LCW Liebert Cassidy Whitmore

Private Education Matters

News and developments in education law, employment law and labor relations for California Independent and Private Schools and Colleges.

August 2019

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LCW NEWS

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STUDENTS

DISCIPLINE

College Provided Student Fair Disciplinary Process Before Expulsion.

Jane Roe, a student at Occidental College (Occidental), alleged that fellow student, John Doe, sexually assaulted her while the two were in his dorm room one evening. Roe reported the incident to Occidental's Title IX Office and requested a "stay-away" letter. Occidental's policy against all forms of misconduct, including sexual assault and non-consensual sexual contact, (the Policy) permits the school to impose "reasonable and appropriate interim measures," such as a campus-wide "stay-away letter," changing class schedules, and an interim suspension, to protect the parties. The school issued a "stay-away" letter, which instructed Doe to refrain from approaching Roe or from communicating with her electronically.

Thereafter, Roe reported to the Title IX Office that Doe had been approaching her in an intimidating manner that made her feel unsafe. The Title IX Office notified Doe that he might have engaged in behavior that violated the "stay-away" letter and reminded him not to violate the letter's instructions. Roe then began hearing troubling things about Doe's conduct towards other female students, which caused her to worry about the safety of her friends. She reported her concerns to the Title IX Office.

About three months after Roe's initial report to the Title IX Office, Roe filed a formal complaint regarding Doe's alleged sexual misconduct. Occidental sent a notice to Doe of Roe's formal complaint, which included the allegation of sexual misconduct and non-consensual sexual contact, the date of the alleged incident, and information on the Policy. Occidental also notified Doe it was conducting an investigation and imposing an interim suspension on Doe pending resolution of the complaint due to the nature of the allegations.

Occidental engaged an external investigator to conduct the investigation. The investigator interviewed Roe, Doe, and twelve additional witnesses; reviewed documentary evidence; and toured the campus grounds and Doe's dormitory. The investigator provided its final investigation report, summaries of the witness interviews, and other evidence to the Title IX Hearing Coordinator, who determined there was sufficient information to find a violation of the Policy could have occurred.

The Title IX Hearing Coordinator sent Doe a notice of the charges, which contained the factual basis for the charges and the alleged violations of the Policy. The Title IX Hearing Coordinator also sent Doe a notice of his hearing date and provided Doe with electronic access to a password-protected website containing all of the investigation's documents and evidence.

After a five hour hearing, the adjudicator found by a preponderance of the evidence that Doe engaged in conduct that violated the Policy. Occidental permanently expelled Doe from the college immediately. Doe appealed the decision to Occidental's Associated Dean of Students, who denied the appeal. Doe sought court intervention, arguing that Occidental denied him a fair hearing, failed to follow its own policies, and relied on findings that were not supported by substantial evidence.

The Court, citing several recent California court decisions, noted that to afford a fair disciplinary procedure, schools must provide students facing suspension, at minimum, (1) notice of the pendency of the action and (2) some kind of a hearing. The hearing does not need to be formal, but does need to give the accused student an opportunity to explain his or her version of the facts.

To provide students an adequate opportunity to explain his or her versions of the facts, schools must first inform the accused student of what he or she is accused of doing and the factual basis for the accusation. Further, schools' disciplinary policies and procedures must be "tailored, in light of the decision to be made, to the capacities and circumstances of those who are to be heard ... to insure that they are given a meaningful opportunity to present their case." Schools are bound by the disciplinary policies and procedures they maintain.

Doe first contended that Occidental denied him a fair hearing by failing to provide him timely notice of the charges against him. The Court disagreed, finding that Occidental provided Doe notice of the pendency of the action on at least three occasions: when it sent Doe the "stay-away" letter, when it sent Doe a reminder of the "stay-away" letter, and when it sent Doe the notice after Roe filed her formal complaint.

In reviewing Doe's claims that Occidental violated multiple provisions of the Policy throughout the disciplinary process, the Court found that Occidental acted exactly as the Policy required in each instance. For example, Doe argued that Occidental violated the Policy by suspending him from campus before the investigation began. However, the Court found that the Policy gave Occidental the authority to impose interim measures, such as the suspension, in the face of an immediate threat of harm to the safety or well-being of an individual. Such threat of harm was demonstrated by Doe's violation of the "stay-away" letter, Roe's concern about his conduct with other women, and Roe's fear he would threaten her friends. Accordingly, Occidental complied with the Policy when it placed Doe on interim suspension pending resolution of the investigation.

The Court also noted that substantial evidence supported the adjudicator's finding that Doe committed sexual assault and non-consensual sexual contact despite Doe's claim otherwise. Because the parties' testimony about whether Doe engaged in the alleged contact conflicted, the adjudicator had to tackle the critical issue of whose version was more reliable and credible. In her decision, the adjudicator presented seven, specific reasons why she found Roe's version more persuasive. Specifically, (1) Doe's statements to others were consistent with statements Roe attributed to him; (2) Doe made inconsistent statements; (3) Roe's reporting was consistent; (4) information provided by Roe was corroborated by Doe; (5) Roe's conduct was consistent with vaginal penetration; (6) Doe's testimony that the absence of bruising required a finding that no sexual assault occurred; and (7) the inability of Doe's witnesses to competently testify to the events that occurred in Doe's room. Because credibility is an issue of fact for the adjudicator to resolve and the adjudicator listed specific reasons why she concluded Roe's account was more credible, the Court stated that it may not reassess the adjudicator's finding.

