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PRIVATE EDUCATION MATTERS

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

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LCW NEWS

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STUDENTS

STUDENT ORGANIZATIONS

University's Decision To Suspend Recognition Of Fraternity For 6 Years For Conduct Violations Upheld By California Court.

The University of Southern California (USC) maintains a University Student Code of Conduct (Code), which prohibits hazing and serving alcohol to anyone under 21 years of age among other things. USC's Office of Student Judicial Affairs and Community Standards (SJACS) investigates alleged violations of the Code.

In January 2018, SJACS began investigating a complaint received from a former student and former member of the Alpha Nu Association of Theta Xi (Theta Xi) fraternity. The complaint alleged that in fall 2016 and fall 2017, Theta Xi hazed new members and served alcohol to underage students at recruitment events. The SJACS's investigation found that in fall 2016 and fall 2017, "Theta Xi's active members expected and at times required underage pledges to participate in drinking games designed to induce severe inebriation, subjected pledges to requirements likely to compromise their dignity and deprive them of sleep, and encouraged pledges to fight other members as a spectator sport." The SJACS concluded that Theta Xi violated nine sections of the Code, including the section prohibiting hazing and the section prohibiting serving alcohol to anyone under 21. As a result, SJACS imposed a six-year suspension of USC's recognition of the local Theta Xi chapter as a sanction.

Theta Xi appealed the six-year suspension to USC's Student Behavior Appeals Panel (SBAP). Theta Xi acknowledged that pledges participated in fight nights and that active members invited pledges to drink alcohol, but characterized the events SJACS asserted violated the Code as voluntary, innocuous, and not warranting of sanctions. The SBAP upheld the suspension, explaining that Theta Xi had violated the Codes' prohibition on hazing and underage drinking, Theta Xi had failed to evaluate its culture or take responsibility for its members' actions, and the suspension would give Theta Xi the opportunity to change its culture and leadership. USC's Vice President of Student Affairs approved SBAP's decision, which made the suspension final.

Theta Xi filed a petition for a writ of administrative mandamus, which is a legal action that asks a court to review and reverse a final decision or order reached by an administrative body, such as USC's SJACS, against USC. Theta Xi alleged that its six-year suspension should be set aside because USC's administrative procedure was unfair and SJACS's factual findings were not supported by the evidence. The trial court rejected both allegations and denied the petition. Theta Xi appealed, and the court of appeal granted review.

On appeal, Theta Xi contended that USC acted in excess of its jurisdiction by suspending its recognition of Theta Xi's USC chapter based on events that preceded the complaint by more than one year; (2) SJACS's factual findings were

unsupported by the evidence; (3) USC's decision was unsupported by SJACS's factual findings; and (4) USC's administrative procedure was unfair.

The court first found that USC acted within its jurisdiction. The relevant SJACS policy stated that "Generally, a matter will be reviewed only when a report has been filed with [SJACS] within one year of discovery of the alleged violation." While the report at issue was filed 14 months after the alleged violation, the court noted that the policy provides a general guideline of one year, and does not preclude SJACS from investigating reports received after one year. The court also noted that the circumstances surrounding the report, the severity of the allegations, and the likelihood that the practices for initiating new members would reoccur, warranted an exception to SJAC's general one-year guideline. The court found little possibility that the delay obstructed the investigation or prejudiced Theta Xi's defense.

The court next found that USC was within its authority to suspend recognition of Theta Xi's local chapter based on violations of USC's private rules and that Theta Xi did not have a vested right to remain recognized by USC, as a private university, in the face of alleged violations of USC rules. The court further found that substantial evidence, including in the form of text messages and witness statements, supported SJACS's findings that Theta XI violated the prohibition against serving alcohol at rush events, and the prohibition against hazing. Specifically, there was substantial evidence that underage pledges drank alcohol during Theta Xi events, including participating in drinking games, and that pledges participated in sleep deprivation activities and other incidents constituting hazing.

The court also found that SJAC's factual findings adequately supported USC's decision to suspend its recognition of Theta Xi's local chapter for six years, and that USC adequately explained the basis for its decision. The court explained that Theta Xi minimized and failed to take responsibility for its members' serious violations of USC rules and the Code and continued to deny the existence of evidence of peer pressure among its members that impairs rational decision making with regard to safety and well-being. The court emphasized USC's hope and expectation that Theta Xi use the six-year suspension as a time to evaluate its culture, take responsibility for its members' actions, and make changes to its culture and leadership.

Finally, the court held that Theta Xi received a fair administrative hearing. Specifically, Theta Xi received adequate notice of the alleged violations of the Code and the factual basis for those alleged violations. Theta Xi received opportunity to review all of the evidence that SJACS collected during the investigation and to produce all of the relevant information they chose to produce. The court found a complete lack of bias, the appearance of bias, or a high probability of bias in the process.

The court also determined that Theta Xi was not entitled to the heightened procedural safeguards that the court found were required in *Doe v. Allee* (2019) 30 Cal.App.5th 1036 (*i.e.,* (1) an opportunity to cross-examine witnesses; (2) separation of investigative and adjudicatory functions; and (3) an administrative appellate procedure.) The court explained that *Doe v. Allee* involved the rights of individual students directly with regard to allegations of sexual assault that was dependent upon the credibility of the two individuals involved and held the potential for severe disciplinary action. In contrast, the investigation and subsequent proceeding at issue here involved the rights of the fraternity, a private association, to participate as an on-campus organization. Further, there were multiple witnesses involved, SJACS had corroborating evidence, and two individuals jointly shared the investigative and adjudicatory functions.

