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## Mission Statement

The primary purpose of the *Illinois State Education Law and Policy Journal* (formerly *Illinois School Law Quarterly On-Line*) is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

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## STUDENTS' RIGHTS

**Rosario v Clark Cmty. Sch. Dist., No. 13-362 (D. Nev. Jul. 3, 2013):** Rosario, a member of the boys varsity basketball team, posted several profanity laced comments about school coaches and administrators on his Twitter account. The tweets were made after the season had ended, from his private Twitter account, while he was off-campus with his family. The school district disciplined him under the district's cyber-bullying policy. Rosario's father filed suit in federal district court, seeking an injunction to lift the discipline. The court denied the injunction request. Rosario then filed suit that included allegations of violations of his First Amendment right to free speech, his Fourth Amendment right to be free from unreasonable searches, and violation of his Fourteenth Amendment right to Equal Protection and Due Process. The school district filed a motion to dismiss.

Of the ten claims filed, the district court dismissed seven without prejudice; the family can amend those seven claims and re-file. The court, however, did not dismiss Rosario's claims that his First Amendment Right to free speech was violated. The district had based its request to dismiss this claim on (1) that the tweets were obscene thus not protected by the First Amendment; and (2) that the school district had the right to regulated off-campus student speech that caused substantial disruption on campus. While the court agreed that one of the eight tweets was not protected under the First Amendment because of obscenity, it found that the other seven tweets, although definitely racist, violent, offensive, and hateful, did not meet the legal definition of obscenity.

Looking to the second defense presented by the district, that off-campus speech can be regulated if it causes substantial disruption, the court did agree with the district that such a standard was appropriate. Referring to several decisions from various federal circuits, the court determined that school officials did have the authority to discipline students for off-campus speech that will foreseeably reach the campus and cause a substantial disruption. In addition, the court also noted that some circuits require a sufficient nexus exist between the off-campus speech and disruption at school. Because this standard must determined on a case-by-case basis looking at the specific facts of each case, the court found that it needed to proceed to trial to be decided on its merits. As regarding Rosario's claim that his Fourth Amendment rights had been violated, the court quoted the Ninth Circuit case of *United States v Choate*, 576 F.2d 165 (1978) "It is well established that when a person shares information with a third party, that person takes the risk that third person will share it with the government." School officials had learned of the tweets not by illegally accessing Rosario's account, which would have been an illegal search, but from one his follower's accounts; a third person who shared it with the government.

**Chigano v City of Knoxville, No. 12-6025 (6th Cir. Jul. 10, 2013):** Chigano suffers from autism. She violated a school policy requiring cell phones to be turned off and not visible during the school day. Therefore her phone was confiscated and taken to the office. Under school policy the phone would only be returned to her parents. When Chigano tried to retrieve the phone after school she was told no. She refused to leave the school office without the phone. Two security officers and then a Knoxville police officer tried to get Chigano to leave voluntarily. When Chigano became physically aggressive with the police officer, she was handcuffed and taken to a juvenile detention center where she was charged with disorderly conduct and resisting arrest. Chigano and her parents filed suit in federal district court alleging a Title VI claim under

the Civil Rights Act of 1964, a §1983 claim alleging a violation of Chigano's Fourth, Eighth, and Fourteenth Amendment rights, and claims alleging violation of various state laws. The court dismissed both the federal and state claims. The only claim which the Chiganos appealed was the Fourteenth Amendment substantive due process claim; that Chigano's bodily security was violated because school officials failed to inform police officers of her autism before they interacted with her. The Sixth Circuit panel affirmed the district court's dismissal of the claim. "While the Due Process Clause prohibits the State from depriving any person of life or liberty, it does not explicitly require the State to protect the life and liberty of its citizens against actions by private actors." The panel viewed the police officer, who was not summoned by the school but another private individual, to be a private actor. The court went on to say, "M.C.'s "increased risk" argument failed because it is based on the school employees' failure to act, i.e. to inform the officer of M.C.'s autism ... but such failure to act is not an affirmative act which is required under the state-created danger theory."