Accordingly, Occidental's discipline withstood Doe's challenge.

Doe v. Occidental College (2019) 37 Cal.App.5th 1003 [249 Cal. Rptr.3d 889], reh'g denied (July 24, 2019), review filed (Aug. 7, 2019).

NOTE:

This case illustrates the importance of maintaining fair disciplinary policies and procedures and consistently adhering to those policies and procedures. This case also illustrates the importance of clearly delineating the basis for credibility findings in disciplinary actions where the decision rests, at least in part, on the credibility of the parties involved. By doing so, schools increase the chances that imposed discipline will withstand later challenges brought by students.

Student Suspended For One Year After Biased Disciplinary Procedures Has Viable Title IX Claim.

John and Jane were students at Purdue University (Purdue), a public university located in Indiana, and both participated in Purdue's Navy ROTC program. After John and Jane began dating, Jane's behavior became increasingly erratic and troublesome. After Jane attempted suicide in front of John, he reported her attempt to two Purdue resident assistants and an advisor in an attempt to get her help. Jane was upset with John for reporting her and began dating someone else.

In April 2016, Sexual Assault Awareness Month, Purdue hosted events and publicized information to promote the reporting of sexual assault. During the first ten days of April, Jane and four other students reported sexual assault to Purdue. Jane alleged that in November 2015, while she was sleeping with John in his room, she woke to him groping her over her clothes without her consent. Jane also alleged that when she confronted John about the incident, John confessed that he had digitally penetrated her while the two were sleeping in Jane's room earlier in November 2015.

Purdue notified John that it was investigating Jane's allegations and instructed him not to have contact with Jane. John was suspended from Navy ROTC, banned from all buildings where Jane had classes, and barred from eating in his usual dining hall because Jane also used it.

John submitted a written response denying all of Jane's allegations and submitted evidence and information that he believed contradicted Jane's allegations. John also met with the investigators wherein he continued to deny Jane's allegations and provided friendly texts Jane had sent him after the alleged incident.

Upon completion of the investigation, a hearing was scheduled before Purdue's Advisory Committee on Equity. On the day of the hearing, John received a few minutes to review a redacted version of the investigation report, which he had not seen before. While reviewing the redacted report, John discovered that the report falsely claimed that he had confessed to Jane's allegations.

John appeared before the Advisory Committee for about thirty minutes and reiterated his innocence, but was unable to address the evidence having only received a few minutes to review a redacted version of the report. Two Committee Members had not read the investigation report before the hearing and the third Committee Member asked John accusatory questions that assumed his guilt. Further, the Committee Members refused John's requests to present witnesses, including his roommate who planned to attest that John was with him in their room during the time of the alleged assault.

Jane did not appear before the Advisory Committee or provide a written statement. Instead, the director of Purdue's Center for Advocacy, Response, and Education (CARE) wrote a letter summarizing Jane's accusations.

A week after the hearing, the Dean of Students sent John a brief letter informing him that he had been found guilty of sexual violence by a preponderance of the evidence. The university suspended John for one academic year. John appealed the decision. The Dean of Students sent a revised letter to John, which provided a brief statement of the factual basis for her finding and stated that she found by a preponderance of the evidence that John was not a credible witness and that Jane was a credible witness. John involuntarily resigned from the Navy ROTC, which has a "zero tolerance" policy for sexual harassment.

John sued Purdue, several Purdue employees, and the Purdue's Board of Trustees for, among other things, discriminating against him based on his sex in violation of Title IX during the disciplinary process.

The Court found that John had a viable claim against Purdue for discriminating against him based on sex in violation of Title IX. Title IX mandates that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." Almost all public and private colleges and universities must abide by Title IX because they receive federal funding through the federal financial aid programs used by their students.

The Court noted that it was undisputed that Purdue receives federal funding and that Purdue excluded John from participating in or denied him the benefits of an education program when it suspended him. Further, the alleged facts raised an inference that Purdue acted at least partly based on sex in John's case.

First, John alleged facts suggesting that Purdue had a financial incentive to discriminate against males in sexual assault investigations. During 2016, Purdue was subject to two investigations by the Office of Civil Rights related to Title IX compliance, so the pressure on the school to demonstrate compliance so as not to risk its federal funding was significant.

Second, John alleged facts suggesting that it was plausible that the Dean of Students, Advisory Committee, and investigators chose to believe Jane because she is a woman and to disbelieve John because he is a man. For example, the Dean of Students found Jane's account of the events more credible than John's account even though Jane did not appear before the Advisory Committee or submit a written statement. Further, the Committee Members demonstrated hostility towards John during the hearing, refused to hear from John's witnesses, and gave credit to Jane based on her accusation alone and without hearing from her.

Third, the director of CARE, who had written the letter summarizing Jane's accusations, which was relied upon by the decision-makers, had posted on the CARE Facebook page during the same month that John was disciplined an article from the Washington Post titled "Alcohol isn't the cause of campus sexual assault. Men are."

