Oregon Civil Rights Newsletter

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EDUCATION ATTORNEY NEEDED FOR A SCHOOL PROBLEM? USUALLY, NO

by Diane Wiscarson and Kelsey Coulter, Wiscarson Law. P.C.

It's the phone call every parent dreads. "There was a problem at school today."

When an issue arises with a child at school, many parents assume they need a lawyer who specializes in education law. If they have a student with a disability, they assume they need a special education lawyer. This, however, is not always the case. As illustrated in the examples below, the location of the problem does not dictate the area of law indicated or the type of lawyer to consult.

Severe Concussion at School

Facts: A high school student has a seizure disorder, which is documented and monitored by appropriate school staff, per the student's individual medical protocol. The medical protocol was developed with the input and expertise of the student's physician. Then, between classes, the student slips on a slimy banana peel lying on the hallway floor, where a careless student threw it several days before. During the student's fall, she hits her head on the concrete floor and suffers a severe concussion, resulting in missing several weeks of school. Medical bills mount for the family and it is unclear if the student will have any long-term impact from the concussion or if the concussion may affect the seizure disorder. The parents are completely overwhelmed and need help.

Which law applies? Not every accident is legally actionable. If the student is entitled to receive special education services under an Individualized Education Program (IEP),[1] which the school failed to follow, the school may be in violation of the Individuals with Disabilities Education Act (IDEA).[2] Nothing in this fact scenario, however, indicates any concern or violation of the student's special education rights.

But, if the accident at school resulted from a known hazard or a failure to maintain school facilities, the school district may be liable. If the school district or a school employee breached a duty of care owed to a student, then state tort law would apply. In extreme cases, 42 U.S.C. § 1983 might apply.

Best choice to call? The parents should call a personal injury lawyer or, in the extreme case, a civil rights attorney.

1 20 U.S.C. § 1414(d) (2012).
2 20 U.S.C. § 1400, *et seq.*

Disclosing Private Family Information

Facts: A parent calls the teacher to complain that her daughter is having trouble in math. The parent also complains that the teacher is not providing enough support and help to the student, who is going to fail math class without some serious intervention from the teacher. The teacher explains that there is another student in the class who has an IEP, severe behavior problems, and the parents just do not care about the behaviorally challenged student, as he is "probably even more trouble at home." The teacher explains that this behavioral student is taking all of her time and requires so much attention, babysitting, and monitoring that there is just not enough time to give hardly any, but certainly not adequate, attention to the other students in the classroom. The teacher identifies the behavioral student and his parents by name, stating that he is in special education, needs to stay there, and should be kept out of her class.

The family is so incensed that their daughter is not getting the help she needs that they call the other family to complain about their son and repeat everything the teacher told them. The parents of the student with the behavioral issues are furious that the teacher disclosed their private and educational information to another family.

Which law applies? The Family Education Rights and Privacy Act (FERPA)[3] applies to all school programs that receive federal funds through the Department of Education. FERPA gives parents the right to access educational records maintained by a school district on their child and to request that a school amend their child's education records. More importantly in this case, it prohibits the school from disclosing a student's personally identifiable information without the consent of a parent.

If an investigation determines that the school committed a FERPA violation, the school must take steps to comply with the law. A FERPA violation does not create a private cause of action against the school. If the school was negligent in the unauthorized disclosure, there may be a cause of action under other federal statutes or state tort law. In the case of a private school, there may also be a breach-of-contract claim depending on any agreements between the school and the parents.

A written complaint alleging a FERPA violation can be filed with the Family Policy Compliance Office, which may result in an investigation.

Best choice to call? The parents should call an education lawyer.

Student Searched Without Permission

Facts: For no apparent reason, a boy gets upset at his middle school and makes a vague statement about wanting to harm others. Now the principal wants to conduct a search of the student's backpack, desk, and locker for weapons or other forbidden items.

Which law applies? Searches and seizures fall under the Fourth Amendment of the US Constitution. Searches conducted by public school officials are generally based on a reasonableness standard. This means the school may conduct a search without a student's permission if it has a reasonable suspicion that the search will result in evidence that a school rule or law is being, or has been, violated. The search should be reasonable in scope and take into account the age and individual circumstances of the student.

Whether the school can search a student's locker or other belongings varies by state and depends on the certain circumstances, such as whether the area to be searched is considered the student's personal property or the property of the school. According to the Portland Public Schools' search-and-seizure policy, lockers, desks, and other storage areas remain in the possession of the school when assigned and made available to a student.

Best choice to call? The parents should call a juvenile criminal defense attorney.

Suspected Learning Disability

Facts: A student is struggling in high school and failing most of his classes. The parents suspect he has a learning disability but have not yet had any testing conducted. They have asked the school what can be done, but the school says the student is not eligible for any additional services.

3 20 U.S.C. § 1232, *et seq*.