***Hunt v State of Delaware, No. 488 (Jun. 25, 2013):*** An autistic student was being bullied on the school bus, and had money taken from him. The administration of his building had reason to believe that a fifth-grader was responsible, so they requested the district School Resource Officer discuss the incident with the suspected student. Now the agreement between the state policy and the school district stated that the SRO was to be assigned to the high school, however, the office stated that he believed he was the SRO for the entire district. The SRO did question the suspected student in the school library. The principal was present for part of the meeting, but left before the interview was done. The suspected student did admit to having the money but that he had not taken it from the autistic student; a student sitting next to the autistic student had done that. The SRO, through a bus seating chart, determined that 8 year old Hunt had been sitting next to the autistic student, so he called him to the office. This was done without the knowledge of the principal. As the SRO was walking Hunt to the office he said that there was already a boy there who had said the Hunt had taken the money, but that the SRO did not believe Hunt had taken the money. Thereafter, he instructed Hunt to deny taking the money when he, the SRO, asked him. Hunt was then questioned by the SRO in the presence of the other student. The SRO proceeded to so scare Hunt in order to obtain a confession from the other student, who did ultimately confess after Hunt became so visibly upset. Hunt told his mother who filed suit in state court alleging violation of §1983 and various torts. Her claims against the school district, the school board, and the building principal were resolved before going to trial; only the claims against the State of Delaware, the Department of Safety and Homeland Security, the Division of the Delaware State Policy, and the SRO (Trooper Pritchett) reached trial, where both the federal and state tort claims were dismissed. On appeal, the Delaware Supreme Court reversed the trial court's ruling on Hunt's Fourth Amendment claim and two of his tort claims. It concluded that the SRO had violated Hunt's right to be free from unreasonable search when he was detained for question. The court rejected the SRO's assertion that he was entitled to qualified immunity. The court stated, "Whenever a police officer accosts an individual and restrains his freedom to walk away, he has 'seized' that person." In the instant case, the court found that the RSO had "seized" Hunt for the following reasons: (1) Hunt was at all times escort by either school personnel or the RSO; (2) the RSO was in uniform with a gun, handcuffs, and other indicia of police authority; (3) Hunt was only 8 years old; (4) Hunt was interviewed in the library, with the door closed, for over an hour; and (5) Hunt was never told that he could leave. Moreover, the RSO even had

stated that he never thought Hunt had taken the money; he just wanted to use him as a way to get the other student to confess. "One could find that Pritchett was interrogating Hunt for the purpose of scaring him, so that AB would be shamed into confessing. Pritchett should have known that it was unreasonable to seize Hunt and intentionally frighten him, in order to teach another student a lesson." The case was remanded for further proceedings.

***Glowacki v Howell Pub. Sch. Dist., No. 11-15481 (E.D. Mich. Jun. 10, 2013).*** On October 20, 2010 some students and staff at Howell High School recognized Anti-Bullying day, a national movement educating individuals about bullying based on sexual orientation. It was not a officially sanctioned school activity, but was permitted. Students in the Gay Straight Alliance Club asked people to wear purple to show solidarity. A teacher printed purple t-shirts with "Tyler's Army" printed on the front and "Fighting Evils with Kindness" on the back in memory of Tyler Clementi, the gay Rutgers student who committed suicide after being bullied. McDowell, the economic teacher wore a Tyler's Army t-shirt, started each class with a video of Tyler Clementi, and facilitated discussion on the topic. During Sixth Period, McDowell asked a student to remove her belt which had a Confederate Flag belt buckle. According to court records, the following exchange followed:

Student Daniel (calmly raising his hand): Why can't she wear a Confederate flag belt buckle when students and teachers can wear purple shirts and display rainbow flags?

McDowell: Because of the difference in symbolism between the Confederate flag and the rainbow flag. The Confederate flag represents the hanging and slashing of African Americans, it isn't allowed in my classroom, and it's discrimination against blacks.

Daniel: I don't accept gays, and the purple shirts discriminate against Catholics.

