

# School Law Reporter

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INTRODUCTION AND COMMENT\* BY

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### **Litigating Special Education Issues without an Attorney: A Parent's Right in Federal Court** *Winkelman v. Parma City School District*, 127 S. Ct. 1994 (U.S. 2007).

In May of 2007, the United States Supreme Court ruled on a special education case to determine whether parents, either on their own or as representatives of their special-needs child, can proceed in federal court unrepresented by legal counsel even though they are not trained or licensed as attorneys. The Supreme Court reversed a federal appellate court, which dismissed the parents' complaint because they filed suit in federal court without legal counsel. The Court held that because parents are guaranteed many procedural rights, including the right to reimbursement should they place their child in a private school if the individualized education program (IEP) is found to be inadequate as well as the right to represent their child in administrative proceedings, the substantive and procedural rights under the Individuals with Disabilities Education Act (IDEA) belong to the parent as well as the child, and parents may file suit in federal court without an attorney. *Winkelman v. Parma City Sch. Dist.*, 127 S. Ct. 1994 (U.S. 2007).

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**“parents of a child with autism spectrum disorder ... felt the program did not provide their son with a free appropriate public education ...”**

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In 2003-04, parents of a child with autism spectrum disorder, who met with the local public school district in Ohio (respondent) to develop an IEP for their son, felt the program did not provide their son with a free appropriate public education (FAPE) guaranteed to students with disabilities under the IDEA. The parents (petitioners) placed their son in private school. After an impartial hearing officer and state education agency found the IEP to be sufficient, the parents filed suit in a federal district court, alleging procedural violations and contending that the IEP the school developed for their son was insufficient. They sought reimbursement for the private school tuition, reversal of the state education

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agency's administrative decision, and declaratory relief. They were not represented by counsel in the federal action. *Id.* at 1998.

The district court ruled on the pleadings in favor of the school district. It found that the petitioners' son had received the guaranteed FAPE. Consequently, without the assistance of an attorney, the petitioners filed an appeal with the United States Court of Appeals for the Sixth Circuit. Ultimately, the Sixth Circuit dismissed the appeal because it violated the common-law rule against a person who is not a licensed attorney representing another person in court. The petitioners appealed to the United States Supreme Court. Because federal appellate courts in different circuits have answered the question differently of whether the right to a FAPE belongs to the child or to the parent, the Supreme Court granted certiorari. *Id.* at 1999.

In a 7-2 vote, the Supreme Court reversed the lower courts and held that parents of special-needs students have a right to proceed in federal court without the benefit of legal counsel. The Court focused on the statutory provisions of IDEA and agreed that the text resolved the legal question presented. Specifically, the Court held that parents are real parties with an interest in the substantive guarantees of IDEA and "not merely the guardians of their child's rights," with an interest only in the procedural guarantees provided in the act. The Court reviewed statutory provisions that specifically reference parental rights, including that parents' concerns be considered by the IEP team when making decisions and parental membership on the IEP team. Further, the Court cited provisions in IDEA detailing procedural safeguards built into the IEP process, which are targeted at "children with disabilities and their parents." The Court also referred to the language in the IDEA that requires a FAPE be provided at no cost to the parent. *Id.* at 2000-2001.

## Regional Reporters

### Federal Courts

*U.S. Supreme Court* ..... **Fred Hartmeister**  
Texas Tech University  
**Rebecca Hellbaum**  
Health Sciences Center, Texas Tech University

#### *Court of Appeals*

**1st and 2nd Circuits** ..... **Karen Miksch**  
University of Minnesota

**3rd and 5th Circuits** ..... **Mark Littleton**  
Tarleton State University

**4th Circuit** ..... **Jennifer Sughrue**  
Florida Atlantic University

**6th Circuit and Ohio** ..... **Valerie Riedthaler**  
Kent State University

**7th Circuit** ..... **Suzanne Eckes**  
Indiana University

**Amy Stekete**  
Baker & Daniels LLP

**8th Circuit** ..... **Cindy Lavorato**  
University of St. Thomas

**John Dougherty**

Lindenwood University

**9th Circuit** ..... **Richard Daugherty**  
University of Nevada - Reno

**10th Circuit** ..... **Larry Rossow**  
University of Oklahoma

**11th Circuit** ..... **David D'Agata**  
Squire, Sanders & Dempsey, L.L.P.

*Federal Supplement* ..... **Michael Yates**  
Missouri Southern State University

**Brenda Kallio**  
University of North Dakota

**Michael Tan**  
William Woods University

#### *Higher Education*

**Federal Cases** ..... **Luke M. Cornelius**  
State University of West Georgia

**Alvin Schilling**

**State Cases** ..... **John LaNear**  
University of Wisconsin - Milwaukee

### State Courts

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University of Central Arkansas

**Northwestern** ..... **Rick Geisel**  
Grand Valley State University

**Northeastern** ..... **Jesulon Gibbs**  
South Carolina State University

**Justin Bathon**

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Next, the Court detailed the procedural guarantees in IDEA that are targeted toward parents during an administrative review. It noted that any party (including parents) may present a complaint and pursue a process of review, which must begin with a meeting with the parent. When a complaint is brought, it must be resolved to the satisfaction of the parent within thirty days or be resolved by a hearing officer. The Court also noted that a hearing officer may find a substantive violation of FAPE only if the child's right to a FAPE was impeded or if the violation in question impeded the parent's opportunity to participate in decision making. After administrative review has been exhausted, the Court provided that any party (including parents) may bring a civil action with respect to the complaint and that state educational agencies are required to develop a model form to assist parents in filing a complaint. Finally, the Court stated that the IDEA allows hearing officers to award private school tuition reimbursement to parents of children who did not receive a FAPE and that courts are allowed to award attorney fees to parents who prevail in a civil action. The Court concluded that the act does not provide anything that bars parents from bringing a civil action. *Id.* at 2001-2002.

The Court rejected the school district's arguments that parents are only guardians who are representing their child's interest in a right to a FAPE under the IDEA, with no independently enforceable substantive rights that their child be provided a FAPE. The Court cited statutory language that discussed rights and procedural safeguards afforded to "children with disabilities and parents of such children." The Court was unconvinced by the district's reliance on case law defining parents' interest in their children's rights under the IDEA as accommodations to the fact that a child is legally incapacitated as a minor. The Court instead referred to the policy interest of "protecting the liberty of parents to direct the upbringing and education of children under their control." *Id.* at 2003.

The Court further rejected the district's argument that even if parents do have rights under the IDEA, these rights only extend to procedural safeguards, such as notice and participation in the IEP process and administrative review, but not substantive rights to a FAPE. Specifically, the Court ruled that the IDEA does not differentiate, through isolated references to various procedures and remedies, between the rights accorded to children and the rights of parents. The Court said that this interpretation would create a complicated system of deciding what complaints are substantive and what are procedural, which is not enumerated in the IDEA. It further rejected the argument because it would deny parents who seek relief for substantive matters, as well as parents who do not seek reimbursement for private school tuition, a remedy past the administrative level. *Id.* at 2005-06.

Finally, the Court rejected respondent's argument that allowing parents to proceed in federal court would violate the requirement under the IDEA of clear notice to

states of any burden imposed. The Court found that since parents are only vindicating the rights already guaranteed to them by the IDEA, there is no new burden imposed on states by allowing parents to bring civil action for the right to a FAPE.

Justices Scalia and Thomas concurred in part and dissented in part with the majority opinion. They concurred that the Sixth Circuit erred in dismissing the procedural issues and the reimbursement for private school tuition in the complaint because the IDEA enumerates that procedural issues and private school tuition reimbursement belong to the parents. They disagreed with the majority's holding that a FAPE belongs to a parent. They found that IDEA's right to sue provision defines the party with a right to sue as the "party aggrieved." They read the guarantees afforded to parents in IDEA as rights to notice and participation only and not as rights to a FAPE. Thus, the minority reasoned, since parents do not have an independent right to a FAPE, they cannot vindicate that right for themselves by proceeding without counsel in federal court. *Id.* at 2008.

Addressing issues involving special education has recently been very popular for the U.S. Supreme Court. Specifically, this decision is the third since 2005 [*Schaeffer v. Weast* (2005) and *Arlington Central School District v. Murphy* (2006)]. Unlike these two earlier decisions, parents appear to be the victor of this most recent ruling. The Court has now afforded access to the federal judiciary for parents of special needs students to litigate unresolved special education issues. Where financial concerns used to keep parents from pursuing special education claims, now parents can proceed with a lessened monetary burden. However, the obvious downside is that parents still have to meet all the same complicated procedural courtroom requirements (as does the school district), thus possibly making the judicial process a bit slower as well as court dockets more crowded. Further, this takes some leverage away from school districts to force a settlement, since parents know they can go to court without the threat of having to incur the costs of attorney fees. In sum, there is now a new way of doing business in resolving special education disputes. School districts need to understand the ramifications of this decision and respond accordingly to ensure students receive a free appropriate public education.



## Elementary and Secondary Education

### Charter Schools/Alternative Schools

*School Comm. of Hudson v. Bd. of Educ.*, 863 N.E. 2d 22 (Mass. 2007). The defendant Massachusetts Board of Education awarded the defendant Math and Science Academy Charter School (AMSA) a charter to operate a state charter school. Students from four local towns were eligible for enrollment at the charter school. A copy of the final application for the charter school was sent to each of the school committees for the four towns affected by the proposed charter school. All four school committees submitted written comments expressing their opposition to the final application for the school. After the charter was issued, three of the four school committees filed suit against the board, the commissioner of education, and AMSA seeking judicial review of the decision to grant a charter. The trial court judge ruled that the school committees did not have rights to judicial review; therefore, a judgment in favor of the defendants was granted. On appeal, the state supreme court affirmed, noting that the plaintiffs did not have standing to bring suit because the school committees do not have the final authoritative say on whether a charter is granted. Equally important, proper protocol exists for the committees to express their concerns to designated educational officials, who in turn are charged with weighing all information and making the final decision as to whether a charter should be granted.

### Noncertified Employees

#### Discrimination

*Pyne v. Dist. of Columbia*, 468 F. Supp. 2d 14 (D.D.C. 2006). The plaintiff was a school district financial analyst until he lost his position due to a reduction in force, after which he became a campus business manager until his termination. After his termination, he unsuccessfully applied for three subsequent positions and, as a result, sued the school district alleging violations of section 1981, Title VII, and the Due Process Clause. In granting the school district's motion for summary judgment, the federal district court held that he was able to demonstrate a prima facie case of national origin discrimination by establishing that he was a member of a protected class, he had applied and was qualified, he had been rejected, and that the school district continued to search for an applicant after the plaintiff had been denied the position. However, the school district rebutted the prima facie case by presenting evidence sufficient to establish

that its actions had not been intentionally discriminatory. Finally, the plaintiff was unable to offer any evidence that the defendant's legitimate, nondiscriminatory reasons were a pretext for the non-rehiring.

*Green v. Iberia Parish Sch. Bd.*, 945 So. 2d 940 (La. App. 3 Cir. 2006). The plaintiff, a former cafeteria worker in the defendant Louisiana school district, filed suit seeking damages related to what she claimed as discrimination and retaliation stemming from her earlier allegations of sexual harassment. The trial court granted the school board's exception of *res judicata*, due to previous proceedings in federal court, and dismissed the matter. The trial court also granted the board's request that the plaintiff be enjoined from filing further proceedings related to her discharge from employment. In affirming, the state appellate court held that the former employee's claims were barred by *res judicata* and that the injunction did not violate the employee's right to access to the courts.

### Pupils

#### Due Process

*Risica ex rel Risica v. Dumas*, 466 F. Supp. 2d 434 (D. Conn. 2006). A Connecticut middle school student who had recently transferred to a new school and had been verbally harassed by his fellow students developed a "hit list" of students he supposedly wanted to get even with. The list was written on the cover of his geography book and was discovered by the school janitor. The student filed a section 1983 action alleging that he was denied procedural due process when he was suspended for ten days for making the "hit list," that his substantive due process rights were violated when school officials failed to intervene to prevent harassment by other students, and that his right to privacy was infringed when the principal disclosed the list to her staff. In granting the defendant's motion for summary judgment, a federal district court held that where the student and his parents were informed about the decision to suspend him and the student admitted making the list, the suspension was justified and school officials did not deprive him of procedural due process. The student was not a "confined individual," thus; school officials did not violate his substantive due process rights by failing to protect him from harassment by other students. The student's "hit list" of fellow students was not an education record under the Family Educational Rights and Privacy Act (FERPA), therefore; the principal's disclosure of the list to her support staff did not violate the student's right to privacy under the Fourteenth Amendment.

