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Editor

Elizabeth Timmerman Lugg, J.D., Ph.D.

Publications Manager

Andrea J. Rediger

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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SPECIAL EDUCATION

J.B. v Avilla R-XIII Sch. Dist./A.L.A. v Avilla R-XIII Sch. Dist., Nos. 12-1112/12-1113 (8th Cir. Jul. 24, 2013): J.B. and A.L.A. had disabilities. The parents/guardian of each student had ongoing disputes with Avilla School District (ASD) over the manner in which the IEPs were being implemented. J.B.'s parents filed a complaint with the OCR charging ASD's disability discrimination grievance resolution process was inadequate to deal with parental complaints about IEPs. OCR found that the process was adequate for addressing IEP-related complaints. Both sets of parents filed suit in federal district court against ASD claiming that ASD had discriminated against their children in violation of the ADA and Section 504 by failing to implement the children's IEPs and for not having an adequate resolution process. The parents did not utilize the due process complaint procedure available under the IDEA. Consequently, ASD was granted summary judgment by the district court because it was found that the parents were required to go through the IDEA due process complaint procedure before they filed suit in federal court; they had not exhausted their administrative remedies. The parents appealed. On appeal, the Eighth Circuit affirmed the lower court's decision finding that the wording of the IDEA was clear on the subject. Specifically:

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 [42 U.S.C.A. § 12101 et seq.], Title V of the Rehabilitation Act of 1973 [29 U.S.C.A. § 791 et seq.] or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (f) and (g) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter, 20 U.S.C. § 1415(1).

The court also found that none of the three recognized exceptions to the exhaustion requirement were satisfied: (1) futility; (2) inability of the administrative remedies to provide adequate relief; and (3) the establishment of an agency policy or practice of general applicability that is contrary to law.

Office of Special Education and Rehabilitative Services' Dear Colleague Letter: In August, 2013, the OSERS issued a "Dear Colleague Letter" providing guidance on the bullying of students with disabilities; to provide an overview of a school district's responsibilities under the IDEA to address bullying of students with disabilities. The guidance states that "any bullying of a student with disabilities which results in the student not receiving meaningful educational benefit is considered a denial of FAPE." In addition, "certain changes to an educational program of a student with a disability (e.g., placement in a more restrict 'protected' setting to avoid bullying behavior) may constitute a denial of FAPE in the LRE." The DCL included a seven page enclosure title "Effective Evidence-based Practices for Preventing and Addressing Bullying." In this publication were included "specific strategies that school districts and schools can implement to effectively prevent and respond to bullying, and resources for obtaining additional information." These specific strategies included: (1) use a comprehensive multi-tiered behavioral framework; (2) teach appropriate behaviors and how to respond; (3) provide active adult supervision; (4) train and provide ongoing support for staff and students; (5) develop and implement clear policies to address bullying; (6) monitor and track bullying behaviors; (7) notify parents when bullying occurs; (8) address ongoing concerns; (9) sustain bullying prevention efforts over time.

K.M. v Tustin Unified Sch. Dist., and D.H. v Poway Unified School District Nos. 11-56259/12-56224 (9th Cir. Aug. 6, 2013): The Ninth Circuit consolidated two cases for oral argument because they involved similar facts and claims. Both cases dealt with an attempt to use the IEP process to obtain Communication Access Realtime Translation (CART) for hearing impaired students. In both cases the school district denied the request for CART, and made other accommodations. The students challenged in state administrative hearings, but both lost because CART was seen as a “maximizing device” beyond the responsibility of the school to provide. Both student then filed suit in federal court alleging that the denial of CART violated the IDEA, Section 504, and Title II of the ADA. In both cases, the district court granted summary judgment for the school district, holding that the school district had fully complied with the IDEA. On appeal, the Ninth Circuit reversed the district courts’ grant of summary judgment on the ADA claim in both cases; it rejected the holding that the school districts’ compliance with IDEA foreclosed an ADA claim because the two statutes impose different procedural requirements and substantive standards on school districts. The IDEA provides elaborate procedure requirements, but the only substantive requirement stems from the US Supreme Court decision in *Rowley* that the IEP be “reasonably calculated to enable the child to receive educational benefits.” [458 U.S. at 206-07] The ADA, however, imposes fewer procedural requirements but establishes the substantive requirement of “effective communications”; public entities must take appropriate steps to ensure that communication with applicants, participants and members of the public with disabilities are as effective as communication with others [28 C.F.R. §35.160(a)] and must furnish appropriate auxiliary aids and services were necessary to afford an individual with a disability an equal opportunity to participate in, and enjoy the benefits of, a service, program, or activity conducted by a public entity. [28 C.F.R. § 35.160(b)(1)]. CART is considered an appropriate auxiliary aid. The parent’s claim under the ADA was not based on a denial of FAPE, but on a violation of Title II of the ADA to provide “effective communication.” The court provided three reasons why the IDEA and the ADA were not coextensive on the topic of communication devices. First, the factors that the public entity must consider in deciding what accommodations to provide deaf or hard-of-hearing children are different. Second, the ADA provides the public entity with defenses unavailable under the IDEA. Third, the specific regulation under the ADA requiring public school to communicate “as effectively” with disabled as with other students goes beyond the IDEA requirement of a basic floor of opportunity established in *Rowley*. The case was remanded for further deliberations.

