School Law for Administrators

Religious Exception

Father files lawsuit claiming religious exemption allowing his children not to get immunized

Citation: Watkins-El v. Department of Education, 2016 WL 5867048 (E.D. N.Y. 2016)

A federal district court has denied a request from the father of four children who asked for a preliminary injunction to exempt his children from getting required immunizations in order to attend school. The court denied the request, finding that the father's claim of a religious objection to vaccinations did not hold water based on some of his children having received vaccinations and further found that the public interest did not weigh in favor of allowing the family to avoid required immunizations.

Richard Watkins-El is the father of four children who attended P.S. 36 in Queens, New York. The oldest child had all the required vaccinations to attend school, but the three younger children were missing some immunizations. Principal Lynn Staton informed Watkins-El that his three youngest children needed to receive certain immunizations. In a letter, Watkins-El asked for a religious exemption.

Health Director Julia Sykes reviewed the request for a religious exemption but found no genuine and sincere religious reason for Watkins-El's request, especially because his oldest child was fully vaccinated and the younger ones had received some vaccinations. She denied his request in a letter dated January 28, 2016, and explained he could appeal by setting up an interview with Health Director Amrita Harbajan within 10 days. Watkins-El did contact Harbajan and expressed his objection, but refused to set up an interview with her.

Staton issued notices of exclusion for Watkins-El's three youngest children barring them from attending school until they were fully vaccinated under state and local law. Watkins-El sent a letter of objection to the school and the Office of School Health (OSH). Sykes reviewed the letter and, again, sent him a letter denying his religious exemption and explaining his

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Around the Nation ~ North Carolina

Judge unhappy with North Carolina's efforts to revise student achievement

After the North Carolina Board of Education opted to change the definition of who is learning at grade level, Superior Court Judge Howard Manning Jr. expressed some major concerns. He was appointed by the North Carolina Supreme Court to oversee the state's compliance with the supreme court's rulings in the 20-year-old school funding litigation known as Leandro. The judge has scheduled a hearing to examine whether state education officials are complying with their constitutional obligation to give every North Carolina child the opportunity to have a sound, basic education. He has expressed concern that North Carolina Board of Education officials are trying to define their way out of their duty to educate all of the state's children.

At issue is a March 2014 decision to change the definition of who is learning at grade level. Manning is asking for an explicit explanation of the reasons behind this change. He is of the opinion that the change waters down requirements and buries them in "academic double speak." In his order scheduling the hearing, the judge said that the new five level measure of student achievement includes a mid-range score that deems tested third-graders as prepared for the next grade level but requires continuing help from a teacher in order for the students to perform successfully in fourth grade.

Regardless of NCBE's claim that its standard demonstrates student readiness, Judge Manning said, "They are NOT solidly at grade level and are NOT well prepared for the next grade which is the Leandro definition of obtaining a sound, basic education at grade level." The judge contends that thousands of North Carolina's 1.5 million public school students reach their teenage years barely able to read or do simple math.

In Leandro, the North Carolina Supreme Court held that it's not up to courts to determine the constitutionally required level of spending on education. Nonetheless, it concluded that students must have the opportunity to become equipped with the knowledge and skills in language, math, history, economics, and other subjects they need to compete for jobs or higher education and become functioning members of society

Source: *WRAL.com*

School Law Bulletin,
Vol. 43, No. 23, December 10, 2016, p. 8.

Around the Nation ~ Michigan

Lansing school district faces two separate charges relating to gender segregation and sexual violence in the school

After a student claimed that she was sexually assaulted at Eastern High School in 2015, she filed a Title IX complaint against the school district claiming that the school district failed to keep her safe on school grounds. The U.S. Department of Education's Office for Civil Rights (OCR) has become involved in this case because they are unhappy with the school district's response to the sexual assault allegations. Additionally, the OCR is probing LSD's decision to create gender-based classrooms at Willow Elementary School (WES). These two cases are unrelated, but they both point to serious concerns with the way that the district is handling issues relating to gender relations.

Karen Truszkowski, the attorney of the student who reported being sexually assaulted, claims that at the time of this incident, the girl was underage. She filed a federal civil rights lawsuit, claiming she was denied equal access to education and protection on school grounds. This is not an isolated incident at Lansing School District, where sexual assault cases are beginning to become more frequent.

In addition to this case, Truszkowski is representing another student from Eastern High School who is suing the district and staff after being assaulted by another student on school property in September 2014. LSD spokesman Bob Kolt said the school

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Religious Exception . . . *(Continued from page 1)*

appeals process. Watkins-El did not appeal.

Under New York Public Health Law, students may not attend classes for more than 14 days unless the parents provide a certificate of immunization for the student, a medical certificate explaining that a certain immunization is detrimental to the student's health, or a written signed, statement showing that the parent "holds genuine and sincere religious beliefs which are contrary to the practice" of immunization (N.Y. Pub. Health Law).