### *First Amendment Rights*

***Raker v. Frederick County Pub. Sch.***, 470 F. Supp. 2d 634 (W.D. Va. 2007). A high school student brought a section 1983 action against the Virginia school system and officials claiming infringement of his First Amendment rights to freedom of speech. He also sought a preliminary injunction permitting him to distribute anti-abortion literature at school during non-instructional times including the cafeteria during his lunch period, in the hallways between classes, and on campus before and after school. In granting the student's motion, a federal district court held that the school regulation that virtually banned circulation of all written communication during the instructional day violated the *Tinker* disruption standard for free speech. The student had distributed similar material before without incident, and in adopting the distribution policy, the school acted without any history or reasonable fear of the material disrupting class work, involving substantial disorder, or invading the rights of others, but instead acted on a remote apprehension of disturbance. The regulation also violated free speech under a forum analysis, regardless of whether school hallways and the cafeteria were classified as closed fora or limited public fora.

### *Fourteenth Amendment Rights*

***Allen v. Parkland Sch. Dist.***, 2007 U.S. App. LEXIS 9671 (3d Cir. 2007). The plaintiff-appellant was a Pennsylvania high school student and member of the wrestling team who was physically confronted by another, older member of the wrestling team. After the confrontation, the appellant filed suit in federal district court against the school district alleging a section 1983 violation based upon a policy, practice, or custom of the wrestling team members redressing misbehavior of younger members through physical violence. The student further claimed that the physical altercation caused physical and emotional injuries. The jury returned a verdict in favor of the defendant school district. Subsequently, the student appealed the decision to the Third Circuit, claiming that the district judge wrongfully failed to recuse himself after engaging in an ex parte communication with the defendant's attorney. Additionally, the student alleged that federal district court abused its discretion by excluding expert witness testimony. In an unpublished opinion, the Third Circuit affirmed, noting that the appellant could offer no evidence that the ex parte communication was 1) actually ex parte since it was within the earshot of everyone in the courtroom and 2) indicative of bias. Furthermore, the federal appeals court determined that the district court did not abuse its discretion by not allowing expert testimony witness that exceeded the district court-ordered deadline for designation of expert witnesses by nine months.

***Saggio v. Sprady***, 475 F. Supp. 2d 203 (E.D.N.Y. 2007). In a section 1983 action brought by a female Caucasian high school student arising out of several incidents in which he was harassed and assaulted by minority students, a federal district court held that the Caucasian student failed to state an equal protection claim against the New York school district. Although hostility between the students ultimately involved accusations of racism, there was no evidence that race played any role in the district's determination of how to deal with the hostility or the discipline imposed, that the district's response to the student was based on the fact that she was Caucasian, or that she would have been treated differently by the district if she were a minority student. The student failed to state a substantive due process claim based on her allegation that she was deprived of her right to public education when the school district "coerced" her into accepting home-schooling instead of supplying her with a guard to escort her from class to class as a response to the assault by her fellow students.

***Simonian v. Fowler Unified Sch. Dist.***, 473 F. Supp. 2d 1065 (E.D. Cal. 2007). A high school student, who was expelled for three months for being in possession of a "pin-head" size leaf of marijuana found by a search of his car, brought a section 1983 action alleging that the school district violated his rights to equal protection. In denying the defendants' motion to dismiss, a federal district court held that a California statute exempting public employees from tort liability did not preclude a Fourteenth Amendment equal protection claim. The suspension and expulsion provision of the state education code did not preclude the student's claim for money damages based on the violation of equal protection. Where an equal protection challenge is based on selective enforcement of a valid law, the plaintiff can show that the defendants' rational basis for selectively enforcing the law is a pretext for an impermissible motive.

***Wilson v. Cahokia Sch. Dist. No. 187***, 470 F. Supp. 2d 897 (S.D. Ill. 2007). A sixth-grade student who allegedly was sexually assaulted after regular classroom hours by a classmate who was serving a period of after-school detention filed a section 1983 action against the Illinois school district and school officials. In granting the defendants' motion to dismiss, a federal district court held that the school district did not violate the student's substantive due process rights by failing to protect her from sexual assault by a classmate outside regular school hours when the student was under no compulsion to be on the school's premises. School officials did not know or have reason to know that her classmate was capable of committing a sexual assault, and the district did not have any policy or custom that caused the alleged constitutional injury. School officials did not violate the Fourth Amendment rights of the student by interviewing her about the attack without her mother being present and having a female school employee examine her for scratches on her back and arms caused by the alleged assault. The school

had a compelling need to promptly investigate incidents of student-on-student violence.

#### ***Fourth Amendment Rights***

*T.S. v. State*, 863 N.E. 2d 362 (Ind. App. 2007). Sergeant Mark Driskell of the Indiana Public Schools Police received a phone call in regards to student T.S. When an anonymous student-informant telephoned a police officer and told him that a student had marijuana in his right pant pocket, the officer escorted the student out of gym class and to the locker room to change clothes. The officer testified that he asked the student if he had anything he should not have, at which point the student removed a small bag of marijuana from his front pocket. The officer indicated that he then reached into the student's pocket and confiscated a second bag of marijuana. In contrast to the officer's testimony, the student averred that once they were in the locker room, the officer told him about the informant, placed his hand on his chest and told him that he had marijuana because his chest was beating fast. The student said at that point, he told the officer about the marijuana, opened his locker, and the officer removed the marijuana from the pant pocket. The student filed a motion to suppress the evidence against him; however, the trial court refused to do so. Relying upon Indiana case law, the state appellate court determined that the officer was a school resource officer acting in an educational capacity, in large part because he took the telephone call in the offices of the high school where the student attended and only intended to communicate the results of his search to the dean of students for a possible school rules violation. As a result of this classification, the applicable law for school officials applied to the officer. Therefore, upon applying the reasonableness standard articulated in *New Jersey v. T.L.O.*, the appellate court determined that the officer acted reasonably when investigating the student and conducting the search. As such, the judgment of the trial to allow the evidence against the student was upheld.

#### ***Law Enforcement***

*In re B.N.S.*, 641 S.E. 2d 411 (N.C. App. 2007). A North Carolina high school student consented to a search of his person by an assistant principal, which yielded a closed pocketknife located in the student's coat pocket. The student was arrested, and a juvenile delinquency proceeding was filed against him for possession of a weapon on a school campus or property. The trial court entered a Level 2 disposition and ordered the student to be confined to a detention facility. On appeal, the student argued the trial court erred in denying his motion to dismiss by holding that a close pocketknife constitutes a weapon for purposes of the statute. The court of appeals affirmed the trial court's ruling and held that the fact that the pocketknife was closed was irrelevant for purposes of the statute.

#### ***Sexual Harassment***

*Baumgardt v. Wausau Sch. Dist. Bd. of Educ.*, 475 F. Supp. 2d 800 (W.D. Wis. 2007). A fourteen-year-old freshman who was sexually assaulted numerous times by her basketball and golf coach brought a section 1983 action against the coach, supervisory personnel, and the Wisconsin school district alleging violations of due process, equal protection, Title IX, as well as state claims for negligence. The athletic director, principal, and school board filed a motion to dismiss the constitutional claims as preempted by Title IX, and asserted that the state negligence claims were barred by the doctrine of governmental immunity. A federal district court held that Title IX's prohibition of sexual discrimination in programs receiving federal funding preempted the due process and equal protection claims brought under section 1983. However, the ministerial duty and known danger exceptions to the state tort liability law barred the athletic director, principal, and board members, who were aware that the coach was sexually harassing the student and failed to investigate or take actions to prevent the improper conduct, from claiming official immunity.

*Vojtasek v. Diocese of Allentown*, 916 A. 2d 637 (Pa. Super. 2006). In 2004, the plaintiff sued for damages based on alleged sexual abuse that occurred in 1990. At the time of the alleged abuse, the plaintiff was a sixteen-year-old student at a private school. The trial court granted the diocese's motion for judgment on the pleadings. In affirming the trial court, the state superior court held that the two-year statute of limitation for personal injury damages could be tolled on the basis of fraud or deception, but not indefinitely. The plaintiff, who admitted to having been injured by the priest in 1990, should have been aware of the diocese's potential liability. Even if the mother was misled about the relationship between the plaintiff and the priest when she asked the school about it in 1990, the court held that the plaintiff was not relieved of the duty to be reasonably diligent in ascertaining the facts and circumstances that might be grounds for recovery within the period prescribed by the statute.

#### ***Students with Disabilities***

*Allen v. Susquehanna Twsp. Sch. Dist.*, 2007 U.S. App. LEXIS 9394 (3d Cir. 2007). The plaintiff-appellants were the parents of a Pennsylvania student covered by the Individuals with Disabilities Education Act (IDEA). The eleven-year-old student's individualized education program was periodically changed as his needs changed. At the time of the incident in question, the student was receiving only resource assistance. In October of 2003, the student, along with a classmate, left school grounds without permission. The student was found later that evening when he was struck and killed by an automobile on an interstate high-

way. The parents filed suit in federal district court alleging in relevant part that the school district violated the Due Process Clause of the Fourteenth Amendment. Using the state-created danger exception, the parents contended that by not providing the student with an escort as he progressed from classroom to classroom the school district willfully disregarded the student's safety. The federal district court granted summary judgment in favor of the defendant school district. In affirming, the Third Circuit noted that the school district could not have willfully disregarded the student's safety by not providing an escort if the school district did not know that the student needed one.

*Anthony v. District of Columbia*, 463 F. Supp. 2d 37 (D.D.C. 2006). In March of 2005, an independent hearing officer (IHO) determined a child with a disability was entitled to placement in a private school and to eighteen months of compensatory education. In determining the eighteen months of compensatory education, the IHO imposed the two-year statute of limitations outlined in the Individuals with Disabilities Education Act (IDEA) rather than the District of Columbia's three-year "catch-all" statute of limitations. The parents filed suit claiming the IHO had improperly used the wrong statute of limitations. The federal district court agreed with the parents and remanded the case back to the IHO for re-determination of compensatory education, finding that the plaintiffs filed their claim prior to the reauthorization of IDEA, which did not speak to a statute of limitations, and were thus entitled to the "catch-all" statute of limitations noted above.

### *Tort Liability*

*Jamieson v. Vatterott Educ. Ctr.*, 473 F. Supp. 2d 1153 (D. Kan. 2007). Former students of a Kansas private vocational educational institution who spent thousands of dollars for tuition, and who were unable to find employment upon completion of their programs, filed suit alleging that the school fraudulently induced them to enroll through numerous misrepresentations including the quality of the instruction, accreditation of the curriculum, adequacy of the facilities, and opportunities for placement. In granting the defendants' motion to dismiss, a federal district court held that the plaintiffs failed to plead with sufficient evidence particularity what misrepresentations were made, when they occurred, where they were made, or what specific individuals made them. The students' alleged cause of action for breach of contract failed because even though the students were unsuccessful in obtaining desired employment following completion of their courses, their breach of contract claims amounted to unenforceable claims of educational malpractice.

*Culotta v. Smithtown Cent. Sch. Dist.*, 831 N.Y.S. 2d 238 (N.Y. App. Div. 2007). During recess/lunch period, a student was allegedly injured when he slipped and fell over

a coat that was lying on the gymnasium floor. The school district was granted summary judgment in a lower court. On appeal, the state appellate court reversed, finding the lower court erred because it failed to submit evidence sufficient to establish its entitlement to judgment as a matter of law. The appellate court found triable issues of fact existed as to whether the school district failed to maintain its premises in a reasonably safe manner by permitting its students to pile coats on the floor of the vestibule, which was not separated in any way from the adjacent gymnasium floor, and whether it was foreseeable that one or more of the coats would fall off the pile onto the adjacent gymnasium floor. Additionally, triable issues of fact existed as to how long the coat had been on the gymnasium floor where the incident occurred after it had fallen and whether the school district had constructive notice of the alleged hazardous condition. Further, triable issues of fact existed as to whether a reasonably prudent parent under comparable circumstances would have allowed the coat to remain on the gymnasium floor while fifth-grade children played about and whether the school district negligently supervised the student.

*LaPage v. Evans*, 830 N.Y.S. 2d 818 (N.Y. App. Div. 2007). The plaintiff student and one of the defendants (Evans) were juniors attending high school in the school district. One of the school buses transported both students, along with several other students, from an off-campus program back to the high school. During the bus ride, someone poked the student-plaintiff, assuming it was the defendant. The two exchanged words and stood up in the bus aisle. The plaintiff pushed the defendant and then both boys returned to their seats. Nothing further transpired throughout the remaining ten minutes of the bus ride. After the students exited the bus at school, the plaintiff either turned around or was spun around by the defendant, and the defendant struck him in the face approximately ten times in rapid succession, breaking the plaintiff's jaw. In an order reversing the trial court's grant of summary judgment to the school district, the state appellate court found when injuries are caused by the intentional acts of another student, the school is liable under a negligent supervision theory only where the plaintiff shows that the acts of the fellow student could have been reasonably anticipated due to the school's notice or prior specific knowledge of the aggressor student's propensity to engage in such conduct. In this case, it is undisputed that neither student had been in fights before, neither had any serious disciplinary history, the two hardly had any previous interaction, and the school district was not aware of any problems with either one individually or between the two of them. Even assuming that the bus driver saw or should have seen what transpired between the two students standing in the aisle, for purposes of the summary judgment motion where the assumption is in favor of the plaintiff, without more, it was insufficient to alert the school district that it should have anticipated Evans' sudden acts after alighting from the bus. Finally,

the appellate court found the incident here happened so suddenly and without warning that the bus driver had no opportunity to intercede, making the defendant's acts the sole proximate cause of the plaintiff's injuries.