Therefore, the court upheld the trial court's denial of Theta Xi's petition.

Alpha Nu Association of Theta Xi v. University of Southern California (2021) 62 Cal.App.5th 383, as modified (Mar. 23, 2021).

NOTE:

Student organizations are entitled to a fair process before private colleges, universities, and K-12 schools may impose sanctions upon them for policy violations. Nevertheless, this case indicates that student organizations may not be entitled to the same heightened procedural safeguards in the investigation and hearing process to which individual students facing the possibility of disciplinary sanctions directly are entitled.

REASONABLE ACCOMMODATIONS

Pharmacy Student Claims University Failed To Reasonably Accommodate His Multiple Disabilities.

In 2017, Mathew Horodner applied and was accepted to Midwestern University's College of Pharmacy (Midwestern) in Glendale. Horodner contacted Midwestern's Office of Student Services before the start of his first semester and requested accommodations for his disabilities, including extra time to complete exams and quizzes and an isolated room in which to work without distraction. Midwestern granted Horodner's requests.

Horodner earned As and Bs his first semester, but later failed Pharmaceutics II. Horodner contended that during the lab component of Pharmaceutics II, the instructors often rushed through material and Horodner had difficulty seeing and hearing the instructors. Thereafter, Horodner began experiencing conditions that made it difficult for him to concentrate, including migraines. Horodner shared this with Midwestern, but did not request additional accommodations.

Thereafter, Horodner's iPad, which he used for his coursework, was stolen. Horodner reported the theft and his "emotional turmoil" to Midwestern and requested an extension of "a few days" to take one of his final exams. Midwestern denied the request.

Horodner failed the final exam, and requested an extension to take the comprehensive course re-examination. Midwestern denied the request. Horodner requested a medical withdrawal under Midwestern's Medical Leave policy. Midwestern also denied this request. Thereafter, Horodner withdrew from Midwestern.

Horodner filed a claim against Midwestern alleging failure to accommodate his disabilities and discrimination against him in violation of Title III of the Americans with Disabilities Act (ADA) and the Rehabilitation Act. Midwestern filed a motion to dismiss, which the court assessed.

The ADA prohibits discrimination based on disability with regard to goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation. The ADA generally requires places of public accommodation to make reasonable modifications in policies, practices, or procedures, when necessary for individuals with disabilities, unless making such modifications would fundamentally alter the nature of the goods, services, facilities, privileges, advantages, or accommodations offered by the public accommodation. Private colleges and universities are public accommodations under the ADA.

The Rehabilitation Act prohibits any program or activity receiving federal financial assistance from excluding, denying benefits to, or discriminating against a qualified individual with a disability solely because of her or his disability. With regard to "a college, university, or other postsecondary institution," the Rehabilitation Act defines a qualified individual with a disability as one who "meets the academic and technical standards requisite to admission or participation in the recipient's education program or activity."

To establish a violation of the ADA or the Rehabilitation Act, Horodner had to allege (1) he is disabled; (2) he is qualified to remain a student at Midwestern; (3) he was dismissed solely because of his disability; and (4) for the Rehabilitation Act claim, that Midwestern receives federal financial assistance, or for the ADA claim, that Midwestern is a public entity. Midwestern conceded that Horodner alleged facts sufficient to meet elements (1) and (4), and only disputed that Horodner provided sufficient facts to meet elements (2) and (3).

The court first rejected Midwestern's argument that Horodner's requested accommodations were unrelated to his disabilities, which Horodner explained presented continued challenges with listening comprehension and auditory processing. The court further disagreed with Midwestern's contention that it had already sufficiently accommodated Horodner's disabilities because he was performing well in his first semester courses. The court explained that what constitutes a reasonable accommodation is not constant and may change in different situations, even situations with relatively slight differences. The court continued that when Horodner transitioned from traditional classwork to lab-based coursework, it was the kind of change in circumstances that may merit additional or different accommodations.

The court next addressed Midwestern's argument that Horodner's requested additional accommodations were unreasonable because they would fundamentally alter the nature of its program, by giving Hororner a significant unfair advantage over his peers, substantially altering the approved curriculum, and sacrificing the integrity of the program. The court determined that it could not reach a conclusion as to this argument on a motion to dismiss.

The court then addressed Midwestern's contention that Horodner failed to show that he is a "qualified individual" under the ADA and Rehabilitation Act. The court explained that the facts demonstrated that Horodner performed well during his first semester, earning As and Bs. Horodner's diminished performance when he began lab coursework indicated that additional accommodations may have been necessary and not that Horodner was necessarily not a "qualified individual." The court determined that dismissal of Horodner's claim was not appropriate on this ground.

Ultimately, the court determined that Horodner had provided enough facts to withstand Midwestern's motion to dismiss and his claims under the ADA and the Rehabilitation Act would proceed.

Horodner v. Midwestern University (D. Ariz., Dec. 23, 2020, No. CV-20-01800-PHX-JAT) 2020 WL 7643198.

NOTE:

With regard to reasonable accommodations, the ADA and its regulations envision an interactive process with participation by the school, college or university, the student, and, if the student is a minor, the student's parents. The interactive process involves the school working with a disabled student and his or her parents or medical providers to identify reasonable accommodations that provide equitable opportunity to participate in the school's educational programs. The interactive process is ongoing, and if an implemented accommodation is not effective, the parties should revisit the process and explore whether additional or different reasonable accommodations may exist.