In total, John's allegations raised a plausible inference that Purdue denied him an educational benefit based on his sex. The Court determined that John's Title IX claims could proceed.

Doe v. Purdue University (7th Cir. 2019) 928 F.3d 652.

NOTE:

Almost all private colleges and universities that receive federal funding through federal financial aid programs used by their students or otherwise must abide by Title IX. While this case is not binding on California private schools because it occurred outside of our federal circuit, it indicates that plausible allegations of bias in disciplinary procedures could possibly support a Title IX violation claim. Additionally, the facts of this case arguably violate the fundamental fairness standard that does apply to private schools and colleges in California.

DISABILITY DISCRIMINATION

University's Refusal To Allow Unleashed Service Animal On University Transportation Did Not Support ADA Discrimination Claim.

Benjamin Thomas is an individual with post-traumatic stress disorder (PTSD), a physical disability, and is assisted by a service animal, a Chihuahua. While attempting to board a bus operated by the University of South Florida (USF) with his service dog, Thomas was denied a ride because the service dog did not have a visible leash. Thomas asserted that he was in control of his service dog at the time via a wireless leash, which could instantly detain the animal in a range up to 900 feet. Thomas alleged that when USF denied him access to the bus because of his unleashed service animal, USF discriminated against him because of his disability in violation of the Americans with Disabilities Act (ADA).

Under Title II ADA regulations, which is applicable to public entities, "[a] service animal shall be under the control of its handler. A service animal shall have a harness, leash, or other tether, unless either the handler is unable because of a disability to use a harness, leash, or other tether, or the use of a harness, leash, or other tether would interfere with the service animal's safe, effective performance of work or tasks, in which case the service animal must be otherwise under the handler's control (e.g., voice control, signals, or other effective means)." If a service animal is not under the handler's control, a "public entity may ask an individual with a disability to remove a service animal from the premises."

USF argued that because Thomas's service animal was not controlled by a harness, leash, or other tether, they were permitted by regulation to ask Thomas to leave. Accordingly, USF argued that Thomas could not state a claim under the ADA.

In analyzing Thomas's complaint, the Court found that the complaint failed to state a claim that USF discriminated against him in violation of the ADA. First, the complaint failed to allege that Thomas was in compliance with the ADA by having his service animal on a harness, leash, or other tether. Second, the complaint failed to allege any facts demonstrating that a wireless leash existed or showing what constitutes a wireless leash. Further, the complaint lacked any facts showing that Thomas was unable to control the service animal via a harness, leash, or other tether because such use would interfere with the service animal's safe, effective performance of work or tasks. Accordingly, the Court dismissed Thomas's complaint, but gave him 15 days to file an amended complaint that cured the deficiencies.

Thomas v. University of South Florida (M.D. Fla., June 12, 2019, No. 8:19-CV-55-T-36AAS) 2019 WL 2452825.

NOTE:

Thomas v. University of South Florida, was decided under Title II of the ADA. Title III of the ADA, which is applicable to public accommodations such as private schools, colleges, and universities, contains identical language regarding service animals as the Title II regulations. The relevant Title III regulation applicable to service animals in public accommodations is codified at the Title 2

EMPLOYEES

MINISTERIAL EXCEPTION

Ninth Circuit Refuses To Reconsider Finding That Ministerial Exception Does Not Apply To Religion Teacher's ADA Claim.

On June 25, 2019, the Ninth Circuit denied a petition for a hearing to reconsider the Court's 2018 decision in Biel v. St. James School. Biel, which was discussed in the January 2019 Private School Matters newsletter, involved fifth grade teacher Kristin Biel's claim for Americans with Disabilities Act (ADA) discrimination against St. James School, a Catholic parish school in Los Angeles.

Biel received her teaching credential in 2009 and went on to work for various tutoring companies and as a substitute at several public and private schools. In March 2013 she was hired by St. James, first as a long-term substitute and then as the full-time fifth grade teacher. Biel is Catholic, and while St. James prefers to hire Catholic teachers, it is not a job requirement. Biel received a half-day of training in Catholic pedagogy.

As a fifth grade teacher, Biel taught students in all their subjects, including 30 minutes of religion teachings, four days a week, joined students at prayer and Mass, and agreed in her employment contract to work within the school's "overriding commitment" to Church doctrine and promote behavior in accordance with Church teachings.

Biel's November 2013 evaluation was positive, but also identified a few areas for improvement. Less than six months after this evaluation (her first and only formal one) Biel was diagnosed with breast cancer. She informed the school she would need to take leave to undergo surgery and treatment. A few weeks later, the school informed her she would not get a new contract for the upcoming school year. Biel filed a claim for discrimination.

St. James argued the ministerial exception was applicable and the trial court agreed, granting summary judgment to the school. Biel appealed.