McDowell: You cannot say that in class.

Daniel: I don't accept gays because I'm Catholic.

McDowell: It's fine if your religion is opposed to homosexuality but saying such things is inappropriate in a classroom setting. You can't say "I don't accept gays" any more than you can say "I don't accept blacks." Do you accept gays or not?

Daniel: I do not.

McDowell: Leave and go to the office. I'm writing up a referral for unacceptable behavior.

Second student: I don't accept gays either, can I leave ?

McDowell: yes

After Daniel and the other student departed, other students asked why McDowell had thrown them out and "why didn't they have free speech?" McDowell "explained that a student cannot voice an opinion that creates an uncomfortable learning environment for another student." The school district expunged Daniel's discipline, and suspended McDowell for 1 day without pay, issued him a written reprimand, and ordered him to attend First Amendment training. McDowell grieved his discipline and his sanctions were reduced. Daniel, his brother and his mother filed

a §1983 action against the school and McDowell for violation of Daniel's First and Fourteenth Amendment rights of free speech and equal protection. All parties moved for summary judgment. The court ruled for the school district on all claims, found McDowell had violated Daniel's First Amendment rights, rejected McDowell's argument of qualified immunity, and held that Daniel's brother lacked standing. The court applied the Tinker Standard, but could find no material or substantial disruption need to meet that standard. Regarding Daniel's comments, the court found no evidence that his "negative comments about homosexuality threatened, named, or targeted a particular individual . . . therefore it did not impinge upon the rights of other students." The court found that the teacher had engaged in impermissible viewpoint discrimination; his discipline of Daniel was based "primarily [on] his disagreement with Daniel's opinions on homosexuality." The court denied McDowell's claim of qualified immunity, finding that a reasonable teacher should have known that students have First Amendment free speech rights.

***Morrow v Balaski*, No. 11-2000 (3d Cir. Jun. 5, 2013):** The Morrow sisters attended Blackhawk High School. Starting in January 2008, they became the target of harassment by Anderson and one of Anderson's friends, also students. Anderson was disciplined, but continued to harass the Morrow sisters. Finally, in a meeting with the girls' parents, the school stated that it could not guarantee the girls' safety and suggested that they enroll in another school district; the school declined to remove Anderson and her friend from school. The Morrows filed a §1983 action in federal district court alleging a violation of their Fourteenth Amendment substantive due process rights. They also brought a supplemental state law claim for negligence. The Morrows claimed that the school has a "special relationship" with their daughters because of their status as minor students; that the school had created the dangerous condition and had a duty to protect. The district court dismissed the complaint finding no special relationship between public school authorities and students. The Third Circuit affirmed the lower court's dismissal of the §1983 claim, stating that "As a general matter a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." In *Vernonia School District 47J v Acton*, 515 U.S. 646 (1995), the Supreme Court stated "We do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional duty to protect." The fact that the school district allowed Anderson and her friend to return to school at the end of their suspensions was not the type of affirmative act needed to create a dangerous environment, which was the second argument provided by the Morrows:

"We are not persuaded by the Morrows' argument that the Defendants affirmatively created or enhanced a danger to Brittany and Emily by suspending Anderson and then allowing her to return to school when the suspension ended. Although the suspension was an affirmative act by school officials, we fail to see how the suspension created a new danger for the Morrow children or "rendered [them] more vulnerable to danger than had the state not acted at all." *Bright v. Westmoreland Cnty.*, 443 F.3d 276, 281 (3d Cir. 2006). To the contrary, the suspension likely made the Morrows safer, albeit temporarily. In addition, the fact that Defendants failed to expel Anderson, or, as the Morrows would describe it, "permitted" Anderson to return to school after the suspension ended, does not suggest an affirmative act. While the Morrows make much of the fact that Defendants' failure to expel Anderson after she was adjudicated "guilty of a crime" may have been contrary to a school policy mandating expulsion in such circumstances, we decline to hold that a school's alleged failure to enforce a disciplinary policy is equivalent to an affirmative act under the circumstances here."