*Benson v. Union Free Schl. Dist. No. 23*, 830 N.Y.S. 2d 757 (N.Y. App. Div. 2007). A child allegedly was injured while attending the New York school district's summer camp program when, as she was swinging on the rings in the school playground, lost her grasp and fell into a pile of sand beneath the rings. A trial court found, in granting the school district's summary judgment motion, that the district established its prima facie entitlement to judgment as a matter of law by demonstrating that there was adequate playground supervision and that a lack of supervision was not the proximate cause of the accident. The child and her parents contended that a heightened level of supervision was warranted under these circumstances, where the child suffered from a condition known as Erb's Palsy. However, this contention was belied by the deposition testimony of the child's mother that no doctor had ever restricted the scope of the activities in which the child could participate. In affirming, the state appellate court noted that the expert evidence submitted by the student and her parents failed to raise a triable issue of fact. The expert's affidavit failed to establish the foundation or source of standards underlying the expert's conclusion that the school district should have provided more intense supervision. Therefore, the expert's affidavit lacked probative force.

## School Districts

### *Constitutional Rights*

*Park v. Hurley*, 474 F. Supp. 2d 261 (D. Mass. 2007). The parents of elementary school students, individually and on behalf of their children, brought a section 1983 action against the school district and its officials alleging that instructional materials used by the school intended to encourage respect for gay persons and couples violated their free exercise of religion and their right to raise their children as they pleased. In granting the defendants' motion to dismiss, the federal district court held that the school district's inclusion in its curriculum of materials depicting families with same-sex parents, and its refusal to exempt the parents' children from such teaching, did not infringe on the parents' or children's rights to substantive due process. The constitutional right of parents to raise their children did not include the right to prescribe what the state may teach. The materials at issue had a rational basis, namely the state's interest in preparing students for citizenship in a diverse society, and did not violate the parents' free exercise of religion.

### *First Amendment Rights*

*Jenkins v. Bd. of Educ.*, 463 F. Supp. 2d 747 (S.D. Ohio 2006). A parent requested that the Ohio school district follow medical instructions other than those listed on the then-current emergency medical card but refused to complete a new medical card specifically outlining the new instructions. The school refused to implement medical treatment except as provided on the medical card. The parent complained publicly and sent a letter to the local newspaper about the poor treatment her diabetic child was receiving in the public school. The parent then filed suit claiming a multitude of violations. After all but one of the claims were dismissed by the plaintiffs, the federal district granted summary judgment to the school district on the plaintiff's first amendment claim, holding that because the parent's communications were not matters of public concern, her discussions and letter to the newspaper were not protected speech; therefore, she was not entitled to assert that the school had retaliated against her.

### *Labor Relations*

*Indiana Area Sch. Dist. v. Ind. Area Educ. Assoc.*, 917 A. 2d 366 (Pa. Cmwlth. 2007). The existing collective bargaining agreement (CBA) between the education association and the school district (district) included certified school nurses as part of the bargaining unit. In 2002, the Pennsylvania Labor Relations Board (board) issued an order requiring the district to include assistant registered nurses (assistant RNs) in the bargaining unit. The school district, however, informed the education association that the assistant RNs would have to bargain for their salaries and benefits. The association refused to bargain, and the district refused to submit the association's subsequent grievance to arbitration. The district and the association filed unfair labor practice charges with the board. The board held that the association committed an unfair labor practice by refusing to bargain and that it failed to establish that the certified school nurse and assistant RN positions were substantially similar. In a separate order, the board ordered the district to arbitrate the association's grievance. The arbitrator determined that the two nurse positions were substantially similar and granted salary and benefits pursuant to the CBA to the assistant RNs. A trial court overturned the arbitrator. The state appellate court, however, reinstated the arbitrator's award. Even though the board's decision finding that the positions were not substantially similar was relevant in the arbitration case, collateral estoppel did not apply. Jurisdiction to determine the arbitrability of an issue rests solely with the arbitrator. The trial court exceeded the limited review courts have in reviewing arbitration decisions. The trial court only had authority to review the arbitrator's decision to determine whether the issue was within the terms of the CBA and whether the arbitrator's decision was rationally derived from the CBA.

### Property & Contracts

**Kleinman v. Lower Merion Township Zoning Hearing Bd.**, 916 A. 2d 726 (Pa. Cmwlth. 2007). A Pennsylvania private school owned two adjoining pieces of land. The first parcel had a school building; the second parcel had a residence with an attached classroom, administrative area, and other rooms. The school applied to merge the two parcels, enlarge the facility on the first parcel, and convert the residence to offices. An objection was filed, claiming that the spacing and density provisions of the applicable ordinances prohibited the school's intended use of the parcels. The objectors claimed that the exception could not be granted because another special exception was within 500 feet and within the same block of the school. Because the objectors' interpretation was not clear from the plain text of the zoning code and because the governing body could have adopted clearer language (and thereby eliminated the ambiguity) but did not, the ordinance language is to be interpreted in favor of the property owner. Thus, the existence of the other nearby special exception did not preclude approval of the exception. Granting the exception also would not, contrary to the objectors' arguments, jeopardize the public interest, health, safety, or welfare of the community. The school has more than the required parking spaces for enrollment and does not propose to expand the student body even though it planned to increase the size of the school facilities. Thus, in affirming a trial court's order denying the objection, the state appellate court also found that the open space reservation requirements did not apply to the school, since its property was not developed for residential purposes.

**Citizens Addressing Reassignment & Educ., Inc. v. Wake County Bd. of Educ.**, 641 S.E. 2d 824 (N.C. App. 2007). A North Carolina school board entered into a lease to construct modular school facilities to alleviate school overcrowding until permanent facilities were constructed. A citizens' group filed suit for mandamus and declaratory and injunctive relief to prohibit the board from expending public funds for the construction of the temporary facility six months after the lease was ratified, construction on the facility was substantially complete, and three months before the beginning of upcoming school year. The trial court granted the board's motion to dismiss the group's claims as moot and on the principle of laches. In affirming, the state appellate court held that the plaintiff could not restrain the expenditure of funds already expended and that the delay in bringing suit in the context of the upcoming school year would bring substantial harm to the school board.

**Brown v. Penland Constr. Co., Inc.**, 641 S.E. 2d 522 (Ga. 2007). A construction company built an indoor baseball-hitting facility for a high school on land owned by a school board. The company sued the school board, the school's athletic boosters club, and the varsity baseball

coach upon the school board's failure to pay for the facility. The trial court denied the defendants' motions for directed verdict, and a jury found each jointly and severally liable under the theory of *quantum meruit* (implied contract). The court of appeals affirmed the trial court's decision. The Supreme Court of Georgia accepted certiorari to determine only whether the trial court erred by denying the coach's motion for directed verdict on issue of *quantum meruit*. In reversing the trial court's decision, the court found that no allegation was made that the coach acted in a willful, malicious, or wanton manner or with actual intent to cause injury sufficient to pierce official immunity.

### Sunshine Laws & FOIA

**Cyr v. Madawaska Sch. Dep't**, 916 A. 2d 967 (Me. 2007). A group of students, parents, and school administrators objected to the school district's decision to nonrenew a teacher's contract. An attorney investigated the controversy and released a report to the public. A citizen sought an unredacted version of the report. The trial court ordered the district to release the report, disagreeing with the district's assertion that the redacted portions were confidential pursuant to state statute. The Supreme Judicial Court of Maine overruled the trial court. After reviewing the redacted portions *in camera*, the court held that those portions—with one exception—related to the personal history, general character, or conduct of the employee or his immediate family. Therefore, the redacted portions constituted the kind of employee evaluation protected under the statute, even though the evaluation was not conducted by a public employee. The court agreed with the trial court, however, that the general recommendations to the local school board on the future conduct of the board were not confidential and should be released.

**O'Shea v. W. Milford Bd. of Educ.**, 918 A. 2d 735 (N.J. Super. A.D. 2007). During an executive session of the board, the board secretary made handwritten notes. She then used those notes to prepare the meeting minutes, which she was statutorily obligated to prepare and make publicly available. The complainant appealed the decision of the Government Records Council not to provide a copy of the secretary's handwritten notes. The New Jersey Superior Court agreed with the council that the handwritten notes were not public records. Without additional interpretation, the notes could not serve as a reliable account of the meeting. The notes were also a work-in-progress and therefore not a public record. The fact that the notes were made by a government employee did not, by itself, make them a public record. Prior case law supported the court's holding that the document used to prepare the official record of the meeting was not a public record. Holding otherwise would also defeat the exception in the law for executive sessions, in which boards are allowed to have private discussions on personnel and contract matters. It would also lead to the

absurd result of making public records notes written on scraps of paper for use as a memory aid.

### ***Tort Liability***

***Butler v. Upchurch Telcoms. & Alarms, Inc.***, 946 So. 2d 387 (Miss. App. 2006). The plaintiff worked as a receptionist with the Mississippi company. As part of her daily responsibilities, she made announcements over the public address (PA) system to the entire school. In March of 1999, the plaintiff suffered an electrical shock that she alleged happened when she simultaneously placed one hand on the "all call" button and the other on the microphone while making announcements. She alleged that the electrical shock resulted in damage to her teeth, tongue, and brain resulting in drooling, speech impairment, partial loss of the use of her right arm and leg, and mental and emotional problems. In affirming in part, reversing in part, and in remanding a trial court's grant of summary judgment to the defendant telecommunications and alarm company, the state appellate court held that genuine issues of material fact existed as to whether the PA system or a frayed fan cord caused the electrical shock.

***Rodriguez v. Hernandez, City of New York, Sch. Construction Authority***, 830 N.Y.S. 2d 780 (N.Y. App. Div. 2007). The plaintiff allegedly sustained injuries when the motor vehicle he was driving was hit by a second vehicle driven by the defendant, Hernandez, which caused the plaintiff to lose control of his vehicle and collide into a sidewalk shed erected in connection with a construction project at a public school building. When the school sidewalk shed collapsed, a pole allegedly stored on top of it fell through the plaintiff's windshield and pierced his leg. The plaintiff brought this action against, among others, Hernandez and the City of New York and the state Department of Education. After a trial court denied the city's motion for summary judgment, the state appellate court reversed, finding that even if the City and the School Construction Authority (SCA) improperly erected a sidewalk shed and permitted it to be used for the storage of construction materials, they were nevertheless entitled to summary judgment dismissing the causes of action asserted against them because they established that the proximate cause of the accident was the plaintiff's loss of control of his vehicle after being hit by Hernandez' vehicle. The sidewalk shed merely furnished the condition for the occurrence, not the cause. Since the possibility that a motor vehicle would leave the paved roadway and strike the sidewalk shed was neither contemplated nor foreseeable, the city and the SCA, in erecting the sidewalk shed, owed no duty to protect passengers or drivers of motor vehicles from an injury arising from a motor vehicle collision with the sidewalk shed, which was erected to protect pedestrians from falling debris during construction.

***Leighton v. City of New York***, 830 N.Y.S. 2d 749 (N.Y. App. Div. 2007). At issue in this case is whether the law allowed a cause of action for damages allegedly sustained by a baby as a result of an accident, which occurred when the baby was *in utero* and not viable outside the womb. The baby's mother, a school teacher who was four months pregnant at the time, allegedly fell as a result of a defective toilet seat. Five minutes after her fall, she felt cramping in her lower abdomen and was taken to the hospital where she was treated and released. Thereafter, the baby was born three months prematurely. While a notice of claim was filed shortly after the baby was born, the complaint in this case to recover damages for personal injuries was not commenced until three years later. Therefore, the city moved to dismiss the complaint on the grounds that the mother's causes of action were time barred and the baby, as a plaintiff, failed to state a cause of action. The lower court dismissed the mother's causes of action as time barred by the one-year-and-ninety-day statute of limitations. That determination was not challenged on appeal.

However, with regard to the infant plaintiff, the city claimed she had no cause of action on the ground that at the time of the alleged breach of duty, she was a non-viable fetus; therefore, the city did not owe her a duty of care. The mother, on behalf of the baby, opposed this and asserted the city was attempting to add in a new requirement to negligence actions. The lower court agreed with the city that in order for the infant plaintiff to have a cognizable cause of action, it must be a viable fetus at the time of the injury and must be later born alive. Since the infant plaintiff was only a fourteen-week fetus at the time of the accident who would not have been viable outside the womb had she been born at that juncture, the lower court found that she had no cause of action. In reversing, the state appellate court found that since the infant plaintiff was born alive and alleged that her injuries resulted from an accident that occurred while she was *in utero*, she has stated a cause of action. Accordingly, the city's motion to dismiss the infant plaintiff's cause of action was denied.