The Ninth Circuit assessed Biel's argument by comparing her with the plaintiff in the landmark case on the ministerial exception, *Hosanna-Tabor*. The court went through each of the four factors used in that case: (1) whether the employer held the employee out as a minister, (2) whether the employee's title reflected ministerial training, (3) whether the employee held herself out as a minister, and (4) whether the employee's job duties included important religious functions. Here Court found that Biel did not meet the standards of the first through third factors. She had only secular training, except for one half-day conference upon her hire at St. James. The school had no religious requirements for her position and it did not hold her out as someone with special expertise in church doctrine or pedagogy. Her title as fifth grade teacher did not indicate anything religious and

nothing in the record indicated that Biel considered herself a minster. Biel only fulfilled one factor, factor four, because her teaching duties included religious curriculum. The Court, however, found that the entire analysis under Hosanna-Tabor would be meaningless if they could rely on that single factor to find that the ministerial exception applied.

Ultimately, the Court found that it would not be faithful to *Hosanna-Tabor* to hold that any school employee who teaches religion as any part of their duties would fall within the ministerial exception. The Court also stated that the First Amendment "does not provide carte blanche to disregard antidiscrimination laws when it comes to other employees who do not serve a leadership role in the faith."

Biel v. St. James School (9th Cir. 2019) 926 F.3d 1238.

NOTE:

Nine Ninth Circuit judges joined in a strong dissent from the Ninth Circuit's refusal to rehear this case through a rehearing en banc (a rehearing by all active judges in the court). In the dissent, the judges state that the decision in Biel v. St. James School conflicts with Hosanna-Tabor and First Amendment principles and "poses grave consequences for religious minorities … whose practices don't perfectly resemble the Lutheran tradition at issue in Hosanna-Tabor." While it is possible that the school will appeal this decision, for now, this case continues to make it more difficult for religious schools in California, which is governed by the Ninth Circuit, to avail themselves of the ministerial exception defense.

WAGE & HOUR

Federal De Minimis Doctrine Does Not Apply To Wage And Hour Claims Brought Under California Law.

Nike Retail Services, Inc. (Nike) requires its retail employees in non-exempt positions to track their hours by punching in and out on a time clock. Every time an employee leaves the store on a break or at the end of a shift, Nike requires the employee to punch out on the time clock and then submit to an exit inspection. The length of the exit inspection varies depending on circumstances such as whether the employee needs to wait at the exit for someone to inspect him or her or whether the employee is carrying a box or bag that needs to be searched. Because exit inspections are always conducted after the employee punches out, they are uncompensated.

Former Nike retail employee Isaac Rodriguez brought a class action on behalf of himself and similarly situated Nike employees seeking compensation for the time spent on these exit inspections. Rodriguez's claims included (1) failure to pay minimum wages (Cal. Labor Code §§ 1194 and 1197); (2) failure to pay overtime wages (Cal. Labor Code §§ 510 and 1194); and (3) unfair business practices (Cal. Bus. & Prof. Code § 17200 et seq.).

Nike argued that Rodriguez's claims were barred by the federal de minimis doctrine, which precludes recovery for otherwise compensable amounts of time that are small, irregular, or administratively difficult to record. Under the federal de minimis doctrine, employers may require employees to work as much as ten minutes a day without compensation. Nike produced expert testimony demonstrating that the average exit inspection took between 16.9 and 20.2 seconds, 21.5% of inspections took no measurable time, 92.2% took less than a minute, and 97.5% took less than two minutes.

However, Rodriguez presented his own expert, who testified that the study conducted by Nike's expert was flawed. Rodriguez also produced testimony from Nike store managers who stated that exit inspections regularly took several minutes.

A District Court agreed with Nike's argument that Rodriguez' claims were barred by the de minimis doctrine and granted Nike's motion for summary judgment. Rodriguez appealed to the Ninth Circuit Court of Appeals.

In analyzing Rodriguez's claims, the Ninth Circuit relied on the California Supreme Court's decision in *Troester v. Starbucks Corp.*, which involved a challenge to Starbuck's practice of requiring employees to perform 4 to 10 minutes of store-closing tasks per day after clocking out because it was not administratively feasible for employees to clock out after performing the store-closing tasks. In *Troester,* the California Supreme Court held that the federal de minimis doctrine does not apply to California's wage and hour statutes or regulations. The California Supreme Court noted that California labor laws are generally more

protective than federal labor laws and require that employees "must be paid for 'all hours worked' or '[a]ny work' beyond eight hours a day." The California Supreme Court also stated that nothing in the language of the California labor law or wage orders demonstrate an intent to incorporate the federal de minimis doctrine into California law. Accordingly, the Court held that Starbucks could not rely on the federal de minimis doctrine to avoid paying employees for the 4 to 10 minutes of store-closing tasks they performed each day.

The Ninth Circuit interpreted the holding in *Troester* as "mandating compensation where employees are regularly required to work off the clock for more than 'minute' or 'brief' periods of time.'" The court continued that *Troester* prevents an employer from raising a de minimis defense under California law where employees are "required to work for more than trifling amounts of time 'on a regular basis or as a regular feature of the job.'"

Due to *Troester* and the Ninth Circuit's conclusion that the evidence showed each exit inspection lasted between zero seconds and several minutes and employees frequently exited multiple times per day, the Court reversed the decision of the District Court and instructed the District Court to conduct further proceedings consistent with *Troester*.

Rodriguez v. Nike Retail Services, Inc. (9th Cir. 2019) 928 F.3d 810.

