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.

October 2019

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LCW NEWS

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STUDENTS

ADMISSIONS POLICIES

Harvard's Race Conscious Admissions Policy Is Constitutional.

In 2014, the Students for Fair Admissions, Inc. (SFFA) filed a lawsuit against Harvard College (Harvard), alleging that Harvard's race conscious admissions policies violated Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. Nearly four years later, four of SFFA's claims proceeded to trial including its allegations that Harvard violated Title VI by (1) using racial balancing; (2) failing to use race as merely a "plus" factor in admissions decisions; (3) using race where there are available and workable race-neutral alternatives; and (4) intentionally discriminating against Asian Americans.

However, in a decision issued on September 30, 2019 in Harvard's favor, Massachusetts federal Judge Allison D. Burroughs's found that while Harvard's admissions program "is not perfect," "the Court [would] not dismantle a very fine admissions program that passes constitutional muster, solely because it could do better." Among Judge Burroughs's recommendations to improve Harvard's admissions program include "conducting implicit bias trainings for admissions officers, maintaining clear guidelines on the use of race in the admissions process, … and monitoring and making admissions officers aware of any significant race-related statistical disparities in the rating process."

Here are some of the highlights from Judge Burroughs's decision, which she based on a thorough examination of Harvard's admissions program and an analysis of U.S. Supreme Court precedent on race-conscious admissions:

Harvard Does Not Engage in Racial Balancing

The U.S. Supreme Court has held that racial balancing in admissions is unconstitutional. Admissions policies such as imposing a fixed race quota to ensure that a schools' student body contains a certain percentage of students from particular racial or ethnic groups or setting aside a certain

number of spots for students from particular racial or ethnic groups constitutes racial balancing.

Judge Burroughs found that Harvard does not engage in racial balancing. Harvard does not set a fixed race or ethnic quota, does not set aside a certain number of spots for students from particular racial or ethnic groups, and does not define student body diversity as having a set percentage of students from particular racial or ethnic groups. Instead, Harvard treats each applicant as an individual and completes a holistic evaluation of the applicant as a whole.

One of SFFA's arguments was that Harvard sent recruitment letters (i.e. invitations to apply) to applicants based on criteria that disfavored potential Asian American applicants, but the evidence showed that the recruitment letters did not affect the ultimate admissions decisions for the applicants who chose to apply. SFFA also argued that the use of "one-pagers," which contained projected statistics on applications and admission rates by gender, geography, academic interest, legacy status, financial aid circumstances, citizenship status, racial or ethnic group, recruited athlete status, and financially disadvantaged applicants as compared to the prior year, by Harvard's admission program was an example of racial balancing. Judge Burroughs disagreed and found instead that the "one-pager" was merely a way for Harvard to track whether it would be able to achieve its goals for minority enrollment for the upcoming year.

Harvard Uses Race as a Non-Mechanical Plus Factor

U.S. Supreme Court precedent requires a truly individualized assessment of each applicant, but permits the use of race as a "plus" factor or a "tip" in making admissions decisions. Admissions policies that consider race in a rigid or mechanical manner such as policies with racial or ethnic quota systems or policies that assign a specified value or amount of points to applicants in certain racial or ethnic groups are in conflict with constitutional requirements.

Judge Burroughs found that the "estimated average magnitude of the tips and the impact of the race-related tips or plus factors on the racial composition of Harvard's classes [] are comparable to the size and effect of tips that have been upheld by the Supreme Court. While the actual magnitude of the racial or ethnic "tip" for a Harvard applicant was not precisely measurable because of Harvard's holistic evaluation of each applicant, Judge Burroughs concluded that the effect of African American or Hispanic identity on an applicant's probability of admission was significantly lower than the effect of being a recruited athlete and was comparable to the effect for being a legacy or being the child or a faculty member.

Importantly, Judge Burroughs noted that the students admitted to Harvard among all racial and ethnic groups had a roughly similar level of academic potential and were all prepared for the academic rigors of the college.

Harvard Has No Available Adequate, Workable, and Sufficient Fully Race-Neutral Alternatives

SFFA argued that Harvard failed to consider and adopt race-neutral alternatives to achieve diversity when it created its race-conscious admissions program. However, Judge Burroughs determined that Harvard demonstrated the available race-neutral alternatives such as eliminating early action, eliminating "tips" for recruited athletes, legacies, applicants on the dean's or director's interest list, and children of faculty and staff (ALDC), increasing outreach, offering more

financial aid, or admitting more transfer students would "have no meaningful impact on racial diversity."

