

FINAL CUMULATIVE UPDATE FOR CALIFORNIA SCHOOL LAW, THIRD EDITION
January 2018

This final cumulative update for the third edition of *California School Law* encompasses significant legal developments since the book was published in September 2013. The update may be downloaded and printed without charge. Each development is linked to the relevant chapter and page in *California School Law*. Thus, readers will find it easy to scroll through this document to find developments of particular interest. Another approach is simply to print the update and keep it together with the book.

Because many updates involve legislative changes to the California Education Code, readers who want to consult the statutes themselves should go to the California Department of Education website at www.cde.ca.gov and click on Laws and Regulations under the “Resources” heading.

Note that as with the book, the information herein is not intended to take the place of expert advice and assistance from a lawyer. It is posted on the book’s website with the understanding that neither the publisher nor the authors are rendering legal services. If specific legal advice or assistance is required, the services of a competent professional should be sought.

CHAPTER 1
LAW AND THE CALIFORNIA SCHOOLING SYSTEM

Page 8: Application of the Americans with Disabilities Act to Person in Wheelchair at Football Games.

As noted in Table 1-1 on this page, the federal Americans with Disabilities Act (ADA) accords persons with disabilities meaningful access to programs and facilities at most businesses in the country. A good illustration of how ADA applies to persons outside the employment context involves a federal lawsuit brought by a disabled person in a wheelchair who claimed that the failure of the Lindsay Unified School District in the Visalia-Porterville metropolitan area to modify its bleachers to accommodate wheelchairs denied him meaningful access to view football games. The high school bleachers at this small school district were constructed in 1971 and are not wheelchair accessible. But the district allows spectators in wheelchairs at several locations on the sides of the field including the end zone at the east side near a concession stand. The plaintiff-appellant argued that these locations are not the same as having access to the bleachers where his view of the field won’t be obstructed by persons walking in front of him and by standing players and coaches and in some locations by a fence. Under ADA Title II regulations, public facilities constructed prior to January 26, 1992, need not to be made accessible and usable by persons with disabilities but the public entity must make its programs readily accessibility. Here, the U.S. Court of Appeals for the Ninth Circuit noted that the school district “offers many different locations from which spectators who use wheelchairs are able to view football games, and it is undisputed that such spectators enjoy unobstructed views from at least three of these locations.” Thus the district is in compliance with ADA. *Daubert v. Lindsay Unified School District*, 760 F.3d 982 (9th Cir. 2014).

Page 9: Stocking Restrooms with Feminine Hygiene Products.

Public schools maintaining any combination of classes from grade six to twelve meeting the 40 percent student poverty threshold are now required to stock at least half of the restrooms with feminine hygiene products. No charge is to be imposed for any menstrual products including, but not limited to, tampons and sanitary napkins for use in connection with the menstrual cycle. (Educ. Code § 35292.6)

Page 20: County Community Schools.

Provisions of the Education Code relating to students who may be involuntarily enrolled in a county community school were amended in 2014 to (1) exclude homeless children, (2) add conditions to referrals made on the recommendation of a school attendance review board, and (3) limit types of juvenile offender referrals. With regard to school attendance review board recommended referrals, the thrust of the legislation is to have both the school district and the county board determine the extent to which the county community school is able to meet the needs of referred students. Referrals are not to be made initially unless it is determined that the county community school has sufficient space, can meet the needs of the student, and the parent/responsible adult/guardian has not objected to the referral because of factors such as safety, geographic distance, lack of transportation, and concern about meeting the student's needs. The student has the right to return to the student's previous school or another appropriate school within the district at the end of the semester following the semester when the acts leading to referral occurred. The right to return continues until the end of the student's eighteenth birthday except for students with special needs. The right to return in this instance ends when the student turns twenty-two. The statute then addresses conditions for county community school enrollment of students on probation with or without the supervision of a probation officer and consistent with the order of a juvenile court. All of these changes are quite detailed and should be reviewed directly. See Education Code Sections 1981 and 1983.

Pages 29-30: Changes to the Interdistrict School Transfer Program.

Sections 48300-48317 of the Education Code relating to the interdistrict school transfer program were revised in 2017 to spell out in more detail the components of the program. Chief among them is that on or before July 1, 2018, a school district opting to become a district of choice must register with both the Superintendent of Public Instruction and the county board of education where the district is located. Starting the following school year, a school district of choice is not to enroll students until the district has completed this registration. Also a district of choice is to give first priority for attendance of siblings of children already attending schools or programs within the district, second priority for attendance to students eligible for free or reduced-price meals, and third priority for attendance of children of military personnel. These legislative provisions remain in effect until July 1, 2023 and are repealed on January 1, 2014 unless the legislature decides otherwise.

Pages 33-34: Expansion of Charter School Student Admission and Disciplinary Requirements.

