005)[153] *Edgewood IV* (1995)[154] *Edgewood III* (1992)[155] *Edgewood II* (1991)[156] *Edgewood I* (1989)[157]
Vermont		*Brigham* (1997)[158]
Virginia	*Scott* (1994)[159] [*Burruss* (1970)][160]	
Washington	[*School Districts' Alliance* (2009)][161] [*Federal Way* (2009)][162] *Northshore* (1974)[163]	*McLeary* (2012)[164] *Seattle* (1978)[165]
West Virginia[166]		*Kanawha* (2006)[167] *Chafin* (1988)[168] *Pauley II* (1984)[169] *Pauley I* (1979)[170]
Wisconsin	*Vincent* (2000)[171] *Kukor* (1989)[172]	*Buse* (1976)[173]
Wyoming	*Campbell Cty. IV* (2008)[174]	*Campbell Cty. II* (2001)[175] *Campbell Cty. I* (1995)[176] *Washakie Cty.* (1980)[177] [*Sweetwater Cty.* (1971)][178]

Endnotes

1 Perry A. Zirkel & Jacqueline Kearns-Barber, *A Tabular Overview of the School Finance Litigation,* 197 Educ. L. Rep. 21 (2005). For more recent and more detailed views, see, e.g., Carlee Poston Escue, William E. Thro, & R. Craig Wood, *Some Perspectives on Recent School Finance Litigation*, 268 Educ. L. Rep. 601(2011); Jason R. Kopanke, Christine Kiracofe, & Spencer C. Weiler, *Can't Get No Satisfaction: An Examination of 65 Years of School Finance Litigation*, 374 Educ. L. Rep.1 (2020); David C. Thompson & Faith E. Crampton, *Overview and Analysis of Selected School Finance and Facility Funding Litigation*, 243 Educ. L. Rep. 507 (2009); William E. Thro, *Barnett's and Bernick's Theory of Constitutional Construction and School Finance Litigation*, 357 Educ. L. Rep. 464 (2018); Spencer C. Weiler, Luke Cornelius, & Edward Brooks, *Examining Adequacy Trends in School Finance Litigation*, 345 Educ. L. Rep. 1 (2017).

2 411 U.S. 1 (1973).

3 *See, e.g.*, Ethan Hutt, Daniel Klasik, & Aaron Tang, *How Do Judges Decide School Finance Cases?*, 97 Wash. U. L. Rev. 1047 (2020) (finding that the outcomes of the school finance cases are attributable to various factors other than the strength of the state's constitution clause).

4 *I.L. v. Ala.*, 739 F.3d 1273, 300 Educ. L. Rep. 749 (11th Cir. 2014).

5 *Ex parte James v. Ala. Coal. for Equity*, 836 So.2d 813, 174 Educ. L. Rep. 487 (Ala. 2002) ("*James II*") (ruled non-justiciable).

6 *James v. Ala. Coal. for Equity*, 713 So.2d 937, 128 Educ. L. Rep. 483 (Ala. 1997) ("*James I*").

7 *Pinto v. State*, 662 So.2d 894, 104 Educ. L. Rep. 1403 (Ala. 1995).

8 *Opinion of the Justices No. 338*, 624 So.2d 107, 86 Educ. L. Rep. 497 (Ala. 1993). For the underlying trial court's decision, see *Alabama Coal. for Equity v. Hunt*, 1993 WL 204083 (Ala. Cir. Ct. 1993).

9 In an unpublished decision, the state superior court ruled that the school finance system in Alaska was unconstitutional. *Kayasulie v. State*, 3AN-97-3782 CIV (Alaska Super. Ct., Sept. 1, 1999).

10 *Moore v. State*, No. 04-9756 (Alaska Super. Ct. 2007) (unpublished trial court decision).

11 *Matanuska-Susitna v. State*, 931 P.2d 391, 116 Educ. L. Rep. 401 (Alaska 1997).

12 A trial court judge subsequently dismissed an adequacy suit. David Hoff, *States on Ropes in Finance Suits,* Educ. Wk., Dec. 8, 2004, at 23. In a less directly related decision, a federal judge ruled that the state's funding for English language learners violated applicable legislation. Chip Scutari, *Judge: State Shorting English Ed*, Ariz. Republic, Jan. 26, 2005, at 1.

13 *Roosevelt Elementary Sch. Dist. v. State*, 74 P.3d 258, 179 Educ. L. Rep. 900 (Ariz. Ct. App. 2003). For subsequent other litigation, see *Cave Creek Unified Sch. Dist. v. Ducey*, 308 P.3d 1152, 297 Educ. L. Rep. 538 (Ariz. 2013) (upholding voter-approved referendum requiring inflationary increase in basic support level); *Craven v. Huppenthal*, 338 P.3d 324, 311 Educ. L. Rep. 466 (Ariz. Ct. App. 2014) (upholding constitutionality of alleged disparity in state funding between district and charter schools).