Additionally, the race-neutral alternatives presented by SFFA had "some elements of impermissible racial balancing." Judge Burroughs also found that the available race-neutral alternative of adopting a more significant "tip" for economically disadvantaged students would result in less diversity and would compromise Harvard's reputation for academic excellence.

Judge Burroughs ultimately concluded that Harvard had "demonstrated that no workable and available race-neutral alternatives would allow it to achieve a diverse student body while still maintaining its standard of academic excellence".

Harvard Does Not Intentionally Discriminate Against Asian Americans

SFFA argued that Harvard intentionally discriminated against Asian Americans. The crux of SFFA's argument was that Harvard should be admitting Asian Americans at a higher rate because non-ALDC Asian American applicants were stronger than non-ALDC white applicants were. However, the Court noted that Asian American applicants are accepted at the same rate as other applicants and make up 20% of Harvard's admitted classes. There was no evidence that anyone in Harvard's admissions program disparaged Asian Americans, no evidence that Asian American applicants were discriminated against overtly, and no evidence that any white applicant was admitted instead of a better-qualified Asian American applicant considering Harvard's holistic evaluation of applicants.

Ultimately, Judge Burroughs found that Harvard's admission program was "designed and implemented in a manner that allows every application to be reviewed in a holistic manner consistent with the guidance set forth by the Supreme Court." In Harvard's admissions program, "applicants are afforded a holistic, individualized review, diversity is understood to embrace a broad range of qualities and experiences, and race is used as a plus factor, in a flexible, non-mechanical way."

Students for Fair Admissions, Inc. v. President and Fellows of Harvard College (Harvard Corporation) (D. Mass., Sept. 30, 2019, No. 14-CV-14176-ADB) 2019 WL 4786210.

Admissions Office Discriminated Against Applicants With Mental Health And Disability Related Issues.

Faced with allegations that New College of Florida (New College) discriminated against applicants with mental health and disability related issues, the Office of the Inspector General for Florida's public university system conducted an investigation, which it recently concluded.

The Inspector General found that New College's Dean of Enrollment Management (Dean), instructed designated admissions staff members (Readers) to "red-flag" application files for applicants that otherwise met the overall standard score for admittance if the application file contained disclosures of mental health and/or disability related issues. Often, the mental health or disability related disclosures were located in an applicant's personal essay or in the additional information sections of an applicant's Common Application.

The red-flagged application files were then routed to the Admissions Review Committee, where committee members conducted a second read, discussed the applications, and made a

final admissions decision. The Admissions Review Committee only received application files that either just missed the overall standard score for admittance or application files that met or exceeded the overall standard score for admittance but contained disclosures of mental health and disability related issues.

The Inspector General's interviews with Readers and committee members revealed that the Dean instituted the "red-flag" instructions to screen for students who could be successful at New College without reliance on New College's underfunded and overloaded Counseling and Wellness Center.

The Inspector General considered the Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act of 1973 (Section 504), Florida law, and New College regulations in analyzing the "red-flag" policy. The Inspector General found that the "red-flag" policy discriminated against applicants with disabilities because it treated those applicants differently than applicants who did not disclose or did not have disabilities. The Inspector General also found that the "red-flag" policy could have the effect of restricting access to New College for persons with disabilities and could conflict with the ADA and Section 504.

The Inspector General's investigation report is available here: https://news.ncf.edu/wp-content/uploads/2019/08/2019-072-InvestigativeReport_Final.pdf

NOTE:

Title III of the ADA (Title III) prohibits discrimination in public accommodations against any individual with a physical or mental disability that substantially limits one or more of the individual's major life activities. Generally, private schools and private postsecondary institutions that are not religious entities or are not operated by religious entities are places of public accommodation within the meaning of Title III. Accordingly, private educational institutions cannot refuse to accept students with certain disabilities or medical conditions and must conduct an individualized, case-by-case analysis into whether it can reasonably accommodate a student with a disability. Further, Section 504 prohibits private schools and private postsecondary institutions that receive federal financial assistance from denying admission to an applicant based solely on the existence of a disability.

