

SCHOOLS ROCK

AUGUST 2009

VOL. 3, ISSUE 1, PAGE 1

Farmer Smith & Lane, LLP

presents *SCHOOLS ROCK*, a semi-annual publication of select recent judicial opinions that could significantly affect California schools and community colleges. Although the publication attempts to summarize the cases in detail, it should not be read as a legal opinion or as a complete guide.

U.S. Supreme Court Holds That Title IX Does Not Preclude Gender Discrimination Claims under § 1983

Plaintiffs' daughter made allegations of sexual harassment committed by an older student on a school bus and school grounds. The harassment was reported to school officials, but after two investigations by the school and an independent investigation by local police, there was insufficient evidence to warrant discipline of the older student. Plaintiffs suggested transferring the older student to a different bus or providing a monitor for the original bus. The school did not act on these suggestions.

A complaint was filed against the school under Title IX (a provision prohibiting sex discrimination) and 42 U.S.C. § 1983 claiming an inadequate response to their allegations of sexual harassment, which resulted in further harassment. The trial court granted a motion to dismiss as to the § 1983 claims and the appellate court affirmed saying that Title IX's implied private remedy precluded a plaintiff from using § 1983 to advance statutory claims based on Title IX itself. The appellate court found that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.

Reversing, the U.S. Supreme Court focused on Title IX's remedial scheme to determine if Congress intended it to be the exclusive avenue through which plaintiffs may assert a claim. It found that allowing a plaintiff to file parallel and concurrent § 1983 claims would not circumvent any required procedures or give access to remedies that would otherwise be unavailable under the statutory scheme of Title IX. In addition, the Court found there were differences in determining who may be liable and the standards for liability between claims under § 1983 and Title IX. The Court concluded that § 1983 suits based on the equal protection clause remain available to plaintiffs alleging unconstitutional gender discrimination in schools. (*Fitzgerald v. Barnstable Sch. Comm.*, 129 S. Ct. 788 (January 21, 2009)).

School Districts Required to Reimburse for Educational Costs Incurred during Appeal to Circuit Court of the District's Refusal to Provide a FAPE under the IDEA

Plaintiff contended that the school district failed to provide him with Free and Appropriate Public Education in accordance with 20 U.S.C. § 1412(a)(1)(A). After an adverse judgment, plaintiff appealed and filed a "stay put" motion under § 1415(j) of the Individuals with Disabilities Education Act to be reimbursed for his educational expenses incurred during the appeal. The school district opposed the motion by arguing it was not required to reimburse plaintiff due to the fact that such a proceeding was not covered under § 1415.

The Ninth Circuit rejected the district's argument. It found that by allowing plaintiff to appeal the decision of an administrative law judge to the district court, § 1415 also makes it possible to appeal to the circuit court. The

court presumed Congress was aware of such possibilities and therefore rejected the position that the plain language of the statute excluded appeals to the circuit court from civil actions. In addition, the Department of Education's regulations implementing § 1415(j) included the appeals process by stating it was applicable to any judicial proceeding. The policy against premature removal of disabled children to inappropriate educational settings also supported applying the "stay put" provision to the appeals process. The court held that the district was required to reimburse plaintiff for educational expenses during the appeals process and remanded to the district court to determine the amount owed. (*Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036 (9th Cir. March 19, 2009)).

Automatic Termination of Employee May Not Be Based on a Plea of No Contest To Misdemeanor Substance Abuse Offenses

A school custodian pled no contest to a misdemeanor controlled substance offense and was subsequently terminated. The school district relied on Education Code § 44009, claiming the offense required automatic termination. The trial court ordered reinstatement because it found that the no contest plea was not a "conviction" within the meaning of Education Code § 45123.