Munir v Pottsville Area Sch. Dist., No. 12-3008 (3rd Cir. July 25, 2013): O.M. suffered from emotional issues that led to hospitalization for suicidal threats in 2005. The Pottsville Area School District (PASD) held a staffing meeting, but concluded that based on the data O.M. was not eligible for learning disability services or for emotional disturbance services. O.M. functioned well from 2005 through March 2008, at which time and throughout the summer; he was hospitalized three times due to suicidal threats and attempts. When his parents enrolled him in a private boarding school in the fall, he was soon sent home for reporting suicidal thoughts. In September 2008 O.M. was again hospitalized. Although no unusual behavior had occurred at school, PASD developed a §504 plan for him. O.M. was hospitalized again in 2009. When he was released his parents enrolled him in a therapeutic residential treatment center where he received various forms of treatment for his mental health issues and educational services. PASD did finally offer O.M. an IEP after reviewing his doctor’s diagnosis and recommendation, but it

was rejected by the parents. The next year the parents sought compensatory education for the time period between 2007 and 2008, and reimbursement for the cost of O.M.'s placement in the private therapeutic residential center. The due process hearing officer rejected the claims because the primary purpose for O.M.'s placement in the residential facility was the provision of mental health treatment rather than for special education services. As for the subsequent placement at another private facility, the hearing officer stated that PASD had proposed an IEP that met all of O.M.'s education needs, therefore the parents were not entitled to reimbursement. On appeal, the Third Circuit affirmed both the due process hearing office and the lower court's affirmation. In order for the parents to succeed on their claim for reimbursement of the costs, they needed to show that PASD had failed to provide O.M. with FAPE and that the alternative private placement was appropriate. "School districts are not, however, financially responsible for the placement of students who need twenty-four hour supervision for medical, social, or emotional reasons, and receive only an incidental educational benefit from that placement."

STUDENTS' RIGHTS

Rogers v Chistina Sch. Dist., No. 45, 2012 (Del. Jul. 16, 2013): Finney, an Intervention Specialist met with a student, Ellerbe, for four hours to discuss Ellerbe's suicidal thoughts. During this interview, Ellerbe confirmed that he had attempted suicide the previous weekend. Finney determined that Ellerbe was no longer suicidal and sent him back to class. Finney also sent an e-mail to administration informing them that she did not consider Ellerbe to be a threat to himself or others. Parents/guardians were never contacted even though state law requires a parent or guardian to be notified of a crisis situation involving a student. When Ellerbe returned home after school he committed suicide. Ellerbe's family brought a wrongful death and survival suit against the school district (CSD), and high school (NHS) officials. The trial court granted summary judgment in favor of the school district after finding there was no duty to the student and no wrongful act. On appeal to the Delaware Supreme Court, the court found that while the parent's claim under the Wrongful Death Statue based on a theory that CSD has a "special relationship" with the student which gave rise to a duty failed, the court did find that the parents had stated a valid claim of negligence per se based on the failure to contact the parents about a crisis situation as required by law. The whole question as to whether a school district could be liable for the off-campus suicide of a student was an issue of first impression in Delaware; never before had the court spoken to this topic. The court could find no Delaware precedent suggesting that in *loco parentis* was applicable to an injury sustained by a high school student on or off school, therefore no duty was found. However, on the topic of negligence per se, the court stated:

It has been long settled in this State that the violation of a statute or ordinance enacted for the safety of others is negligence in law or negligence per se. ... The Protocols, mandated by the Delaware Department of Education and promulgated pursuant to its statutory authority delegated by the General Assembly, have the force and effect of law."