VICARIOUS LIABILITY

School Board Found Vicariously Liable For Student's Assault Of Fellow Student.

A Louisiana state court of appeal recently affirmed a lower court's finding that a public school board was vicariously liable for one student's recurrent sexual assaults of another student while on a school bus. The facts were as follows:

The parents of first grade student, B.P., began noticing changes in his behavior, including violent and disruptive conduct, shortly after the beginning of the school year. B.P., who was six years old, also began begging his parents to drive him to and pick him up from school. He then began having "accidents" at the end of the school day so his parents would have to pick him up. B.P.'s parents took him to a counselor to address the behavioral changes and a primary care physician to address the "accidents," but B.P. continued to have issues.

Thereafter, B.P. told his mother that another student, K.M., had asked B.P. to show him his genitals and had placed his mouth on B.P.'s genitals. B.P.'s mother spoke with the assistant principal, who interviewed B.P., K.M., and another male student, six-year old G.L., who was also involved in the incidents. K.M. was a ten-year-old male student at B.P.'s school with a history of engaging in sexually inappropriate behavior at school. This conduct included incidents such as bathroom humor, crawling

under bathroom stalls while other students occupied them, and unfastening his pants on the playground to try to "have sex" with another student.

The assistant principal determined that K.M. initiated all of the incidents, but did not notify law enforcement. However, B.P.'s mother did inform law enforcement, who conducted an investigation. The evidence demonstrated that K.M., B.P., and G.L. engaged in sexual conduct on the school bus including showing each other their genitals and placing their mouths on each other's genitals.

B.P. continued to experience some behavioral and anger issues related to the incident that necessitated counseling, medication, and a transfer to a different school. B.P.'s parents sued the school board for damages related to the incidents arguing that the school board failed in its obligation to supervise K.M. properly and its obligation to protect B.P.

The trial and appellate courts agreed with B.P.'s parents and found the school board vicariously liable for the acts of K.M, which the school board knew or should have known were foreseeable based on K.M.'s previous conduct. The courts found that the school board had a duty to provide reasonable supervision of students that is appropriate for their ages and protect against the "risk that K.M. would behave in an entirely inappropriate manner." The school board failed in its duty to protect B.P. from K.M.'s actions.

Pike v. Calcasieu Parish School Board (La. Ct. App. 2019) 272 So.3d 943, reh'g denied (June 26, 2019).

NOTE:

This case was decided in a Louisiana Court of Appeal based on the court's interpretation of Louisiana law. It is not binding on California courts. However, California private and independent schools have a similar duty to exercise reasonable care towards their students and take steps to protect students from reasonably foreseeable harm. Additionally, the California Child Abuse and Neglect Reporting Act (CANRA) requires employees who work with minors, or have direct contact with them, to report known or reasonably suspected child abuse or neglect immediately or as soon as practicably possible and to disclose such incidents to the child's parents or legal guardians in a timely manner. These reporting obligations apply even when sexual abuse occurs between minors.

STUDENT ORGANIZATIONS

Policy Banning Single-Sex Student Organizations May Violate Title IX.

In May 2016, Harvard College (Harvard) announced a new policy that would take effect prospectively for students matriculating in fall 2017, which made any student who became a member of a single-gender social organization ineligible to hold leadership positions in recognized student organizations or athletic teams and ineligible to receive Harvard – administered fellowships (the Policy). The Policy applies equally to men who join all-male organizations and women who join all-female organizations. Harvard stated that the Policy is "necessary to promote its values of inclusivity and non-discrimination."

Fraternities, sororities, and members of single-sex organizations (Plaintiffs) brought an action against Harvard, alleging that the Policy violated Title IX, which prohibits discrimination based on sex in any educational program or activity receiving federal funds. Specifically, the Plaintiffs alleged that the Policy harmed students who joined unrecognized, single-sex organizations by forcing them to "forego valuable leadership and post-graduate opportunities which can impact future professional opportunities." The Plaintiffs also alleged that the Policy negatively affected them by making it more difficult for them to recruit and maintain members and to raise money. For example, Plaintiffs Kappa

Alpha Theta Fraternity, Inc. and Kappa Kappa Gamma Fraternity alleged that they closed their Harvard Chapters because of the Policy.