Which law applies? IDEA[4] is a federal law that funds special education programs. Schools receiving funds must follow certain requirements to maintain their funding. The IDEA ensures that students with disabilities have access to a "free and appropriate education" when they need special education or related services because of a disability. If a student is found eligible under the IDEA, the school district must develop an IEP tailored to the student's individual needs.

Title II of the Americans with Disabilities Act (ADA)[5] and Section 504 of the Rehabilitation Act of 1973 (§ 504)[6] both prohibit discrimination against individuals with disabilities in the school setting. Section 504 applies to programs or activities that receive federal funding from the Department of Education. The ADA applies to almost every entity, regardless of funding.

Whether the ADA, Section 504, or the IDEA applies depends on the very specific circumstances. The definition of a disability and the standard for eligibility differ under Section 504 compared to the IDEA. The IDEA uses a categorical approach, while the definition under Section 504 is broader and focuses on the functional impact of a physical or mental disability. A student may not be eligible for services under the IDEA, but still qualify under Section 504.

The Office of Civil Rights within the US Department of Education is responsible for enforcing the ADA and Section 504. To file a claim alleging an IDEA violation, a complaint must first be filed with the Oregon Department of Education to request an administrative due process hearing.

Best choice to call? The parents should call a special education lawyer.

Peer-on-Peer Bullying

Facts: A child is being bullied at school for being gender-nonconforming. The child's parents have called the school several times, but the bullying continues. As a result, the student has become suicidal and is afraid to attend school at all.

Which law applies? Schools should be a safe place for students to learn. If circumstances at a school cause the educational environment to become hostile, the school should take steps to eliminate the problem.

Civil rights laws apply if the harassment is based on race, national origin, color, sex, religion, or disability. Civil rights laws are enforced by the US Department of Education and the US Department of Justice. Applicable laws include the ADA, IDEA, Title IV and VII of the Civil Rights Act of 1964,[7] and Title IX of the Education Amendments of 1972.[8] Other state laws may apply, including Oregon's anti-bullying laws.

Schools that receive federal funding must prevent discrimination. If a school receives a report of harassment, the school must conduct an investigation. If it determines that harassment occurred, the school must take steps to end the harassment and prevent further harassment in the future. If the school has actual knowledge of harassment and acts with deliberate indifference or willful disregard for safety, civil liability against the school district or school employees may apply. If the school district failed to train staff or implement a policy to prevent discrimination resulting in an injury of the student, the family may have a federal claim under 42 U.S.C. § 1983.

If the bullying is extreme and results in any kind of physical assault, the parents of the bullied student may want to pursue criminal charges. They may also consider filing a civil lawsuit against the family of the student who is doing the bullying.

Best choice to call? The parents should call a civil rights attorney, depending on the basis of the harassment, or a personal injury attorney for an action against the bully.

Dispute with Private School

Facts: Partway through the school year at a private parochial school, a student starts to exhibit behavioral problems. After a few months of trying to resolve the issues, the school terminates the student's enrollment. When the student's parents request a tuition refund for the rest of the school year, the school refuses, citing

4 20 U.S.C. § 1400, *et seq*.
5 42 U.S.C. § 12101, *et seq*.
6 29 U.S.C. § 794, *et seq*.
7 42 U.S.C. § 1981, *et seq*.
8 20 U.S.C. § 1681, *et seq*.

the enrollment agreement the parents signed when they registered their child for the school. The enrollment agreement stated that the parents would be responsible for the entire school year's tuition, even if they withdrew their child from the school for any reason.

Which law applies? An enrollment agreement for a private school usually includes a provision that parents are not entitled to a tuition refund if they withdraw their child from school or even if the school asks the student to leave. These enrollment agreements are generally legally binding and enforceable contracts. Thus, the usual rules of contract law would be applied to any dispute between the private school and the parents.

Best choice to call? The parents should call a contract lawyer.

Service Animals

Facts: A student with autism has a service dog.[9] The student's parents inform the school that their child will bring the service dog to school, starting in a week. The school district responds that the parents must ask the school's permission to bring the service animal to school. The parents then "ask" the school to allow the service dog to accompany the student to school, but wonder from whom they are to get permission when the service dog needs to accompany its person to the doctor, the store, or to see a movie.

Which law applies? Until recently, school districts and courts were divided on whether service animals in school fell under the ADA or IDEA.

Under the IDEA, an IEP must be tailored to address each child's individual needs.[10] As part of this, the IEP must include all of the services a student needs to access a free and appropriate education. Some school districts claimed that if a service animal was not included in a child's IEP, the school was not required to allow a service animal in the school. Other school districts treated service animals as an ADA issue and allowed them in school with their person, just like any other public building.