## **Teacher & Administrator Employment**

### ***Contracts, Salary & Benefits***

***Piney Woods Country Life Sch. v. Young***, 946 So. 2d 805 (Miss. App. 2006). The plaintiff was employed at the school full-time as an assistant director and teacher. She also worked as a part-time house parent when situations arose requiring her to do so. In January of 2002, the plaintiff sustained a work-related injury in the course of her full-time employment position at the school. The Mississippi Workers' Compensation Commission calculated the plaintiff's average weekly wage as only her salary for the full-time position. The commission determined that it could not in-

clude her earnings as a part-time house parent. In addition, the trial court affirmed. In affirming in part, reversing in part, and remanding, the state appellate court held that (1) substantial evidence supported the Workers' Compensation Commission's calculation of the claimant's loss of earning capacity, and (2) the entire earnings the claimant received from the same employer, though earned in two different positions, were to be considered in calculating benefits.

### *Discrimination*

**Kurek v. N. Allegheny Pub. Sch.**, 2007 U.S. App. LEXIS 10266 (3d Cir. 2007). The plaintiff-appellant was a teacher in the defendant Pennsylvania school district and was diagnosed with a medical condition that led to extreme exhaustion. After several attempts to return to teaching in the school district with limited success, the teacher made a final request to the school district to teach. The school district requested a note from a physician certifying her ability to return to work. The physician's note indicated that the teacher could return to work given four specific accommodations. The school district agreed with three of the accommodations, but refused to grant the accommodation that allowed the teacher to work less than seven and a half hours per school day. The teacher filed suit in federal district court alleging that the school district violated the Rehabilitation Act by not providing the accommodation. The teacher contended that a seven-and-a-half-hour workday was not an essential function of the job. In affirming a federal district court's grant of summary judgment to the school district, the Third Circuit noted that the school district offered substantial evidence of the necessity of the seven-and-a-half-hour work day, including the specific mention in the collective bargaining agreement. As such, the federal appeals court upheld the district court's determination that the teacher was not a qualified person with a disability as defined by the Rehabilitation Act.

**Woods v. Sheldon Indep. Sch. Dist.**, 2007 U.S. App. LEXIS 8562 (5th Cir. 2007). The plaintiff-appellant, a sixty-nine-year-old African-American male, was on the first year of a two-year teaching contract when his supervisor recommended to the Texas school board that the contract not be extended for another year. After the board concurred with the recommendation not to extend the contract, the teacher resigned. Subsequent to the end of the academic year, the teacher filed a complaint with the Equal Employment Opportunity Commission, which issued a right-to-sue letter to the teacher. The teacher then filed suit in federal district court alleging race and age discrimination. The federal district court granted summary judgment to the defendant school district. In his appeal to the Fifth Circuit, the teacher dropped the race-discrimination claim. In an unpublished opinion, the federal appeals court upheld the ruling of the lower court, noting that the teacher failed to make a prima

facie case of discrimination because the teacher failed to show that he was "discharged" from employment.

### *Dismissal, Nonrenewal & RIF*

**Herrera v. Union No. 39 Sch. Dist.**, 917 A. 2d 923 (Vt. 2006). A school principal's two-year contract stipulated that if his contract was not renewed or if he was suspended or dismissed during the term of the contract, he could appeal such action pursuant to the state statute governing appointment and dismissal of principals. During the fall semester (the contract did not expire until the following summer), the executive committee of the school board met with the principal and offered him a choice to either resign with pay and benefits or be terminated. When the principal did not respond to this offer, the board wrote a letter, informing him he had been placed on administrative leave with pay for the remainder of the contract term, that his contract would not be renewed for the following school year, and that he had the right to have a hearing regarding the non-renewal of his contract. The principal attended a hearing, but the board did not change its decision to non-renew his contract. A member of the board and the superintendent were quoted in a newspaper article, suggesting that the real reasons for the board's action were not suitable to be revealed to the public and would subject the board (and therefore taxpayers) to financial risk. The principal filed suit alleging several causes of action, including breach of contract, violation of due process rights, and defamation. The trial court dismissed the contract and due process claims on summary judgment, and a jury found that the district was not liable for defamation.

In reversing the trial court on the contractual and procedural claims, the Supreme Court of Vermont held that the district breached the contract by dismissing the principal without providing him the appeal procedure specified by the law in cases of dismissal. The district's action was clearly a mid-year dismissal, even if it was with pay. Dismissals, the court noted, may include pay or other terms determined by the employer. At the time of the supposed non-renewal, the district relieved the principal of all responsibility and authority. The district even informed the state unemployment office that the principal had been fired. The court ruled that the district could not argue that the principal's failure to appeal the supposed non-renewal made his claim that he was dismissed untimely. The board did not issue a written decision with findings of fact and conclusions of law, as required by the statute governing dismissal. The principal could recover nominal damages for the district's failure to offer the hearing guaranteed in the contract, and he could also recover consequential damages if he could prove that the lack of the appropriate hearing harmed his reputation such that he lost job opportunities. In addition, the court found that the principal may state a claim for deprivation of a liberty interest if he can show that the district made statements that undermined his apparent professional

competency to the degree that he could no longer practice his profession. The district's comments suggested not only incompetence, but malfeasance. The district violated the principal's liberty interest by damaging his reputation without allowing him the opportunity guaranteed by the statute to clear his name.

### *First Amendment Rights*

**Roberts v. Newark Pub. Schs.**, 2007 U.S. App. LEXIS 9529 (3d Cir. 2007). The plaintiff-appellant was a substitute teacher in the defendant school New Jersey school district. The teacher allegedly taught nearly every day for nine years. In 2000, he filed a grievance with the teacher's union against the school district because he arrived to teach on a day that school was cancelled due to inclement weather. Subsequent to the complaint, he was paid for the day. The teacher claimed that after filing the grievance, he stopped receiving teaching assignments. In federal district court, he sued, claiming, inter alia, that the school district violated his First Amendment right to free speech by "blackballing" him due to his grievance. Furthermore, the teacher alleged that the district violated his Fourteenth Amendment right to equal protection with their system of securing substitute teachers. In an unpublished opinion affirming the federal district court's grant of summary judgment to the school district, the Third Circuit noted that the speech claim regarded speech that was a private concern and not subject to constitutional protection. Additionally, the court held that the appellant produced no evidence that he was in a protected class that led to an unconstitutional violation of exclusion.

**Houlihan v. Sussex Tech. Sch. Dist.**, 461 F. Supp. 2d 252 (D. Del. 2006). A Delaware school psychologist, who openly criticized the school district for a lack of compliance with Individuals with Disabilities Education Act (IDEA) guidelines, received three written reprimands, and her contract was non-renewed within five weeks of discussing her concerns with a school board member. In making its determination as to whether the school district had dismissed the psychologist in retaliation for her concerns over IDEA violations, the federal district court examined whether the psychologist could demonstrate a prima facie case of retaliation under the Rehabilitation Act. Finding that she did, and finding that she received her first written reprimand one week after making her initial complaint, the court denied the school district's motion to dismiss the Rehabilitation Act complaint. Because the psychologist's complaints were taken in her role as psychologist, and not in her role as private citizen, the court, in granting summary judgment to the school district on the First Amendment claim, found that the psychologist's speech was not protected; therefore, the school district could not be found guilty of retaliation.

## Higher Education

### Athletics

#### *NCAA*

**U.S. Dep't of Educ. v. NCAA**, 481 F.3d 936 (7th Cir. 2007). The University of the District of Columbia is a member of the NCAA, and as such subject to its rules. A violation of an NCAA rule can impose heavy costs should it result in the imposition of sanctions on the violator. Member schools can minimize their punishment, however, by reporting their violations to the NCAA before it discovers them. The university did this, reporting violations involving its basketball teams in the 2004-05 season. The exact nature of the violations was unclear, but they seem to have included misuse of federal funds, and the Inspector General of the Department of Education began an investigation of that misuse. In the course of the investigation, the department issued a subpoena to the NCAA for documents the university had submitted, or the NCAA had prepared, in connection with the NCAA's investigation of the university's self-reported violations. The NCAA moved to quash the subpoena or in the alternative for a protective order. The federal district court denied the motion. The NCAA appealed only from the denial of the protective order. In affirming, the Seventh Circuit found that the department is authorized by law to conduct such an investigation. The NCAA had argued that if the government can make unrestricted use of documents submitted to the NCAA in aid of its own investigations, this would impede those investigations because whistleblowers will worry that if they inform the NCAA, their cover will be blown. According to the federal appellate court, this amounted to arguing that a private organization should have the right to impede government investigations because it wants to conduct its own investigations without hindrance. To state the proposition was almost enough to refute it.

#### *Labor Relations*

**Board of Trs. v. Ill. Labor Relations Bd.**, 862 N.E. 2d 944 (Ill. 2007). In negotiating collective bargaining agreements between the state university in Illinois and both the Service Employees International Union (SEIU) and the Illinois Fraternal Order of Police Labor Council (FOP), a dispute over whether parking could or should be bargained arose. The SEIU wanted a parking fee schedule favorable to its interests, and the FOP wanted a parking space provided for each employee close to their job location. The university refused to bargain with both SEIU and FOP on the parking issues, arguing they were only permissible, as opposed to

mandatory, subjects of bargaining. Both the SEIU and the FOP contend parking conditions are a mandatory subject of bargaining as it concerns wages, hours, and terms and conditions of employment. In reversing a state appellate court's ruling that parking was not a mandatory bargaining subject, the Illinois Supreme court reasoned that even though the University voluntarily provided parking as a service, where such a service is offered it becomes a condition of employment. Because reasonable alternatives to parking were limited and most employees drove to work, parking could reasonably be considered integral to the employee's job. Secondly, the court found that the parking issue was not a matter of inherent managerial authority. The university argued both that the parking was a revenue stream for the university and that parking implicated academic functions; however, the court found these did not rise to the level of the inherent managerial authority test. Thus, the court found for the SEIU and the FOP that parking was a mandatory subject of bargaining.

### *Tort Liability*

***Stumpf v. Hagerman Const. Corp.***, 863 N.E. 2d 871 (Ind. App. 2007). The plaintiff, an employee of a company subcontracted by the defendant to install pipes as part of an Indiana university's renovation of a campus facility, fell from a ladder and sustained brain damage while performing his work. Subsequently, the plaintiff filed suit against the construction company and the subcontractor for negligence. The trial court granted summary judgment to the defendants and granted their motion to prohibit the deposition of an expert witness. In his appeal, the plaintiff argued that the defendants owed him a duty of care that was breached, thereby proximately causing the injury. In Indiana, an employer is generally not responsible for overseeing the work of an independent contractor. However, there are exceptions, with one being that a duty can exist based on contract. The plaintiff argued that such a responsibility was contractually created between the construction company and the university. The state appellate court reversed the trial court's grant of summary judgment to the defendant, noting that a triable issue existed as to whether a duty was owed to the plaintiff. After analyzing the final contracts among the parties, the court agreed with the plaintiff that the language in the contract between the construction company and the university made the construction company responsible for his subcontractor's employees. The court decided that whether this duty of care was breached was a jury question. With regard to not allowing the expert's testimony, the appellate court upheld the trial court's decision because the testimony was irrelevant to the negligence claim.

***Perdue v. Athens Tech. Coll.***, 641 S.E. 2d 631 (Ga. App. 2007). The grandmother of a Georgia college student filed suit for negligence against the college for injuries related to

her fall at a commencement ceremony. The plaintiff's counsel provided prior notice to the Risk Management Division and Department of Administrative Services in accordance with state law. However, the notice failed to set forth the amount of the loss claimed as required by state tort law. The trial court dismissed the suit for failure to comply with this provision. In affirming, the state appellate court held that the plaintiff's notice clearly did not state the amount of loss claimed, and the subsequent settlement demand by letter, not sent by certified mail in accordance with state statute, did not cure the prior notice.

## Nonacademic Personnel Employment

### *Discrimination*

***Keller-Mcintyre v. S.F. State Univ.***, 2007 U.S. Dist. LEXIS 21490 (N.D. Cal. 2007). The employee asserted causes of action alleging employment discrimination, retaliation, and harassment on the basis of sex, age, and disability, in violation, respectively, of Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. The university moved for summary judgment with respect to all causes of action. The employee's sex and age discrimination claims were based on the contention that she was forced to work outside her classification and in a lower work status under a colleague, whose credentials were inferior to those of the employee, as well as the dean's decision to re-assign the positions of the employee and an assertedly younger male, with the result that the employee was given a younger male's job in the kinesiology department while the male was given the employee's job in her former department. According to the federal district court, assuming, arguendo, the employee had established a prima facie case of sex and age discrimination as a result of the dean's decision to re-assign the employee and the male to each other's positions, the university had articulated a legitimate, nondiscriminatory reason for that assignment. Therefore, the court granted the university's motion for summary judgment with respect to the employee's claim that she was discriminated because of her sex and age by being assigned to work in the department of kinesiology. In regard to the employee's disability discrimination claims, the court concluded that the university's motion for summary judgment with respect to this claim was denied to the extent that such a claim was based on previously asserted adverse employment actions.