The Court held that the Plaintiffs had stated a plausible claim that the Policy violated Title IX by discriminating based on sex. The "Policy, as applied to any particular individual, draws distinctions based on the sex of the individual." Further, the Policy requires Harvard to analyze the sex of the student and the sex of the students in the social organization with which the student seeks to associate. "In doing so, Harvard discriminates both on the basis of the sex of the students in the social organization and the sex of the student who associates with that organization."

The Court found the Plaintiffs alleged facts sufficient to state a plausible claim under a theory of gender stereotyping in that the "Policy was motivated, in part, by the view that single-sex, social organizations promote sexual assault and bigotry on campus and produce individuals who fail to act as modern men and women should." This suggests that Harvard's ideal of the modern man or woman is informed by stereotypes about how men and women should act. "Withholding benefits from students who fail to conform to such stereotypes violates Title IX." Accordingly, the Court permitted the Title IX claim to proceed to trial.

Kappa Alpha Theta Fraternity, Inc. v. Harvard University (D. Mass., Aug. 9, 2019, No. CV 18-12485-NMG) 2019 WL 3767517.

CHILD SEXUAL ASSAULT

Governor Signs AB 218 Into Law, Which Significantly Extends The Statute Of Limitations Period For Claims Of Childhood Sexual Assault.

On October 13, 2019, the Governor signed into law AB 218, which significantly extends the statute of limitations period for individuals to file civil lawsuits for childhood sexual abuse against persons and entities. Similar legislation was passed by the California Assembly and Senate last year (AB 3120), and in 2013 (SB 131), but the legislation was vetoed by Governor Brown.

Under existing law, the statute of limitations period for filing a civil lawsuit seeking recovery for damages suffered as the result of childhood sexual abuse against a person or entity is the later of: (1) 8 years after the individual reaches the age of majority or; (2) within 3 years of the date the individual discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by sexual abuse.

AB 218 expands the definition of childhood sexual abuse and instead refers to this as childhood sexual assault. AB 218 also increases the time limit for an individual to bring a civil lawsuit initiating an action to recover damages suffered as a result of childhood sexual assault to the later of: (1) 22 years after reaching the age of majority; or (2) 5 years of the date the individual discovers or reasonably should have discovered that the psychological injury or illness occurring after the age of majority was caused by the childhood sexual assault.

The law further provides that in an action for liability against a person or entity for intentionally or negligently causing the childhood sexual assault that resulted in the injury, the action may not be commenced after the plaintiff's 40th birthday "unless the person or entity knew or had reason to know, or was otherwise on notice, of any misconduct that creates a risk of childhood sexual assault by an

employee, volunteer, representative, or agent, or the person or entity failed to take reasonable steps or to implement reasonable safeguards to avoid acts of childhood sexual assault." The law states that "providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard."

AB 218 allows courts to compel a defendant to pay up to three times the amount of actual damages to a plaintiff if an attempted cover up of the childhood sexual assault was involved, unless prohibited by another law. A "cover up" is defined as "a concerted effort to hide evidence relating to childhood sexual assault."

AB 218 provides a three-year lookback window for previously expired claims. AB 218 states that for any claims for damages in which the statute of limitations would otherwise be barred as of January 1, 2020, the time limit is now extended, and may be commenced within the later of: (1) three (3) years from January 1, 2020; or (2) the statute of limitations period established by this new law.

(AB 218 amends Sections 340.1 and 1002 of the Code of Civil Procedure, and amends Section 905 of the Government Code, relating to childhood sexual assault.)

For more information on the impacts of AB 218 on private education, see the LCW Special Bulletin, which was published on October 17, 2019, and is available here: https://www.lcwlegal.com/news/governor-signs-ab-218-into-law-which-significantly-extends-the-statute-of-limitations-period-for-claims-of-childhood-sexual-assault.

EMPLOYEES

LABOR RELATIONS

NLRB Releases Advice Memorandum On Employer Social Media Rules.