The case was remanded for further proceedings on the negligence claim.

B.H. v Easton Area Sch. Dist., No. 11-2067 (3rd Cir. Aug. 5, 2013): This is one of the "I ♥ Boobies" cases where a school district banned the wearing of bracelets to raise breast cancer awareness which supported the phrase, "I ♥ Boobies." Students were disciplined for wearing the bracelet on Breast Cancer Awareness Day in violation of the policy. The students filed suit

in federal district court against the school district seeking a preliminary injunction to prevent the district from enforcing the ban. The district court issued the preliminary injunction. On appeal, the Third Circuit affirmed the district court's order, finding that neither *Fraser v Bethel*, nor *Tinker v Des Moines* justified the ban. Since little evidence was presented that the bracelets would cause a material and substantial disruption as required under *Tinker* for a prior restraint of speech, the court centered on the application of *Fraser*. In analyzing *Fraser*, in light of the subsequent Supreme Court ruling in *Morse v Frederick*, the court concluded that a new, modified standard for restricting lewd, vulgar, or offensive speech had been established by the Court. Under the new standard, the analysis must consider whether the speech, even though lewd and vulgar, could be reasonably interpreted as bearing on a political or social issue; it must also consider whether the speech is "ambiguously" lewd or "plainly" lewd. After using this analysis, three conclusions may be reached. First, schools may restrict ambiguously lewd speech only if it cannot plausibly be interpreted as commenting on a social or political matter. Second, schools may not restrict ambiguously lewd speech that can also plausibly be interpreted as commenting on a social or political issue. Third, schools may restrict plainly lewd speech regardless of whether it could plausibly be interpreted as social or political commentary. In short, *Fraser* standard was no longer applicable to lewd speech if it addressed a political or social matter. In constructing this new standard, the court relied heavily on Justice Alito's concurrence, joined by Justice Kennedy, which although on the side of the majority was not the majority opinion. In that concurrence, the two justices conditioned their votes on the "understanding that (1) [the majority opinion] goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use, and (2) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue."

***J.S. v Fort Wayne Cmty Sch.*, No. 12-155 (N.D. Ind. Aug. 20, 2013):** This is the case fondly referred to as the "I ♥ Boobies" case. The Fort Wayne Community Schools (FWCS) prohibited students from wear bracelets containing the phrase, "I ♥ Boobies" concluding the terminology was "offensive to women and inappropriate for school wear." Inside of the bracelet is printed the website of the Keep a Breast Foundation and includes the words "art, education, awareness, action." Therefore, the students claimed it was a violation of their freedom of speech. A student, J.A., after having her bracelet confiscated, filed suit against FWCS in federal district court seeking a declaratory judgment and permanent injunction against the ban of wearing the bracelet. J.A. argued it was freedom of speech. FWCS relied on *Bethel v Fraser*, 478 U.S. 675 (1986) in defending the ban; that the district had a right to regulated speech that was lewd, vulgar, obscene, or plainly offensive. The court agreed with the school district, denying the student's motion of declaratory judgment and permanent injunction, finding that the FWCS had "made an objectively reasonable decision in determining that the bracelet was lewd, vulgar, obscene, or plainly offensive." In making this decision, the court rejected the recent decision by the U.S. Court of Appeals for the Third Circuit in *B.H. v Easton Area Sch. Dist.*, No. 11-2067, 2013 U.S. App. LEXIS 16087 (3d Cir. Aug. 5, 2013) which struck down a similar ban as a violation of the student's right to free speech. Instead, it rested its decision on the conclusion that the United States Supreme Court case of *Morse v Frederick*, 551 U.S. 393 (2007) "established new limits on a school's ability to regulate student speech commenting on political or social issues." The fact that the commentary was arguably on social or political issues does not limit the ability of the school district to first determine whether the wording was lewd, vulgar, obscene, or plainly offensive. "School

officials who know the age, maturity, and other characteristics of their students better than federal judges, are in a better position to decide whether to allow these products into their schools. Issuing an injunction would take away the deference courts owe to schools and make their job that much harder.”