Note:

The decision in Rodriguez provides and important reminder to private schools, universities, and colleges in California to pay hourly employees for all time worked, even for seemingly trivial increments of time. More information on Troester v. Starbucks Corp. is available at https://www.lcwlegal.com/news/starbucks-case-provides-guidance-to-public-employers-on-the-flsa-de-minimis-rule.

INDEPENDENT CONTRACTORS

Ninth Circuit Withdraws Decision That ABC Test Applies Retroactively And Poses Question To California Supreme Court.

In May 2019, the Ninth Circuit issued a decision in *Vazquez v. Jan-Pro Franchising International, Inc.*, holding that the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*, which established the ABC Test for determining whether a worker is an independent contractor, applies retroactively.

However, on July 22, 2019, the Ninth Circuit withdrew its opinion in Vazquez and stated its intention to certify the question of whether *Dynamex's* ABC Test applies retroactively to the California Supreme Court. California Rules of Court allows the California Supreme Court to decide a question of California law upon request of the United States Supreme Court, a federal court of appeal, or the highest court of any state if the decision could determine the outcome of a matter pending in the requesting court and there is no controlling precedent. Given that the California Supreme Court has yet to weigh in on whether the ABC Test applies retroactively, it seems appropriate for the Ninth Circuit to withdraw its finding and defer to the California Supreme Court's determination.

Vazquez v. Jan-Pro Franchising International, Inc. (9th Cir. 2019) 930 F.3d 1107.

Note:

The Vazquez decision was reported in the May 2019 Private School Matters newsletter. Watch for further developments on this issue in future newsletters.

SCHOOL ADMINISTRATION/ GOVERNANCE

IRS NON-DISCRIMINATION NOTICE

IRS Provides A Third Method For A Private School To Publicize Its Notice Of Nondiscriminatory Policy.

IRS Revenue Procedure 75-50 requires a private school that is applying to be exempt or currently is exempt from federal income tax under section 501(c)(3) of the Internal Revenue Code to (1) adopt a racially nondiscriminatory policy as to students, (2) publicize the policy, and (3) operate in a bona fide manner in accordance with the policy. Previously, Revenue Procedure 75-50 provided private schools with two permissible methods to publicize the nondiscriminatory policy: (1) publishing the policy at least once annually in a newspaper of general circulation that serves all racial segments of the community or (2) using the broadcast media to publicize the policy, provided that the means by which the policy is communicated is reasonably expected to be effective.

Effective May 28, 2019, Revenue Procedure 75-50 now also allows private schools to satisfy the publicity requirement by displaying a "notice of its racially nondiscriminatory policy on its primary publicly accessible Internet homepage at all times during its taxable year … in a manner reasonably expected to be noticed by visitors to the homepage."

The IRS will consider various factors in determining whether a notice is reasonably expected to be noticed by visitors to the homepage including "the size, color, and graphic treatment of the notice in relation to other parts of the homepage, whether the notice is unavoidable, whether other parts of the homepage distract attention from the notice, and whether the notice is visible without a visitor having to do anything other than simple scrolling on the homepage."

Further, the policy must be located on the private school's public internet homepage. A homepage that requires visitors to input any type of login information, such as an email address, username, or password, to access would not comply. The policy must also be located on the primary landing page of the homepage. Accordingly, a link to the policy located on the homepage is not compliant. Similarly, the policy may not only be visible on the homepage as part of a carousel, by selecting a dropdown, or by hover (mouseover).

The modifications to IRS Revenue Procedure 75-50 are available at: https://www.irs.gov/pub/irs-drop/rp-19-22.pdf.

PRIVATE SCHOOL STATISTICS

U.S. Department Of Education Releases Findings From 2017-2018 Private School Universe Survey.

The U.S. Department of Education released Characteristics of Private Schools in the United States: Results From the 2017-18 Private School Universe Survey, which contains the information collected by the National Center for Education Statistics (NCES) of all private schools in the U.S. that are (1) not supported primarily by public funds; (2) provide classroom instruction for one or more grades K-12; and (3) has one or more teachers. NCES has completed this survey every two years since the 1989-1990 school year.

The survey collects data such as the religious affiliation of the school, the school's location, the number of students enrolled, the grade levels offered, the school's program emphasis, the number of full time equivalent (FTE) teachers, and the graduation rate. One exciting highlight of the survey for private school educators, parents, and students is the finding that 97% of 12th graders enrolled in private schools graduated from high school and 62% went on to attend a 4-year college.

The complete findings are available at: https://nces.ed.gov/pubs2019/2019071.pdf.

BUSINESS AND FACILITIES

ADA ACCESSSIBILITY

Website Accessibility Under The ADA: A Tale As Old As 1996.

In 1990, the Americans with Disabilities Act (ADA) became the law of the land. Under Title III of the ADA, private nursery, elementary, secondary, undergraduate, and postgraduate schools, and other places of education must provide to persons with disabilities the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations." The ADA's drafters did not specifically address website or digital platform accessibility.

However by September 1996, the issue of website accessibility was on the horizon when Senator Tom Harkin wrote to the U.S. Assistant Attorney General for the Civil Rights Division, seeking guidance on the "administration's policy on making Web pages compatible for the disabled" after a constituent expressed concern over the issue.