**Long v Murray Cnty. Sch. Dist., No 12-13248 (11th Cir. Jun. 18, 2013).** Long was a high school student who ultimately hung himself after being subject to severe and pervasive bullying throughout high school. Every time the school was alerted to an incident, it had responded quickly and effectively. The district court granted summary judgment to the district, finding that it had not demonstrated deliberate indifference and had not violated Long's civil rights. In a *per curiam* opinion, the Eleventh Circuit affirmed the decision of the lower court and ruled that a school district was not deliberately indifferent to the bullying of a deceased disabled student. The plaintiffs had failed to provide sufficient evidence on the basis of which a jury could reasonably find that the school district knew that their remedial action was ineffective.

**Wyatt v Fletcher, No. 11-41359 (5th Cir. May 31, 2013),** Wyatt played softball at Kilgore High School. Wyatt's coaches took her aside to ask her about her relationship with an older woman. They also accused Wyatt of spreading rumors about the coaches' sexual orientation. After this discussion, the coaches called Wyatt's mother to meet. At the meeting, comments made by the coaches made Wyatt's mother realize the sexual orientation of her daughter. The coaches claimed that they were giving Wyatt's mother the information because the older woman with whom Wyatt had a relationship was involved in drugs and alcohol use, thereby causing a potentially dangerous situation for their student. Wyatt's mother filed suit alleging that the providing of such information was a violation of her daughter's Fourth and Fourteenth Amendment rights. The coaches raised the defense of qualified immunity and moved for summary judgment. The magistrate rejected the defense. The ruling was appealed. On appeal, the critical issue before the court was whether an individual has a recognized constitutional right to privacy in his or her sexual orientation, including the right to not have that information disclosed to a parent. While the court stated that a general right to privacy is clearly established, whether that included disclosing information regarding sexual orientation to a parent was not. Since that right was not clearly established, the coaches' defense of qualified immunity and summary judgment was appropriate.

## HIGHER EDUCATION

**Fisher v University of Texas at Austin, No. 11-345 (U.S. Jun. 24, 2013):** Fisher, a white applicant, was denied admission to the University of Texas at Austin (UT–Austin) in 2008 under the university's "holistic review" process that was adopted after such a process was found acceptable by the Supreme Court in *Grutter v Bollinger*, 539 U.S. 306 (2003). The state of Texas also has the Top Ten Percent Law under which any student graduating in the top 10% of his or her high school class is automatically admitted to the Texas state university system. After *Grutter*, race was added to the "personal achievement index," a mix of leadership qualities, extracurricular activities, work and service experience, and special circumstances. That index, combined with a separate academic index, is used on a matrix to grant admission to applicants who don't get in through the Top Ten Percent Law. Fisher sued the university in federal district court, alleging that the consideration of race violated the Equal Protection Clause of the Fourteenth Amendment. The district court granted summary judgment to the university. The Fifth Circuit affirmed stating that the university system bore a rational relationship to its stated compelling interest; that after *Grutter* substantial deference needed to be given to the university in both determining its interest and whether its plan was narrowly tailored to meet the state interest.

Writing for the majority, Justice Kennedy reaffirmed the Court's adherence to its previous

decisions regarding the use of race in university admissions; that “obtaining the educational benefits of ‘student body diversity is a compelling state interest that can justify the use of race in university admissions.’” The majority also emphasize that the Equal Protection Clause “demands that racial classifications be subjected to strict scrutiny; that strict scrutiny imposes on the university the ultimate burden of demonstrating, before turning to racial classifications, that available, workable race-neutral alternative do not suffice.” The Court did not see the requirement to afford great deference to the university; it must still show that the admissions process meets strict scrutiny in its implementation by being narrowly tailored to the identified interest. This is not what the Fifth Circuit had done, having been too quick to defer to the university when it affirmed the grant of summary judgment. “Strict scrutiny demands the court to assess whether the University has offered sufficient evidence that would prove that its admission program is narrowly tailored to obtain the educational benefits of diversity.” The decision was vacated and remanded to the Fifth Circuit for further proceedings consistent with the Supreme Court’s opinion.