Staton submitted a report to the Administration for Children's Services (ACS) in April when the youngest children had not attended school for almost two months and the oldest had only attended sporadically. The ACS began an investigation.

Watkins-El asked the court for a preliminary injunction to exempt his children from the state and local requirements for immunizations. He alleged: 1) the New York immunization requirements violated his constitutional rights to due process and free exercise of religion, and 2) the OSH was wrong in denying his request for exemption. He also asked the court to terminate the ACS investigation.

The court denied Watkins-El's request for a preliminary junction for a religious exemption and noted he could not demonstrate his entitlement to relief on either the constitutional violation ground or the OSH improper denial of his request.

Regarding the constitutional claims, the court found that Watkins-El failed to demonstrate a likeliness of success on the merits. The Second U.S. Circuit has held that the state's public health immunization requirements do not violate the free exercise of religion clause of the First Amendment nor the due process clause of the Fourteenth Amendment (*Phillips v. City of New York)*. Watkins-El also failed in his state law claims, since he did not exhaust his administrative remedies or appeal the decision of the OSH.

In further analysis, the court found that even if he had pursued his administrative options, he would have still failed on the merits of his claim. Watkins-El claimed his religion was Islamism and that he is a Moor, but did not claim any of the tenets of Islamism or Moorish culture prohibited immunizations. Rather, he based his argument on the claim that the vaccines contained "monkey cells, pork derivatives, and aborted human fetuses," which his religion prohibits him from consuming. The court noted Watkins-El's "opposition to these substances may be genuine and sincere, but he as not demonstrated that it stems from a religious, rather than simply moral, belief" *(See Mason v. General Brown Cent. School Dist.)*. In addition, he submitted no evidence that the vaccines in question contained any of the substances that he mentioned. Therefore, the court denied the request for a preliminary injunction to stop the mandate for complete immunizations for Watkins-El's children.

Watkins-El also asked the court to halt the ACS investigation into suspected educational neglect. The court found he also failed to show he was entitled to relief in this matter.

The extended absences of Watkins-El's three children and the sporadic attendance of the oldest child were enough to trigger the principal's duty to report suspected educational neglect. Rather than agreeing to enjoin the investigation, the court noted Watkins-El had no right to be free from the investigation. The court said there was no evidence the investigations was retaliatory or without merit. Therefore, the court denied the request for a preliminary injunction ordering the end of the ACS investigation.

The court noted, "Balancing public health with personal autonomy is a delicate task. Plaintiff has not shown that his familial decisions take precedence over New York State vaccination laws, which shelter the most vulnerable members of society with herd immunity.

School Law Bulletin,
Vol. 43, No. 24, December 25, 2016, pp. 5-6.

State Created Danger

District requests reconsideration of summary judgment in a case where a student died of secondary drowning after swim class

Citation: *Spady v. Bethlehem Area School District, 2016 WL 6995024 (E.D. Pa. 2016)*

A federal district court in Pennsylvania has granted a school district's request for reconsideration of a 2014 denial of its request for summary judgement in a case in which the parent of a child who died while at school sued the district. But while the court granted reconsideration of the summary judgment motion, it denied the school district's summary judgment, finding that while the law had changed since its 2014 decision allowing for reconsideration, there were genuine issues of material fact as to whether the child's rights had been violated.

Juanya Spady was a tenth-grade student in the Bethlehem Area School District at Liberty High School. He was enrolled in physical education, taught by Carlton Rodgers, who was a full-time P.E. teacher for the district and who was also a certified life guard.

During the last week of November 2010, students in Rodgers' class were taking part in a two-week swimming course. Swimmers and non-swimmers were required to enter the pool during this session. Juanya Spady could not swim, and Rodgers was aware of this fact. On December 2, 2010, Spady entered the pool and swam in the shallow end for the first part of class while Rodgers instructed students from the side of the pool. After the lesson Spady held on to the side of the pool and moved into the deep end. When he was in the deep end, he ran into a group of students and was submerged for a few seconds, during which time it is likely that he inhaled water. Spady exited the pool, telling Rodgers his chest hurt and asking permission to sit on the bleachers.

Rodgers went to check on Spady a few minutes later and directed him to get back in the pool, despite Spady's request to stay out of the water. He remained in the shallow end for the remainder of class and exited the pool with the rest of the students.

In Spady's next class, nearly an hour and a half after he left the pool, Spady fell backward and began to have a seizure. His teacher noted a pink fluid escaping from his nose and mouth. The school nurse attempted to revive Spady while emergency medical assistance was called, but Spady died later that day from a condition known as delayed drowning or dry drowning, which can cause asphyxiation because fluid in the lungs prevents the lungs from oxygenating blood.