14 *Hull v. Albrecht*, 960 P.2d 634, 128 Educ. L. Rep. 371 (Ariz. 1998).

15 *Roosevelt Elementary Sch. Dist. No. 66 v. Bishop*, 877 P.2d 806, 93 Educ. L. Rep. 330 (Ariz. 1994).

16 *Shofstall v. Hollins*, 515 P.2d 590 (Ariz. 1973).

17 *Lakeview Sch. Dist. No. 25 v. Huckabee*, 220 S.W.3d 645, 220 Educ. L. Rep. 383 (Ark. 2007) ("*Lakeview IV*"). For subsequent, inconclusive rulings, see *Deer/Mt Judea Sch. Dist. v. Kimbrell*, 430 S.W.3d 29, 305 Educ. L. Rep. 1136 (Ark. 2013); *Deer/Mt Judea Sch. Dist. v. Beebe*, 2012 WL 665604 (Ark. Mar. 1, 2012).

18 *Lakeview Sch. Dist. No. 25 v. Huckabee*, 91 S.W.3d 472, 173 Educ. L. Rep. 248 (Ark. 2002) ("*Lakeview III*"). In a subsequent decision, the court released jurisdiction, concluding that the legislature had achieved adequate, albeit not full, compliance. *Lake View Sch. Dist. No. 25 v. Huckabee*, 189 S.W.3d 1, 209 Educ. L. Rep. 537 (Ark. 2004). In the same decision, the court reappointed masters based on an allegation that the legislature had failed to comply with its directives. *Lake View Sch. Dist. No. 25 v. Huckabee*, 210 S.W.3d 28, 215 Educ. L. Rep. 1198 (Ark. 2005) ("*Lake View V*").

19 *Lakeview Sch. Dist. No. 25 v. Huckabee*, 10 S.W.3d 892, 141 Educ. L. Rep. 1183 (Ark. 2000) ("*Lakeview I*").

20 *Dupree v. Alma Sch. Dist. No. 30*, 651 S.W.2d 90, 11 Educ. L. Rep. 1091 (Ark. 1983).

21 The state reportedly tentatively settled a lawsuit filed by the ACLU on behalf of low-income students. Duke Helfand & Cara DiMassa, *State, ACLU Settle Suit on Education*, L.A. Times, Aug. 11, 2004, at B6. For further information concerning *Williams v. State*, see the ACCESS website (http://www.schoolfunding.info/news/litigation).

22 *Cal. Sch. Bds. Ass'n v. State*, 454 P.3d 962 (Cal. 2019).

23 *Campaign for Quality Educ. v. Cal.*, 209 Cal. Rptr. 3d 888, 337 Educ. L. Rep. 305 (Ct. App. 2016).

24 *Serrano v. Priest*, 226 Cal. Rptr. 584, 32 Educ. L. Rep. 653 (Ct. App. 1986) ("*Serrano III*").

25 *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) ("*Serrano II*").

26 *Serrano v. Priest*, 487 P.2d 1241 (Cal. 1971) ("*Serrano I*") (pre-*Rodriguez*).

27 *Lobato v. State*, 304 P.3d 1132 (Colo. 2013). For a subsequent ruling that cancellation of the base per pupil level subject to failsafe provision did not violate the state constitution, see *Dwyer v. State*, 257 P.3d 185 (Colo. 2015).

28 *Lujan v. Colo. State Bd. of Educ.*, 649 P.2d 1005, 295 Educ. L. Rep. 791 (Colo. 1982).

29 The Connecticut Supreme Court subsequently ruled that the issue was justiciable and remanded the matter for further proceedings. *Seymour v. Region One Bd. of Educ.*, 803 A.2d 318, 168 Educ. L. Rep. 368 (Conn. 2002).

30 *Conn. Coalition for Justice in Educ. Funding v. Rell*, 176 A.3d 28, 351 Educ. L. Rep. 391 (Conn. 2018).

31 *Horton v. Meskill*, 486 A.2d 1099, 22 Educ. L. Rep. 809 (Conn. 1985) ("*Horton III*").

32 *Horton v. Meskill*, 445 A.2d 579, 4 Educ. L. Rep. 547 (Conn. 1982) ("*Horton II*").

33 *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977) ("*Horton I*").

34 *Delawareans for Educ. Opportunity v. Carney*, 199 A.3d 109, 362 Educ. L. Rep. 420 (Del. Chancery Ct. 2018) (denied motion to dismiss).

35 Subsequently, the state's highest court struck down, as violating the uniformity clause in the Florida constitution, the voucher program that included religious schools. *Bush v. Holmes*, 919 So.2d 392, 206 Educ. L. Rep. 756 (Fla. 2006) ("*Holmes III*").