***Kelly v. Harcum Coll.***, 2007 U.S. Dist. LEXIS 15975 (E.D. Pa. 2007). The facilities department is responsible for maintenance, housekeeping, and grounds at the Pennsylvania college. The department had twelve employees. Until May of 2004, the department was supervised by a single individual. Following this individual's resignation, the department had two co-directors, both of whom are white.

The employee, a forty-two-old African-American claimed that he was discriminated against by not being promoted to the position of co-director. In Count I of the employee's complaint, he alleged that the college discriminated against him based on his race in violation of section 1981. It was clear to the court that there was no genuine issue of material fact and that the college was entitled to judgment as a matter of law on this count. Because the employee failed to offer evidence from which a reasonable factfinder could disbelieve the college's articulated reason for promoting the two co-directors over the employee, summary judgment in favor of the college was appropriate on Count I. Count II was a defamation claim. Here, Count I provided the basis for federal jurisdiction, and that claim had been dismissed, leaving only a state law claim for defamation. Judicial economy and convenience favor the employee pursuing this claim in state court. Fairness concerns were not implicated since the employee risked dismissal of his state law claim when he filed in federal court and invoked the court's discretionary supplemental jurisdiction power. Moreover, comity favors permitting a state court to hear the state law claim. Thus, the court declined to exercise supplemental jurisdiction over the employee's defamation claim.

*Philipsen v. Univ. of Mich. Bd. of Regents*, 2007 U.S. Dist. LEXIS 25898 (E.D. Mich. 2007). The employee applied for employment as a program coordinator in the university's school of business. The employee was offered the position and accepted the position with the understanding that it did not have university benefits. Soon after accepting the position, the employee asked the program director whether it would be possible to add university benefits to the position. At the director's request, the university approved a position change and converted the program coordinator position into a position with benefits. Meanwhile, the director learned that her assistant director had accepted another position at the university. The director contacted the employee and inquired whether she would be interested in applying for the assistant director position, and the employee was eventually offered the assistant director position. According to the employee, prior to being advised of the salary for the assistant director position, the director stated: "I've got an offer for you. Before I give it to you, I have a question ... Are you sure you don't want to stay at home to be with your children." At some point, either before or after the job offer, the employee informed the director that her au pair was not working out and that she needed to make alternate childcare arrangements. Later, the employee inquired of the director about a flextime work schedule. The employee was informed that the schedule proposed was not acceptable for the program. Even later, the employee expressed a hope that during the slower months, she would occasionally be permitted to work through lunch and leave the office at 4:00 P.M. The director testified that she felt that the employee's communications were disre-

spectful and that she felt it was a part of a pattern in which the employee was never completely satisfied with the terms of her employment. The employee was sent a letter rescinding the offer of employment. At the same time, the university's school of business filled the assistant director position and the project coordinator position. Both positions were filled with females. In her suit against the university, the employee asserted a "sex-plus" discrimination action. "Sex-plus" discrimination exists when a person is subjected to disparate treatment based not only on her sex, but on her sex considered in conjunction with a second characteristic. Here the employee claimed that the university unlawfully rescinded her job offer based on her status as a woman with children. In granting the university's summary judgment motion, the federal district court found that the director's alleged question was not direct evidence of discrimination because it did not compel a reasonable factfinder to conclude that the employee's job offer was rescinded for discriminatory reasons. Further, the employee failed to produce sufficient circumstantial evidence to create a triable issue. Here, there was no evidence that the employee was treated differently than were males with young children, or males in general for that matter. In fact, the employee was offered the position of program coordinator over a male applicant with children. She was also offered the assistant director position, despite the director's knowledge that the employee had young children. Finally, after the employee's job offer was rescinded, both the assistant director position and the project coordinator position were filled with females. Under these facts, and the authority of case law, the court found that the university was entitled to summary judgment on the employee's "sex-plus" claims under Title VII and state law.

*Strain v. Univ. of Pittsburgh Med. Ctr.*, 2007 U.S. Dist. LEXIS 22288 (W.D. Pa. 2007). The employee brought this action against her employer, the defendant medical school, alleging that the school demoted her because of her age and gender and replaced her with a younger male in violation of the Age Discrimination in Employment Act, Title VII of the Civil Rights Act, and the Pennsylvania Human Rights Act. The employee also alleged that the school retaliated against her by issuing an unsatisfactory performance evaluation and by stripping her of all meaningful duties after she filed a charge with the EEOC. The employee was a sixty-three-year-old female with a bachelor's degree in medical technology and a master's certification in project management. Beginning in the late 1980s, various companies employed the employee in their information technology departments until 1999, when South Side Hospital, her employer at the time, was purchased by the school. In her first year at the school, she received three promotions and a favorable employment review. The employee's last promotion was to the position of project lead within the school's information services division in late 1999, a position she

continues to hold. In granting the school's post-trial motion for judgment as a matter of law, the federal district court concluded that the evidence adduced at trial did not support the inference that the school discriminated or retaliated against the employee. For similar reasons, the employee could not meet her ultimate burden of persuading the court that the school's legitimate, nondiscriminatory explanations for its actions were actually false and that its true motive was discriminatory or retaliatory. Because the employee did not prove that age, gender, or protected activity was the but-for cause of her removal from the physicians portal project in October of 2003, the content of her December 2003 evaluation, or the quality and quantity of her work assignments thereafter, she did not meet her ultimate burden of persuading the court that the reasons the school offered for its actions were pretextual.

*Hunter v. Rowan Univ.*, 2007 U.S. Dist. LEXIS 23515 (D.N.J. 2007). The Caucasian employee, an administrative assistant employed at the university, alleged that the university and individual defendants, including a dean, discriminated against her on the basis of her race in violation of sections 1981 and 1983 and in violation of the New Jersey Law Against Discrimination (NJLAD). Additionally, the employee alleged that she was discriminated against because of her age in violation of the Age Discrimination in Employment Act (ADEA) and the NJLAD. She also contended that the NJLAD was violated when she was retaliated against for engaging in protected activity. Finally, the employee alleged that the university and the dean conspired to carry out racial discrimination in violation of section 1985. The federal district court granted the university's and individual defendants' motions for summary judgment on the employee's race and age claims. In May of 2003, the dean requested and received approval from the university administration to replace the employee. After an extensive search, a forty-five-year-old Hispanic woman was hired to fill the position. The court found that even assuming, for the sake of argument that in addition to the decision not to renew the employee's contract, the employee's move to less desirable office space and/or the failure to inform her of the job vacancy is an adverse employment action, a reasonable jury could not conclude that any treatment the employee received at the university was because of her race. With regard to the ADEA and NJLAD, the employee failed to attempt to discredit the defendants' articulated reasons for certain adverse employment actions. The university and individual defendants provided adequate evidence that the employee's performance was no longer satisfactory. The employee also failed to present any evidence showing that invidious discrimination was the real motivating factor behind the adverse actions.

### *Dismissal, Nonrenewal & RIF*

*Nalls v. Bd. of Trs. of Ill. Cmty. Coll. Dist. No. 508*, 2007 U.S. Dist. LEXIS 23878 (N.D. Ill. 2007). The employee was employed by an Illinois community college as an adult educator. On February 12, 2005, the employee was observed carrying a computer monitor, partially covered by a red blanket, down a stairwell of the college. Upon inspection of the employee's office by the college security personnel and staff that observed the employee, a computer monitor and red blanket were discovered. The identifying numbers of the computer monitor discovered in the employee's office matched those on a computer monitor missing from a restricted access, secured area of the college. The employee alleged in his complaint that the president of the college instructed college security to remove him from the college and initiated the employee's arrest by city police in connection with the monitor discovered in his office. Later, the college sent the employee a letter advising him that an emergency pre-discipline meeting had been set for February 21, 2005, outlined charges against him, and informed him that he was suspended without pay pending resolution of the charges. The employee attended the meeting with two union representatives and two witnesses. Sometime thereafter, the employee was formally terminated. The employee contended that the college deprived him of his right to procedural due process guaranteed by the Fourteenth Amendment by discharging him without first providing him with notice and opportunity to be heard. The employee argued that he was deprived of his protected interest in continued employment no later than February 14, 2005, after the college changed the locks on his office door, stationed security personnel outside his office, directed security to escort him off the college's premises, and initiated his arrest by city police because these measures actually or constructively terminated his employment. The college countered that the deprivation of the employee's protected interest did not occur until after the employee's disciplinary hearing on February 22, 2005, when the employee's employment was officially terminated. Before then, the college maintained that the employee was merely suspended without pay. The federal district court found that it need not decide when the employee was actually terminated because even if it was assumed that the employee was simply suspended without pay prior to his disciplinary hearing, it was clear that his due process rights were violated. According to the court, if the termination was justified, the employee may be entitled to lost pay for the period beginning February 14 through the time he would have been fired or suspended without pay had proper procedures been followed. If the termination was not justified, the employee's damages may include the consequences of the termination, such as lost pay. Also, the employee might recover damages for mental and emotional distress caused by the denial of procedural due process. All of this suggested to the court that a trial on damages was

on the horizon. The college now had the burden of going forward with evidence that the termination was justified.

*Wozniak v. Ind. Univ. Bd. of Trs.*, 2007 U.S. Dist. LEXIS 20114 (S.D. Ind. 2007). The employee was fired from her job as director of development and communications at an Indiana university research center. She brought a claim, pursuant to section 1983, alleging that the university and an individual defendant deprived her of a protected property interest, her job, without providing her with the procedural due process protections required by the Constitution. The university asserted that the employee was an at-will employee who did not have a protected property interest and could be fired at any time, for any reason or, in fact, for no reason at all. To prevail on her civil rights claim, alleging a deprivation of property without due process of law, the employee must establish that she had a protected property right in her employment. Otherwise, her claim may allege a wrong, but it does not rise to the level of a constitutional violation, a necessary requirement for bringing action under section 1983, which was the basis of the court's jurisdiction. Indiana traditionally has acknowledged two forms of employment: at-will and employment for a definite or ascertainable term. Even so, the Indiana Supreme Court has recognized only three ways to avoid or rebut the presumption of at-will employment. These exceptions are an independent consideration supporting the employment contract, a public policy exception arising from a statutory right or duty, and promissory estoppel. Of these exceptions, only the first consideration generally has the potential to establish a property right. Whatever approach is used, the employee failed to support her claim of a protected property interest with evidence of, or at least a factual dispute regarding, her entitlement to continued employment. She did not allege, nor did her evidence support, the existence of an employment contract of a definite term. This left, then, the employee's claim of a protected property right stemming from the university's policies and practices. To establish her entitlement to continued employment, the employee must show that she could not be denied employment unless certain conditions were met. The employee pointed to the alleged grievance and separation pay policies and asserted that a reasonable person would have a well-founded understanding that the employee's employment could not be interrupted without her having recourse to the policies outlined in the university's policy manual. However, the alleged grievance and separation pay policies only restrict the manner of an employee's discharge. They do not impose conditions that the university must meet before firing an employee, and the employee did not point to any personnel provisions that do. Her unsupported assertion about the effect of the policy manual was insufficient to withstand summary judgment, which was granted to the university.

## Professor & Administrator Employment

### *Contracts, Salary & Benefits*

*Chang v. Univ. of Toledo*, 2007 U.S. Dist. LEXIS 22077 (N.D. Ohio 2007). The professor was hired by the university in 1989 as an assistant professor in the economics department. In 1995, he was promoted to associate professor and granted tenure. He was promoted to full professor in 2003. Each fall, faculty members are evaluated for their performance during the preceding academic year. After a faculty member submits a workload agreement for the approaching year, the evaluation committee considers the faculty member's annual report of professional activity and student-teaching evaluations. The evaluation committee recommends a merit score for each faculty member that factors in teaching, research, and service. If the department chair disagrees with a committee's score, a reconciliation process ensues that results in a final score. The professor did not submit a workload agreement form. The department, after seeking advice from the university and the union, weighted the professor's evaluation as follows: teaching 40 percent, research 40 percent, and service 20 percent. He and another professor received the lowest average score of the six faculty members evaluated. In the reconciliation process, two of the faculty members' scores were adjusted upward, and four, including the professor's, were adjusted downward. After the professor's low evaluation scores, his compensation was reduced accordingly. He filed a complaint with, and received a right to sue letter from, the Equal Employment Opportunity Commission. The professor then timely filed this suit alleging discrimination based on his race (Asian) and national origin (Chinese). Here, the professor had shown no evidence of direct discrimination. There was no evidence that anyone ever used offensive language toward the professor's race or national origin or that the professor's race or national origin were ever considered as factors in his evaluation. Further, the professor neither established a prima facie case, nor rebutted the university's legitimate, non-discriminatory reasons for reducing his pay. The professor's prima facie case faltered in that he could not show that a similarly situated individual outside of the protected class was treated more favorably than he. Finally, the professor set forth no evidence that the university's reasons for reducing the professor's pay were mere pretext for discriminatory action. Based on these reasons, the federal district court granted the university's motion for summary judgment.