Affirming the trial court's judgment, the appellate court cited *Cartwright v. Board of Chiropractic Examiners*, which held that a conviction by plea of no contest may not be used in an administrative proceeding to impose discipline absent legislative authorization. While the legislature enacted a provision to allow automatic termination based on a plea of no contest to a sex offense, the court found that no similar change was enacted or intended to change current provision of the Education Code relating to

substance abuse offenses. The court held that a permanent classified district employee who enters a plea of no contest to a misdemeanor controlled substance offense may not be automatically terminated. (*Cahoon v. Governing Bd. Of Ventura Unified Sch. Dist.*, 171 Cal.App.4th 381 (2d Dist. February 23, 2009)).

School Districts May Not Deduct Vacation Leave and Differential Leave Concurrently under Education Code § 45196

Petitioner was employed by the district as a school bus driver. She had injured her knee and had surgery, which led to her absence from work for extended periods of time. During this time the district deducted vacation leave and differential leave concurrently, claiming that it had the right to do so under a collective bargaining agreement. Petitioner sought a writ of mandate seeking to compel the district to recalculate the leave deductions. The district demurred, stating that petitioner had failed to exhaust their administrative remedies. The trial court denied the demurrer on the grounds that petitioner was trying to enforce a controlling statute, not a collective bargaining agreement.

Although the district had engaged in deducting differential and vacation leave concurrently for over two decades, the court found that the plain language of Education Code § 45196 provided for paid sick leave to be exclusive of vacation leave. The appellate court stated that because the district's practice of combining vacation and differential leave was not a subject of agreement under the collective bargaining agreement and because it contradicts § 45196 the court cannot uphold such a practice. (*Cal. Sch. Employees Assn. v. Colton Joint Unified Sch. Dist.*, 170 Cal.App.4th 857 (4th Dist. January 26, 2009)).

**School Districts Not Required to Split
Position of Full-Time Employee during
Layoffs to Accommodate Part-Time
Employees Who Had Seniority**

After a memorandum of understanding under which the district had provided special education services to other school districts had been terminated, the district began layoff proceedings under Education Code § 44955. One position that was being discontinued was a full-time equivalent school psychologist position. Both plaintiffs who had been terminated held part-time school psychologist positions that equated to one full-time position and had seniority over the person who was retained in a full-time position.

In rejecting the appellant's argument that their seniority entitled them to be reinstated at their prior positions at the expense of the retained employee, the appellate court relied on interpretations of a similar provision, Education Code § 44956. The court found that if an employee with seniority is not entitled to compel a school district to split a full time position held by an employee with less seniority in the case of a reinstatement under Education Code § 44956, there was no reason why a district should be compelled to split the position in the event of a layoff. The court held that appellants did not have the right to force the district to divide the full-time position to accommodate their desire for a part-time position. (*Hildebrandt v. St. Helena Unified Sch. Dist.*, 172 Cal.App.4th 334 (1st Dist. March 19, 2009)).

**Court States That California Constitution
Does Not Eliminate Consideration of Race
So Long as There Is No Discrimination Or
Preferential Treatment**

Plaintiff challenged a school district's policy of assigning students to different

schools and academic programs, claiming that it violated provisions of the State Constitution against discrimination. Student assignments were based on a multi-factor test, which also includes a consideration of the average household income, education level, and racial composition of the neighborhood in which the student lives. All students living in that neighborhood received the same diversity score regardless of their individual race. The district demurred to the complaint, which the trial court sustained.

In affirming the trial court's judgment, the appellate court stated that the California Constitution did not eliminate the possibility of considering race for any and all purposes. Rather, such laws must not discriminate against, or grant preferential treatment to, any individual or group on the basis of race. The court found that the student assignment policies did not violate the Constitution because every student in the neighborhood considered was treated equally regardless of their individual race. There was no showing that it would always be the case that students of color would receive more favorable diversity scores based on the assignment policy, so the court found that the assignment policy was not a veiled substitute for a plan that discriminates on the basis of race. The court held that the district's assignment policies did not violate the State Constitution. (*Am. Civ. Rights Found. v. Berkeley Unified Sch. Dist.*, 172 Cal.App.4th 207 (1st Dist. March 17, 2009)).

