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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.

GOVERNANCE AND ADMINISTRATION

Filing Petition to Perpetuate Testimony or Preserve Evidence Does *Not* Constitute Filing of a “Suit” Required Under Tort Claims Act.

A claimant was involved in an automobile collision with a city police officer who driving a patrol car. The city argued that the claimant failed to meet the six-month statute of limitations of the California Tort Claims Act. The claimant responded that his petition to preserve evidence constituted an “action” that satisfied the statute of limitations. The trial court agreed, and the jury found liability against the city. The Court of Appeal reversed the judgment, holding that the filing of a petition to perpetuate testimony or preserve evidence does not constitute the filing of a “suit” for purposes of satisfying the six-month statute of limitations of the Tort Claims Act. A “suit” is an adversarial proceeding to enforce a right or redress an injury. Initiating a petition to preserve

evidence is not an adversarial proceeding. *Orr v. City of Stockton* (May 4, 2007) 150 Cal. App. 4th 622.

An Employee Who Was Wrongfully Demoted Is *Not* Entitled to Back Pay for Period When He Was Not Available for Work Due to a Non-Industrial Illness.

Plaintiff was demoted from his position of employment with a school district. Before learning of the demotion, plaintiff commenced a disability leave for reasons unrelated to his employment. Due to his illness, plaintiff has remained unavailable for work ever since. The Personnel Commission of the district found demotion was wrongful and ordered reinstatement but concluded that plaintiff was not entitled to full back pay in light of his unavailability for work.

The Court of Appeal affirmed. Back pay is a “makewhole” remedy, intended to restore the employee to the financial situation that would have existed but for the employer’s wrongful conduct. Because plaintiff was unavailable for work at the time of his wrongful demotion, he is not entitled to back pay. *Davis v. Los Angeles Unified School Dist. Personnel Comm.* (June 28, 2007) 152 Cal. App. 4th 1122.

“Romero Act” Transferring Power from School Boards to Superintendents and City Mayors Violates California Constitution.

The Legislature enacted the Romero Act. The Act transferred substantial power from the school board to the district superintendent. It also granted the mayor to ratify appointment of the district superintendent. The school

district challenged the Act's constitutionality. The Court of Appeal agreed, finding that in the absence of any looming constitutional crisis, the unique circumstances of the district do not, alone, constitute a basis for depriving the citizens of the city of their constitutional right to an elected school board running the district. Under the Act, the mayor also would have veto power over the selection of the superintendent. The California Constitution, however, prohibits the Legislature to effectively transfer many of the powers of the school board to the mayor, based on its belief, hope or assumption that the mayor could do a better job. The Act, being found not severable, was wholly struck down. *Mendoza v. The State of California* (April 17, 2007) 149 Cal. App. 4th 1034.

Schools May Not Deduct Pay From Classified Employee on Leave to Pay Other Classified Employees Who Were Assigned to Work for the Classified Employee on Leave.

A classified employee of a school district went on temporary disability leave. As its long-standing practice, the district assigned some of her work to other classified employees and deducted their pay from her salary. Plaintiff association challenged the practice, claiming that those employees were not "substitute" employees because they were already employed by the district and were not employed to replace the classified employee when she was temporarily absent.

The Court of Appeal agreed. The term "substitute employee" does not include a current, classified employee who is assigned—voluntarily or involuntarily—the absent employee's hours or tasks. The Education Code only authorizes the district to

either deduct from the absent employee's salary the amount paid to a person *hired* as a substitute or adopt and maintain a policy crediting regular classified employees with at least 100 working days per year of paid sick leave. *California School Employees Ass'n, Tustin Chap. No. 450 v. Tustin Unified School Dist.* (February 27, 2007) 148 Cal. App. 4th 510.



EMPLOYEE RELATIONS

Losing Significant Job Responsibilities Alone Does Not Constitute Demotion.

Due to restructuring, an employee lost many of her job assignments and responsibilities. Nonetheless, she retained the same job title and the same salary, and she continued to report to the same individual. She claimed to the commission that she had suffered a *de facto* demotion. The commission concluded that, in the absence of employment discrimination, it lacked jurisdiction to decide a claim of a constructive demotion.

The Court of Appeal agreed. The employee was not entitled to a hearing before the commission because she had not been demoted. “Demotion” and “reduction” are synonymous: Each is defined as a lowering in rank or grade. Having none, the claim of de facto demotion lacks merit. *Berumen v. Los Angeles County Dep’t of Health Services* (June 21, 2007) 152 Cal. App. 4th 372.

Firing Teacher for Reporting a Coach Recommending Nutritional Supplements Is Not Wrongful Termination in Violation of Public Policy.