In December 2012, Mica Spady, Juanya's mother, filed a civil rights action against Rodgers and the school district. In an amended complaint in 2013, Mica Spady asserted that the defendants committed various constitutional violations; she also alleged state law claims. Rodgers and the district asked for summary judgment. Rodgers asserted that qualified immunity precluded liability. The district argued that Spady had failed to establish municipal liability. The court denied the requests for summary judgment, finding that a genuine issue of material fact existed as to whether Rodgers violated Juanya's constitutional rights and whether BASD, as a municipality, did so too. On a later appeal, Rodgers was awarded summary judgement so the district remains as the only defendant.

In 2015, the district requested that the court reconsider its summary judgment motion because there was an intervening change in controlling law when the appeals court ordered that Rodgers should be granted summary judgment. In ordering that Rodgers should be granted summary judgment, the appeals court noted that Spady's Section 1983 claim was derived from the Due Process Clause of the Fourteenth Amendment, which establishes that "[n]o state shall . . .deprive any person of life, liberty, or property, without due process of law[.]" Mica Spady had argued that this clause covers an individual's "constitutional right to bodily integrity," and while the appeals court acknowledged that there is generally a right to bodily integrity under the Due Process Clause, it cautioned that courts should not define the constitutional right with a high level of generality but instead "must define the right allegedly violated at the appropriate level of specificity."

The appeals court summarized this as follows: a student is briefly submerged in water, is allowed to rest out of the pool after complaining of chest pain, but then directed to go back in the pool's shallow end for the remainder of the class, not exhibiting any signs of serious distress until over an hour later. The specific constitutional right is the right to have the teacher affirmatively intervene to minimize the risk of dry drowning, an extremely rare occurrence. For qualified immunity purposes, the question, the court noted, is if the law was so well-established that a reasonable teacher would have known that "failure to take action to assess a non-apparent condition that placed the student in mortal danger violated that student's constitutional right."

The appeals court did not determine if this right was violated but did order that Rodgers be granted summary judgment in the situation, i.e. it found that the law was not so well-established on this specific matter that Rodgers would have known his failure to take action could violate a constitutional right, and he was therefore entitled to qualified immunity.

Based on this decision, the school district requested reconsideration of its request for summary judgment, arguing the court's earlier decision that there was a genuine issue of material fact

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Around the Nation ~ Michigan . . . *(Continued from page 2)*

district is aware of the investigations and is fully cooperating. He reaffirmed the district's decision not to comment on ongoing lawsuits filed by former students alleging Title IX violations.

Lansing School District is struggling to maintain healthy relationships between boys and girls in the classroom, and OCR officials are keeping a watchful eye on the district. They are currently debating whether single-gender classrooms at WES are in compliance with Title IX. Last fall WES separated boys and girls in the school into separate classrooms for their core classes. The gender segregated classes were implemented as an effort to improve LSD's academics after being designated a priority school in 2014. The state's School Reform Office approved a plan to turn Willow into an all-boys school in January 2015, but the district changed course and went with gender-based classrooms instead.

Bill Di Sessa, a Michigan Department of Education spokesman believes that there are different requirements to operate a boys-only school than there are to operate a school with gender-based classes. DiSessa claims that the federal investigation began shortly after the district missed an April 1 deadline to amend its proposal for gender-based classes at WES.

School district officials dispute this sequence of events, saying that at the time the district elected to begin hosting gender-based classes, they believed that the requirements were the same as they were for single-gender classes LSD Superintendent Yvonne Caamal Canual claims that the district has no intention of violating any policies, and that they are making decisions based on what they believe to be in the best interest of all students.

Currently, the school district is under investigation by the ACLU of Michigan who says that they oppose the idea of gender-based classes because it could reinforce negative stereotypes and attitudes. OCR officials would not disclose who filed the complaint that prompted the investigation, citing its ongoing nature. Several Title IX requirements exist for maintaining single-gender classrooms, including the requirement that enrollment is completely voluntary and that school officials provide an equal learning environment for both genders.

Title IX violations can lead to a loss of federal funding, and currently there are more than a dozen districts across Michigan are under federal investigation for possible Title IX violations ranging from grievance procedures to sexual harassment.

Source: *Detroit Free Press*

School Law Bulletin,
Vol. 43, No. 21, November 10, 2016, p. 7

State Created Danger . . . *(Continued from page 3)*

as to whether Juanya's constitutional rights were violated by the district was an error of law and the conclusion therefore manifestly unjust.