Wynar v Douglas Cnty. Sch. Dist., No. 11-17127 (9th Cir. Aug. 29, 2013): Wynar, a student at Douglas High School (DHS) collected weapons and ammunition. His on-line messages on social media to his friends started to become increasingly violent and disturbing; he suggested he was going to engage in a school shooting. Wynar’s friends became alarmed and brought the messages to the attention of a school coach and the high school principal. When interviewed by the principal and policy, Wynar claimed the messages were a joke. Wynar was punished for 10 days. The school board charged Wynar with violating Nevada Code § 392.4655(1)(a) which provided that a student would be deemed a habitual discipline problem if there is written evidence that the student threatened or extorted another pupil, teacher, or school employee. Wynar was expelled for 90 days. Wynar filed suit in federal district court alleging violation of his First Amendment free speech rights and his Fourteenth Amendment procedural due process rights. The district court granted summary judgment for the school district. Wynar appealed the constitutional issues. On appeal, the Ninth Circuit affirmed the lower court decision. In its opinion, the court recognized the split among circuits on how to handle off-campus student speech, and declined to rule that *Tinker* “material and substantial disruption” applied to all off-campus speech. However, the court did state that when faced with an identifiable threat of school violence, schools did have the ability to take disciplinary action relying on *Tinker*. Therefore, the court had no trouble in concluding that the school district’s expulsion of Wynar was a lawful exercise of its constitutional authority under *Tinker*. The fact that Wynar had no prior disciplinary problems and that he was joking was unpersuasive to the court. “We need not discredit Wynar’s insistence that he was joking; our point is that it was reasonable for Douglas County to proceed as though he was not.”

Wallace v Detroit Pub. Sch. Dist., No. 12-1367 (6th Cir. Aug. 26, 2013): Henry Ford High School (HFHS) in Detroit had a long history of violence and gang activity. After school one day, as retribution for a fight that had occurred in school earlier in the day, gang members opened fired on a group of students walking away from the school. One student was killed and three were injured. The three that were injured filed suit against the three shooters and the Detroit Public Schools (DPS), the principal and the two school security guards on the theory that under §1983 DPS and the school employees had violated their substantive due process based on a claim of state-created danger. They also filed in tort. The district court returned a judgment in favor of the injured students against the shooters for \$8 million on the tort claims, but dismissed the federal substantive due process claim against DPS and the employees. On appeal, the injured students advanced three arguments: (1) DPS’s merger of Redford High School and HFHS resulted in a “state-created danger” of increased violence because of the known presence of rival gangs in the two schools; (2) HFHS officials failed to respond to the fight during the school day which preceded the shooting, and that failure caused a “state-created danger” that led to the shooting; this violated their substantive due process; and (3) a twenty-five year history of serious gang violence in and around HFHS represented a “public nuisance” attributable to the DPS. On appeal, the Sixth Circuit affirmed the lower court’s decision stating that there was no constitutional requirement that the government must “protect the life, liberty, and property of its citizens

against invasion by private actors.” From the Supreme Court’s “special relationship” language, a “state-created danger” theory of liability has evolved. However, to succeed under such theory, a plaintiff must show: (1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; (2) a special danger to the plaintiff wherein the state’s actions placed the plaintiff specifically at risk, separate from a risk to the public at large; and (3) that the state knew or should have known that its actions specifically endangered the plaintiff. The test for whether an affirmative act, as required under the first prong, has occurred, the test is “whether the victim was safer before the state action than he was after it.” Applying this test to the instant case, the court found that “neither merging the high schools nor breaking up the fight satisfies the affirmative act element. . . . The relationship between the merger of the two schools and the violence that occurred was too attenuated and indirect to count as an affirmative act that placed the plaintiffs in the setting of a state-created peril.”

***Cox v Sampson Cnty Bd. of Educ.*, No. 12-344 (E.D.N.C. Sept. 9, 2013):** J.C. was a student at Union Elementary School (UES). He was suspected of having taken \$20 from another student when that student spilled some coins on the floor. J.C. told Assistant Principal Holmes that he did not take the money, and pulled out his pockets to show her. When no money was found, Holmes proceeded to have J.C. strip to his underwear, but found no money. Holmes told J.C. that she had the authority to strip search him because teachers and other students thought he had the money. J.C.’s mother was also told by the school district that, given the circumstances, Holmes had the authority to strip search her son. J.C.’s suit against the school district in federal district court alleged that his Fourth Amendment rights to be free from an unreasonable search had been violated. The school district filed a motion to dismiss for failure to state a claim. The district court denied in part and granted in part the motion to dismiss. It denied the motion as the Fourth Amendment and state constitution claims against the school district, but granted the motion to dismiss the Fourth Amendment claim against Holmes in her official capacity as duplicative, and the state constitution claim against Holmes in personal capacity because it was not supported by law. J.C. had brought his Fourth Amendment claim on the theory of municipal liability based on policy or custom. The school district did have a written policy on searching students, including instances when a more intrusive strip search would be allowed. Under district policy, strip searches were to be reserved only for instances where there was fear that the student had something that was imminently dangerous to the student or others. J.C. claimed that the district had failed to properly train employees. The district countered that it could not be held responsible for poor decisions of individuals; in their decision not to follow the policy. After reviewing the Supreme Court precedent on student searches laid out in *TLO* and *Redding*, the court concluded, “It is plausible that a search of the underclothes of a student, conducted by an adult of the opposite sex, looking for money, which poses absolutely no danger to the student or others, is excessively intrusive and not permissible under the Fourth Amendment.” Therefore, a claim had been stated and a motion to dismiss on the Fourth Amendment claim was inappropriate. The same applied to the state constitutional search and seizure claim against the school district.