In an advice memorandum released on August 15, 2019, the Office of the General Counsel for the National Labor Relations Board (NLRB) analyzed whether certain social media rules maintained by CVS Health were unlawfully overbroad under the NLRB Board's (Board) decision in *Boeing Co.*

In *Boeing Co.*, the Board held that a facially neutral rule that, under a reasonable interpretation, might potentially interfere with National Labor Relations Act (NLRA) rights should be evaluated utilizing two factors: (1) the nature and extent of the potential impact on NLRA rights, and (2) the employer's legitimate justifications associated with the rule. The Board evaluates the rule using the two factors while balancing the business justifications for the rule against the rule's invasion of the employees' NLRA rights while focusing on the employees' perspective.

After balancing, the Board classifies the employment rule within one of three categories. Category 1 includes rules that are lawful to maintain because either the rule does not prohibit or interfere with NLRA-protected rights, or the business justifications outweigh the potential adverse impact on those rights. Category 2 includes rules that warrant individualized scrutiny of the balance between the rights and the business justifications. Category 3 includes rules that are unlawful to maintain because they would limit or prohibit protected conduct and the business justifications do not outweigh the limitation of those rights.

Some of the conclusions discussed in the Advice Memorandum include the following:

1. A rule requiring employees who choose to speak on social media about their employer to make clear in their communications that they are not speaking on behalf of the employer or as an official representative of the employer fell in Category 1 and was lawful. The employer had a significant interest in making sure that only authorized employees spoke for the employer and the rule had no real impact on NLRA rights.

2. A rule requiring employees to obtain advanced approval before using the employer's name or logo as part of a social media account name or URL fell in Category 1 and was lawful. The employer's interest in protecting its intellectual property and making sure employees do not make statements or incur obligations that could be interpreted as coming from the employer outweighed any effect on NLRA rights.

3. A rule requiring employees who choose to mention their employer or discuss their work on social media to identify themselves by their real name fell in Category 2 and was unlawful. Requiring employees to self-identify when discussing terms and conditions of employment imposes a significant burden on NLRA rights that is not outweighed by the employer's legitimate interest in making sure that only authorized employees speak for the employer.

4. A rule requiring employees not to "post anything discriminatory, harassing, bullying, threatening, defamatory, or unlawful" on social media was a lawful rule. The General Counsel opined that the rule was a civility rule designed to require harmonious relationships in the workplace, which *Boeing Co.* specifically allowed.

5. A rule prohibiting sharing employee information on social media was unlawful because employees could reasonably interpret the rule as preventing employees from engaging in concerted activities protected by the NLRA.

6. A rule prohibiting sharing confidential and personal information about coworkers and customers on social media was lawful.

The advice memorandum is available here: https://www.nlrb.gov/news-publications/nlrb-memoranda/advice-memos/recently-released-advice-memos

NLRB Advice Memorandum CVS Health Case 31-CA-210099.

NOTE:

The NLRA grants private sector workers the right to organize and be represented by labor unions and gives significant protections to employees whether or not they work in a unionized environment. We recommend seeking legal counsel with specific questions regarding social media policies.

ARBITRATION

Governor Signs AB 51, Prohibiting Mandatory Arbitration Agreements For FEHA And Labor Code Claims.

On October 13, 2019, Governor Newson signed Assembly Bill 51 into law, which prohibits employers, starting January 1, 2020, from requiring any applicant or employee to submit any claims under the California Labor Code or the California Fair Employment and Housing Act (FEHA) to mandatory arbitration, as a condition of employment, continued employment, or the receipt of any employment-related benefit. AB 51 adds the new Section 432.6 to the Labor Code.

For more information, see the LCW Special Bulletin, which was published on September 30, 2019 as is available here: https://www.lcwlegal.com/news/governor-signs-ab-51-prohibiting-mandatory-arbitration-agreements-for-feha-and-labor-code-claims

WAGE & HOUR

U.S. Department Of Labor Releases Long-Awaited FLSA Salary Basis Update.

On September 24, 2019, the U.S. Department of Labor (DOL) announced a final rule modifying the weekly salary and annual compensation threshold levels for white collar exemptions to FLSA overtime requirements. The final rule will become effective on January 1, 2020. The new FLSA regulations will not have any impact on the overtime-exempt status of teachers at private schools, and/or other overtime exempt positions such as administrators, deans, and managers. This is because pursuant to California law, private schools already need to pay twice the state's minimum wage to satisfy the requirements for overtime-exempt status, which is greater than the new FLSA salary threshold. Thus, while private schools in other states will benefit from the new DOL regulations, private schools in California will not see any benefit or impact from those regulations.