In a one paragraph concurrence, Justice Scalia stated, simply, that the Constitution prohibits government discrimination on the basis of race. Moreover, if Fisher had requested the Court to overrule the holding in *Grutter* that the state had a compelling interest in the educational benefits of diversity which could justify racial preferences in university admissions, Scalia suggested that he would have voted to overrule. In his 20-page concurrence, Justice Thomas stated that he, too, would overrule *Grutter* and hold that the use of race in higher education admissions was “categorically prohibited by the Equal Protection Clause.” [Editor’s Note: Could these justices have been giving a hint to Fisher that she should ask that *Grutter* be overruled?]

## **EMPLOYEES’ RIGHTS**

***University of Texas Southwestern Medical Center v Nassar, No. 12-484 (24 Jun. 2013):*** Nassar was both an associate professor at the University of Texas Southwestern Medical Center (UTSMC), and a staff physician at Parkland Memorial Hospital (PH), which had an affiliation agreement with the University. Nassar complained that his direct supervisor at the UTSMC made discriminatory remarks about his ethnic and religious background. He resigned from his faculty position and sought a new position at PH. He informed management at PH about the discriminatory remarks, after which management intervened and prevented PH from hiring Nassar. Nassar claimed retaliation. PH stated it was because of a pre-existing policy between the UTSMC and PH requiring physicians at PH to also hold positions at the UTSMC. The issue before the Supreme Court was a retaliation charge under Title VII. In a 5–4 decision, the Court stated that to establish liability for a retaliation claim, “but-for” causation must exist; but for the unlawful motive of the employer the adverse action would not have occurred. While not specifically named in Title VII, retaliation claims compliment claims based on discrimination based on race, color, religion, sex, or national origin. These latter claims are status based claims. For such claims liability is established if the plaintiff shows discriminatory motive for taking adverse action, even if lawful motives also existed; referred to as the “motivating factor.” In making the distinction as to what standard should be used for a retaliation claim, the Court relied heavily on the 1991 Congressional Amendments to Title VII, in which the “motivating factor” test was specifically stated as the appropriate test for determining status-based claims of discrimination. Congress did not, however, add the motivating factor test to retaliation claims. When this happens, the Court will presume that the Congress knew what it was doing; if it adds something in one place, but not in another, that difference was intentional.



Therefore, a traditional “but-for” causation test still applied to retaliation claims. Therefore, the Fifth Circuit erred in applying the motivating factor test in the instant case; that the “but-for” causation test should have been employed. The case was remanded for further proceeds consistent with the Court’s opinion.

***Vance v Ball State Univ.*, 11-556 (U.S. Jun. 24, 2013):** Vance, an African-American woman, started working as a substitute server at Ball State University Dining Services in 1989. In 1991 she was promoted to part-time catering assistant. In 2007 she was hired as full-time catering assistant. During this time Davis, a white woman, was a catering specialist in the same division. Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance. In 2005/2006 Vance filed claims of discrimination against Davis. The university tried to deal with the workplace tension, but in 2006 Vance filed suit in District Court in the Southern District of Indiana, claiming a racially hostile work environment in violation of Title VII. In her complaint Vance alleged that Davis was her supervisor and that the university was liable for Davis’ creation of a racially hostile work environment. Both parties moved for summary judgment. The District Court entered summary judgment for the university stating that the university could not be held vicariously liable for Davis’ alleged racial harassment because Davis was not Vance’s supervisor; it could not be held negligent because it reasonably responded to all incidents of which it was aware. The Seventh Circuit affirmed the decision of the lower court. The Supreme Court granted review because of the split among federal circuits as to the definition of “supervisor” in the context of vicarious liability.