36 *Citizens for Strong Sch., Inc. v. Fla. State Bd. of Educ.*, 262 So.3d 127, 362 Educ. L. Rep. 1104 (Fla. 2019).

37 *Schroeder v. Palm Beach Cty. Sch. Bd.*, 10 So.3d 1134 (Fla. Dist. Ct. App. 2009).

38 *Coalition for Adequacy & Fairness in Sch. Funding v. Chiles*, 680 So.2d 400 (Fla. 1996).

39 *Fla. Dep't of Educ. v. Glasser*, 622 So.2d 944, 85 Educ. L. Rep. 379 (Fla. Dist. Ct. App. 1993).

40 *St. Johns Cty. v. N.E. Fla. Builders*, 583 So.2d 635, 69 Educ. L. Rep. 636 (Fla. 1991) (additional fee only).

41 *Haridopolos v. Citizens for Strong Sch., Inc.*, 81 So.3d 465, 277 Educ. L. Rep. 1214 (Fla. Dist. Ct. App. 2011) (upheld jurisdiction and certified the question).

42 Next, three Atlanta parents reportedly filed suit in state court seeking to have the state's education system declared unconstitutional. Paul Donsky, *Fed-Up Father Joins Suit for Better Schools,* Atlanta J.-Const., Jan. 28, 2005, at 1D.

43 *McDaniel v. Thomas*, 285 S.E.2d 156 (Ga. 1981) (denial of defendants' motion for summary judgment).

44 *Consortium for Adequate Sch. Funding in Ga. v. State*, 2008 WL 8238595 (Ga. Super. Ct. Fulton Cty., Aug. 11, 2008).

45 A state trial court reportedly rejected the part of a recent suit that challenged the constitutionality of Idaho's education funding system. Todd Dvorak, *Judge Dismisses State from School Fees Lawsuit*, Mar. 14, 2013, www.idahostatejournal.com/news/state/article_b33d1b40a-8c7.

46 *Joki v. State*, 394 P.3d 48, 343 Educ. L. Rep. 589 (Idaho 2017).

47 *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 82Educ. L. Rep. 660 (Idaho 1993). In subsequent successive decisions, the state's highest court eliminated the majority of the plaintiffs' claims (*ISSO I*) but, rejecting mootness, preserved the thoroughness claim for trial (*ISSO II*) and remanded it for a second time with narrowing (*ISSO III*). *Idaho Sch. for Equal Educ. Opportunity v. State*, 976 P.2d 913, 134 Educ. L. Rep. 606 (Idaho 1998) (*ISSO III*); *Idaho Sch. for Equal Educ. Opportunity v. State Bd. of Educ.*, 912 P.2d 644, 107 Educ. L. Rep. 1010 (Idaho 1996) ("*ISSO II*"); *Idaho Sch. for Equal Educ. Opportunity v. Evans*, 850 P.2d 724, 82 Educ. L. Rep. 660 (Idaho 1993) ("*ISSO I*"). The plaintiffs reportedly prevailed at the trial level. *See* Michelle Galley, *Idaho Judge Strikes Down Facilities Finance Law*, Educ. Wk., Nov. 12, 2003, at 16

48 *Thompson v. Engelking*, 537 P.2d 635 (Idaho 1975).

49 *Carr v. Koch*, 960 N.E.2d 640, 275 Educ. L. Rep. 971 (Ill. Ct. App. 2011).

50 *Lewis E. v. Spagnolo*, 710 N.E.2d 798, 141 Educ. L. Rep. 222 (Ill. 1999).

51 *Comm. for Educ. Rights v. Edgar*, 672 N.E.2d 1178, 114 Educ. L. Rep. 576 (Ill. 1996).

52 *Blase v. State*, 302 N.E.2d 46 (Ill. 1973).

53 *McInnis v. Shapiro*, 293 F. Supp. 327 (N.D. Ill. 1968) (pre-*Rodriguez*).

54 *Bonner v. Daniels*, 907 N.E.2d 516, 245 Educ. L. Rep. 512 (Ind. 2009) (ruled nonjusticiable).

55 *King v. State*, 818 N.W.2d 1, 283 Educ. L. Rep. 390 (Iowa 2012).

56 *Petrella v. Brownback*, 787 F.3d 1242 (10th Cir. 2015).

[57] *Unified Sch. Dist. No. 229 v. State*, 885 P.2d 1170, 96 Educ. L. Rep. 258 (Kan. 1994).

[58] *Gannon v. State*, 402 P.3d 1186, 96 Educ. L. Rep. 258 (Kan. 2017). The state supreme court next ruled that the legislature's subsequent funding plan remediated the constitutional violations, first subject to two financial adjustments and more recently retaining jurisdiction for continued implementation. *Gannon v. State*, 420 P.3d 477, 356 Educ. L. Rep. 443 (Kan. 2018) (*Gannon VI*), *further proceedings*, 443 P.3d 294, 367 Educ. L. Rep. 1121 (Kan. 2019) (*Gannon VII*).