For more information, see the LCW Special Bulletin, which was published on September 30, 2019 as is available here: https://www.lcwlegal.com/news/the-long-awaited-flsa-salary-basis-update-is-finally-here-everything-california-private-schools-need-to-know.

ADMINISTRATION/ GOVERNANCE

COMMON INTEREST PRIVILEGE

School Advisory Board's Letter To Outside Leadership Protected By Common Interest Privilege.

Alan Hicks was the principal of a Catholic elementary and middle school. Damian Richard was the husband of one of the school's teachers, the parent to children who attended the school, and a member of the school's advisory board. As a member of the school's advisory board, Richard received complaints about Hicks's poor leadership and mismanagement of the school, inappropriate comments to and about students and female staff, and support of curriculum to which parents disagreed.

The advisory board investigated the complaints and submitted a letter of its findings to individuals in leadership positions within the Diocese. The letter alleged that Hicks made inappropriate comments about the physical appearance of students and female staff such as telling a female middle school student that she was too fat to be a model, stating a male elementary student looked like a "pervert," and commenting on a female teacher's breast size. The letter also provided examples of what the advisory board believed demonstrated Hicks' poor judgment such as Hicks instructing a group of middle school boys on the topic of masturbation without parental approval and allowing a motorcycle dealership to hold a film shoot on campus with bikini-clad models while schoolchildren were present for summer camp.

The letter further stated that Hicks lowered the school's academic standards by deemphasizing math and science instruction, which led to declining math scores. The letter also alleged

that Hicks was not properly addressing incidents of bullying between students or incidents of teachers punishing students inappropriately. The letter further contained allegations that Hicks failed to take appropriate action to protect children from child abuse by priests at his former school.

After the Diocese completed an investigation into the allegations, it removed Hicks from his position as principal. Hicks sued Richard for defamation and intentional infliction of emotional distress, alleging that the claims in the letter Richard and the other members of the advisory board sent to the Diocese were falsely stated. Hicks alleged that Richard was motivated to send the letter due to employment issues that Richard's wife was having with the school.

Richard filed an anti-SLAPP motion to strike Hicks's lawsuit, which Hicks opposed. An anti-SLAPP motion is a motion to strike a lawsuit brought primarily to chill the valid exercise of the constitutional rights of petition or free speech. The anti-SLAPP statute applies to private communications concerning issues of public interest.

To prevail on an anti-SLAPP motion, Richard had to show that he engaged in the conduct alleged in Hicks's complaint in furtherance of his right of free speech under the United States or California Constitution in connection with a public issue. If Richard successfully made that showing, the burden shifted to Hicks to demonstrate that he had a probability of prevailing on his claims.

The Court concluded that Richard successfully met his burden to show that the letter was protected activity as an act in furtherance of his right to free speech in connection with a public issue and the matters in the letter concerned issues of public interest such as "providing school children with an appropriate education and protecting them and school employees from abuse, bullying, and harassment." Further, the concerned parents that comprised the advisory board sent the letter to outside authorities in the Diocese to compel them to investigate the allegations and take appropriate action as necessary.

Richard argued that Hicks could not show that he had a probability of prevailing on his claims because the letter was protected by the common interest privilege. The common interest privilege applies to a communication made ***without malice*** to a person interested in the communication's subject matter by another person also interested in the communication's subject matter. Proving malice requires a showing that the person making the communication was motivated by hatred or ill will or lacked reasonable grounds for believing the truth of the content of the communications. The common interest privilege provides a complete defense to most torts, such as Hicks's claims for defamation and intentional infliction of emotional distress.

Citing *Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, the Court noted that "[o]rdinarily, the common interest of the members of a church in church matters is sufficient to give rise to a qualified privilege to communications between members on subjects relating to the church's interest." The Court found that this reasoning also applied to communications between "parents of parochial school children and church authorities overseeing the school on subjects relating to the school," such as the statements in the advisory board's letter to the leadership individuals in the Diocese.