While the court agreed to reconsider the motion for summary judgment based on the appeals court's decision with respect to Rodgers, it disagreed with the district's assertion that the district was also entitled to summary judgement. It found that while the appeals court described the constitutional right at issue, it did not determine if the right had been violated. The appeals court framed the right under the state-created-danger theory, which is an exception to the general rule that "[t]here is no affirmative right to governmental aid or protection under the Due Process Clause of the Fourteenth Amendment." For the state-created danger theory to apply, several criteria must be met, including: 1) the harm ultimately caused was foreseeable and fairly direct; 2) the state actor acted in willful disregard for the safety of the plaintiff; 3) there existed some relationship between the state and the plaintiff; 4) the state actors used their authority to create an opportunity that otherwise would not have existed for the [harm] to occur.

This analysis as to whether Juanya's rights had been violated was one of the fact and therefore best left to the jury. Therefore, summary judgment was not appropriate. Summary judgment is an"extraordinary remedy" awarded when there is "no genuine dispute as to any material fact that the movant is entitled to judgment as a matter of law." Here, the court found that there were general issues of material fact as to whether the district was deliberately indifferent to Juanya's constitutional right in failing to train employees in charge of swimming classes about the risk of dry drowning, and further whether this failure to train led to Juanya's death. Mica Spady argued that the district was deliberately indifferent because it did not have a formal training program for instructing students how to swim and did not inform employees about the risk of dry drowning; Rodgers was not aware of the risk which experts have described as a rare but known risk with exhibited symptoms which should induce someone to seek immediate medical care. An expert for Mica Spady testified that Juanya's death was preventable had the swim teacher known to look out for and act upon symptoms associated with dry drowning.

The district argued on the other hand that it was not deliberately indifferent to a constitutional violation, pointing to the fact that it required its P.E. teachers who oversaw swimming classes to be certified lifeguards, which Rodgers was. The district's expert witness noted that dry drowning is rare and not mentioned in any authoritative water safety texts or prominent conferences and is not taught as a standard of which lifeguards must be aware. The district's expert further stated that there was nothing the district could have done to prevent Juanya's death.

Given the evidence presented and in particular the experts' conflicting opinions, the court found that there were facts and credibility determinations that were appropriate for a jury to decide, and summary judgment was not appropriate.

School Law Bulletin,
Vol. 44, No. 2, January 25, 2016, pp. 4-6

2016 Sports Law Year-In-Review

(Below please find the third part of a three-part installment by Lee Green, J.D. on January 04, 2017 discussing 2016 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Legal Issues In Athletics Administration

Liability for sports injuries. Concussion management protocols. Title IX compliance. Hazing. Sexual harassment and sexual violence. Freedom of speech and social media. Freedom of speech and national anthem protests. First Amendment religion issues. Student-athlete privacy rights. Due process and equal protection issues in athletics programs. Sports participation rights of transgender students. Disabilities law applied to sports programs. Labor law and the new Fair Labor Standards Act regulations. State association legal authority.

Over the course of the last year, federal and state lawsuits were filed, court cases were decided, legislation was enacted, administrative agency rulings were released, state athletic association decisions were rendered, and other legal pronouncements were handed down impacting school sports programs. In each instance, the principles that were established and the best standards of practice that were highlighted illustrate the importance for school administrators and athletics personnel of understanding contemporary issues in sports law and proactively applying that knowledge to policy development and day-to-day management of programs.

Hazing

Hazing continues to be a widespread problem in school athletics programs and one of the most highly litigated claims against districts and athletics personnel, with courts typically imposing liability either because of the failure to create an anti-hazing policy or for developing a policy that is substantively inadequate or ineffectively implemented.

In September 2016, related to a situation that garnered extensive media attention throughout the year, a federal civil suit was filed against an East Tennessee school district, a high school principal, an athletic director, and a basketball coach, by the main victim's family in a hazing and rape case. The plaintiff in *Doe v. Hamilton County Department of Education* was a freshman on the Ooltewah High School basketball team who as part of a hazing ritual, in the basement of a cabin in which the team was staying during a December 2015 road trip, was sodomized with a pool cue and sustained injuries so severe that he had to be rushed to a hospital for emergency surgery. Three other freshmen were also raped with the pool cue during the hazing. The pleadings in the case allege knowledge by school personnel of a long history of hazing incidents in Ooltewah's athletic program, often violent and resulting in physical injury to victims, and a failure to develop and implement effective anti-hazing policies. The incidents led to the cancellation of the remainder of the Ooltewah boys' basketball season. The three direct perpetrators of the attack were convicted in a juvenile court of aggravated rape and aggravated assault and received sentences of varying lengths in juvenile detention. The school's athletic director pleaded guilty to failure to report child abuse and entered a diversion program which upon completion will permit his record to be expunged. The head basketball coach pleaded not guilty to similar charges, arguing that the Tennessee Child Abuse Reporting Law is too vague concerning who is required to report instances of sexual assault, to whom the reports should be made, and how timely such reports must be.