[59] *Gannon v. State*, 368 P.3d 1024, 329 Educ. L. Rep. 1090 (Kan. 2016).

[60] *Gannon v. State*, 319 P.3d 1196, 302 Educ. L. Rep. 377 (Kan. 2014).

[61] *Montoy v. State*, 120 P.3d 306, 202 Educ. L. Rep. 319 (Kan. 2005). The final ruling, however, did not determine constitutionality, instead resolving the limited issue of the state's legislative compliance with its earlier order in the defendants' favor. *Montoy v. State*, 138 P.3d 755, 210 Educ. L. Rep. 1251 (Kan. 2006).

[62] *Young v. Williams*, No. 03-00055/01152 (Cir. Ct., Div. II, Feb. 13, 2007) (unpublished trial court decision available at http://www.nsba.org/site/view.asp?CID=450&DID=40361).

[63] *Rose v. Council for Better Educ.*, 790 S.W.2d 186, 60 Educ. L. Rep. 1289 (Ky. 1989).

[64] *Jones v. State Bd. of Elementary & Secondary Educ.*, 927 So.2d 426, 208 Educ. L. Rep. 959 (La. Ct. App. 2006) (formula that did not include capital outlay costs).

[65] *Charlet v. Legislature of La.*, 713 So.2d 1199, 128 Educ. L. Rep. 510 (La. Ct. App. 1998).

[66] *La. Ass'n of Educators v. Edwards*, 521 So.2d 390, 45 Educ. L. Rep. 905 (La. 1988).

[67] *Livingston Sch. Bd. v. La. State Bd. of Elementary & Secondary Educ.*, 830 F.2d 563, 42 Educ. L. Rep. 57 (5th Cir. 1987) (federal Constitution).

[68] *Scarnato v. Parker*, 415 F. Supp. 272 (M.D. La. 1976) (federal Constitution).

[69] *Sch. Admin. Dist. No. 1 v. Comm'r*, 659 A.2d 854, 101 Educ. L. Rep. 289 (Me. 1995).

[70] Long-standing litigation concerning the adequacy of state funding for Baltimore's school subsequently reached Maryland's highest court. Laura Loh, *Allies Support Schools in Suit,* Balt. Sun, Mar. 7, 2005, at 1. Earlier in this litigation, the state's highest court rejected a local district's request to intervene. *Montgomery Cty. v. Bradford*, 691 A.2d 1281, 117 Educ. L. Rep. 638 (Md. 1997).

[71] *Hornbeck v. Somerset Cty. Bd. of Educ.*, 458 A.2d 758, 10 Educ. L. Rep. 592 (Md. 1983). For more recent litigation, see *Md. State Bd. of Educ. v. Bradford*, 875 A.2d 703, 199 Educ. L. Rep. 298 (Md. 2005) (concerning Oversight Act in wake of consent decree).

[72] *Parker v. Mandel*, 344 F. Supp. 1068 (D. Md. 1972) (pre-*Rodriguez*).

[73] *Hancock v. Comm'r*, 822 N.E.2d 1134, 195 Educ. L. Rep. 591 (Mass. 2005).

[74] *McDuffy v. Sec'y of the Executive Office of Educ.*, 615 N.E.2d 516, 83 Educ. L. Rep. 657 (Mass. 1993). During the remedy stage, the trial court reportedly ruled that the state still had not fulfilled its obligation. *See* John Gehring, *Mass. School Funding Comes Up Short, Judge Rules*, Educ. Wk., May 5, 2004, at 25. The matter was reportedly under appellate review. Hoff, *supra* note 11, at 23.

[75] In an inconclusive decision, the state's highest court remanded the issue for further proceedings. *Adair v. State*, 680 N.W.2d 386, 188 Educ. L. Rep. 449 (Mich. 2004).

[76] *Durant v. State*, 650 N.W.2d 380, 169 Educ. L. Rep. 389 (Mich. Ct. App. 2002).

[77] *E. Jackson Pub. Sch. v. State*, 348 N.W.2d 303, 16 Educ. L. Rep. 646 (Mich. Ct. App. 1984).

[78] *Milliken v. Green*, 212 N.W.2d 711 (Mich. 1973).

[79] *Skeen v. State*, 505 N.W.2d 299 (Minn. 1993).

[80] *Cruz-Guzman v. State*, 916 N.W.2d 1, 357 Educ. L. Rep. 302 (Minn. 2018) (justiciable).

[81] *Van Dusartz v. Hatfield*, 334 F. Supp. 870 (D. Minn. 1971) (pre-*Rodriguez*).