EMPLOYEES’ RIGHTS

***Mooney v Lafayette Cnty. Sch. Dist.*, No. 12-60753 (5th Cir. Aug. 8, 2013):** Mooney began her career as a speech pathologist. Her first year as assistant principal coincided with a local elec-

tion for a superintendent. Mooney supported the challenger for the office rather than the incumbent. During the campaign, Mooney's principal and an assistant superintendent tried to get her to switch her support to the incumbent but she refused. Unfortunately for her, the incumbent was re-elected. After the election, Mooney's principal claimed that Mooney's work performance began to deteriorate. No formal complaints were placed in Mooney's file, however, until almost 18 months after the elections, at which time Mooney was also informed that she was being demoted back to speech pathologist. Initially, the reason given was budgetary and that the school needed a male in the position of assistant principal. After Mooney complained, the reason for her demotion was changed to performance issues; lack of punctuality and difficulty in handling parent relations. Mooney filed a written protest at which point the demotion was halted and she was put on a performance improvement plan instead; a plan which designated punctuality and parent relations as two problems that needed to be remediated. In the spring, the superintendent ordered a RIF. Mooney was the only administrator who was RIFed. Mooney filed suit in federal district court against the school district under §1983 claiming that her contract was not renewed in retaliation for engaging in First Amendment protected speech and for opposing gender discrimination, which was in violation of Title VII. The district court granted summary judgment on behalf of the school district as to both claims. On appeal the Fifth Circuit vacated the district court's dismissal of Mooney's §1983 First Amendment retaliation claim, affirmed its dismissal of the Title VII claim, and remanded the case to the lower court for further proceedings. "The First Amendment precludes a discharge based upon an employee's exercised of her right to free expression if two criteria are satisfied: first, the expression relates to a matter of public concern, see *Connick v Myers*, 461 U.S. 138 (1983), and, second, the employee's interest in commenting upon matters of public concern must outweigh the public employer's interest in promoting the efficiency of the public services it performs through its employees. See *Pickering v Bd. of Educ.*, 391 U.S. 561 (1968)." Although the time between Mooney's action and the alleged retaliation was long—almost three years—the court concluded that it was sufficient for a reasonable juror to infer retaliatory causation; that it was one reason motivating the decision. Since a genuine issue of material fact existed, the district court erred when it entered summary judgment.

Duvall v Putnam City Sch. Dist. No. 1, No 11-6250 (10th Cir. Aug. 5, 2013): Duvall was employed by Putnam City School District (PCSD) as a special education teacher. She became concerned when PCSD began moving toward a "full inclusion" model, and sent e-mails voicing that concern. Duvall also submitted letters of dissent relating to most of the IEPs with which she had been involved, and started going to state agencies for information about "services for children." Duvall received a letter of admonishment for her building principal for the way she had conducted herself at an IEP meeting. When Duvall requested a transfer, she was offered her choice between two regular education positions, but Duvall didn't want to lose her bonus for teaching special education so declined the position. Regardless, she was assigned to teach first grade for the following year. Duvall filed a grievance about her new assignment and then a week later resigned. Shortly thereafter Duvall filed suit in state court against PCSD alleging adverse employment actions which violated her rights under Section 504 and the First Amendment. Defendants removed the suit to federal district court where they were granted summary judgment on both of her retaliation claims. On appeal, a two-judge majority affirmed the lower court ruling in its entirety. The third judge joined with the majority as to dismissal of the Section 504 claim against one employee, but dissented from the rest of the majority's opinion. The majority found that the