Both a 23-page report issued following an investigation by the Hamilton County District Attorney's Office and a 27-page report on the matter by a law firm commissioned by the Hamilton County Board of Education concluded that a culture of hazing and bullying, often involving violent and sexual acts perpetrated on victims, existed in the school's athletic program. Both investigations provided extensive lists of recommendations, including creation of a strong and effective anti-hazing policy (truly substantive; not merely form-over-substance guidelines), appointment of the already-federally-mandated Title IX coordinator

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(sexual harassment or violence, even same-gender, is a Title IX issue), training regarding the duties imposed by federal law on a Title IX coordinator, orientation programs for all school and athletics personnel regarding the policy, education programs for all students, student-athletes and parents, and detailed guidance for school personnel regarding the state child abuse reporting law.

In November 2016, a $1 million settlement was reached in *Doe v. Maine Township High School District 207*, a hazing suit brought by five soccer players at Maine West High School (Illinois) who in the fall of 2012 were initiated by upperclassmen who after practice allegedly administered physical beatings, tore off their pants and underwear, and sodomized them with fingers and sticks. The six perpetrators were charged in juvenile court with assault and two soccer coaches were charged with failure to report child abuse. All of the criminal charges were eventually dropped, but the school board disciplined the students and fired the coaches. In response to the incidents, the state of Illinois enacted a statute criminalizing the failure by a school official to report hazing and the school district hired a consulting firm to develop an anti-hazing policy, conduct training sessions for personnel regarding the policy, and provide educational programs for students and student-athletes on hazing and bullying.

In March 2016, five football coaches were dismissed from all of their coaching duties at Conestoga High School (Pennsylvania) after school officials became aware of a multiple hazing incidents, often involving sexual assault, that allegedly had been taking place for years in the football program, including an October 2015 episode when three seniors, including a team captain, attacked a freshman in the locker room, pinned him down, and sodomized him with a broomstick. The assault took place on the weekday that the upperclassmen on the team had nicknamed for the hazing they inflicted on underclassmen each week – "No Gay Thursday" – a day when players considered sexually-oriented initiation rituals to be permissible and a day that underclass student-athletes tried to avoid the school's locker room because it was always unsupervised by athletic personnel and therefore the preferred location for hazing activities. The perpetrators were charged in juvenile court with assault and unlawful restraint, but prosecutors declined to charge them with the more serious crime of involuntary deviate sexual intercourse, an offense for which conviction requires permanent registry as a sex offender. They also were not charged with violating Pennsylvania's hazing law, a crime punishable by up to a year in prison and a $2,000 fine, because at the time of their infractions, that state statute applied only to hazing at the college level. That loophole was closed when, in May, the Pennsylvania Legislature expanded the anti-hazing law to protect all students in grades 7-12 at all public and private schools in the state.

Despite the national media focus directed towards the Ooltewah, Maine West, and Conestoga hazing scandals, it should be noted that similar hazing allegations surfaced numerous times during 2016 at schools across the country, including the football team at Oak Hills High School (California), the boys' basketball team at Capital High School (Washington), the football team at Dietrich High School (Idaho), the swim team at Germantown Academy (Pennsylvania), the football team at Dos Palos High School (California), the cheerleading squad at Western High School (Indiana), the football team at Lake Zurich High School (Illinois), the swim team at Great Bend High School (Kansas), the football team at Chelmsford High School (Massachusetts), the baseball team at Wayne High School (Ohio) – merely ten examples of the 50+ incidents of hazing reported as having occurred in high school sports programs since the beginning of the year.

Sexual Harassment & Violence

In September 2016, the administration issued three resources intended to remind K-12 schools of their legal obligations to proactively develop, implement, and monitor strategic plans designed to prevent sexual harassment and sexual assault from occurring on their campuses and to appropriately respond to reported instances of sexual harassment or sexual violence at their institutions. Presently, there are 277 active investigations being conducted by the U.S. Department of Education's Office for Civil Rights involving allegedly mishandled sexual violence cases at 214 college and universities. At the K-12 level, the OCR currently has 108 open investigations involving sexual violence cases in 99 school districts.

The first resource, issued by the White House Task Force to Protect Students from Sexual Assault, is titled *Considerations for School District Sexual Misconduct Policies* and includes an extensive set of recommendations for crafting a policy for schools as a whole and for athletic departments. It is available at **www.justice.gov/ovw/file/900716/download**. The second, released by the National Center on Safe Supportive Learning Environments, is titled Safe Place to Learn and provides a range of materials to support efforts to prevent peer-to-peer sexual harassment and sexual violence. It is available at

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https://safesupportivelearning.ed.gov/safe-place-to-learn-k12. The third, issued by the U.S. Department of Justice's Office on Violence Against Women, is titled *Protecting Students Against Sexual Assault* and contains an extensive set of policy development resources. It is available at **www.justice.gov/ovw/protecting-students-sexual-assault**.