Hicks argued that the common interest privilege did not apply to the letter because the letter was motivated by Richard's ill will towards Hicks because of the employment issues that Richard's wife was having with the school. However, the Court concluded that Hicks failed to produce evidence that Richard acted with hatred or ill will towards Hicks or lacked reasonable grounds for believing the truth of the

content of the letter. There was no evidence that Richard was hostile towards Hicks or threatened retaliation. Similarly, the letter was written in a businesslike manner and all allegations were supported by a chart that indicated the source of the allegation, when the allegation occurred, the witnesses to the allegation, how to contact those witnesses, and, when appropriate, website links for news articles describing the conduct.

Accordingly, the Appellate Court directed the trial court to grant Richard's Anti-SLAPP motion and strike Hicks's complaint.

Hicks v. Richard (Cal. Ct. App. 2019) 252 Cal.Rptr.3d 578.

EQUITABLE SERVICES UNDER ESSA

U.S. Department Of Education Issues Updates On Equitable Services For Private School Students Under ESSA.

On October 10, 2019, the U.S. Department of Education released updated guidance clarifying the obligations of local education agencies (LEAs) to provide equitable educational services to eligible private school students, their teachers, and their families under Title I, Part A of the Elementary and Secondary Education Act of 1965 (ESEA), as amended by the Every Student Succeeds Act (ESSA). Importantly, the guidance clarifies the permissibility of inter-district pooling of Title I funds to provide equitable services and the permissibility of religious organizations serving as third-party contractors to provide equitable services. The guidance is available here: https://www2.ed.gov/about/inits/ed/non-public-education/files/equitable-services-guidance-100419.pdf.

SCHOOL SAFETY GUIDE

U.S. Department Of Education Releases School Safety District Guide.

On September 25, 2019, the U.S. Department of Education in partnership with the U.S. Departments of Justice, Homeland Security, and Health and Human Services released a school safety guide titled The Role of Districts in Developing High-Quality School Emergency Operations Plans (Emergency Guide) to assist school districts in preparing emergency operations plans. While geared towards public school districts, the Emergency Guide provides valuable information that can assist private and independent schools prepare emergency plans.

The Emergency Guide addresses topics such as: forming and operating a school planning team; identifying, evaluating, and addressing threats, hazards, and vulnerabilities; developing courses of action for emergency situations; creating exercise and training programs to practice the plan; working with community partners and law enforcement; and reviewing, revising, and maintaining the plan.

The Emergency Guide is available here: https://rems.ed.gov/docs/District_Guide_508C.pdf.

LCW BEST PRACTICES TIMELINE

Each month, LCW presents 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.

NOVEMBER THROUGH JANUARY

- ☐ Issue Performance Evaluations
  - We recommend that performance evaluations be conducted on at least an annual basis, and that they be completed before the decision to renew the teacher for the following school year is made. Schools that do not conduct regular performance reviews have difficulty and often incur legal liability terminating problem employees - especially when there is a lack of notice regarding problems.
    - Consider using Performance Improvement Plans but remember it is important to do the necessary follow up.
- ☐ Compensation Committee Review of Compensation before issuing employee contracts
  - The Board is obligated to ensure fair and reasonable compensation of the Head of School and others. The Board should appoint a compensation committee that will be tasked with providing for independent review and approval of compensation. The committee must be composed of individuals without a conflict of interest.
- ☐ Review employee health and other benefit packages, and determine whether any changes in benefit plans are needed.
- ☐ If lease ends at the end of the school year, review lease terms in order to negotiate new terms or have adequate time to locate new space for upcoming school year.
- ☐ Review tuition rates and fees relative to economic and demographic data for the school's target market to determine whether to change the rates.
- ☐ Review student financial aid policies.
- ☐ Review and revise Enrollment/Tuition Agreements.
- ☐ File all tax forms in a timely manner:
  - Forms 990, 990EZ
    - Form 990:
      - Tax-exempt organizations must file a Form 990 if the annual gross receipts are more than $200,000, or the total assets are more than $500,000.
    - Form 990-EZ
      - Tax-exempt organizations whose annual gross receipts are less than $200,000, and total assets are less than $500,000 can file either form 990 or 990-EZ.
    - A school below college level affiliated with a church or operated by a religious order is exempt from filing Form 990 series forms. (See IRS Regulations section 1.6033-2(g)(1)(vii)).
    - The 990 series forms are due every year by the 15th day of the 5th month after the close of your tax year. For example, if your tax year ended on December 31, the e-Postcard is due May 15 of the following year. If the due date falls on a Saturday, Sunday, or legal holiday, the due date is the next business day.
    - The school should make its IRS form 990 available in the business office for inspection.
  - Other required Tax Forms common to business who have employees include Forms 940, 941, 1099, W-2, 5500

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 K-12 school called an LCW attorney to ask whether private schools must provide annual training regarding the identification of child abuse and neglect and the responsibilities of mandated reporters.