EMPLOYEES

EQUAL PAY

Professor Who Was Paid Several Thousand Dollars Less Per Year Than Her Male Colleagues May Proceed With Equal Pay Act Claim.

Jennifer Freyd is a Professor of Psychology at the University of Oregon (University) and a leader in the field of the psychology of trauma. At the University, Freyd is the principal investigator at the Freyd Dynamics Laboratory where she conducts empirical studies related to the effects of trauma and is responsible for running the laboratory and supervising both doctoral candidates and undergraduate students. Freyd is the editor of the Journal of Trauma & Dissociation and has served on the editorial board for many other journals. In addition, Freyd has served in a variety of roles at the University, and consults for other entities.

The University adjusts tenured faculty salaries using two different mechanisms. First, a merit raise is based on job performance and the contributions made in the areas of research, teaching, and service. Second, a retention raise is based on whether the faculty member is being recruited by another academic institution. To determine whether to grant a retention raise, the University considers many factors, including: the faculty member's productivity and contribution to the University; if the faculty member's departure is imminent in the absence of a raise; any previous retention increases; implications for internal equity within the unit; and the strategic goals of the University. While Freyd received initial inquiries from other universities, she never had a retention negotiation nor received a retention raise.

In 2014, as part of an unrelated public records request, Freyd unintentionally received salary information for the Psychology Department faculty. That information showed she was making between $14,000 and $42,000 less per year than four male colleagues with comparable rank and tenure. Each of those four men had received retention raises or had at least one retention negotiation. Freyd conducted her own regression analysis on the data and noticed a marked disparity in pay between the genders. Freyd and two other female psychology professors then conducted a second regression analysis, which presented similar results.

In spring 2016, the Psychology Department conducted a mandatory annual self-study. The self-study revealed an annual average difference of $25,000 in salary between male and female professors. The study concluded this discrepancy appeared to have emerged mostly as a result of retention raises. Indeed, of the 20 retention negotiations from 2006 through 2016, only four affected female faculty and only one of the successful retention cases involved a woman.

Several months later, the Department Head conducted his own regression analysis and sent his results to the Dean and Associate Dean of the College of Arts and Sciences. The Department Head recommended the University address its "most glaring" inequity case – Freyd. The Dean and Associate Dean concluded Freyd's compensation "was not unfairly, discriminatorily, or improperly set." Accordingly, she was denied a raise.

Freyd sued the University, the Dean, and the Assistant Dean alleging, among other claims, violations of the U.S. Equal Pay Act, Title VII of the Civil Rights Act, and Title IX. The district court found in favor of the University because Freyd could not show that she and her comparators performed substantially equal or comparable work. The district court also concluded that Freyd did not have sufficient evidence of disparate impact or discriminatory intent, and that the University showed its salary practices were job related and consistent with business necessity. Freyd appealed.

The U.S. Equal Pay Act prohibits wage discrimination based on sex. To demonstrate a violation of the Act, a female employee must show that a male employee is paid different wages for equal work in jobs that are "substantially equal."

On appeal, the Ninth Circuit concluded the district court was wrong to rule in the University's favor on Freyd's Equal Pay Act claim. Specifically, the court concluded that a reasonable jury could find that Freyd and her comparators perform a "common core of tasks" and do substantially equal work. For example, Freyd and three of the comparators are all full professors in the Psychology Department who conduct research, teach classes, advise students, serve actively on University committees, and participate in relevant associations and organizations. While their duties may not have been

identical, the court reasoned that their responsibilities were not so unique that they could not be compared for purposes of the Equal Pay Act.

The Ninth Circuit also found that the district court erred in dismissing Freyd's Title VII disparate impact claim. To establish disparate impact under Title VII, an employee must show that a seemingly neutral employment practice has a significantly discriminatory impact on a protected group. The employee also must establish that the challenged practice is (1) not job related; or (2) is inconsistent with business necessity. Here, the court noted that Freyd challenged the practice of awarding retention raises without also increasing the salaries of other professors of comparable merit and seniority. Further, because of numerous factors related to gender, female faculty may be less willing to move and thus less likely to entertain an overture from another institution. It also noted that Freyd had significant evidence that the University's practices caused a significant discriminatory impact on female faculty. Freyd's evidence included the statistical analysis of an economist who concluded female professors earned $15,000 less than male professors, as well as the University's own self-study data. Finally, the court noted that Freyd may be able to establish the University's retention raise practice was not a business necessity because she offered an alternative practice that may be equally effective in accomplishing the University's goal of retaining talented faculty.

However, the Ninth Circuit determined that the district court was right to rule in the University's favor with respect to Freyd's Title VII and Title IX disparate treatment claims. Regarding Freyd's Title VII disparate treatment claim, the court noted that because equity raises and retention raises are not comparable, it could not say that Freyd's comparators were treated "more favorably" than she was. Similarly, Freyd's Title IX disparate treatment claim failed because Freyd presented no evidence of intentional discrimination.

The Ninth Circuit remanded the case back to the district court for further proceedings on Freyd's Equal Pay Act and disparate treatment claims.

Freyd v. University of Oregon (9th Cir. 2021) 990 F.3d 1211.

NOTE:

This case involved the US Equal Pay Act, which prohibits wage discrimination only based on sex. California's Equal Pay Act (Labor Code §§ 432.3 & 1197.5) prohibits wage discrimination on the basis of sex, race, and ethnicity. California's law provides employees greater protection than the US Equal Pay law because it prevents an employer from relying on an employee's salary history to justify a wage disparity. We recommend regularly conducting equal pay audits to ensure that all employees are paid similarly for substantially equal or similar work.