Another valuable resource for schools and athletic programs is a Dear Colleague Letter that was issued by the U.S. Department of Education's Office for Civil Rights on April 24, 2015 and which is intended to remind school districts of the federal mandate that every school system have in place a Title IX Coordinator. The DCL is essentially a policy guidance clarifying the obligations of school districts to have systems and protocols in place to address sexual harassment in all programs, curricular and extracurricular, throughout K-12 schools, including athletics programs, and focusing in particular on the duty of school districts to designate a Title IX Coordinator to handle complaints of any Title IX violation alleged to have occurred on campus, including sexual harassment or sexual violence, and who will conduct in-service training programs for school personnel about their responsibilities under the law, along with educational programs for students about their Title IX rights. The DCL is available full text at **www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf**.

In March 2016, in *Doe, et al v. Torrance Unified School District*, 18 current and former wrestlers at Torrance High School (California) filed a civil lawsuit seeking an unspecified amount of damages alleging they were sexually molested by their wrestling coach, Thomas Snider. The suit asserts that district and school administrators had for years been warned about the coach's behavior, but had repeatedly ignored those disclosures by school personnel, student-athletes, and parents, resulting in Snider having the opportunity to prey on additional generations of young men at the school. In October, Snider was convicted in a criminal court of a range of sexual offenses involving his molestation of 25 boys at the school and he was sentenced to a prison term of 69 years to life. The legal standard that will be applied to the sexual harassment civil suit against the school district is whether someone in a position to take remedial action had knowledge the abuse was occurring and exhibited deliberate indifference to correcting the situation. *Knowledge plus deliberate indifference*. It is the legal standard established by the U.S. Supreme Court in two landmark cases involving school liability for sexual harassment, *Gebser v. Lago Vista ISD* (1998) and *Davis v. Monroe County Board of Education* (1999), with both rulings illustrating the need for schools to take immediate corrective action whenever school personnel receive notification or through any means become aware that sexual harassment or violence is occurring on campus.

Disabilities Law

Issues continue to arise in school athletics programs involving the application to sports activities of the Americans With Disabilities Act (ADA), the Individuals With Disabilities Education Act (IDEA), and Section 504 of the Rehabilitation Act.

On December 11, 2015, just eight days after the lawsuit was filed, a settlement was reached in *Kempf v. Michigan High School Athletic Association*, a case involving a deaf high school wrestler who had originally been denied an exception to MHSAA regulations that limited his American Sign Language interpreter to the coach's box at the corner of the mat, a limitation that made it impossible for the interpreter maintain line-of-sight for hand signal communication with the student-athlete. The waiver had originally been denied because of safety concerns that allowing the interpreter to move around the perimeter of the mat might result in collisions with either the official or the wrestlers, but the settlement included common sense restrictions on the interpreter's movements and exercise of caution. The resolution of the situation was consistent with the requirements of federal disability law requiring that rule waivers be granted unless they would result in a fundamental alteration of the nature of the activity as long as the requested accommodations are reasonable.

In October 2015, the U.S. Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter" (DCL) clarifying the obligations of schools to prevent bullying and harassment of students and student-athletes with disabilities. Titled *Responding to Bullying of Students with Disabilities*, the full-text of the guidance is available in the OCR's online Reading Room at **www2.ed.gov/about/offices/list/ocr/letters/colleague-bullying-201410.pdf**.

The document supplements the guidelines set forth by the OCR a year earlier in another DCL clarifying the legal duties imposed on schools with regard to providing sports participation opportunities for students with disabilities. That guidance is available at **www2.ed.gov/about/offices/list/ocr/letters/colleague-201301-504.html**. The core message of the directive is that

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students with disabilities should be granted equal opportunity to participate alongside their peers in school athletics programs, club sports, intramural sports, and physical education courses.

> "We make clear [in the letter] that schools may not exclude students who have an intellectual, developmental, physical, or any other disability from trying out and playing on a team, if they are otherwise qualified," said Arne Duncan, U.S. Secretary of Education. "We know that students with disabilities are all too often denied the chance to participate and with it, the respect that comes with inclusion. This is simply wrong. While it's the coach's job to pick the best team, students with disabilities must be judged based on their individual abilities, and not excluded because of generalizations, assumptions, prejudices, or stereotypes."

The directive did not create new law. It merely clarified the legal obligations of educational institutions under already-existing laws dealing with the rights of students with disabilities. Specifically, schools are required to provide students with disabilities equal opportunity to participate in sports, meaning that schools must conduct an individualized assessment of a student with a disability to determine reasonable accommodations that might be provided to allow the fullest possible extent of participation in school athletics activities. A reasonable accommodation is one that does not fundamentally alter the nature of the sport or activity, does not give the person with a disability a competitive advantage over competitors without disabilities, and does not present a safety risk to the person with a disability or to other competitors.