A football coach suggested to a student to consume protein drinks containing creatine to gain weight. A teacher noticed the student’s weight gain, and the student told the teacher about the coach’s recommendation. The student’s kidneys had problems, and the student was hospitalized. The teacher reported the coach’s suggestion to the school’s athletic director. The director told the teacher that he would not take action unless parents get involved. The teacher left the school and was appointed as probationary on another school where the teacher learned the coach’s wife was the interim principal. The teacher worked for almost two years. He then received a letter of termination to begin at the end of the second probationary year. The teacher filed suit, alleging that he was unlawfully terminated in violation of public policy. The jury returned a verdict in his favor and awarded him with more than \$1 million dollars in damages.

The Court of Appeal reversed. In California, there is no discernable policy against teachers recommending weight-gaining substances to students. The school may discharge the probationary teacher, who

is an at-will employee, “for no reason, or for an arbitrary or irrational reason”. *Carter v. Escondido Union High School Dist.* (March 21, 2007) 148 Cal. App. 4th 922.

Notice of Non-Reelection Requires Personal Service.

A district sent a notice of non-retention to a probationary employee by certified mail with return-receipt fee on March 12. The employee did not receive actual notice until May 8, when he received a copy of it from his attorney. The employee filed a petition for a writ of mandate, requesting the trial court declare his reelection for the upcoming school year because he did not receive timely notice of his non-reelection. The trial court denied his petition.

The Court of Appeal reversed. Indeed, the Education Code was silent on how to provide notice of non-reelection. However, a statute requiring that a notice shall be given, but which is silent as to the manner of giving such notice, contemplates personal service thereof. If the Legislature intends that notice of non-reelection would be sufficient by certified mail, it should have said so. *Hoschler v. Sacramento City Unified School Dist.* (April 3, 2007) 149 Cal. App. 4th 258.

Teachers With No Teaching Credentials May Still Be Classified as “Probationary”.

On April 12, a school district terminated provisionally credentialed teachers, who were “district interns”, “pre-interns”, or “holder of emergency teaching permits or credentials waiver.” The sole reason for their release was “economic considerations.” The district argued that these terminated teachers were “temporary” or “provisional” and thus were

not protected by statutory procedures afforded to “probationary” employees. The plaintiff association filed a petition for writ of mandate and declaratory relief in the superior court. The superior court denied the petition.

The Court of Appeal disagreed. The Education Code establishes only four classifications for certificated employees: permanent, probationary, substitute and temporary. Because “temporary” classification is not guaranteed procedural protections, the Legislature has limited the ability of school districts to classify teachers as temporary employees. Courts strictly interpret rules to define “temporary” employees. A person who has been determined to be qualified to teach is not a temporary employee simply because he or she is not yet fully accredited, but rather because he or she occupies a position the law defines as temporary. “Temporary” employees are those who are employed to serve for less than three or four months, or in some type of limited, emergency or temporary assignments or classes; those who are employed for up to one year to replace a certificated employee who is on leave or has a lengthy illness, or those who are employed in categorically funded programs or in programs operated by a district under contract. The definition of “temporary” employee does not inquire upon a teacher’s credential. *Cal. Teachers Ass’n v. Vallejo City Unified Sch. Dist.* (March 29, 2007) 149 Cal. App. 4th 135.

CONSTITUTIONAL RIGHTS

Race Cannot Be a Factor in Assigning Students in K-12 Schools, Perhaps Unless the District Had a History of Segregation.

In a Seattle school district, K-12 students list their preferences for schools. If a school is overfilled, the district uses the student’s race as a tiebreaker, depending upon the racial composition of the particular school. This school district has never operated segregated schools.

On the other hand, a court in Kentucky dissolved its *Brown v. Board of Educ.* decree, finding that the school district had achieved unitary status by eliminating the vestiges of its prior policy of segregation. Nevertheless, the district maintained a desegregation compliance using racial guidelines for overcrowded schools.

The U.S. Supreme Court, in a 5-4 decision, held that both race-based policies violate the Equal Protection Clause of the Fourteenth Amendment. The race-based policies do not meet any compelling interest of remedying the effects of past intentional discrimination. The Seattle school district was never segregated; the Kentucky school district was found unitary. Where diversity is the objective, students must see fellow students as individuals rather than solely as members of a social group. The dissent claims that the plurality is a major step back from *Brown v. Bd. of Educ. Parents Involved in Community Schools v. Seattle School Dist. No. 1* (June 28, 2007) 127 S. Ct. 2738.

School Principal May Suspend Students Whose Speech Supports Illegal Drug Use.