DISCRIMINATION

School Did Not Violate Title VII By Prohibiting Football Coach From Praying At The 50 Yard Line At The End Of Each Game.

Bremerton School District (District) employed Joseph Kennedy as a football coach at Bremerton High School (School) from 2008 to 2015. Kennedy is a practicing Christian, and his religious beliefs required him to give thanks through prayer at the end of each game by kneeling at the 50-yard line. Because Kennedy's religious beliefs occurred on the field where the game was played immediately after the game, spectators including students, parents, and community members would observe Kennedy's religious conduct. While Kennedy initially prayed alone, a group of School players soon asked if they could join him. Over time, the group grew to include the majority of the team. Kennedy's religious practice also evolved and he began giving short speeches at midfield after games while participants kneeled around him.

The District first learned that Kennedy was praying on the field in September 2015, when an opposing team's coach told the School's principal that Kennedy had asked his team to join him in prayer on the field. After learning of the incident, the Athletic Director spoke with Kennedy and expressed disapproval of the religious practice. In response, Kennedy posted on Facebook "I think I just might have been fired for praying." Subsequently, the District was flooded with thousands of emails, letters, and telephone calls from around the country regarding Kennedy's prayer.

The District's discovery of Kennedy's 50-yard line prayers prompted an inquiry into whether Kennedy was complying with its Religious-Related Activities and Practices policy. That policy provided that school staff should not encourage nor discourage a student from engaging in non-disruptive oral or silent prayer or other devotional activity. The District's investigation revealed that the coaching staff received little training regarding the District's policy, so the superintendent sent Kennedy a letter advising him that he could continue to give inspirational talks, but they must remain entirely secular in nature. The letter also noted that student religious activity needed to be entirely student-initiated; Kennedy's actions could not be perceived as an endorsement of that activity; and that while Kennedy was free to engage in religious activity, it could not interfere with his job responsibilities and must be physically separate from any student activity.

While Kennedy temporarily prayed after everyone else had left the stadium, he alleged he soon returned to his practice of praying immediately after games. However, the District received no further reports of Kennedy praying on the field, and District officials believed he was complying with its directive.

On October 14, 2015, Kennedy wrote a letter to the District through his lawyer announcing he would resume praying on the 50-yard line immediately after the conclusion of the October 16, 2015 football game. Kennedy's intention to pray on the field was widely publicized through Kennedy and his representatives, and the District arranged to secure the field from public access. Following the game, Kennedy prayed as he had indicated he would do, with a large gathering of coaches and players around him. Members of the public also jumped the fence to join him, resulting in a stampede. On October 23, 2015, the District sent Kennedy a letter explaining that his conduct at the October 16th game violated the District's policy. The District offered Kennedy a private location to pray after games or suggested that he pray after the stadium had emptied. Kennedy responded that the only acceptable outcome would be for the District to permit Kennedy to pray on the 50-yard line immediately after games. Kennedy continued his behavior in violation of the District's directives. The District placed him on paid administrative leave on October 26, 2015. During this time, District employees felt repercussions due to the attention Kennedy gave the issue, and many were concerned for their safety. Kennedy did not apply for a coaching position for the following season, but he initiated a lawsuit against the District asserting, among other things, that his Title VII rights were violated.

After significant litigation and numerous appeals, the district court eventually entered judgment in the District's favor. Kennedy appealed.

On appeal, the court analyzed Kennedy's claims pursuant to Title VII, including failure to rehire, disparate treatment, failure to accommodate, and retaliation. To establish a Title VII failure to rehire claim, Kennedy had to show (1) he was a member of a protected group; (2) he was adequately performing his job; and (3) he suffered an adverse employment action. The Ninth Circuit noted that Kennedy established that he is a member of a protected group and he suffered an adverse employment action. The Ninth Circuit, however, concluded that Kennedy could not establish that he was adequately performing his job. Kennedy refused to follow District policy and conducted numerous media appearances that led to spectators rushing the field after the October 16th game in disregard of the District's responsibility to student safety.

Similarly, to establish a claim of disparate treatment under Title VII, Kennedy had to show (1) he is a member of a protected class; (2) he was qualified for his position; (3) he experienced an adverse employment action; and (4) similarly situated individuals outside his protected class were treated more favorably. Kennedy's disparate treatment claim failed because he could not show the District treated him differently than similarly situated employees. This was because Kennedy's conduct was clearly dissimilar to that of other assistant coaches. To establish a claim of failure to accommodate under Title VII, Kennedy had to show (1) he had a bona fide religious belief, the practice of which conflicts with an employment duty; (2) he informed his employer of the belief and conflict; and (3) the employer discharged, threatened, or otherwise subjected him to an adverse employment action because of his inability to fulfill the job requirement. The Ninth Circuit noted that the evidence showed that the District repeatedly made good faith efforts to reasonably accommodate Kennedy's religious practices. Kennedy indicated that the only acceptable outcome was for him to pray on the 50-yard line immediately following the game. The District met its burden in establishing that accommodating Kennedy's religious practices on the 50- yard line would cause an undue hardship.

Lastly, with respect to his retaliation claim, Kennedy had to show (1) he engaged in statutorily protected expression; (2) he suffered an adverse employment action; and (3) there is a causal link between the protected expression and the adverse action. The Ninth Circuit determined that Kennedy was unable to make this showing. The District had a legitimate reason for placing Kennedy on administrative leave because he made it clear he would continue to pray on the 50-year line immediately following games.