The directive did not mandate that a student with a disability be automatically placed on a competitive school squad, only that an individualized assessment be made to determine whether a reasonable accommodation exists that might enable the otherwise qualified student with a disability to participate. The OCR guidance states:

> "Of course, simply because a student is a qualified student with a disability does not mean that the student must be allowed to participate in any selective or competitive program offered by a school district; school districts may require a level of skill or ability of a student in order for that student to participate in a selective or competitive program or activity, so long as the selection or competition criteria are not discriminatory."

If a student with a disability is not otherwise qualified and reasonable accommodations are not available to allow the student to participate in mainstream programs, the Dear Colleague letter made it clear that pursuant to existing disabilities laws, schools have an obligation to provide sports participation opportunities through adapted athletics programs – ones specifically developed for students with disabilities – or allied programs – ones designed to combine students with and without disabilities together in a physical activity.

The starting line for schools is to develop a road map for the future development of district-wide adapted and allied athletics programs that will best serve the needs of students with disabilities. Rely on organizations with experience in creating such programs such as the Inclusive Fitness Coalition (**www.incfit.org**), the American Association of Adapted Sports Programs (**www.adaptedsports.org**), and the U.S. Department of Education (read the full-text of a working paper titled *Creating Equal Opportunities For Children & Youth With Disabilities To Participate In Physical Education & Extracurricular Athletics* at **www2.ed.gov/policy/speced/guid/idea/equal-pe.pdf**).

Labor Law: Fair Labor Standards Act

On May 18, 2016, the United States Department of Labor (DOL) announced the final version of new standards revising the Fair Labor Standards Act (FLSA) minimum wage and overtime requirements and establishing an implementation date for the updated regulations of December 1, 2016. The core component of the new rules is an increase to the minimum salary level required for salaried "white collar" workers – employees whose primary job duties are executive, administrative, or professional in nature – to be considered exempt from the FLSA. The new standards raise the compensation threshold from $455 per week ($23,660 annually) to $913 per week ($47,476 annually).

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The importance of the change for schools and athletics programs is that under the old scheme, "white collar" employees earning an annualized salary of at least $23,660 were considered exempt and could work unlimited overtime hours with no overtime pay owed to them. Now, any salaried worker making below $47,476 will need to be compensated at time-and-a-half (of the employee's salary broken down into an effective hourly rate) for every hour worked beyond 40 in a workweek. The financial repercussions of the change may be severe for many districts because of the likelihood that a significant percentage of school and athletic program employees across the country earn between $23,660 and $47,476 and those who do will have their status shift on December 1, 2016, from FLSA-exempt to non-exempt.

Therefore, in addition to ensuring FLSA compliance for all school employees with regard to the hours they work performing their regular job duties, one of the additional challenges presently facing districts is the imminent necessity of reclassifying everyone who plays a role in school extracurricular activities or athletics to evaluate whether they are exempt from the FLSA or whether they are entitled to overtime for what are often extensive hours worked beyond 40-per-week as measured by the sum of the time spent on their regular job duties combined with the hours worked in assisting with scholastic sports, theatre, choir, band, orchestra, debate, forensics, or clubs through service as coaches, assistant coaches, athletic trainers, activity or club sponsors, or any of the variety of support positions for school events such as ticket sellers, ticket takers, ushers, concession workers, public address announcers, statisticians, scoreboard operators, scorebook keepers, security officers, or event supervisors.

On November 22, 2016, in *State of Nevada v. U.S. Department of Labo*r, a lawsuit filed by a coalition of 21 states and more than 50 business groups, a federal judge in Texas granted a motion enjoining the implementation of the new FLSA regulations which were scheduled to go into effect on December 1, 2016. In addition, the judge granted a request that the injunction would apply nationwide. The DOL issued a statement indicating that it would immediately appeal the ruling and that the agency believed that the revisions, which had been planned since March 2014 and regarding which all states and business groups had received an opportunity to comment throughout the last two-and-a-half years, should be implemented as scheduled. "We strongly disagree with the decision by the court, which has the effect of delaying a fair day's pay for a long day's work for millions of hardworking Americans. The [FLSA] overtime revisions are the result of a comprehensive, inclusive rulemaking process, and we remain confident in the legality of all aspects of the new rules." School districts that have developed plans for dealing with the FLSA revisions should maintain a state of readiness to immediately implement those compliance strategies in the event that an appellate court issues an emergency stay to block the *State of Nevada* ruling or altogether overturns the ruling. Note: As of the copy deadline for this article, no action had been taken by an appellate court to reinstate an implementation date for the FLSA revisions.