[82] *Clarksdale Mun. Sch. Dist. v. State*, 233 So.3d 299, 351 Educ. L. Rep. 670 (Miss. 2017).

[83] *Comm. for Educ. Opportunity v. State*, 294 S.W.3d 477, 249 Educ. L. Rep. 926 (Mo. 2009).

[84] *Comm. for Educ. Equality v. State*, 967 S.W.2d 62, 126 Educ. L. Rep. 538 (Mo. 1998). For an earlier, procedural ruling that was inconclusive as to constitutionality, see *Comm. For Educ. Equality v. State*, 878 S.W.2d 446, 92 Educ. L. Rep. 1020 (Mo. 1994).

[85] In a related matter limited to Indian education, a state trial court ruled that the Indian Education for All Act of 1999 was unconstitutional. *See* Mary Ann Zehr, *Judge Says Montana Falls Short on Indian Education,* Educ. Wk., Apr. 28, 2004, at 11.

[86] State *ex rel. Woodahl v. Straub*, 520 P.2d 776 (Mont. 1974).

[87] *Columbia Falls Elementary Sch. Dist. No. 6 v. State*, 109 P.3d 257, 196 Educ. L. Rep. 958 (Mont. 2005). For a subsequent case dismissed as non-justiciable, because it was premature in light of the *Columbia Falls* decision, see *Stroebe v. State*, 127 P.3d 1051 (Mont. 2006).

[88] *Helena Elementary Sch. Dist. No. 1 v. State*, 769 P.2d 684, 52 Educ. L. Rep. 352 (Mont. 1989), *amended*, 784 P.2d 412, 57 Educ. L. Rep. 1374 (Mont. 1990).

[89] A trial court judge reportedly dismissed an adequacy suit. *Hoff*, *supra* note 11, at 23.

[90] *Citizens of Decatur for Equal Educ. v. Lyons-Decatur Sch. Dist.*, 739 N.W.2d 742, 224 Educ. L. Rep. 938 (Neb. 2007).

[91] *Neb. Coal. for Educ. Equity v. Heineman*, 731 N.W.2d 164, 219 Educ. L. Rep. 761 (Neb. 2007) (not justiciable).

[92] *Gould v. Orr*, 506 N.W.2d 349, 86 Educ. L. Rep. 414 (Neb. 1993) (ruled non-justiciable).

[93] *Londonderry Sch. Dist. SUA No. 12 v. State*, 958 A.2d 930, 238 Educ. L. Rep. 307 (N.H. 2008) (dismissed as moot).

[94] *Londonderry Sch. Dist. SUA No. 12 v. State*, 907 A.2d 988, 213 Educ. L. Rep. 640 (N.H. 2006).

[95] *Claremont Sch. Dist. v. Governor*, 794 A.2d 744, 163 Educ. L. Rep. 882 (N.H. 2002) ("*Claremont V*").

[96] *Claremont Sch. Dist. v. Governor*, 761 A. 2d 389, 148 Educ. L. Rep. 978 (N.H. 2000) ("*Claremont IV*").

[97] *Claremont Sch. Dist. v. Governor*, 712 A. 2d 612 (N.H. 1998) ("*Claremont III*").

[98] *Claremont Sch. Dist. v. Governor*, 703 A.2d 1353, 123 Educ. L. Rep. 233 (N.H. 1997) ("*Claremont II*").

[99] *Claremont Sch. Dist. v. Governor*, 635 A.2d 1375, 88 Educ. L. Rep. 1102 (N.H. 1993) ("*Claremont I*").

[100] *Abbott v. Burke*, 971 A.3d 989, 245 Educ. L. Rep. 232 (N.J. 2009).

[101] *Abbott v. Burke*, 20 A.3d 1018, 268 Educ. L. Rep. 328 (N.J. 2011) (upholding constitutionality, under Appropriations Clause, of court enforcement of judicial order to fund identified low-income districts).

[102] *Abbott v. Burke*, 710 A.2d 450, 126 Educ. L. Rep. 258 (N.J. 1998) ("*Abbott V*"). In a series of decisions thereafter, the court allowed for relaxation in the remedies provided in *Abbott IV* and *Abbott V*. *E.g.*, *Abbott v. Burke*, 832 A.2d 906 (N.J. 2003). For the entire series of *Abbott* cases, see http://www.edlawcenter.org/ELCPublic/AbbottvBurke/AbbottDecisions.htm. For the latest skirmishes, see *Abbott v. Burke*, 960 A.2d 360, 239 Educ. L. Rep.142 (N.J. 2008) ("*Abbott XIX*"); *Abbott v. Burke*, 956 A.2d 923 (2007) ("*Abbott XVIII*"); *Abbott v. Burke*, 935 A.2d 1152 (2007) ("*Abbott XVII*"). For a related line of litigation focused on property-poor rural, rather than urban, districts, see, e.g., *Bacon v. State Dep't of Educ.*, 942 A.2d 827, 230 Educ. L. Rep. 64 (N.J. App. Div. 2008).