### *Dismissal, Nonrenewal & RIF*

*Escobar v. Univ. of N. Tex.*, 2007 U.S. Dist. LEXIS 17686 (E.D. Tex. 2007). The professor filed action after

the university terminated her employment as a non-tenured assistant professor. The professor originally asserted claims against the university for sex, race, and national origin discrimination under Title VII of the Civil Rights Act and for age discrimination under the Age Discrimination in Employment Act (ADEA). The federal district court, however, previously dismissed the professor's claims under the ADEA. The university then filed its motion for summary judgment, arguing that the professor could not present competent summary judgment evidence that the university intentionally discriminated against her under Title VII. In January of 2004, the professor received her first annual evaluation, which included reports that her teaching evaluations were below departmental averages and noted that she was strongly encouraged to work on her research, publication, and proposal activities and to improve her performance in research and teaching. Despite this subpar evaluation, the report did state that the professor was making satisfactory progress toward tenure. In her second annual review, however, the professor was told that it was not believed that she would make tenure and that it would be recommended that she be terminated. The employee agreed to submit her goals for the next academic year in an attempt to show how she planned to get on the right path toward tenure. The goals submitted by the professor did not meet expectations, and it was recommended to the dean that the professor be terminated. In this action, the professor stated that she is a Hispanic (Columbian) female and that when she applied and was hired for her position, there were no other Hispanic female professors in the department. Further, the professor claimed that she attempted to get specific advice from the department chair on how to improve over the course of her employment, but that she was told only to apply for a government grant with two other females because "three gals are better than two." The professor made several statements in support of her argument that she was terminated due to discrimination as opposed to performance, but in support of these claims, she only offered the court her subjective belief of discrimination. She did not have any support for these statements. Her only other evidence was anecdotal. The court concluded that no genuine issue of material fact existed as to whether the university discriminated against the professor. Therefore, the court granted the university's motion for summary judgment.

*Marzec v. Toulson*, 2007 U.S. Dist. LEXIS 23614 (S.D. Ga. 2007). The professor filed an action against the board of regents, several named defendants, college police, and the medical college for alleged violations of section 1983, Title VII, the Age Discrimination in Employment Act (ADEA), and various state laws. The professor was hired by the Georgia medical college as an assistant professor on a renewable one-year employment contract. The professor had been reprimanded for alleged inappropriate professional behavior. Later, the department chair directed that a letter

of non-renewal be delivered to the professor. A staff doctor, an officer of the college police, and the administrative department manager delivered the letter. When presented with the letter, however, the professor refused to accept it, or to turn over his keys and identification badge. What happened next was highly disputed. The professor alleged that college police officers assaulted him and placed him handcuffed to the floor and walls in a holding cell with a mask over his mouth despite the professor having suffered an asthma attack during the incident. Shortly after being placed in the holding cell, emergency medical personnel transferred the professor to the hospital emergency room for treatment for an asthma attack and a severed Achilles tendon sustained during the altercation. The defendants' version of the events differed greatly from the professor's version. According to the defendants, the professor aggressively resisted the officers' efforts to peacefully deliver the letter. Undisputed was the fact that an arrest warrant was obtained, charging the professor with numerous felony counts. The counts were later reduced to three by the court. The professor was tried and acquitted of all charges before a jury. The defendants argued that the Eleventh Amendment barred the professor's section 1983 and state law claims. The professor contended that the defendants had not shown that the state of Georgia was the real party in interest. However, under Eleventh Amendment analysis, courts have consistently deemed the board of regents an arm of the state of Georgia. As such, the board of regents and the individual defendants in their official capacity were entitled to Eleventh Amendment immunity as to the professor's section 1983 and state law claims. This did not leave the professor without an avenue for recovery, but only meant that these claims must be brought in state court. However, in regard to the professor's claim of excessive force, the individual defendants were not entitled to qualified immunity. Thus, the defendants' motion for summary judgment was granted in part and denied in part.

## Students

### *Dismissal*

*Koumantaros v. City Univ. of New York*, 2007 U.S. Dist. LEXIS 19530 (S.D.N.Y. 2007). The student, a white female, applied for admission to the Program in September of 2001. The Program is a curriculum within the City College of New York, which is a branch of the City University of New York (CUNY). The student was admitted as a student in the class of 2004 and began attending classes in March of 2002. The student enrolled in the Geriatrics course during the 2003 summer semester. In August 2003, the student was informed that she had failed the Geriatrics final exam with a grade of 59 percent, thereby giving her a failing grade for the course. On September 4, 2003, the student was called before the Course and Standing Committee (CSC). Ac-

According to the program's official policy, any student who fails two or more courses will be dismissed, subject to the program's discretion. Therefore, according to the policy, the student's failure in Geriatrics, occurring fewer than three months after her failure in Physiology II, put her at risk of dismissal from the program. At a September 4, 2003, meeting, the student claimed that her Geriatrics exam had been erroneously graded. The CSC adjourned the meeting to allow the student to review her exam. The student's review of the exam confirmed that she had indeed failed the exam. Accordingly, the CSC unanimously voted to dismiss the student from the program. On December 23, 2003, the student filed the complaint that initiated this action. On March 16, 2006, CUNY moved for summary judgment. According to the federal district court, even one incident of racial harassment, if sufficiently severe, can create a hostile educational environment. Of course, a reasonable jury could find that the student has not provided sufficient evidence of repeated and continuous harassment to constitute a hostile environment. However, though reasonable jurors may well disagree about whether the alleged incidents negatively altered the student's educational environment, the potential for such disagreement rendered summary judgment inappropriate. The hostile environment analysis is fact-specific and is best left for trial. Therefore, the university's motion for summary judgment was denied.

*Gordon v. Purdue Univ.*, 862 N.E. 2d 1244 (Ind. App. 2007). The plaintiff-appellant was an economics graduate student at the Indiana university. After receiving an unsatisfactory score in his thesis research courses, his major advisor resigned from his advisory committee. The department's policy committee instructed the plaintiff to complete three tasks by a particular date or be dismissed from the program. The plaintiff requested and was granted an extension but failed to complete the tasks and was thus terminated from the doctoral program. After his university appeal was unsuccessful, the plaintiff filed suit against the university and his advisor for breach of contract, negligence, and defamation. Summary judgment was granted in favor of the defendants for all claims except whether the university or an agent of the university acted in bad faith. The trial court subsequently allowed the plaintiff the opportunity to amend his complaint to clarify what he deemed to be bad faith. The university filed a motion to strike the amended complaint, which was granted. The plaintiff then attempted to file a second amended complaint, but the trial court refused to allow him to do so. In affirming, the state appellate court held that the plaintiff failed to specify what actions on behalf of the university constituted bad faith despite the opportunities to clarify his arguments.

### *Educational Loans/Financial Aid*

*McKay v. Vanderbilt Univ. (In re McKay)*, 2007 U.S. Dist. LEXIS 20143 (D. Or. 2007). In October of 1996, the student debtor (debtor) executed a graduate and professional student account and deferment agreement (agreement) in which she agreed to pay for educational services she obtained from the university. The debtor used the agreement to attend the university for the 2007 spring semester. Under the agreement, tuition was loaned to the student on November 21, 1996, and repayment was due on April 30, 1997. On June 4, 2003, the debtor filed a voluntary petition for bankruptcy under Chapter 7. On September 17, 2003, the bankruptcy court issued an order discharging the debtor's debts and closed the case. During the bankruptcy case, the debtor took no action to seek a specific determination that her debt to the university was discharged. The university obtained a judgment against the debtor under the agreement in the sum of \$38,250. The debtor filed an adversary proceeding in the bankruptcy court against the university and an individual defendant, the attorney who obtained the judgment. The complaint alleged that the debt was discharged and the defendants violated the discharge injunction by attempting to collect the debt. The bankruptcy court granted summary judgment in the university's favor: the debt is an educational loan under 11 U.S.C. Section 523 (a)(8) and is non-dischargeable; and the defendants did not violate the discharge injunction. According to the federal district court, the nature of the debt was to provide the debtor the convenience of charging tuition and related educational expenses to an account, which would be paid monthly or late fees would be added. Deferred amounts were to be paid in full by certain dates near the end of each semester. In addition to the convenience, the educational benefit to the debtor was that she could start classes without paying tuition upfront. The court concluded that this was a student loan as contemplated by section 523(a)(8). Consequently, the debt was non-dischargeable. Because the debt was not discharged, the university and the individual defendant did not violate the discharge injunction by attempting to collect it. As such, the district court affirmed the bankruptcy court's rulings.

*Haddad (Junior) v. Dominican Univ.*, 2007 U.S. Dist. LEXIS 18140 (N.D. Ill. 2007). The former student brought suit, pro se, against the university and Sallie Mae, Inc. (Sallie Mae) for violations of the Higher Education Act (Act). The defendants moved for summary judgment on all grounds. Because the student could not demonstrate that he was falsely certified or that he exhausted his administrative remedies, the motions for summary judgment were granted. The student attended the university from 1998-99. To fund his education at the university, the student executed three separate student loan applications entitled Application and Promissory Note for Federal Stafford Loan. The loans were

made by TCF Bank and purchased by Sallie Mae, a secondary market purchaser that provides liquidity to the federal loan program. The student personally signed all three applications but testified that he did not read the loan applications before he signed them. The student claimed that neither the university nor Sallie Mae evaluated his financial ability to receive or repay student loans. The student's claims brought under the act were barred as a matter of law because it was undisputed that the student failed to exhaust the administrative remedies provided to him under the act. 34 C.F.R. Section 682.402(e) outlines the administrative method by which a borrower may file a claim for false certification of student loans. A borrower seeking discharge of a federal student loan must submit a written request and a sworn statement to the holder of the loan. The holder of the loan forwards the request to a guaranty agency that decides whether the request for discharge should be granted. If the agency denies the request, a borrower may appeal directly to the Secretary of Education. There was no evidence in the record that the student took any of these required actions regarding his false certification claims prior to filing this suit. Further, there was no genuine issue of material fact that the student was both eligible for federal Stafford loans and that the university did not "falsely certify" the student as that term is defined in the act.

*Pratt v. Educ. Credit Mgmt. Corp.*, 2007 U.S. Dist. LEXIS 21735 (S.D. Tex. 2007). The former student (debtor) sought a discharge of her student loan pursuant to 11 U.S.C. Section 727, which grants a debtor a discharge for debts that arose before the order of relief, except as provided in 11 U.S.C. Section 523. Section 523 states in relevant part: a discharge under section 727 of this title does not discharge an individual debtor from any debt, for an educational benefit overpayment or loan made, issued or guaranteed by a governmental unit, unless excepting such debt from discharge will impose an undue hardship on the debtor and the debtor's dependents. In respect to the issue of minimal standard of living, the bankruptcy court's factual findings were found to be not clearly erroneous. Those findings included a determination that the debtor's family was unable to maintain a minimal standard of living if the debtor was forced to repay her student loan obligations. Unlike the bankruptcy court, the district court did not believe that the debtor had satisfied her burden under the second prong of *Brunner v. New York State Higher Education Services Corporation*. The federal district court found several facts, which precluded the debtor from demonstrating that additional circumstances exist that will prevent her from paying on her student loan obligation for a significant portion of the repayment period. According to the court, the debtor and her husband were a young, educated, healthy couple at the beginning of their respective career paths and with almost certain income increases. The debtor's student loans will enable her to earn a substantially greater income over

her working life than she otherwise would have had she not earned a bachelor's degree. She has currently chosen to forfeit her earning potential to stay at home with her children, but this is not her only option, and it will not persist indefinitely. Accordingly, the bankruptcy court's final order discharging the debtor from her debt to ECMC was reversed.

*In re Sorber*, 358 B.R. 68 (Bkrtcy. N.D.N.Y. 2007). The debtor sought a discharge of student loan debt under federal bankruptcy law. The debtor held a variety of positions and obtained several student loans totaling over \$70,000. He also had various other monthly financial commitments, such as child support, that led him not to submit any payments on the student loan debt. The bankruptcy court denied the debtor's relief claim, however, because the debtor could not show he had a disability or other limitation that prevented him from obtaining other employment. Also, because the debtor did not submit any payments on the loan, even while employed, he did not evidence good faith in attempting to repay. Thus, the claim for discharge of the student loan debt was denied.