In February 2017, the United States Supreme Court issued *Fry v. Napoleon Community Schools*,[11] which held that service animals fall under the ADA, not the IDEA. Thus, service-animal claims can be filed directly in federal court under the ADA and do not have to go through the state administrative-exhaustion process first, as required by the IDEA.

Best choice to call? The parents should call a special education or civil rights lawyer.

When *Is* an Education Attorney Needed?

When something happens at a school or school event, consider carefully what the actual problem is, rather than just the location of the occurrence. If the problem has to do with a child's actual education—whether in the mainstream general education population or in special education—then it is time to consider calling an education or special education attorney for a consultation or advice.

Diane Wiscarson and Kelsey Coulter are attorneys with Portland-based Wiscarson Law, the only firm in Oregon with a primary emphasis on special education law for families. Since its founding in 2001, Wiscarson Law has shepherded thousands of Oregon and Washington families through the region's public schools and education service districts on behalf of their special needs children.

9 Under the ADA, miniature horses can also be service animals.
10 20 U.S.C. § 1414(d)(3).
11 580 U.S. ___, 137 S.Ct. 743 (2017).

SUPREME COURT UPDATES

by Alyssa Engelberg, Dunn Carney, and Kirsten Rush, Busse & Hunt

***Bank of America Corp. v. Miami*, No. 15-1111 (May 1, 2017)**

In a 5–3 decision, the Court vacated the decision of the Eleventh Circuit and remanded the case concerning the City of Miami's claim that banks violated the Fair Housing Act (FHA) by engaging in discriminatory and predatory lending conduct that led to a disproportionate number of foreclosures in neighborhoods where the majority of residents were minorities. The Court held that the City of Miami was an "aggrieved person" authorized to bring suit under the FHA because the city's claims of financial injury in decreased property-tax revenue and increased demand for police, fire, and other municipal services were within the "zone of interests" the FHA protects. The Court further held that the Eleventh Circuit erred in determining that the applicable standard for proximate cause was foreseeability. Instead, the FHA requires a direct relation between the injury asserted and the conduct alleged.

***Cooper v. Harris*, No. 15-1262 (May 22, 2017)**

The Court held 5–3 that North Carolina violated the Equal Protection Clause of the Fourteenth Amendment by redrawing two congressional districts using race as the predominant factor without a compelling reason and that the state's interest in complying with the Voting Rights Act did not justify that consideration of race. In examining the record, the Court explained that the state purposefully established a racial target for one of the districts, which did not withstand strict scrutiny, and in the second district, racial considerations predominated the district's design without justification. In its decision, the Court also held that the state's victory in a similar state-court lawsuit did not dictate the disposition of the case before the Court or change the applicable standard of review.

***Cnty. of Los Angeles v. Mendez*, No. 16-369 (May 30, 2017)**

In a unanimous decision, the Court held that the Fourth Amendment provides no basis for the Ninth Circuit's "provocation rule." Under the provocation rule, a law enforcement officer's reasonable use of force becomes unreasonable as a separate constitutional violation if (1) the officer intentionally or recklessly provoked a violent confrontation and (2) the provocation was an independent Fourth Amendment violation. The Court explained that the provocation rule is incompatible with the Court's excessive-force jurisprudence because it holds officers liable for an excessive-force claim where the officer used reasonable force after the occurrence of a separate unreasonable seizure.

***Nelson v. Colorado*, No. 15-1256 (April 19, 2017)**

In a 7–1 decision, the Court reversed the Colorado Supreme Court, holding that a statute requiring exonerated criminal defendants to prove their innocence by clear and convincing evidence in a civil action before they could be reimbursed for the fees, costs, and restitution paid because of an invalid conviction violated the Fourteenth Amendment's guarantee of due process. In its analysis, the Court applied the procedural due process balancing test from *Matthews v. Eldridge*, 424 U.S. 319 (1976), which evaluates the factors of (1) the private interest affected, (2) the risk of erroneous deprivation of that interest through the procedures used, and (3) the governmental interest at stake. Applying these factors, the Court held that to comport with due process, a state may not impose anything more than minimal procedures on the refund of fees and costs assessed as part of a conviction that is subsequently invalidated.

***North Carolina v. Covington*, No. 16-1023 (June 5, 2017)**

In a per curiam decision, the Court held that after the district court determined that redistricting in North Carolina constituted racial gerrymandering, it erred by analyzing the balance of equities in a cursory fashion when crafting the remedy for the violation by ordering special elections. The Court explained that the court on remand should engage in a case-specific analysis and consider the severity and nature of the particular constitutional violation, the extent of likely disruption to the ordinary processes of government if early elections are imposed, and the need to act with proper judicial restraint when intruding on state sovereignty.

Alyssa Engelberg is an associate at Dunn Carney, where she represents closely held companies in employment Law. Kristen Rush is an associate at Busse & Hunt, which represents employees in employment cases.