[103] *Abbott v. Burke*, 693 A.2d 417, 118 Educ. L. Rep. 371 (N.J. 1997) ("*Abbott IV*").

[104] *Abbott v. Burke*, 643 A.2d 575, 92 Educ. L. Rep. 545 (N.J. 1994) ("*Abbott III*").

[105] *Abbott v. Burke*, 575 A.2d 359, 60 Educ. L. Rep. 1175 (N.J. 1990) ("*Abbott II*").

[106] *Abbott v. Burke*, 495 A.2d 376, 26 Educ. L. Rep. 670 (N.J. 1985) ("*Abbott I*").

[107] *Robinson v. Cahill*, 355 A.2d 129 (N.J. 1976)

("*Robinson IV*").

[108] *Robinson v. Cahill*, 351 A.2d 713 (N.J. 1975) ("*Robinson III*").

[109] *Robinson v. Cahill*, 339 A.2d 193 (N.J. 1975) ("*Robinson II*").

[110] *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) ("*Robinson I*").

[111] *Maisto v. State*, 64 N.Y.S.3d 139, 349 Educ. L. Rep. 163 (App. Div. 2017) (remanded for more specific factual findings).

[112] *N.Y. State Ass'n of Small City Sch. Dist., Inc. v. State*, 840 N.Y.S.2d 179, 222 Educ. L. Rep. 830 (App. Div. 2007) (the only plaintiffs with standing failed to state cause of action).

[113] *N.Y. Civil Liberties Union (NYCLU) v. State*, 771 N.Y.S.2d 563, 185 Educ. L. Rep. 222 (App. Div. 2004).

[114] *Reform Educ. Financing Inequities Today (REFIT) v. Cuomo*, 631 N.Y.S.2d 551, 103 Educ. L. Rep. 1144 (1995).

[115] *Bd. of Educ., Levittown Union Free Sch. Dist. v. Nyquist*, 453 N.Y.S.2d 643, 6 Educ. L. Rep. 147 (1982).

[116] *Spano v. Bd. of Educ.*, 328 N.Y.S.2d 229 (Sup. Ct. Westchester Cty. 1972) (pre-*Rodriquez*).

[117] *Aristy-Farer v. State*, 58 N.Y.S.3d 877 (2017) (partially denied dismissal).

[118] *Hussein v. State*, 950 N.Y.S.2d 342 (2012) (justiciable and not moot).

[119] *Campaign for Fiscal Equity (CFE) v. State*, 769 N.Y.S.2d 106 (2003) (New York City only). For an overview of CFE's lead attorney and his successful strategy, see David Hoff, *Winning Ways*, Educ. Wk., Jan. 5, 2005, at 27. For a subsequent decision concerning the remedy, see *Campaign for Fiscal Equity v. State*, 814 N.Y.S.2d 1, 209 Educ. L. Rep. 340 (App. Div. 2006).

[120] *Britt v. N.C. State Bd. of Educ.*, 357 S.E.2d 432, 40 Educ. L. Rep. 507 (N.C. Ct. App. 1987).

[121] *Hoke Cty. Bd. of Educ. v. State*, 599 S.E.2d 365, 190 Educ. L. Rep. 661 (N.C. 2004) (with narrowed remedy). In an earlier decision, the state's highest court rejected many of the plaintiff's claims, but remanded the matter for trial on the narrowed possibility of a constitutional violation. *Leandro v. State*, 488 S.E.2d 249,120 Educ. L. Rep. 304 (N.C. 1997). For a more recent decision in which the court rejected an LEA, as compared with the SEA, as being the appropriate defendant, see *Silver v. Halifax Cty. Bd. of Comm'rs*, 821 S.E.2d 755, 361 Educ. L. Rep. 857 (N.C. 2018).

[122] *Bismarck Pub. Sch. Dist. No. 1 v. State*, 511 N.W.2d 247, 88 Educ. L. Rep. 1184 (N.D. 1994) (lacked super-majority required to declare statute in violation of state constitution). A subsequent suit (*Williston Public School District v. State*, 2003) reportedly resulted in an agreement to increase the level and the change the formula for school funding. *Kopanke et al.*, *supra* note 1, at 8.

[123] *DeRolph v. State*, 754 N.E.2d 1184, 156 Educ. L. Rep. 1290 (Ohio 2001) ("*DeRolph III*") (vacated by *DeRolph IV*).

[124] *Bd. of Educ. of City Sch. Dist. of Cincinnati v. Walter*, 390 N.E.2d 813 (Ohio 1979).