In 2017, Education Code Section 47605 (petitions for charter schools operating within a school district) and Section 47605.6 (petitions for countywide charter schools) were amended to require that if random drawing is necessary for student admission, preferences may be extended beyond students currently attending the charter school and students who reside in the school district or county for countywide charter schools to include, but not be limited to, siblings of students admitted or attending the school and children of the charter school's teachers, staff, and founders. Each type of preference is to be approved by the chartering authority at a public hearing, be consistent with federal and California law, and not result in limiting enrollment access for students with disabilities; academically low-achieving students; English learners; neglected or delinquent students; homeless students; students who are economically disadvantaged; foster youth; or students based on nationality, race, ethnicity, or sexual orientation. Preferences also are not to include mandatory parental involvement.

These statutes also have been amended to require a charter school petition to contain a comprehensive description of procedures for disciplining or removing students that are consistent with federal and California law. These include giving oral or written notice of charges for

suspensions of fewer than 10 days and, if the student denies the charges, an explanation of the evidence to support them and an opportunity for the student to present the student's side of the story. For suspensions longer than 10 days and expulsions, the charter school is to provide timely written notice of the charges, an explanation of the student's basic rights, and a due process hearing by a neutral officer within a reasonable number of days. At the hearing the student has the right to present testimony, evidence, and witnesses; to confront and cross-examine adverse witnesses; and to be represented by legal counsel or an advocate. No student is to be involuntarily removed for any reason unless the parent or guardian has been given written notice no less than five schooldays before the effective date of the action.

There also are other changes made in the charter school petition process by this legislation. To learn more, go to the State Department of Education website at www.cde.ca.gov and click on Laws and Regulations.

Page 34: California Supreme Court Addresses Due Process Dimensions of County Board of Education's Role in Charter School Revocation.

As noted on this page, county boards of education can authorize charters for schools serving a county-wide student population, oversee their operation, and revoke charters for noncompliance with state law and the charter petition. Their role in this capacity is similar to school boards. In a case involving Today's Fresh Start charter school, the California Supreme Court addressed the dimensions of due process of law when a county board of education revokes a charter it has granted.

Today's Fresh Start argued that in revoking its charter, the Los Angeles County Board of Education violated due process of law because the county board operates schools in the county and Today's Fresh Start competes for students and funding. Thus, the county board could not be impartial. The California Supreme Court unanimously rejected the argument, noting that the few specialized schools the county board operates serve mostly high school students and Today's Fresh Start is a kindergarten through eighth grade school. Furthermore, county board members receive no financial benefit from revoking charters. The high court also noted that under Education Code Section 47605.6, county boards can only approve charter schools like Today's Fresh Start that provide instructional services not provided by county offices of education.

Today's Fresh Start also maintained that the role of the Los Angeles County Office of Education and its governing board in accusatory, investigative, and adjudicatory functions in the revocation context undermines due process of law. The justices pointed out that the legislature has given both school districts and county offices of education these multiple tasks, something neither uncommon nor unconstitutional. To prove a denial of due process, there must be evidence of actual bias. Here there was none. The county superintendent fulfilled her statutory responsibilities of investigating concerns about the operation of the charter school, and the general counsel of the county office and board fulfilled her responsibilities in advising the county board of its duties without being an advocate or adjudicator. *Today's Fresh Start, Inc. v. Los Angeles County Office of Education*, 159 Cal. Rptr.3d 358 (Cal. 2013).

What likely was a factor in triggering this lawsuit was that the Los Angeles Board of Education voted four to three to revoke the charter and upon appeal, the State Board of Education split evenly. The lesson learned is that care must be taken by charter school authorizers to make sure that the charter school investigation is carefully done and that the charter school is given ample opportunity to present its side of the story. If this is done, then the chances of a charter school's prevailing in a due process challenge revocation are remote.

Page 35: In Revoking a Charter, the Authorizer Must Establish Substantial Evidence to Overcome The Extra Weight Given to Charter School Academic Performance.

As noted on this page, the charter school authorizer must consider student achievement of all student groups served by a charter school as the most importance factor in a revocation decision. But even if student achievement is high, this does not negate a revocation decision if one or more of the other factors set forth in Education Code Section 47607(c) for revoking a charter are established. Operating three charter schools in Oakland, the American Indian Model Schools (AIMS) challenged the Oakland Board of Education’s revocation of its charter after an independent audit uncovered significant fiscal mismanagement. The Alameda County Board of Education later affirmed the district’s decision. At the time, the AIMS schools were among the top performing charter schools in the state. One of its schools received the Title I California Distinguished School Award from the California Department of Education for closing the achievement gap between rich and poor students. AIMS strongly opposed the action, contending that closure should not take place pending resolution of the appeal process. Both the trial court and court of appeals agreed, noting that there must be evidence that the charter authorizer considered student achievement as the most important factor in deciding whether to revoke a charter. Here that was not evident. Thus a preliminary injunction was warranted preventing closure. *American Indian Model Schools v. Oakland Unified School District*, 173 Cal. Rptr.3d 544 (Cal. App. 1 Dist. 2014).

Page 37: California Supreme Court Clarifies How Facilities Are to be Provided to Charter Schools.