For these reasons, the Ninth Circuit concluded the district court properly entered judgment in the District's favor on Kennedy's Title VII claims.

Kennedy v. Bremerton School District (9th Cir. 2021) 991 F.3d 1004.

NOTE:

This case demonstrates how contentious religious accommodation issues can become. It is essential that private schools, colleges, and universities clearly document the discussions, interactive processes, and accommodations suggested and/or reached when working to address religious accommodation requests.

WAGE & HOUR

Labor Code Does Not Permit Employers To Round Time Punches For Employee Meal Periods.

AMN Services, LLC, (AMN) is a healthcare services and staffing company that recruits nurses for temporary contract assignments. AMN maintains a policy that provides an uninterrupted 30-minute meal period beginning no later than the end of the fifth hour of work during which employees were "relieved of all job duties" and were "free to leave the office site." AMN uses a timekeeping software called Team Time, which rounds all employee time entries to the nearest 10-minute increment.

For example, if an employee arrived at work at 6:59 am and clocked out for lunch at 12:04 pm, Team Time would round the entries to 7:00 am and 12:00 pm respectively. Further, if that same employee (who clocked out for lunch at 12:04 pm), then clocked back in at 12:25 pm, Team Time would round the employee's entries to 12:00 pm and 12:30 pm, respectively. As a result, Team Time would show that this employee went to lunch after being at work for 5 hours, when the employee was actually at work for 5 hours and 5 minutes. Team Time would further show that the employee received a 30-minute meal break, when the employee only actually received a 21-minute meal break.

Under the California Labor Code, employers must generally provide employees with one 30-minute meal period that begins no later than the end of the fifth hour of work and another 30-minute meal period that begins no later than the end of the tenth hour of work. The California Labor Code further requires that if an employer does not provide an employee with a compliant meal period, then the employer must pay the employee one additional hour of pay at the employee's regular rate of compensation for each workday that the meal period is not provided (Premium Wages).

AMN employee, Kennedy Donahue (Donahue), brought a class action lawsuit against AMN, alleging that the way Team Time rounded employees' time entries resulted in AMN denying its employees compliant meal periods and failing to pay employees the Premium Wages they were owed under the Labor Code when the employees did not receive a compliant meal period.

The trial court found in AMN's favor and determined that the rounding practice for meal periods was proper and fairly compensated employees over time. The trial court further noted that there was insufficient evidence that supervisors at AMN prevented employees from taking compliant meal periods. Donahue appealed.

On appeal, the Court of Appeal affirmed the trial court's decision and generally agreed with the trial court's rationale. The Court of Appeal additionally noted that the plain text of the Labor Code and associated wage order does not prohibit rounding for meal periods. Donahue appealed, and the California Supreme Court granted review to address two questions of law relating to her meal period claim. First, whether an employer may properly round time punches for meal periods. Second, whether time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations.

The California Supreme Court first held that employers cannot round time punches by adjusting the hours that an employee has actually worked to the nearest preset time increment in the meal period context. The Court explained that rounding time punches for meal periods is inconsistent with the purposes of the Labor Code and associated wage order, which sets precise time requirements for meal periods (*i.e.*, each meal period must be "not less than 30 minutes," and no employee shall work "more than five hours per day" or "more than 10 hours per day" without being provided with a meal period).

The Court further noted that the Premium Wages requirement for missed meal periods confirms that precision is required and rounding is inconsistent with the intent behind the meal period requirements. Collectively, the meal period provisions are designed to prevent even minor infringements on meal period requirements, and rounding is incompatible with that objective. The Court opined that meal periods serve an important role in an employees' health, safety, and well-being and shortening or delaying meal periods by even a few minutes may have negative impacts on employees.

The Court next held that time records showing noncompliant meal periods raise a rebuttable presumption of meal period violations. An employer may rebut the presumption by providing evidence that they provided employees bona fide relief from duty or proper compensation. Employers have a duty to ensure that they provide each employee with bona fide relief from duty and to accurately reflect this in the employer's time records. Otherwise, the employer must pay the employee premium wages for any noncompliant meal period. Nevertheless, an employer will generally not be liable if it provides employees with the opportunity to take a compliant meal period and the employee chooses to take a short or delayed meal period or no meal period at all. Further, employers are under no obligation to police meal periods to make sure no work is performed.

The Court held that AMN improperly used rounded time punches to track meal periods, which did not account for short or delayed meal periods, and

determined that the trial court and the parties should address the issue of whether AMN produced sufficient evidence to rebut the presumption of meal period violations. Accordingly, the Court reversed the judgment and remanded the matter to the trial court to conduct further proceedings consistent with its opinion.

Donohue v. AMN Services, LLC (2021) 11 Cal.5th 58.

Note:

This was a case of first impression for the California Supreme Court, which means that the Court had never before analyzed or reached a decision on this topic. In light of this case, any employers who have a practice of rounding employees' time punches for meal periods should cease doing so and should revise those policies. Employers should also note that the statute of limitations for violations under the Labor Code is three years.

BUSINESS & FACILITIES

SUMMER CAMPS

CDC And CDPH Release Guidance For Summer Camps.