[125] *DeRolph v. Ohio*, 780 N.E.2d 529 (Ohio 2002) ("*DeRolph IV*"). For subsequent reaffirmation by an order prohibiting further trial court's further jurisdiction, see *Ohio v. Lewis*, 789 N.E.2d 105, 176 Educ. L. Rep. 841 (Ohio 2003).

[126] *DeRolph v. State*, 728 N.E.2d 993, 144 Educ. L. Rep. 644 (Ohio 2000) ("*DeRolph II*").

[127] *DeRolph v. State*, 677 N.E.2d 733, 116 Educ. L. Rep. 1140 (Ohio 1997) ("*DeRolph I*").

[128] *Okla. Educ. Ass'n v. Okla. Legislature*, 158 P.3d 1058, 220 Educ. L. Rep. 360 (Okla. 2007) (ruled non-justiciable).

[129] *Fair Sch. Fin. Council of Okla. v. State*, 746 P.2d 1135, 43 Educ. L. Rep. 805 (Okla. 1987).

[130] *Pendleton Sch. Dist. v. State*, 200 P.3d 133, 241 Educ. L. Rep. 423 (Or. 2009).

[131] *Withers v. State*, 987 P.2d 1287, 139 Educ. L. Rep. 677 (Or. 1999) ("*Withers II*").

[132] *Withers v. State*, 891 P.2d 675, 98 Educ. L. Rep. 1050 (Or. 1995) ("*Withers I*").

[133] *Coalition for Equitable Sch. Funding, Inc. v. State*, 811 P.2d 116, 67 Educ. L. Rep. 1311 (Or. 1991).

[134] *Olsen v. State*, 554 P.2d 139 (Or. 1976).

[135] *C.G. v. Pa. Dep't of Educ.*, 2008 WL 4820474 (M.D. Pa. 2008) (dismissed challenge to special education funding allocation due to lack of standing).

[136] *Pa. Ass'n of Rural & Small Sch.* (*PARSS*) *v. Ridge*, 737 A.2d 246 (Pa. 1999).

[137] *Marrero v. Commw.*, 739 A.2d 110, 139 Educ. L. Rep. 533 (Pa. 1999) (ruled that urban district's claim, which was only indirectly an issue of constitutionality, was nonjusticiable on grounds of political question and separation of powers).

[138] *Bensalem Sch. Dist. v. Commw.*, 524 A.2d 1027, 38 Educ. L. Rep. 1059 (Pa. Commw. Ct. 1987).

[139] *Danson v. Casey*, 399 A.2d 360 (Pa. 1979).

[140] *William Penn Sch. Dist. v. Pa. Dep't of Educ.*, 170 A.3d 414, 348 Educ. L. Rep. 271 (Pa. 2017) (justiciable).

[141] *Woonsocket Sch. Comm. v. Chaffee*, 89 A.3d 778, 303 Educ. L. Rep. 924 (R.I. 2014).

[142] *City of Pawtucket v. Sundlun*, 662 A.2d 40, 102 Educ. L. Rep. 235 (R.I. 1995).

[143] *Richland Cty. v. Campbell*, 364 S.E.2d 470, 44 Educ. L. Rep. 820 (S.C. 1988).

[144] *Abbeville Cty. Sch. Dist. v. State*, 767 S.E.2d 157, 312 Educ. L. Rep. 917 (S.C. 2014). For the foundational decision in this litigation, see *Abbeville Cty. Sch. Dist. v. State*, 515 S.E.2d 535, 135 Educ. L. Rep. 833 (S.C. 1999).

[145] *Davis v. State*, 804 N.W.2d 618, 273 Educ. L. Rep. 411 (S.D. 2011).

[146] *Olson v. Guindon*, 771 N.W.2d 318, 247 Educ. L. Rep. 961 (S.D. 2009) (inconclusive decision only ruling that plaintiffs had standing).

[147] *Tenn. Small Sch. Sys. v. McWherter*, 91 S.W.3d 232, 172 Educ. L. Rep. 1044 (Tenn. 2002) ("*Small Sch. III*").

[148] *Tenn. Small Sch. Sys. v. McWherter*, 894 S.W.2d 734, 98 Educ. L. Rep. 1102 (Tenn. 1995) ("*Small Sch. II*").

[149] *Tenn. Small Sch. Sys. v. McWherter*, 851 S.W.2d 139, 82 Educ. L. Rep. 991 (Tenn. 1993) ("*Small Sch. I*").

[150] *Morath v. Tex. Taxpayer Student Fairness Coalition, 490 S.W.3d 826, 332 Educ. L. Rep. 1117 (Tex. 2016).*

[151] *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (federal Constitution).

[152] *Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist.*, 228 S.W.3d 864, 222 Educ. L. Rep. 921 (Tex. Ct. App. 2007) ("*Neeley II*").