letter of admonishment did not constitute an adverse action because the letter was issued because of the manner in which she present her dissent to the IEP, not the content of her dissent and the letter did not affect her employment or alter her workplace conditions. The majority did find, however, that Duvall's reassignment to a first grade classroom was sufficient to make the necessary showing of an adverse action because it involved a loss of pay; there was a sufficient causal connection between her protected activity and her reassignment to make out a *prima facie* case of retaliation under Section 504. The burden then shifted to PCSD which presented a plausible reason, other than retaliation, for the reassignment; that Duvall was unhappy in her current position and the students would be better served with the reassignment. Consequently retaliation was not proven. As to the First Amendment retaliation claim, the court turn to the *Pickering/Connick/Garcetti* line of precedent. On that topic, the majority found that "even if the First Amendment claim survived the first three steps of the *Garcetti/Pickering* analysis, it would nonetheless fail at the fourth step because of lack of evidence of causation." Because no evidence was present that Duvall had been communicating with individuals outside of the school district, it could not be the motivating factor in any adverse employment action. Those communications she had within the district would be considered to fall outside of First Amendment protection under the *Garcetti/Pickering* line of precedent.

DISTRICT ADMINISTRATION

Recently the Illinois Appellate clarified three provisions of the Illinois Freedom of Information Act in the case of *State Journal-Register v University of Illinois Springfield*. The suit arose out of a FOIA request by the newspaper for information regarding the allegedly improper conduct by three college coaches. The university produced some documents, but others they withheld based on the predecisional/deliberative process, personal information, and student records exemptions to FOIA. In making its decision, the court clarified that while an entire document relied on by a public body in making a decision is exempt before the decision is made; once the decision is made the "purely factual" material is not protected unless it is "inextricably intertwined with predecisional and deliberative discussions. As for personal privacy, the court reinforced the idea that this exemption is quite broad. Information in a personnel file is exempt from disclosure unless it relates to the public duties of the employee. Items such as compensation for accrued sick and vacation time and employee status are exempted. Moreover, personal information will only be released if the rights of public to the information outweigh the victim's right to privacy. Sometimes redacting names is not sufficient to protect privacy. Finally, as regarding students records, the court held that none of the documents requested were educational records covered by FERPA so decline to entertain the issue of whether FERPA specifically prohibits schools from releasing students records, thereby make them exempt under FOIA.

Leslie v Hancock Cnty. Bd. of Educ., No. 12-13628 (11th Cir. Jul. 12, 2013): Leslie and Richardson served as the Superintendent and Assistant Superintendent of the Hancock County school district. The believed that the Hancock County Tax Commissioner was collecting taxes in a manner which made it impossible to prepare the school board's budget and secure adequate funding. They brought their opinion about the Tax Commissioner to the attention of both the school board and the tax commission on several occasions. In November 2010, all new members were elected to the school board except for one seat. The new board chair was the sister-in-law of

the Tax Commission about whom Leslie and Richardson had been complaining. The new board fired Leslie and demoted Richardson to a teaching position. Both filed suit in federal district court against the school board and its members, both in their official and individual capacities, alleging retaliation for the exercise of their free speech. The board and its members filed a motion to dismiss on the grounds that the speech was not protected by the First Amendment and that they, the board members, were entitled to qualified immunity in their individual capacities. The district denied the motion to dismiss. On appeal of the denial of qualified immunity and failure to state a claim, the Eleventh Circuit dismissed the appeal on failure to state a claim, holding that the appellate court lacked jurisdiction. On the topic of qualified immunity, the court stated that in order for Leslie and Richardson to prevail they would need to show that there was a violation of a constitutional right that was “clearly established” at the time the violation occurred. The court held that the law was not “clearly established” that a public employer can be held liable for retaliation against a policy-making or confidential employee for speech related to policy or politics. In order to sustain a First Amendment retaliation claim, it would need to be shown that the employee was speaking as a citizen on a matter of public concern, that her interests as a citizen outweighed the interests of the State as an employer, and that the speech played a substantial or motivating role in the adverse employment action. After reviewing the Supreme Court’s decision in *Pickering v Board of Education of Township High School District 205, Will County, Illinois*, 391 U.S. 563 (1968), the court concluded that the correct application of the *Pickering* balance to a policymaking or confidential employee who speaks about policy was not “established with such obvious clarity by the case law that every objectively reasonable government official facing the circumstances would know that the official’s conduct did violate federal law when the official acted.” Therefore, the board members were entitled to qualified immunity.