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Circuit Court of Appeals held that the parents could not do so without the benefit of counsel. The Court granted *certiorari* to resolve disagreement among the Courts of Appeal as to whether a nonlawyer parent of a child with a disability could prosecute an IDEA suit in federal court. Focusing on IDEA's plain text and statutory framework, the Court agreed that parents enjoy independent, enforceable rights and, as such, may act *pro se* as real parties in interest of IDEA actions without necessarily reaching the question of whether they are entitled to litigate their child's claims *pro se*. Justice Kennedy authored the majority opinion, with Justices Scalia and Thomas concurring in part and dissenting in part. The case was argued on February 27, 2007, and decided on May 21, 2007.

## Rule 46 Dismissal

**No. 06-1202.** *Doe v. Kamehameha Sch.*, 470 F.3d 827 (9th Cir. 2006). A male student with no Hawaiian ancestry applied for admission to a private, non-profit K-12 educational institution in Hawaii that receives no federal funds. After the student was denied entry, he filed a 42 U.S.C. Section 1981 suit claiming discrimination on the basis of race. The Kamehameha schools were created through a charitable testamentary trust that was established by the last direct descendent of the Hawaiian monarchy. In order to provide for education and the upbringing of Native Hawaiians, the trust and the schools it supports give preference to students of Hawaiian ancestry. After the district court ruled in favor of the school, a three-judge panel of Ninth Circuit Court of Appeals judges reversed, concluding that the admissions policy constituted unlawful race discrimination under 42 U.S.C. Section 1981. However, after the Ninth Circuit agreed to hear the case sitting *en banc*, the district court's original ruling was affirmed. In a lengthy and widely split 8-7 vote, the majority of the Ninth Circuit judges concluded that the fact that the schools receive no federal funds while giving preference to Native Hawaiians in its admissions policy does not give rise to a section 1981 violation. Among other dispositive factors, the Ninth Circuit majority reasoned that the affirmative action admissions policy is temporary in nature and does not unnecessarily trammel the rights of others who are not of Hawaiian descent. Petitioners raised three questions for the Court's consideration, including whether the racially exclusionary admissions policy is subject to the Title VI strict-scrutiny analytical standard or the marginally less-demanding Title VII standard.

## U.S. Supreme Court Docket

**Summary of Court Action Reported**  
*from May 1, 2007*  
*through May 29, 2007*

**Provided by Fred Hartmeister**  
**and Rebecca Hellbaum**

### Cases Decided

**No. 05-983.** *Winkelman v. Parma City Sch. Dist.*, 150 Fed. Appx. 406 (6th Cir. 2006). Acting *pro se*, the non-lawyer parents of an eight-year-old with autistic spectrum disorder questioned whether they should be permitted to represent their son and pursue their claim under the Individuals with Disabilities Education Act (IDEA). Previously, the Sixth

### Cases Awaiting Decision after Oral Argument

**No. 05-908.** *Parents Involved in Comm. Sch. v. Seattle Sch. Dist. No. 1*, 426 F.3d 1162 (9th Cir. 2005). Relying on the Equal Protection Clause and Title VI, a plaintiff parent

group claimed that the school district's use of a racially based "tiebreaker" component violates both the Constitution and federal civil rights protections. The school assignment plan, prompted by the district's efforts to voluntarily desegregate its schools, may serve to override parental choice in school selection when the tiebreaker factor is used. After a federal district court granted summary judgment for the district, a split three-judge Ninth Circuit Court of Appeals panel reversed. After the appellate court granted rehearing *en banc*, a split (7-4) Ninth Circuit affirmed the district court's original summary judgment ruling on behalf of the defendant school district. Recognizing the compelling interests associated with educational and social benefits of racial diversity, as well as the school's efforts to avoid racially concentrated or isolated school campuses, the appellate court reasoned that the assignment plan was narrowly tailored to achieve those interests. Although the plan included a numeric trigger, the court saw that as a laudable and permissible goal rather than being a quota. The court failed to find that any proposed alternative plans could achieve the district's compelling desegregation interests. Petitioners now ask the Court to ascertain how the equal protection rights of public high school students have been affected by the Court's rulings in *Grutter v. Bollinger*, 539 U.S. 306 (2003) and *Gratz v. Bollinger*, 539 U.S. 244 (2003). In particular, petitioners question whether a school district that is not racially segregated and that normally permits students to attend any high school of a student's choosing may deny admission to a chosen school solely because of using race in an effort to achieve a desired racial balance in particular schools. On November 6, 2006, the Court granted a motion by the Solicitor General for leave to participate in the oral argument as *amicus curiae* in support of the petitioning parents. On the same date the Court denied a motion of the NAACP Legal Defense & Educational Fund, Inc., for leave to participate in the arguments as *amicus curiae*. Arguments were heard on December 4, 2006.

**No. 05-915.** *Meredith v. Jefferson Co. Pub. Sch.*, 416 F.3d 513 (6th Cir. 2005). The Sixth Circuit Court concurred with the district court's judgment and rationale that the school district's racially sensitive student assignment plan passed Equal Protection constitutional muster. The courts agreed that the school board has a compelling interest to use racial guidelines in assigning students to particular schools. In addition, the school district does so in a manner that is narrowly tailored to realize its goals. As in the *Parents Involved* case noted in the preceding summary, petitioners raise questions surrounding the Court's *Grutter* and *Gratz* in 2003 and how those impact non-post-secondary public education. Specifically, the petitioners urge the Court to consider whether *Grutter* and *Gratz* are overturned or merely misapplied when a county board of education uses race as the sole factor in assigning students to particular schools using a mechanical and inflexible quota system. November 6, 2006 motions by the Solicitor General and the NAACP

Legal Defense & Educational Fund, Inc. were handled in comparable fashion as noted in *Parents Involved* (above). The oral argument was conducted on December 4, 2006.

**No. 05-1589.** *Davenport v. Wash. Educ. Ass'n*, 130 P.3d 352 (Wash. 2006); also **No. 05-1657.** *Washington v. Wash. Educ. Ass'n*, [same citation]. In two consolidated cases, the First Amendment frames questions of the union's role as the exclusive bargaining agent for state educational employees and its use of agency shop fees collected from nonmembers being expended for political purposes. Washington's highest court affirmed an intermediate court of appeals ruling that the association had not intentionally violated a statutory provision governing the expenditure of agency fees since the statute in question was unconstitutional. Further, the court reasoned that state law does not provide a private right of action to assert tort claims for alleged violations of the agency shop fee arrangement since that statutory provision is also unconstitutional. In summary, the petitioning union contends that the state law forbidding the use of nonmember agency shop fees for political purposes without affirmative authorization violates the union's First Amendment rights. The Court granted certiorari in these cases on September 26, 2006. On December 11, 2006, the Court granted the Solicitor General's motion to participate in divided oral arguments as *amicus curiae* but denied the petitioners' motion for additional time for arguments. Arguments were heard on January 10, 2007. On May 21, 2007, the Court granted both the petitioner and respondent motions for leave to file supplemental briefs after the oral argument.

**No. 06-157.** *Hein v. Freedom From Religion Found. Inc.*, 433 F.3d 989 (7th Cir. 2006). A taxpayer was deemed to have standing under Article III to challenge an executive branch decision to provide funding for conferences designed to promote President Bush's faith-based and community initiatives. The plaintiff contends that the Presidential executive order program's violation of the First Amendment's Establishment Clause is more than merely incidental regardless of whether it is financed by an appropriation for general administrative expenses or by an appropriation earmarked for a specific program. The Solicitor General and the Justice Department filed the government's petition for certiorari. Certiorari was granted on December 1, 2006, and on January 8, 2007, the Court granted the Solicitor General's motion to dispense with printing the joint appendix. Oral arguments in the case were heard on February 28, 2007.

**No. 06-278.** *Morse v. Frederick*, 439 F.3d 1114 (9th Cir. 2006). A high school student in Alaska displayed a banner across the street from his school that read "Bong Hits 4 Jesus." The banner was displayed during a privately sponsored Olympic Torch procession that students were authorized to watch during school hours. After the principal crossed the street and confronted the student, she confiscated the banner and suspended the student for ten

days. Claiming that his First Amendment rights had been violated, the student filed a 42 U.S.C. Section 1983 suit. Although a federal district court granted summary judgment premised on qualified immunity to the principal and school board, the Ninth Circuit Court of Appeals vacated the judgment and remanded for further proceedings. The appellate court concluded that the principal's conduct violated the student's constitutionally protected right since the banner was displayed outside the classroom, across the street from the school, and during a non-curricular period that was only partially supervised by school officials. Further, the student's display was deemed not to have interfered with the school's basic educational mission. Divided arguments were held on March 19, 2007, with the Solicitor General participating as *amicus curiae*.

**No. 06-427.** *Tennessee Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 442 F.3d 410 (6th Cir. 2006). The alleged recruiting of high school student athletes in 1997 is at the center of this complex case. Among the allegations, a middle school coach passed along two free tickets he received to an upcoming football game to two of his student athletes. Also, the private school that had previously been penalized for recruiting violations sent letters and made phone calls to students at other schools regarding pre-enrollment and plans for spring football practice. Following nearly a decade of litigation appeals and remands, a 2-1 majority of the Sixth Circuit Court of Appeals affirmed the trial court's granting of injunctive relief to the private academy on its First Amendment and procedural due process claims, reversed a finding for the academy on its substantive due process claim, concluded that the athletic association's executive director is entitled to qualified immunity, reversed the trial court's order finding that the athletic association is entitled to antitrust immunity, and remanded the case for further proceedings. The court focused on the question of whether the athletic association violated the private school's constitutionally protected interests when it imposed penalties for exerting "undue influence" in recruiting students for athletic purposes. On April 13, 2007, the Court denied a motion of the Association of Christian Schools International for leave to participate in oral argument as *amicus curiae* and for divided argument. Certiorari was granted on January 8, 2007, and the case was argued on April 18, 2007.

## Certiorari Granted

**No. 06-637.** *Board of Educ. of City Sch. Dist. of City of New York v. Tom F.*, citation unavailable (2d Cir. 2006). This Individuals with Disabilities Education Act case hinges on whether a public school district is responsible for providing tuition reimbursement to the parents of a child who has not previously received special education services. Although the district court held that reimbursement was barred, the Second Circuit Court of Appeals

vacated and remanded the case for further proceedings in light of *Board of Education of Hyde Park Central School District v. Frank G.* [see **No. 06-580**, below]. As petitioners, the school district contends that the Second Circuit's ruling stands in direct contradiction to the plain language in 20 U.S.C. Section 1412(a)(10)(C)(ii), which authorizes tuition reimbursement to parents of a disabled child "who previously received special education and related services under authority of [a] public agency." Certiorari was granted on February 26, 2007.

## Cases Recently Filed

**No. 06-560.** *Avis Budget Group Inc. v. Cal. State Teachers Ret. Sys.*, 452 F.3d 1040 (9th Cir. 2006). This securities fraud case involves allegations that a secondary agent assisted the primary defendant in organizing and creating sham triangular transactions with third-party vendors. The complaint is premised on the primary defendant having purchased revenue for itself and then recording the revenue in violation of Securities and Exchange Commission guidelines. A district court dismissed the complaint after applying a restrictive test for primary liability. The Ninth Circuit Court of Appeals affirmed dismissal of the case but also remanded so that the plaintiff may seek leave to amend in order to take advantage of the favored less-restrictive reasoning in the appellate court's opinion.

**No. 06-580.** *Board of Educ. of Hyde Park Cent. Sch. Dist. v. Frank G.*, 459 F.3d 356 (2d Cir. 2006). The singular issue in this Individuals with Disabilities Education Act (IDEA) case is whether it permits the award of private school tuition reimbursement for a student who has not previously received special education and related services under the authority of a public agency. The lower courts concluded that Congress disallows reimbursement unless the student was under the authority of a public school or agency when it failed to provide for a free appropriate public education. The courts reasoned that to decide to the contrary would be incompatible with the express purpose of IDEA.

**No. 06-582.** *University of Notre Dame v. Laskowski*, 443 F.3d 930 (7th Cir. 2006). Having determined that federal taxpayers have standing, the courts below held that they may seek an injunction ordering a private religious university to repay grant funds that had allegedly been expended in violation of the Establishment Clause. Although federal taxpayers normally lack standing to complain about federal expenditures, the Seventh Circuit Court of Appeals reasoned that Article III standing exists since they arguably incurred a constitutional injury.