RESPONSE: The LCW attorney explained that private schools are not required to provide the annual training that employees of public schools and employees of licensed childcare facilities must receive under Education Code section 44691.

However, private schools must inform employees who qualify as mandated reporters of their mandated reporter obligations including when they must report, how to report, and how to respond if there is an emergency or the alleged abuser appears at the school. Private schools must also provide mandated reporters with copies of certain sections of the California Child Abuse and Neglect Reporting Act (CANRA), including Penal Code sections 11165.7, 11166, and 11167. Finally, private schools must have each mandated reporter sign a form provided by the school in which the individuals acknowledge that they understand their responsibilities as mandated reporters before commencing employment and as a prerequisite of that employment.

While actual training is not legally required for private school employees in K-12 schools, the LCW attorney explained that LCW strongly encourages private schools to provide training to mandated reporters so they understand their responsibilities and understand how to fulfill those responsibilities.

MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Consortium Training

Nov. 5 **"Pregnancy, Maternity and Parental Leaves"**
CAIS | Webinar | Julie L. Strom

Nov. 12 **"Leaves, Leaves and More Leaves"**
Golden State Independent Schools Consortium | Webinar | Stacy Velloff

Nov. 13 **"Managing Student and Employee Internet/Social Media Use"**
Builders of Jewish Education Consortium | Webinar | Brett A. Overby & Stephanie J. Lowe

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.

Nov. 1 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment and Mandated Reporting"**
Curtis School | Los Angeles | Michael Blacher

Seminars/Webinars

Nov. 20 **"2020 Legislative Update for Private Education"**
Liebert Cassidy Whitmore | Webinar | Stacy Velloff

Dec. 3 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

Dec. 4 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | San Francisco | Erin Kunze

Dec. 5 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

Dec. 5 **"AB 51: Arbitration Agreements in Employment"**
Liebert Cassidy Whitmore | Webinar | Linda K. Adler

Dec. 9 **"Harassment Prevention: Train the Trainer Refresher"**
Liebert Cassidy Whitmore | San Francisco | Erin Kunze

Dec. 10 **"Harassment Prevention: Train the Trainer Refresher"**
Liebert Cassidy Whitmore | Fresno | Shelline Bennett

Dec. 12 **"Harassment Prevention: Train the Trainer Refresher"**
Liebert Cassidy Whitmore | San Diego | Judith S. Islas

Dec. 17 **"Harassment Prevention: Train the Trainer"**
Liebert Cassidy Whitmore | Los Angeles | T. Oliver Yee

Dec. 19 **"Harassment Prevention: Train the Trainer Refresher"**
Liebert Cassidy Whitmore | Los Angeles | T. Oliver Yee

NOTICE: We will be publishing Legislative Round Ups next month and will return with our Private Education Matters newsletter in December.

Firm Publications

To view these articles and the most recent attorney-authored articles, please visit: **www.lcwlegal.com/news.**

J. Scott Tiedemann and Alison Kalinski authored an article for the League of California Cities' magizine Western City. The article is about the #MeToo movement and some of the major legislative changes affecting employees in the workplace as well as best practices to protect your agency and create a harassment-free workplace.

Litigation Partner Jesse Maddox wrote an article for the Santa Monica Observer titled, "Use It or Lose It: SCOTUS Decision Clarifies that Employers Must Assert an Administrative Exhaustion Defense Early During Litigation."

Sacramento Partner Gage Dungy authored the Daily Journal Corporation article, "A Recap of New Employer Requirements as Cleanup Bill Passes," discussing recent legislation passed in California amending SB 1343 harassment training requirements on September 23, 2019

Partner Peter Brown and Associate Lisa Charbonneau wrote an article that appeared in the *Daily Journal* titled "DOL may update overtime rate regulations for the first time in 50 years" on September 13, 2019.

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.

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

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