State Association Power

On November 23, 2016, in *Fenwick High School v. Illinois High School Association*, a state court judge in Illinois rejected a legal challenge by a high school that it be allowed to advance to the Class 7A state championship football game because a referee's mistake resulted in a loss in a state semifinal game. Fenwick High School led 10-7 with four seconds remaining in the game when its quarterback, on fourth down from its own 15-yard line, threw the ball high and deep down the field to run out the clock, but was penalized for intentional grounding. The referees incorrectly awarded its opponent, Plainfield North High School, with a 10-yard penalty and an untimed down which was used to kick a game-tying field goal to force overtime. Fenwick scored a touchdown and extra point to go up 17-10, but Plainfield North responded with a touchdown and two-point conversion to win 18-17.

The IHSA later issued a statement acknowledging that the rules specify that a loss of down penalty, such as intentional grounding, that occurs as time expires shall not lead to an untimed down. Three days after the game, the IHSA Board of Directors decided that it did not have the authority to overturn bylaw 6.033, which states "the decisions of game officials shall be final; protests against the decision of a game official shall not be reviewed by the Board of Directors." The bylaw originally was enacted by a vote of all IHSA member schools – including Fenwick – and, according to the association's rule-making procedures, the Board did not have the power to discretionarily choose not to abide by the rule. In announcing the decision, the judge expressed empathy for the Fenwick players and community, but stated "Here, as on the playing field, one side wins and one side loses."

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In recent years, an increasing number of lawsuits have been filed disputing the decision of a state association with regard to the outcome of an athletics contest, almost always involving legal challenges to governing body rules agreed to in advance by the complainant-school based on their voluntary membership in the state association. Such suits involve issues broader than the application of the specific rule in play, in particular the question as to the role of the judicial system in resolving disputes involving interscholastic sports contests and whether athletic competitions should ultimately be decided not on the field, but in a courtroom. Courts across the country have consistently ruled that judges should not be "Monday Morning Quarterbacks" with regard to overturning the outcomes of games.

For instance, in February 2016, an Indiana Court of Appeals upheld the authority of the Indiana High School Athletic Association to follow the rules enacted by all of its member schools that resulted in penalties on Hammond High School and Griffith High School, including a double forfeit, cancellation of remaining regular season games, and a bar on state tournament participation, because of a fight during a basketball game between the two schools that escalated into a melee involving players, coaches, parents, and fans.

In November 2016, the Alabama Supreme Court upheld the authority of the Alabama High School Athletic Association to, pursuant to rules enacted by all of its member schools, including the affected institution, eliminate Washington County High School from the state football playoffs for using an ineligible player in its first-round win, a legal challenge that had resulted in a postponement of the second round of the playoffs.

In October 2015, the Mississippi Supreme Court upheld the authority of the Mississippi High School Activities Association to, pursuant to transfer rules enacted by all its member schools, declare two Hattiesburg High School basketball players ineligible to compete.

Also in October 2015, a state trial court judge upheld the authority of the New York State Public High School Athletic Association to, pursuant to a rule establishing a minimum number of regular-season games for an athlete to be eligible for the postseason, enforce a football playoff game forfeiture against Aquinas High School for using an ineligible player.

And in November 2015, a state trial court judge upheld the authority of the Oklahoma Secondary School Activities Association to, pursuant to bylaws enacted by all of its member schools, enforce the disputed outcome of a football playoff game in which referees incorrectly negated a Douglas High School touchdown, resulting in a win for its opponent Locust Grove. In its written opinion, although acknowledging the unfairness of a bad call potentially impacting the outcome of an athletic contest, the court stated, "[m]ore tragic, however, would be for this Court to assert itself in this matter. While mindful of the frustrations of the young athletes who feel deprived by the inaction of the [OSSAA], it borders on the unreasonable and extends far beyond the purview of the judiciary to think this Court more equipped or better qualified to decide the outcome or any portion of a high school football game. Courts ought not meddle in these activities or others, especially when [the Oklahoma City Public Schools and Douglas] have agreed to be bound by and have availed themselves to the governance of the [OSSAA]. The court continued, "There is neither statute nor case law allowing this Court discretion to order the replaying of a high school football game ... [t]he pursuit of further judicial action would result in the frustration of the world of athletics as we know it. This slippery slope of resolving athletic contests in court would inevitably usher in a new era of robed referees and meritless litigation due to disagreement with or disdain for decisions of game officials."

The consistent rulings in these cases upholding the power of state associations reinforces the concept that bad calls by officials are a part of sports and that, despite the unfairness of losing an athletic contest because of an erroneous on-field or on-court ruling, or because of an eligibility rule agreed to in advance by a school, such incidents are an inherent part of sports and providing judicial review for every such bad call would result in a flood of litigation across the country that would substantially interfere with the far more serious issues with which an already backlogged court system is struggling to resolve.