**Cost of Complying with the Public Safety
Officers Procedural Bill of Rights Act Is
Not A Reimbursable State Mandate for
School Districts Permitted, but Not
Required to Hire Peace Officers**

The Commission on State Mandates (Commission) was directed to review a prior

decision stating that the costs incurred in complying with certain procedural protections of the Public Safety Officers Procedural Bill of Rights Act (POBRA) were reimbursable state mandates. The Commission again held such costs to be reimbursable for school and special districts that employ peace officers. The Department of Finance petitioned for a writ of administrative mandamus to overturn the decision of the Commission as to school districts and special districts permitted but not required to hire peace officers. The trial court denied the petition.

In reversing the trial court's judgment, the appellate court stated that because the school districts were permitted to hire peace officers rather than required, they could not satisfy the requirement of legal compulsion generally required for a program to be classified as a reimbursable state mandate. The court also found that the record did not show that the school districts faced practical compulsion as it had been defined in prior decisions. Those decisions required that the school districts face "certain and severe penalties such as double taxation or other 'draconian' consequences." The court stated that there was no showing that hiring peace officers was the only way, as a practical matter, for the school districts to comply with its public safety obligations. The court held that the costs incurred in complying with POBRA were not reimbursable state mandates. (*Dept. of Finance v. Commn. On State Mandates*, 170 Cal.App.4th 1355 (3d Dist. February 6, 2009)).

Elements of a Claim under Education Code § 220 Mirror Those of Title IX and Money Damages are an Available Remedy

Plaintiffs attended High School together where they were subjected to anti-gay insults and epithets, threats of physical violence, and physical abuse by their peers. They began to keep a log of the incidents and later reported

them to the principle and vice-principle of the school. Although the school had investigative procedures in place and a policy against such harassment, neither the principle nor vice-principle followed up on the allegations. The harassment continued and plaintiffs brought a claim under Education Code § 220, which prohibits sex discrimination, and sought money damages under § 262.3

However, § 220 is silent regarding the elements a plaintiff must allege in order to state a claim for its violation. The trial court found that the appropriate standard for determining liability under § 220 would be a negligence standard analogous to the one found in the Fair Employment and Housing Act (FEHA). It reasoned that the Title IX standard of "deliberate indifference" offered by the defendant school district was inconsistent with the duty of a public school to take affirmative steps to combat discrimination. A jury verdict was returned in favor of the plaintiffs.

Affirming the judgment, the appellate court took issue with the negligence standard adopted by the lower court. It found that legislative history demonstrated that the California legislature relied on Title IX to develop the State's own anti-discrimination laws and, therefore, Title IX provided the more appropriate analogy for determining liability under § 220. The court went on to track Title IX's well-developed case law regarding elements of a discrimination claim in an educational setting. It found that the concerns shaping the case law surrounding Title IX were equally applicable to § 220. The court held that elements a plaintiff must show under a § 220 claim include that (1) he or she suffered "severe, pervasive and offensive" harassment that effectively deprived the plaintiff of the right of equal access to educational benefits and opportunities, (2) the school district had

"actual knowledge" of that harassment, and (3) the school district acted with "deliberate indifference" in the face of such knowledge.

Turning to the issue of damages, the court engaged in statutory interpretation to see if the § 262.3 language, "other civil remedies," included money damages. Several factors supported the courts finding that money damages were available. First, the court found that the plain meaning of "civil remedies" has typically included money damages. Second, construing the statute to only provide declaratory relief would render other language within the same statute superfluous, a result that violates standard canons of construction. Third, language in § 262.3 is in direct contrast with other statutes that provide only for equitable relief. As such, the court held that money damages were available for a sex discrimination claim. (*Donovan v. Poway Unif. Sch. Dist.* (2008) 167 Cal.App.4th 567).

Send your questions or comments to:

Craig E. Farmer, Esq.

CFarmer@farmersmithlaw.com or

Emmanuel R. Salazar, Esq.

ESalazar@farmersmithlaw.com

FARMER SMITH & LANE, LLP

3620 American River Drive, Suite 218

Sacramento, CA 95864

Tel: (916) 679-6565 • Fax (916) 679-6575