On May 13, 2021, the California Department of Public Health (CDPH) released Guidance for Overnight Camps, which remains in effect through September 2021 unless otherwise indicated by the CDPH. The CDPH indicated that sleepaway camps in counties in the Red, Orange, and Yellow Tiers may open with modifications effective June 1, 2021. Notably, the Guidance for Overnight Camps contains different requirements for overnight camps whose staff and attendees are fully vaccinated than for overnight camps that have any staff or attendees who are not fully vaccinated. For overnight camps that have any unvaccinated staff or attendees, the CDPH directs that camps should follow guidance from the Centers for Disease Control and Prevention (CDC) for overnight camps, and makes recommendations regarding for testing, health screening, cohorting, quarantining and isolation, physical distancing, and face coverings.

The CPDH also updated its guidance for day camps and other supervised youth activities on May 18, 2021. The guidance specifically addresses indoor and outdoor daytime activities involving youth. The CDPH guidance requires day camps and other supervised youth activities to follow certain portions of the COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in California, 2020-2021 School Year, including the Layers of Safety, Confirmed or Suspected COVID-19 Case Response, Closures, and Testing sections. Additionally, day camps and supervised youth activities should post the 2021 COVID-19 Guidance Checklist for Day Camps and Other Supervised Youth Activities Settings in their facility. Day camps and supervised youth activities in counties in the Purple Tier must follow the CDPH Guidance Related to Cohorts - UPDATED March 22, 2021 unless they are already operating at the time their county moves into the Purple Tier.

The CDC also issued guidance for summer camps recently titled Guidance for Operating Youth and Summer Camps during COVID-19, which includes a Readiness and Planning Tool to Prevent the Spread of COVID-19 Among Campers and Staff. The CDC guidance applies to all types of youth day and overnight camps, and includes guidance on physical distancing, face coverings, symptom screening, healthy hygiene measures, preparing for COVID-19 exposures, cleaning and disinfecting, food service, modification to sports and camp activities, guidance specific to overnight camps, and much more.

The CDC guidance should supplement, rather than supplant the CDPH guidance, with regard to day camps, supervised youth activities, and overnight or sleepaway camps. The CDPH guidance coupled with the CDC guidance may be particularly helpful for those planning camps this summer.

BREACH OF CONTRACT

Court Permits Some Claims Related To Transition To Remote Learning Brought By University Students.

Quinnipiac University (University) is a private university located in Connecticut. During the spring 2020 semester, the University transitioned to online learning in response to the COVID-19 pandemic. The University provided housing and dining credits for the spring 2020 semester, but did not provide tuition or fee refunds.

Thereafter, two students who were enrolled in the University at the time of the transition and two parents who each had a child who was enrolled in the University at the time of the transition, filed a lawsuit against the University for breach of contract, breach of implied contract, unjust enrichment, and conversion. The students and parents alleged that the online classes that the University provided were not equivalent to the in-person, on-campus education that they enrolled in and paid for and the students were deprived of hands-on educational opportunities and experiences.

The students and parents also alleged that it was difficult to access and communicate with professors during online learning and many professors were unprepared to deliver an effective educational experience using online learning technologies. The students and parents cited to language in University educational, promotional, and registration materials highlighting the on-campus experience, which they asserted led to their reasonable expectation when registering for classes for the spring 2020 semester that those classes would be provided on-campus. They also allege that the language in University educational, promotional, and registration materials contractually obligated the University to deliver in-person instruction. Interestingly, the students and parents noted that before the transition, the University charged between $515 and $575 per credit for undergraduate online degree programs, and between $1,517.50 and $2,023.33 per credit for on-campus courses, which they say demonstrate the significant difference between the values of online and in-person education. The University filed a motion to dismiss.

The court first analyzed whether the parents had standing to bring their claims against the University. To have standing, the parents were required to show (1) an injury in fact; (2) a sufficient causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. Alternatively, the parents could establish standing by showing (1) the existence of a valid contract; (2) the parents' performance or excuse for nonperformance; (3) the University's breach of contract; and (4) resulting damages.

The court held that the parents did not have standing under either method. The court noted that the fact that a parent pays tuition on behalf of his or her adult child does not confer standing on that parent to sue for breach of an obligation that the college or university owed the child. The court further noted that the parents did not have a contract with the University; the contract at issue was between the adult students and the University; and the parents' financial loss derives from a private arrangement between the parents and their children. If, however, the parents had a valid contract with the University and had alleged an injury arising from a breach of that contract, the court explained that the parents may have been able to assert a contractual standing to bring the suit. Therefore, the court dismissed the parents' breach of contract, breach of implied contract, and unjust enrichment claims.

The court next analyzed whether the students' claims were barred by the educational malpractice doctrine. The educational malpractice doctrine bars the courts interference in any complaint that essentially alleges that an educational institution breached its agreement by failing to provide an effective education and would require the court to evaluate the course of instruction and method of teaching that has been adopted by that educational institution. The court expressed its belief that the students' claim could be resolved without implicating the educational malpractice doctrine. The court noted that if it later becomes clear that the court cannot resolve the students' claims without evaluating whether a course conducted remotely was less valuable than one conducted in person, and if so, by how much, the court will reassess whether this matter is barred by the educational malpractice doctrine.

The court then analyzed the students' contract related claims. The court allowed the students' breach of contract claim to proceed. The court determined that the students produced sufficient evidence to allow for the inference that the University's course and registration materials contained a specific promise to provide in-person instruction. The court also allowed the students' unjust enrichment claim to proceed because the students produced sufficient evidence that the University may have accrued excess funds by transitioning to remote learning. Finally, the court dismissed the students' conversion claim, finding that the students' had relinquished the tuition funds and other fees to the University and those amounts no longer belonged to the students.