RECENT LEGAL DEVELOPMENTS

by Richard F. Liebman and Anthony Kuchulis, Barran Liebman LLP

Circuit Courts of Appeals

Stevens v. Rite Aid Corp., 851 F.3d 224 (2nd Cir. 2017)

The Second Circuit overturned a $2.6 million jury award in favor of a pharmacist who alleged his needle phobia prevented him from administering immunizations, deciding as a matter of law that his termination was not unlawful under the Americans with Disabilities Act (ADA). The ADA requires that employers accommodate qualified individuals with disabilities who can perform the essential functions of their job. Rite Aid had terminated the pharmacist soon after learning he could not administer immunization shots without a risk of passing out from fear. The court upheld the termination as lawful, holding that the employer had clearly established that administering immunization shots was an essential function of the job. The court also rejected the pharmacist's suggested accommodations, which included hiring an assistant to administer shots for him, as that would merely relieve him of an essential function of the work that he was hired to perform.

NLRB v. Pier Sixty, LLC, 885 F.3d 115 (2nd Cir. 2017)

The Second Circuit held that under certain circumstances, profane and offensive social media posts can be protected as concerted activity under the National Labor Relations Act. The primary questions for the court were what constituted "opprobrious conduct" in the context of an employee's comments on social media and to what extent such comments are protected under Section 8 of the Act, relating to employees' right to act in concert and discuss working conditions. The employee, Hernan Perez, after a dispute with his supervisor, Robert McSweeney, posted the following on Facebook: "Bob is such a NASTY MOTHER F***ER don't know how to talk to people!!!!!! F*** his mother and his entire f***ing family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!" Perez was terminated shortly after making that post. Despite the vulgar and offensive nature of the post, the court determined that it was protected speech because its primary subject matter was regarding working conditions and union activity, the employer otherwise generally tolerated profanity among its workers, and the online forum was a tool for organizing and not technically a "public outburst."

Int'l Refugee Assistance Project v. Trump, No. 17-1351, 2017 U.S. App. LEXIS 9109 (4th Cir. May 25, 2017)

The Fourth Circuit affirmed the district court's issuance of a nationwide preliminary injunction with respect to President Trump's revised travel ban, a ninety-day suspension of travel from seven predominantly Muslim countries. The revised ban had been re-issued after courts blocked a similar ban for unconstitutionally targeting individuals based on religion. The revised ban contained additional details regarding specific security reasons why individuals from the selected countries were being targeted without reference to their religious beliefs. Despite its neutral security language, the court opined that a stay of the ban was proper based on potential violations of the establishment clause, stating that the ban "in text speaks with vague words of national security, but in context drips with religious intolerance, animus, and discrimination."

Federal District Courts

Blatt v. Cabela's Retail, Inc., No. 5:14-cv-04822, 2017 US Dist LEXIS 75665 (E. Dist. of Penn. May 18, 2017)

The Eastern District of Pennsylvania held that gender dysphoria is a protected disability under the ADA. Shortly after being hired, the plaintiff was diagnosed with gender dysphoria, also known as Gender Identity Disorder, which limited her major life activities, including interacting with others, reproducing, and social and occupational functioning. The plaintiff alleged that her employer discriminated against her on the basis of her disability by failing to allow her to use the women's restroom, failing to provide the correct nametag, and failing to provide her with a gender-matching uniform. In denying the employer's motion to dismiss the complaint, the court held that the ADA could be read to protect individuals with gender dysphoria when it inhibits major life activities and that the plaintiff's claims, as alleged, could constitute an actionable claim.

Other Legal Developments

Oregon Pay Equity Act of 2017

On June 1, 2017, Governor Brown signed into law the Equal Pay Act of 2017 to address pay disparities among women, minorities, and other protected classes.

The Equal Pay Act prohibits employers from compensating certain protected classes at a rate less than other employees for work requiring substantially similar knowledge, skill, effort, responsibility, and working conditions. Protected classes listed in the Act include race, color, religion, sex, sexual orientation, national origin, marital status, veteran status, disability, and age. The Act provides that pay differences may be lawful only if based on certain factors, including a seniority system, a merit system, measurable differences in quality or quantity of work, work locations, travel, education, training, or experience. Employees who believe that they have been discriminated against on the basis of unequal pay in violation of the Act will have a private right of action beginning on January 1, 2019.

Additionally, the Act affects hiring practices, as it prohibits employers from seeking information about an applicant's prior compensation or setting compensation based on the applicant's past or current compensation levels. This part of the Act is scheduled to take effect on September 9, 2017, at which point the Bureau of Labor and Industries (BOLI) will have the authority to enforce it and issue civil fines. On January 1, 2024, employees will have a right of private action against prospective employers if asked about pay history.

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The *Oregon Civil Rights Newsletter* is recruiting new members for its editorial board.

If you are interested in serving as a board member, please contact Megan Lemire at megan.lemire@gmail.com.