An employer’s liability for workplace harassment under Title VII depends on the status of the harasser. If the harasser is a co-worker, negligence standards apply. If the harasser is a supervisor the standard is different. If a tangible employment action occurs as the end product of the harassment, the employer is strictly liable. If no tangible employment action occurs, the employer may present an affirmative defense: (1) that the employer exercised reasonable care to prevent and correct any harassing behavior; or (2) the harassed unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. A tangible employment action is one constituting “a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.” Tangible employment actions fall within the special province of the supervisor. Therefore, for purposes of Title VII, a supervisor is an individual who can hire, fire, promote, demote, reassign, or otherwise cause a significant change in employment status or benefits, including individuals who have the authority to recommend such actions. In accepting this decision, the Court specifically reject the definition in the EEOC’s Enforcement Guidance as being “nebulous”, “vague”, and a “study in ambiguity.” In his concurrence, Justice Thomas stated that he believed that the negligence standard should apply to both supervisors and co-workers. Justice Ginsburg wrote a lengthy dissent where she stated that the EEOC’s definition should be followed; to do otherwise goes against the intent of the protections under Title VII. She was joined in her dissent by Justices Breyer, Sotomayer, and Kagan.

***Douglas v Rochester City Sch. Dist.*, No. 12-3227-cv (2d Cir. May 22, 2013):** Douglass worked as a probationary athletic director with the Rochester Schools. Douglass alleged discrimination based on her race and gender, specifically from the school principal, Rodriguez. She requested a new supervisor in a letter to the district human resources office. Six months later,

Douglass received a negative performance evaluation and subsequently did not have her contract as probationary athletic director renewed. The district offered her another position teaching elementary physical education. Douglass filed a complaint with the EEOC and eventually brought suit in federal district court alleging retaliation and a racially and sexually hostile work environment. The school district was granted summary judgment by the district court and Douglass appealed. On appeal, a three judge panel affirmed the lower court. In order to have prevailed Douglass would have need to show that the workplace was so permeated with discriminatory intimidation, ridicule and insult so as to constructive alter the conditions of her employment. Douglass failed to provide specific evidence of either the pervasive discrimination sufficient to alter her conditions of employment, or to provide a nexus between her supervisor's actions and her race or gender. As for the retaliation claim, the panel found that Douglass failed to show that she suffered an adverse employment action as a result of a protected activity. The letter to human resources was too general to put the school district on notice that Douglass was complaining of discrimination. Douglass was offered a teaching position and was under no obligation to retain her as a probationary athletic director past the probationary period.

### **SPECIAL EDUCATION**

***Doug C. v State of Hawaii Department of Education, No. 12-15079 (9th Cir. June 13, 2013):*** Spencer, son of Doug C., was autistic and was eligible for special education services. At the start of 5th grade, Spencer was placed in a private facility paid for by the Hawaii Department of Education. On November 9, 2010, the Department held an annual IEP meeting, despite Doug C. being unable to attend, and changed Spencer's placement to Maui High School. The Department had been trying to schedule a meeting with Doug C. for over 6 weeks, yet ultimately something always came up at the last minute for Doug C. and the meeting needed to be rescheduled. In the case of the November 9th meeting, Doug C. e-mailed and said he was sick and unable to attend. He suggested November 16 or 17. However, the deadline for Spencer's annual review was the 13th, so the 10th or 11th were suggested. Doug C. would not definitely commit to either date. The Department decided to go forward with the meeting on the 9th as scheduled. Once Spencer's placement was changed, Doug C. filed a due process complaint claiming that he was excluded from the meeting. The administrative hearing officer held that the Department did not deny Spencer FAPE. The district court affirmed finding that the Department did fulfill its statutory duty to ensure that Doug C. was afforded an opportunity to participate. Spencer continued in the private placement while Doug C. appealed to the Ninth Circuit. A three-judge panel unanimously held that by failing to include Doug C. in the IEP meeting, the Department had denied FAPE. An IEP meeting can continue without a parent only if the parent affirmatively refuses to attend, or if the school is unable to convince the parents that they should attend. The simple fact the Doug C. was uncooperative and totally frustrating to work with, or that deadlines were approaching, were not allowable reasons to hold the IEP meeting in his absence.