Metzner v. Quinnipiac University (D. Conn., Mar. 25, 2021, No. 3:20-CV-00784 (KAD)) 2021 WL 1146922.

NOTE:

In December 2020, a California court addressed a similar issue in Steven J. Lindner v. Occidental College. For more information, see the LCW article titled, Student's Suit For Partial Tuition Refund Due To Transition To Virtual Instruction Fails.

DID YOU KNOW...?

Each month, LCW provides quick legal tidbits with valuable information on various topics important to private K-12 schools, colleges, and universities:

- **K-12 Field Trips Are Allowed With Modifications.** On April 23, 2021, the California Department of Public Health (CDPH) updated its K-12 Schools Reopening Framework and Guidance Q&A to permit field trips for K-12 schools provided that the K-12 schools follow the current CDPH COVID-19 and Reopening In-Person Instruction Framework & Public Health Guidance for K-12 Schools in

California, 2020-2021 School Year safety mitigation approaches (*e.g.*, stable groups, distancing, and bus ventilation and spacing recommendations).

- **Beware Of Phishing Scams Targeting .Edu Email Addresses.** On April 2, 2021, the Internal Revenue Service (IRS) issued a warning about an "ongoing IRS-impersonation scam that appears to target educational institutions, including students and staff who have '.edu' email addresses." The IRS noted that the "suspect emails display the IRS logo and use various subject lines, such as 'Tax Refund Payment' or 'Recalculation of your tax refund payment'." The suspect email asks the recipient to click on a link and submit a form to claim their refund. The IRS explained that it "doesn't initiate contact with taxpayers by email, text messages or social media channels to request personal or financial information." The IRS encourages persons who believe they received one of these phishing emails to report it to the IRS. See IRS Tax Tip 2021-42 for more information on the scam and how to make a report.

- **Connectivity Funding For Schools.** On May 10, 2021, the Federal Communications Commission (FCC) announced the launch of a new $1.7 billion program, funded by the American Rescue Plan Act (ARPA) to "enable schools and libraries to purchase laptop and tablet computers, Wi-Fi hotspots, and broadband connectivity for students, school staff, and library patrons in need during the COVID-19 pandemic." By early July, the FCC will be opening a 45-day application window for schools to apply for funding for approved devices and services. LCW is monitoring the application process and will report once the 45-day application window opens.

- **COBRA Notice Deadline Approaching.** By May 31, 2021, employers must provide notice of the Consolidated Omnibus Budget Reconciliation Act (COBRA) subsidy provided under the American Rescue Plan Act of 2021 (ARPA) and certain other COBRA rights under ARPA to Assistance Eligible Individuals (AEIs) who first became eligible to elect COBRA before April 1, 2021, and have not reached the maximum period for their COBRA coverage and/or did not elect COBRA coverage when it was first offered. These AEIs then have 60 days after the notice is provided to elect COBRA coverage. The DOL has issued model notices and related guidance for this purpose—see the LCW Bulletin Department of Labor Releases Model COBRA Notices for the American Rescue Plan Act's Employer-Provided COBRA Subsidy . Employers are also required to provide AEIs who experience a COBRA-qualifying event between April 1 and September 30, 2021 with a general ARPA COBRA notice to inform them of their rights for COBRA coverage and the COBRA subsidy. For most employers, the third-party COBRA administrator will prepare and distribute the required notice. Employers, however, must identify which individuals are AEIs.

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.

MARCH- END OF APRIL

□ The budget for next school year should be approved by the Board.

□ Issue contracts to existing staff for the next school year.

□ Issue letters to current staff who the School is not inviting to come back the following year.

□ Assess vacancies in relation to enrollment.

□ Post job announcements and conduct recruiting.

- Resumes should be carefully screened to ensure that applicant has necessary core skills and criminal, background and credit checks should be done, along with multiple reference checks.

□ Summer Program:

- Advise staff of summer program and opportunity to apply to work in the summer, and that hiring decisions will be made after final enrollment numbers are determined in the end of May.

- Distribute information on summer program to parents and set deadline for registration by end of April.

- Enter into Facilities Use Agreement for Summer Program, if not operating summer program

□ Transportation Agreements:

- Assess transportation needs for summer/next year

- Update/renew relevant contracts

MAY

□ Complete hiring of new employees for next school year.
□ Complete hiring for any summer programs.

□ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g., janitorial services if applicable).

- Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:

  ▪ School and classroom janitorial.

  ▪ School site administrative.

  ▪ School site grounds and landscape maintenance.

  ▪ Pupil transportation.

  ▪ School site food-related.

- A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:

  ▪ That there is a physical barrier at the worksite to limit contact with pupils.

  ▪ That there is continual supervision and monitoring of all employees of that entity, which may include either:

  - Surveillance of employees of the entity by School personnel; or

  - Supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code Section 33192). (See Education Code Section 33193).

□ If conducting end of school year fundraising through raffles:

- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code Section 320.5.

- In order to comply with Penal Code Section 320.5, raffles must meet all of the following requirements

  ▪ Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.

  ▪ Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older

  ▪ At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:

- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.

  ▪ Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.

  ▪ Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.

  - Ex: If a business donates to the school for the auction items from its inventory that it sells directly, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

JUNE

Conduct exit interviews:

Conduct at the end of the school year for employees who are leaving (whether voluntarily or not). These interviews can be used to improve the organization and can help defend a lawsuit if a disgruntled employee decides to sue.