A school permitted staff and students to participate in the Olympic Torch Relay as an approved social event or class trip. Teachers and administrative officials monitored the students who were allowed to leave class to observe the relay outside the school. When the torchbearers passed by, a student and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The school principal immediately crossed the street and ordered that the banner be taken down. Everyone complied except one student. The principal suspended the student, reasoning that she thought the banner encouraged illegal drug use, in violation of established school policy. The student sued the school and the principal for violation of his First Amendment rights.

A divided U.S. Supreme Court held that the banner can be reasonably interpreted to promote the use of illegal drugs, deterring drug use by children is an important interest, and a school may restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. *Morse v. Frederick* (June 25, 2007) 127 S. Ct. 2618.

Anti-recruiting Rule Does Not Violate First Amendment.

The school athletic association is a not-for-profit membership corporation organized to regulate interscholastic sports among members, which include some 290 public and 55 private high schools. It has since the early 1950s prohibited high schools from using "undue influence" in recruiting middle school students for their athletic programs. A member academy sent to select eighth grade students a letter, inviting them to participate in

a spring training session. The letter also explained that football equipment would be distributed and "getting involved ... would definitely be to your advantage" The association sanctioned the member academy. It imposed a fine, excluded the boys' basketball and football teams from tournament playoffs for two years, and placed the academy's athletic program on probation for four years. The academy filed suit.

The U.S. Supreme Court ruled for the association, holding that there is a difference of constitutional dimension between rules prohibiting appeals to the public at large and rules prohibiting direct, personalized communication in a coercive setting. Plus, the academy made a voluntary decision to join the association and to abide by its anti-recruiting rule. *Tennessee Secondary School Athletic Ass'n v. Brentwood Academy* (June 21, 2007) 127 S. Ct. 2489.

DISABILITY EDUCATION

Good Faith Required for IEP Meetings.

A U.S. district court ruled that so long as a school makes good faith effort to schedule an individualized education program (IEP) meeting at a time when the parents could attend, decision to move forward with an IEP meeting in effect for a student at the beginning of a school year, without the parents, does not violate procedural rights under the Individuals with Disability Education Act (IDEA). Plus, student's teacher must be present but it does not matter if the teacher present was a past, current, or future teacher. *E.P. v. San Ramon Valley Unified School Dist.* (June 21, 2007) 2007 U.S. Dist. LEXIS 47553.

School District Is Not Responsible for Ensuring that the Minor Translated Behavioral Skills Learned in the Classroom to the Home or Community Settings.

A minor qualified for special education services due to autistic behaviors. The district provided special education services to him until his parents placed him in a residential facility. A hearing officer had determined that, in order to provide a free and appropriate public education (FAPE) for the minor, the district was required to provide a 24-hour residential placement designed to address the minor's behaviors in the school environment and enable him to generalize his behavior-related skills outside the school setting.

The district court disagreed. The school district was not responsible for ensuring that the minor translated behavior skills learned in the classroom to the home or community settings. The court found that the minor's education progress at his last nonresidential school, while not perfect, was substantial, notwithstanding his behavioral difficulties. The district's offer to place him in another nonresidential school was an appropriate response to the behavioral problems the minor had exhibited. *San Rafael Elementary School Dist. v. California Special Educ. Hearing Office* (3/28/07) 482 F. Supp. 2d 1152.

Discrepancy Between Achievement and Intellectual Ability, if Correctable, Cannot Be Sole Basis for Disability.

A ten-year old performed at grade-level appropriate in the public school classroom. Her SAT-9 scores placed her above the 50th percentile with near uniformity, and her performance on various intelligence tests indicated high intellectual ability. But, the student had a seizure disorder, which

adversely affected her ability to focus and pay attention in the regular classroom. The district provided her with Section 504 plan, which included preferential seating in the classroom, use of a graphic organizer and AlphaSmart keyboard, one-step directions, visual support for instruction and concepts, frequent prompts and checks for understanding, and daily teacher checks for homework assignments. The district determined that the student did not qualify for special education services, specifically concluding that the student does not have a learning disability. The parents withdrew their child from the district and sued for reimbursement of tuition fees paid to a private school. The district court denied their request.

The U.S. Ninth Circuit Court of Appeals agreed. Under IDEA and California's Education Code, specific learning disability results only if a severe discrepancy between ability and achievement could not be corrected through other regular or categorical services offered within the regular instructional program. States are obligated to provide a basic floor of opportunity through a program individually designed to provide educational benefit to a handicapped child, rather than potential-maximizing education. *Hood v. Encinitas Union School Dist.* (9th Cir. Apr. 9, 2007) 482 F.3d 1175.

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