Since then, the DOJ promised to develop regulations to guide the public on the requirements under the ADA but still has not done so, leaving businesses and entities unsure of what is required under the law. All of this uncertainty has not prevented litigants from filing lawsuits about inaccessible websites and mobile applications. Approximately, 2,000 so-called website accessibility cases were filed in 2018, an increase from prior years.

Lawsuits are on the rise but what does the law require as digital content increases?

The law remains in a state of flux regarding what "public accommodations" like private schools must provide to comply with the ADA when it comes to website/digital platform accessibility. A recent Ninth Circuit Appellate Court decision, *Robles v. Domino's Pizza, LLC*, (2019) 913 F.3d 898 (Robles), held that "public accommodations" must provide "full and equal enjoyment of the[ir] goods, services, facilities, privileges, advantages, or accommodations" to people with disabilities and must "ensure that no individual with a disability is excluded, denied services, segregated or otherwise treated differently than other individuals because of the absence of auxiliary aids and services" (emphasis added).

The "full and equal" access right applies to websites and mobile applications because they are auxiliary aids and services in enjoying the goods, services, facilities, and other advantages offered by or at a "public accommodation."

Private schools in California should aim to provide full and equal enjoyment of their services and facilities to people with or without disabilities on and offline. The gap in technical and regulatory guidance from either the DOJ or federal courts is unsettling but also means schools can get creative with their resolutions.

Does this apply to my private school?

Yes. It likely applies to your school. Private schools are identified as "public accommodations" under Title III of the ADA because website accessibility applies not only to students and their parents, but also to potential applicant students and their parents.

For example, in the U.S. District Court for the Southern District of New York, Plaintiff Jason Camacho, a blind man living in Brooklyn, has filed lawsuits alleging web inaccessibility issues against 50 private colleges, including the California Institute of Arts and Los Angeles College of Music. Mr. Camacho was not a student at any of the schools, but he claimed that his screen reader could not function with their websites preventing him access to the schools (i.e. applying to said schools).

In *Robles*, discussed above, the Ninth Circuit Court held that when there is a critical nexus between access to the physical location of the "public accommodation" and its website or mobile application, the inability to access the website or mobile application impeded access to the goods and services of the physical location. To put it more simply, if there is a significant connection between access to your school's website and/or mobile application and access to the physical brick and mortar school, then compliance with the ADA is likely required. There is likely a significant connection if

students or their parents can (1) apply for admission online; (2) pay tuition online; (3) access grades or test results online; and/or (4) access classroom materials online because completion of these acts or tasks is related to attending and participating in school.

So where to begin? Are there any sources or guidelines for private schools to consider?

Yes, private schools can refer to a few resources for guidance on accessibility. For example:

1. Information and Communication Technology (ICT) Standards and Guidelines prepared by the U.S. Access Board to help federal agencies comply with section 508 of the Rehabilitation Act of 1973;

2. Website Accessibility Under Title II of the ADA directed at website accessibility for state and local government entities; and

3. The most recent version of the Web Content Accessibility Guidelines (WCAG) Version 2.1. Notably, WCAG recommendations vary from basic accessibility (level A), essential access (level AA) to most accessible (level AAA). Schools will need to determine with their legal counsel and web developer what level of accessibility is feasible and reasonable in each specific context.

You've convinced me. We want to make our website accessible, but who should we make it accessible to?

Another area where the law is unclear is who must be able to access your website. Recent cases in the public eye involved visually impaired plaintiffs. However, accessibility can affect not only individuals with visual impairments, but may include individuals with (1) audio/audio-visual impairments, and/or (2) speech, cognitive or neurological disabilities.

I'm ready to refer to those guidelines you mentioned but can you give me some examples of changes that increase website or digital accessibility?

1. Provide text alternatives for non-text content (like captions for images so that they can be read by screen reading software);
2. Make page layout and content adaptable (especially to mobile devices);
3. Use color and contrast appropriately (make it easier to read);
4. Make text "readable" (i.e. font size, letter spacing, paragraph spacing, etc.);
5. Provide keyboard and user controls versus mouse controls only;
6. Avoid negative physical reactions (seizures) by preventing any content from flashing more than three times per second;
7. Use page title tags; and
8. Make website easily navigable.

Remember specific changes to your website should be discussed with legal counsel and your web developer. And as always, the law is subject to change. Currently, the Robles case, which is controlling in California, has been appealed to the U.S. Supreme Court and acceptance of the case for consideration by the Court is pending.

In addition, consider your obligations under California laws such as the Unruh Civil Rights Act, Civil Code § 51 (Unruh). Unruh is a state law, which provides protection from discrimination by all business establishments in California, including housing and public accommodations. It specifically outlaws various types of discrimination including on the basis of a disability.