[153] *Neeley v. W. Orange-Cove Consol. Ind. Sch. Dist.*, 176 S.W.3d 746, 204 Educ. L. Rep. 793 (Tex. 2005) ("*Neeley I*").

[154] *Edgewood Indep. Sch. Dist. v. Meno*, 893 S.W.2d 450, 98 Educ. L. Rep. 509 (Tex. 1995) ("*Edgewood IV*").

[155] *Edgewood Indep. Sch. Dist. v. Kirby*, 826 S.W.2d 489, 73 Educ. L. Rep. 1190 (Tex. 1992) ("*Edgewood III*").

[156] *Edgewood Indep. Sch. Dist. v. Kirby*, 804 S.W.2d 491, 66 Educ. L. Rep. 496 (Tex. 1991) ("*Edgewood II*").

[157] *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 56 Educ. L. Rep. 663 (Tex. 1989) ("*Edgewood I*").

[158] *Brigham v. State*, 692 A.2d 384, 117 Educ. L. Rep. 667 (Vt. 1997) ("*Brigham I*"); *cf. Brigham v. State*, 889 A.2d 715, 206 Educ. L. Rep. 330 (Vt. 2005) ("*Brigham II*") (reversed dismissal).

[159] *Scott v. Commw.*, 443 S.E.2d 138, 91 Educ. L. Rep. 396 (Va. 1994).

[160] *Burruss v. Wilkerson*, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.*, 397 U.S. 44 (1970) (pre-*Rodriguez*).

[161] *Sch. Dist. Alliance for Adequate Funding of Special Educ. v. State*, 244 P.3d 1, 262 Educ. L. Rep. 1004 (Wash. 2010) (special education only).

[162] *Fed. Way Sch. Dist. No. 210 v. State*, 219 P.3d 941, 250 Educ. L. Rep. 781 (Wash. 2009) (employee salary figures in funding formula).

[163] *Northshore Sch. Dist. No. 417 v. Kinnear*, 530 P.2d 178 (Wash. 1974).

[164] *McCleary v. State*, 269 P.3d 227, 276 Educ. L. Rep. 1101 (Wash. 2012) (failure to meet constitutional mandate for education).

[165] *Seattle Sch. Dist. No. 1 of King Cty. v. State*, 585 P.2d 71 (Wash. 1978).

[166] In an unpublished decision, the state's intermediate appellate court ruled in favor of the defendants. *Tomblin v. State Bd. of Educ., Civ. Action No. 75-1268* (W. Va. Cir Ct. Jan. 3, 2003) (available via CFE's ACCESS website - www.schoolfunding.info/states)

[167] *Bd. of Educ. of Cty. of Kanawha v. W. Va. Bd. of Educ.*, 639 S.E.3d 893, 215 Educ. L. Rep. 1154 (W. Va. 2006).

[168] *State Bd. Educ. v. Chafin*, 376 S.E.2d 113, 51 Educ. L. Rep. 637 (W. Va. 1988). For a subsequent decision limited to salary supplements, see *State ex rel. Bd. of Educ. of Randolph Cty. v. Bailey*, 453 S.E.2d 368, 97 Educ. L. Rep. 530 (W. Va. 1994).

[169] *Pauley v. Bailey*, 324 S.E.2d 128 (W. Va. 1984) ("*Pauley II*"). For a related case, see Pauley v. Gainer, 353 S.E.2d 318, 37 Educ. L. Rep. 953 (W. Va. 1986).

[170] *Pauley v. Kelly*, 255 S.E.2d 859 (W. Va 1979) ("*Pauley I*").

[171] *Vincent v. Voight*, 614 N.W.2d 388, 146 Educ. L. Rep. 422 (Wis. 2000).

[172] *Kukor v. Grover*, 436 N.W.2d 568, 52 Educ. L. Rep. 241 (Wis. 1989).

[173] *Buse v. Smith*, 247 N.W.2d 141 (Wis. 1976).

[174] *Campbell Cty. Sch. Dist. v. State*, 181 P.3d 43, 232 Educ. L. Rep. 394 (Wyo. 2008).

[175] *Campbell Cty. Sch. Dist. v. State*, 19 P.3d 518, 151 Educ. L. Rep. 634 (Wyo. 2001). The third decision in this line, *Campbell County III*, concerned capital construction. *Campbell Cty. Sch. Dist. v. State*, 32 P.3d 325, 157 Educ. L. Rep. 366 (Wyo. 2001).

[176] *Campbell Cty. Sch. Dist. v. State*, 907 P.2d 1238, 105 Educ. L. Rep. 771 (Wyo. 1995).

[177] *Washakie Cty. Sch. Dist. No. 1 v. Herschler*, 606 P.2d 310 (Wyo. 1980).

[178] *Sweetwater Cty. v. Hinkle*, 491 P.2d 1234 (Wyo. 1971) (pre-*Rodriguez*).