**No. 06-757.** *Marineau v. Guiles*, 461 F.3d 320 (2d Cir. 2006). In this First Amendment case, middle school admin-

istrators in Vermont required that a student cover certain images on his T-shirt with duct tape. The images consisted for the most part of a depiction of President George W. Bush as a chicken-hawk president while also accusing him of being a former alcohol and cocaine abuser. Alleging that their son's freedom to engage in political speech had been unconstitutionally infringed, the student's parents ultimately sought to have the disciplinary action taken against him expunged from his record. Following a three-day bench trial, the district court declined to enjoin the school defendants from enforcing the school's dress code as it related to the student's T-shirt. At the same time, the lower court also held that the student's disciplinary record should be expunged since the defendants should not have censored the word "cocaine" on the T-shirt. Both parties then appealed to the Second Circuit Court of Appeals. Reasoning that *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) governs, and finding that the student's T-shirt did not cause any disruption or confrontation in the school, the appellate court found for the student on the free speech issue. On this basis, the appellate court also agreed that the disciplinary record should be expunged.

The petitioning school district now poses a single question for the Court's consideration: Does the First Amendment allow public schools to prohibit students from displaying symbols of drugs and alcohol on clothing worn during the school day?

**No. 06-1339.** *Sun v. Bd. of Trs. of Univ. of Ill.*, 473 F.3d 799 (7th Cir. 2007). An assistant professor of engineering, who was denied tenure after numerous committees and faculty members considered his case, premised a subsequent lawsuit on various procedural irregularities and nefarious motives. After the defendants' counsel failed to comply with discovery and the court granted several motions to compel discovery, it entered a default judgment against the defendants. Soon thereafter, however, the court vacated the default and eventually granted summary judgment in favor of all defendants. The *pro se* professor appealed the court's vacation of the default judgment and entry of judgment for the defendants. The Seventh Circuit Court of Appeals affirmed.

**No. 06-1341.** *Regents of Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 482 F.3d 372 (5th Cir. 2007). In a complex case involving multiple public and private institutions and employee pension plaintiff groups, they allege that several financial institutions entered into partnerships and transactions that allowed Enron Corporation to take liabilities off its books temporarily and to book revenue from the transactions when it was actually incurring debt. Since the result of such conduct allowed Enron to misstate its financial condition, defraud investors, and help executives generate vast personal compensation while maintaining the illusion of corporate health, the plaintiffs argue that the defendant financial institutions knew exactly

what Enron was doing and thus should be culpable for promoting Enron investments.

[Contributors' note: The following cases marked with an \* were filed so recently that more information about the facts and issues on appeal were unavailable as we went to press. Additional information will be forthcoming in a future edition of the School Law Reporter.]

\* **No. 06-1392.** *Garrett v. Okla. Panhandle St. Univ.*, citation unavailable (Okla. Ct. App. 2006). Viability of enforcement of an out-of-state judgment against a state university is this case's primary point of contention.

\* **No. 06-1399.** *North Carolina Sch. Bd. Ass'n v. Ripellino*, 639 S.E.2d 441 (N.C. 2007). The case began in 1998 when a student who was exiting a school district parking lot in her parents' vehicle was struck by a traffic-control gate. Although the school board agreed to pay the parents slightly more than \$2,000 for damages to their vehicle, the board refused to pay medical expenses or other compensation for the student. The state's highest court split evenly on an appeal of right issue, thus affirming an intermediate court of appeals opinion without precedential value. Next, the court unanimously concluded that the intermediate appellate court erred in remanding the case to the trial court for entry of summary judgment in favor of the plaintiffs on their nonconstitutional claims. At this stage, the petitioners raise claims touching on tort immunity, equal protection and due process.

\* **No. 06-1428.** *Knight v. Alabama*, 476 F.3d 1219 (11th Cir. 2007). The plaintiffs in this case contend that certain tax provisions in the Alabama Constitution violate the United States Constitution since they severely limit funding for public education resulting in a segregative effect on the state's public colleges and universities. The case has been litigated in various stages over the past twenty-six years, and during this period, remedial actions have been implemented to increase administrative and faculty integration and provide for more flexible admissions policies. Noting that the federal district court has unflaggingly monitored Alabama's progress in completing the desegregation of its system of higher education over the past decade, the Eleventh Circuit Court of Appeals held that the challenged tax policies were not undermining the desegregative process to a level that even remotely triggers the Federal Constitution.

\* **No. 06-1495.** *Levi v. O'Connell*, 50 Cal.Rptr.3d 691 (Cal. Ct. App. 2006). A single mother of an extremely gifted minor child under the age of sixteen sought to require the California Department of Education to pay for her son's college education. The mother premised her claim on her inability to pay college tuition, compulsory school attendance statutes, and the fact that the standard K-12 academic system is ill-suited to educate her son. The boy had begun attend-

ing a local college when he was seven, had passed the high school proficiency exam when he was nine, and attended the University of California at Los Angeles (UCLA) when he was thirteen. A state trial court rejected the mother's causes of action for declaratory relief, a violation of equal protection, and 42 U.S.C. Section 1983 damages. On appeal, the state's intermediate court of appeals affirmed after failing to find an applicable state or federal statute requiring that the minor be provided a free college education tailored to his particular academic needs.

\* **No. 06-1511.** *Johnston County Bd. of Educ. v. Ripellino*, 639 S.E.2d 441 (N.C. 2007). In 1998, a high school student was departing from the school's parking lot in her parents' vehicle when a traffic control gate swung closed, struck the vehicle, and injured the student. The school district paid slightly more than \$2,000 for property damage but refused to pay medical expenses or other compensation for the injured student. After the student and her parents filed suit, various defendants were ultimately successful in persuading the trial court that they were entitled to summary judgment and judgment on the pleadings. The state's intermediate court of appeals reversed and remanded. On an equally divided basis, the state's highest court affirmed (without precedential value) the question surrounding whether the plaintiff/appellants were entitled to an appeal of right. However, on the issue of whether the intermediate appellate court erred in remanding the case to the trial court for entry of summary judgment in favor of the plaintiffs on their nonconstitutional claims, the Supreme Court of North Carolina unanimously reversed and remanded to the trial court for further proceedings.

\* **No. 06-1512.** *Minnifield v. La. Dep't of Educ.*, unpublished case (5th Cir. 2007). *Pro se* plaintiff without any children who graduated from high school in 1975 filed suit seeking \$22 million in compensatory and punitive damages while alleging that his high school mascot, a confederate rebel, manifested state-sponsored discrimination in violation of the Louisiana and United States Constitutions. Although the rebel mascot remains, the school discontinued using the confederate battle flag on its yearbook, its cheerleader uniforms, and on the high school building in 1990. The federal district court dismissed the case for lack of standing since the plaintiff's claim for injunctive relief was moot because of his graduation. The court also dismissed as time-barred the plaintiff's claim for damages under 42 U.S.C. Section 1983 since those claims accrued when the plaintiff had reason to know of the actionable injury many years earlier.

## Certiorari Denied

**No. 06-895.** *Bostic v. Gray*, 458 F.3d 1295 (11th Cir. 2006). A sheriff's deputy who also served as an elementary

school resource officer observed a nine-year-old student threaten to do something physical to her teacher. Although the Eleventh Circuit Court of Appeals concurred that the officer was justified in calling the student aside and asking her questions, he was not entitled to qualified immunity for his actions when he proceeded to handcuff the compliant student simply to punish her and teach her a lesson. The courts concluded that the officer's actions were not reasonably related to the scope of circumstances and, as a result, violated the student's Fourth Amendment rights. The petitioner argued that the lower courts had misinterpreted *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

**No. 06-1215.** *Clover Park Sch. Dist. No. 400 v. Wash. State Bd. of Educ.*, unpublished case (Wash. Ct. App. 2006). Following good-faith negotiations, property was transferred from one public school entity to another. A state trial court reasoned that the exchange did not unconstitutionally exacerbate property tax disparities or increase racial or socioeconomic isolation. A state appellate court affirmed. Questions presented to the Court included whether a respondent school district's statutorily permissible but racially based preemptory removal of the original trial court judge violated the Fourteenth Amendment's equal protection clause.

**No. 06-1315.** *Hess v. Lander Univ.*, 203 Fed. Appx. 456 (4th Cir. 2006). In this *pro se* proceeding, a former employee claimed that she suffered from gender-based employment discrimination. The Fourth Circuit Court of Appeals affirmed judgment for the employing university, and in doing so, rejected the plaintiff's contention that the decision was tainted with serious errors of law and procedure.

[*Editor's note: The following cases were inadvertently left out of last month's issue; however, certiorari was denied between April 3, 2007 and May 1, 2007.*]

**No. 06-1049.** *Wells v. Indiana*, 848 N.E.2d 1133 (Ind. Ct. App. 2006). In a case that touched only indirectly on educational interests, the petitioner claimed that university students should have been included in the jury pool that was drawn when he was prosecuted and convicted of disorderly conduct. By essentially excluding the student population of 38,000 from the jury venire from within a county with a population of 120,000, the petitioner argued that his jury did not represent a fair cross-section of the community. The lower courts concluded that the exclusion of students did not violate the Sixth Amendment "fair cross-section" requirement since the jury was drawn from voter registration, property tax, and Bureau of Motor Vehicle records, and most students do not consider themselves to be part of the community in the sense that they do not vote, own property, or register their vehicles in the county.

**No. 06-1064.** *Feied v. Regents of Univ. of Cal.*, unpublished case (Cal. Ct. App. 2006). In what amounted to the third iteration of a former university system employee's protracted attempt to seek retirement benefits, the state's trial and intermediate court of appeals rejected restyled negligence claims. Previous attempts by the employee to seek civil rights damages in federal court had been viewed as time barred and precluded by the Eleventh Amendment, and even earlier breach of contract claims filed in state court had been rejected on the grounds that the claims were barred by the statute of limitations.

**No. 06-1163.** *Barnes v. Tyler Indep. Sch. Dist.*, unpublished case (5th Cir. 2006). This was an employment case involving allegations of racial discrimination and the relevancy of a school desegregation order to the school district's employment decisions. The Fifth Circuit Court of Appeals concluded that the district court that heard the discrimination claim did not abuse its discretion when it excluded as irrelevant the plaintiff's attempt to introduce a 1970 desegregation order that imposed voluntary hiring requirements to ensure equal treatment of minority employees while the school district was operating a dual school system. The district court had rejected the plaintiff's arguments after concluding that the order was more confusing than probative.

**No. 06-1168.** *Buffalo Teachers Fed. v. Tobe*, 464 F.3d 362 (2d Cir. 2006). The plaintiff teachers' unions argued that a wage freeze enacted by a local fiscal stability authority violated the Contracts and Takings Clauses of the United States Constitution. The unions sought declaratory and injunctive relief against enforcement of the wage freeze. However, both the district court and Second Circuit Court of Appeals failed to find any constitutional violations despite legislative action, which impaired various political subdivisions in meeting their financial obligations. Summary judgment in favor of the defendants was affirmed.

**No. 06-1174.** *Horwitz v. Ill. State Bd. of Educ.*, citation unavailable (Ill. Ct. App. 1007). A public school teacher's employment was terminated for cause. The teacher responded by contending in a *pro se* suit that she was denied due process because the administrative dismissal proceedings were arbitrary and that the school board and state trial court erred by applying *res judicata* to prevent her from presenting her First Amendment claims. Previously, the school board had found that the teacher had engaged in irremediable misconduct that included insubordination and refusal to take part in a board-ordered conflict-resolution process. The teacher had also used unprofessional and abusive language about her colleagues, thus supplementing the manifest weight of compelling evidence against the teacher.

**No. 06-1185.** *Mickens v. Polk County Sch. Bd.*, unpublished case (11th Cir. 2006). The Eleventh Circuit Court of Appeals affirmed the dismissal of the *pro se* plaintiff's Title VII and Americans with Disabilities Act (ADA) retaliatory discrimination claims.

**No. 06-1199.** *Zelnik v. Fashion Inst. of Tech.*, 464 F.3d 217 (2d Cir. 2006). A public university faculty member in New York filed suit after he was not afforded professor emeritus status following his retirement. Claiming that he suffered retaliation for speech related to a matter of public concern, the former professor relied on the First Amendment to frame his claim. The professor's public commentary had focused on his disagreement with a proposal to close a portion of a street near the campus in order to create a pedestrian mall, a project that had surfaced after a traffic accident in the vicinity had resulted in a student being injured. The Second Circuit Court of Appeals distinguished any applicability of *Garcetti v. Ceballos*, 126 S.Ct. 1951 (2006), concluding that since the professor's comments were made outside the scope of his official duties, he was speaking solely as a private citizen. However, since neither court found that the professor had demonstrated having suffered an adverse employment action due to emeritus status being viewed as nothing more than an honorific title, the case was dismissed on the defendants' motion for summary judgment.

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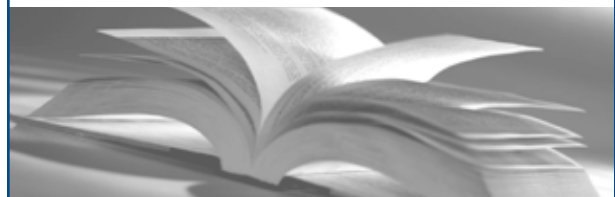
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