Although there are no bright line rules for "public accommodations" falling under Title III when it comes to digital access, there appears to be a consensus that there is at least "some" obligation to make digital platforms accessible to individuals with disabilities. Private schools should keep in mind that the ADA was passed to provide people with disabilities the ability to participate in mainstream American life by preventing discrimination and promoting access. Schools should implement reasonable accommodations that promote access to their websites to lower the risk of potential discrimination claims.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

AUGUST

Conduct staff trainings, which may include:

- ☐ AB 1825 Sexual Harassment Training, which a school with more than 50 employees must provide to supervisors and managers every two years.
- ☐ Mandated Reporter Training
  - Prior to commencing employment all mandated reporters must sign a statement to the effect that they have knowledge of the provisions of the Mandated Reporter Law and will comply with those provisions. (California Penal Code section 11166.5.)
- ☐ Risk Management Training such as Injury, Illness Prevention, CPR.
- ☐ Distribute Parent/Student Handbooks and collect signed acknowledgement of receipt forms, signed photo release forms, signed student technology use policy forms, and updated emergency contact forms.

SEPTEMBER

- ☐ The due date to submit EEO-1 Component 2 pay data for 2017 and 2018 is September 30, 2019, and the report must be filed with the U.S. Equal Employment Opportunity Commission through the web-based portal available at https://eeoccomp2.norc.org, which opened on July 15, 2019. Effective July 15, 2019, the EEOC helpdesk is open and answering Component 2 pay data questions at EEOCcompdata@norc.org or (877) 324-6214. Further instructions on how to file are posted on the EEOC website at: http://www.eeoc.gov/employers/eeo1survey/howtofile.cfm
- ☐ It is the opinion of the General Counsel of the EEO Commission that Section 702, Title VII of the Civil Rights Act of 1964, as amended, does not authorize a complete exemption of religious organizations from the coverage of the Act or of the reporting requirements of the Commission. The exemption for religious organizations applies to discrimination on the basis of religion. Therefore, since the EEO Standard Form 100 does not provide for information as to the religion of employees, religious organizations must report all information required by this form.

OCTOBER 1ST THROUGH 15TH

- ☐ File Verification of Private School Instruction (Education Code § 33190.)
  - Every person, firm, association, partnership, or corporation offering or conducting private school instruction on the elementary or high school level shall between the first and 15th day of October of each year, file with the Superintendent of Public Instruction an affidavit or statement, under penalty of perjury, by the owner or other head setting forth the following information for the current year:
    - (a) All names, whether real or fictitious, of the person, firm, association, partnership, or corporation under which it has done and is doing business.
    - (b) The address, including city and street, of every place of doing business of the person, firm, association, partnership, or corporation within the State of California.
    - (c) The address, including city and street, of the location of the records of the person, firm, association, partnership, or corporation, and the name and address, including city and street, of the custodian of such records.
    - (d) The names and addresses, including city and street, of the directors, if any, and principal officers of the person, firm, association, partnership, or corporation.
    - (e) The school enrollment, by grades, number of teachers, coeducational or enrollment limited to boys or girls and boarding facilities.
    - (f) That the following records are maintained at the address stated, and are true and accurate:

1. The attendance of the pupils in a register that indicates clearly every absence from school for a half day or more during each day that school is maintained during the year (Education Code § 48222.)
2. The courses of study offered by the institution.
3. The names and addresses, including city and street, of its faculty, together with a record of the educational qualifications of each.

(g) Criminal record summary information of applicants that has been obtained pursuant to Education Code Section 44237.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: An administrator of an independent school called LCW with a question about unauthorized overtime. The school operates a summer sports day camp on its campus that offers a variety of sports programs. The employees who work at the camp are hourly employees. The employee that leads the soccer program clocked in early two mornings one week to complete some preparation and setup work, which resulted in the employee working overtime. The employee had not obtained approval before completing the overtime work. The administrator asked whether the school must pay the employee for this overtime. The administrator also asked how to address the situation with the employee so that he knows he needs to have approval before working overtime in the future.

RESPONSE: The LCW attorney explained that the school must pay the employee for the overtime work, even if the employee did not receive approval in advance. Employees must be paid for all hours worked. The school should handle the issue of the employee performing overtime work without obtaining prior approval as a disciplinary matter. The administrator should review the school's policy on the matter with the employee and remind him that working overtime without prior approval is not allowed. The administrator should inform him that he must seek permission before working any overtime going forward.

Daniel Cassidy Celebrates Fifty Years of Practicing Law

Liebert Cassidy Whitmore would like to congratulate **Daniel C. Cassidy** on celebrating fifty years of practicing law. Dan, a founding partner of Liebert Cassidy Whitmore, is among the most experienced and accomplished practitioners in the fields of public sector labor relations, negotiations and employment law.

After graduating from the University of Southern California Dan joined the workforce for a decade before attending law school. He earned his Juris Doctor degree from Loyola Law School in Los Angeles in 1968 and began practicing law in 1969 working in the Los Angeles County Counsel office. During his time there, Dan was promoted to Assistant County Counsel and gained numerous insights into the trials and tribulations of labor negotiations and employee relations along the way.

Dan joined the law office of Paterson and Taggart, an education law firm. Here he met his lifelong friend, John Liebert. However, after the tragic death of partner Mike Taggart in the 1978 PSA Flight 82 plane crash in San Diego, the firm dissolved. After this traumatic event, Dan adopted the motto, "life is short, take risks."