MID-JUNE THROUGH END OF JULY

□ Update Employee and Student/Parent Handbooks:

- The handbooks should be reviewed at the end of the school year to confirm that the policies are legally compliant, consistent with the employment agreements and enrollment agreements that were executed, and current with the latest best practice recommendations. The school should also add any new policies that it would like to implement upon reflection from the prior school year and to prepare for the upcoming school year.

□ Conduct review of the school's Bylaws (does not necessarily need to be done every year).

□ Review of insurance benefit plans:

- Review the school's insurance plans, in order to determine whether to change insurance carriers. Insurance plans expire throughout the year depending on your plan. We recommend starting the review process at least three months prior to the expiration of your insurance plan.
    - Workers Compensation Insurance plans generally expire on July 1.
    - Other insurance policies generally expire between July 1 and December 1.

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 an LCW attorney and explained that the school has students who identify with a gender other than their birth gender and use names other than their birth name. These students' and their families have asked that the students' school records reflect the gender with which the students' identify and their preferred name. The administrator asked whether the school may grant their request.

RESPONSE: The LCW attorney explained that any official school records, such as transcripts, must contain the student's legal name and gender, as appropriate. For students who have legally changed their name and gender through the court system and obtained a *Decree Changing Name and Order Recognizing Change of Gender and for Issuance of New Birth Certificate* (Decree Changing Name and Gender) from the court, the school can make changes to official school records to reflect the Decree Changing Name and Gender. For students who have not completed that process through the court system and obtained a Decree Changing Name and Gender, the school needs to continue using the students' legal information on any official school records.

However, generally, California schools should use students' preferred names and the gender with which they identify wherever possible. Accordingly, unofficial or informal school records, such as school rosters, school email addresses, class lists, school assignments, etc. may contain the student's preferred name and gender identification. The LCW attorney explained to the administrator that, when responding to these families, the school can explain that the school must use the student's legal information on official documents, but will make changes to unofficial documents to reflect the student's preferred name and the gender with which they identify.

Firm Publications

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

LCW Partner Mark Meyerhoff recently took part in a KNX 1070 Newsradio segment with reporter Craig Fiegener in which Mark discussed a new law that will require public safety applicants for employment in California to be screened for implicit or explicit biases. This law will go into effect in January 2022 and puts pressure on public safety departments to determine how best to conduct such screening. Mark also discussed the issue of public safety departments limiting the private speech of police personnel that is so prevalent amidst high-profile social and political issues.

LCW Managing Partner and general counsel for the Los Angeles County Police Chiefs Association J. Scott Tiedemann was quoted in the April 28 *San Francisco Chronicle* article "State Supreme Court needed to resolve conflict in police disciplinary procedure." The piece by Courts Reporter Bob Egelko detailed a case involving Oakland police in which a state appeals court ruled that officers being questioned by a disciplinary agency have no right to see the agency's confidential reports until the questioning is over. This ruling conflicts with another appeals court ruling and the dispute must now be resolved by the state Supreme Court. Scott said the new ruling "will have an immediate and positive impact on how law enforcement agencies conduct effective misconduct investigations."

LCW Associate Alex Volberding was quoted in the May 11 article "Inland Regional Center in San Bernardino requiring employees to get coronavirus vaccine" published in the *Daily Bulletin.* The piece discusses the COVID-19 vaccination mandate the San Bernardino Center gave its employees, with the exception of those with a medical condition or conflicting religious belief. Alex highlighted the law in respect to this mandate.

LCW Partner Shelline Bennett provided viewers details on vaccination mandates for employees returnig to workplaces during a Fox 26 (Fresno) Eye on Employment segment. During the segment, Shelline also covered reasonable accommodation as well as healthy and safe workplaces.

LCW Partner Peter Brown and Associate Alex Volberding authored the article "Guidance on COVID-19 and the Fair Labor Standards Act" in the May 12 issue of the *Daily Journal.* The piece explores the Department of Labor's updated guidance on the FLSA and its application to common COVID-19-related circumstances faced by employers during the pandemic.

Managing Partner J. Scott Tiedemann and Associate Allen Acosta recently penned the article "Pressure to Terminate" for the May/June 2021 issue of *Sheriff & Deputy Magazine.* The piece provides sheriffs critical tips on protecting the integrity of internal investigations—particularly during periods when the public is demanding that a deputy be terminated and criminally charged for their on-the-job actions. Further, the article shares how to provide transparency to the public while maintaining due process for the officer involved.

LCW WEBINAR

Five Things California Private Schools Need to Know About: Performance Evaluation & Documentation

REGISTER TODAY!

THURSDAY, OCTOBER 14, 2021 | 12:00 PM

Schools have had to adjust to many changes over the past year. One constant aspect of school management, however, is evaluating employees and documenting performance concerns in a timely fashion. We will cover the most important reasons why schools should engage in regular evaluations, and how they should use documentation to help employees improve, reward their good work, and protect and support the school's employment decisions. We will also discuss reasons why schools choose to avoid timely performance documentation and how doing so can harm a school's interests. Whether students are learning in-person or online, evaluation and performance documentation of employees is a critical piece of employment management. Don't miss this webinar!

PRESENTED BY:
Julie Strom

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June 23 **"Managing the Marginal Employee"**
Verbum Dei High School | Webinar | Julie L. Strom

July 29 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations - Part 1"**
California Association of Independent School | Webinar | Shelline Bennett

July 30 **"Training Academy for Workplace Investigators: Core Principles, Skills & Practices for Conducting Effective Workplace Investigations - Part 2"**
California Association of Independent School | Webinar | Shelline Bennett

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