Dan and John formed their own firm in 1980 – Liebert Cassidy – which quickly became the top public employment law firm in Southern California. The rapid success of the firm was in part to Dan's leading philosophy on how the firm should be, as he describes, "more like a family – I wanted to make sure that our people gave their best service to clients but had a well-rounded life outside of the law office."

Building on the success cultivated by Dan and John, the firm continued to grow by merging with the Whitmore Johnson & Bolanos firm in 2000. The Whitmore firm was based in the Bay Area and was culturally complimentary to Liebert Cassidy – a critical requirement for Dan, John and the other partners. Liebert Cassidy Whitmore was born and has continued to build upon the foundation well established in both predecessor firms.

Over the course of his fifty years practicing, Dan's love of the law and his clients has never wavered. Melanie Poturica, former Managing Partner of LCW, describes some of Dan's key qualities that shaped LCW's culture.

"I learned from Dan that one of the successes to being an effective lawyer and trusted advisor to our clients is to bring my best, caring self to all client relationships. Not only does Dan sincerely care about our clients but he also knows how to work with the union side of the table and employees. His care for people and genuine concern for the public agencies he represents are the reason he is so good at getting labor agreements without acrimony and bitterness."

J. Scott Tiedemann, the current Managing Partner of LCW, echoes Melanie's sentiments, stating, "Dan's love of people is the foundation of LCW's success. Nowadays, Dan is often the first one sending and responding to congratulatory emails with apt emojis as he celebrates life milestones for our partners, employees and their families." Scott adds, "Dan is, of course, a pioneer in the field of labor and education law in California, but he is also a leader in the law business, adopting the premise of preventative law and laying the foundation for a firm that fosters inclusivity."

Dan is now semi-retired from practicing law, but continues to mentor attorneys at LCW and provide advice and support to clients. "I am so grateful that even in retirement, Dan is actively involved with LCW," says Scott, "he provides us with invaluable insights about our past but always has a keen eye towards our future."

Outside of his practice, Dan is involved in his community and volunteer work with his alma mater, USC. In 2017, USC awarded Dan with the Alumni Service Award, an honor that recognizes outstanding volunteer efforts on behalf of the university.

Dan enjoys spending time with his wife, Terri, 5 kids, 14 grandchildren, and 12 great-grandchildren. His two favorite hobbies are traveling and trying new restaurants and food.

LCW congratulates Dan Cassidy for this incredible accomplishment and wishes him continued success in his practice!

NEW TO THE FIRM

Kate Im joins our Los Angeles office where she provides counsel and representation to Liebert Cassidy Whitmore's clients on a variety of matters including labor, employment, and education law. Kate specializes in working with school districts covering the full spectrum of education law including personnel matters, collective bargaining, public works contracts, and student affairs. She can be reached at 310.981.2056 or kim@lcwlegal.com.

Amy Brandt is an Associate in our San Francisco office where she works closely with school district management and leaders on various issues such as employee investigations, employee discipline, civil rights issues, student discipline, contract interpretation, contract drafting, and community partnerships. She can be reached at 415.512.3045 or abrandt@lcwlegal.com.

Meredith Karasch joins our Los Angeles office where she provides counsel and advice to educational institutions in all aspects of labor, employment, and education law. Meredith is an experienced litigator and trial lawyer and has defended clients before administrative bodies and state and federal courts. She can be reached at 310.981.2059 or mkarasch@lcwlegal.com.

Monica M. Espejo joins our Sacramento office where she provides representation and counsel to clients in matters pertaining to labor & employment law as well as business, construction, and facilities. She can be reached at 916-584-7000 or mespejo@lcwlegal.com.

Private Education Matters is available via e-mail. If you would like to be added to the e-mail distribution list, please visit www.lcwlegal.com/news.

Please note: by adding your name to the e-mail distribution list, you will no longer receive a hard copy of ***Private Education Matters***.

If you have any questions, contact **Sara Gardner** at sgardner@lcwlegal.com.

Firm Activities

Consortium Training

Sept. 10 **"How to Conduct Student Misconduct Investigations"**
CAIS | Webinar | Stephanie J. Lowe

Sept. 19 **"Courageous Authenticity"**
ACSI Consortium | Webinar | Elizabeth Tom Arce

Oct. 15 **"Independent Contractors"**
Golden State Independent Schools Consortium | ebinar | Stephanie J. Lowe

Oct. 22 **"Employee Evaluations and Separations"**
CAIS | Webinar | Grace Chan

Oct. 24 **"Hot Topics in Wage & Hour"**
ACSI Consortium | Webinar | Lisa S. Charbonneau

Customized Training

Our customized training programs can help improve workplace performance and reduce exposure to liability and costly litigation. For more information, please visit www.lcwlegal.com/events-and-training/training.

Sept. 3 **"HR Law 101"**
Chandler School | Pasadena | Pilar Morin

Sept. 16 **"Mandated Reporting"**
Polytechnic School | Pasadena | Michael Blacher

Speaking Engagements

Sept. 26 **"Things Every Nonprofit Needs to Know About Contracts"**
Arthur J. Gallagher & Co. Risk Avoidance for Nonprofits in 2019 | Petaluma | Casey Williams

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