In 2015 the California Supreme Court superseded the appellate court decision noted on this page regarding the Los Angeles Unified School District's provision of facilities to charter schools operating in the district. In a detailed unanimous opinion, the high court discussed the meaning of State Board of Education (SBE) regulations regarding how available facilities for charter schools are to be determined under Education Code Section 47614. It concluded that a school district must follow a three-step process in responding to a charter school's request for classroom space. First, the district must identify a comparison group of schools with similar grade levels as set forth in Section 11969.3 (a) of the SBE regulations. Second, the district must count the number of classrooms provided to noncharter K-12 students in the comparison group whether the classrooms are staffed by teachers or not. And third, the district must use the resulting number of classrooms as the denominator in the average daily attendance (ADA)/classroom ratio for allocating classrooms to charter schools based on their projected ADA. *California Charter Schools Association v. Los Angeles Unified School District*, 185 Cal. Rptr.3d 556 (Cal. 2015).

Page 38: How Near to Where a Charter School Wants to Locate Must District-Provided Facilities Be?

A California court of appeal faced this question in 2015 when the Westchester Secondary Charter School challenged a decision by the Los Angeles Unified School District to provide a facility that was near, but not in, the Westchester neighborhood where the charter school wanted to be. The district facility was Crenshaw High School located 2.53 miles from Westchester and between 6.5 and 7.4 miles from the charter school’s first and second choice campuses in Westchester. The appellate judges noted that the term “near” is not defined in either statutory or administrative law. Rather, it is a flexible term. Furthermore, while the charter school requested a facility in Westchester, it said it would consider other campuses reasonably close to Westchester. The court also rejected the charter school’s claim that the district could accommodate it at its second preferred site in Westchester by eliminating set-aside space for expansion of other programs at that site as well as by giving it space at a closed former elementary school being used for adult education. The district’s reasons for doing so were justifiable. *Westchester Secondary Charter School v. Los Angeles Unified School District*, 188 Cal. Rptr.3d 792 (Cal. App. 2 Dist. 2015).

CHAPTER 2
ATTENDANCE, INSTRUCTION, AND ASSESSMENT

Page 49: Additions to Compulsory Attendance Law.

A student whose parent or guardian lives outside the school district but who is employed and lives with the student at the student's place of residence for a minimum of three days during the school week is to be admitted to public schools of the district on a full-time basis. (Educ. Code § 48204 (a)(7)).

Also, attendance law now requires that before a school district can conduct an investigation to determine whether a student meets the residency requirements for school attendance, the school district must have an investigatory policy adopted at a public meeting of the governing board. (Educ. Code § 48204.2). Among other things, the investigatory policy is to identify the circumstances for conducting an investigation, describe the methods used, prohibit surreptitious photographing or video-recording of students being investigated, and provide an appeal process.

Pages 50-51: Charter Schools Must Now Accommodate Both Foster and Homeless Students. In Addition, Many Foster Students Rights Now Extended to Homeless Students.

The term "local education agency" in the context of accommodating both foster and homeless students has now been extended to charter schools (Educ. Code § 48859). In addition, new legislation extends many of the rights of foster children to those who are homeless. Among them is the right of homeless students to continue education in the school of origin through the duration of homelessness. If a high school homeless student's status changes so the student is no longer homeless before the end of the school year, the student is to be allowed to continue through graduation. If a homeless student in kindergarten or any of grades 1-8 is no longer homeless, the student is to be allowed to continue education in the school of origin through the duration of the academic year. If a homeless student is transitioning between grade levels, the student is to continue in the same attendance area of the school of origin. If the homeless student is transitioning to a middle or high school and the school designated for matriculation is in another school district, the local education agency is to allow the homeless student to continue in the school designated for matriculation in that school district. The new school is to enroll the homeless student even if the student has outstanding fees, fines, textbooks, or other items or funding due to the school last attended. The same is true if the student is unable to produce clothing or records normally required for enrollment such as previous academic records, medical records including immunization history, and proof of residency.

Other rights of foster children now extended to homeless students include the right to receive partial credits for courses if they switch schools midyear, the right to meet only state graduation requirements if they transfer high schools after their second year unless the new district determines the student is reasonably able to complete the graduation requirements in time to graduate by the end of the student's fourth year, and the requirement that districts notify the district-appointed liaison before expelling a homeless student. If the homeless student is in special education, the liaison must be invited to the expulsion hearing. (Educ. Code §§ 48915.5, 48852.7, 48918.1, 51225.1-51225.2).

Page 51: More on Student Records Pertaining to Foster and Homeless Children.

See updates for Chapter 10.

Page 51: Education Code Section 48215 Deleted.

As noted on this page, this provision denying undocumented immigrants various public services including education was declared null and void in 1995 but remained in the Education Code. In 2014 Governor Jerry Brown signed a bill deleting it.

Page 51: Immunization of Students.

While Education Code Section 48216 as stated on this page gives governing boards the authority to deny admission to students who have not been immunized, a provision of the Health and Safety Code has provided an exemption for medical reasons or because parents believe immunization is contrary to personal beliefs. Growing concern about health and safety in public schools resulted in a legislative change to the Health and Safety Code (sections 120325, 120335, 120338, 120370, 120375). The same is true of Education Code Section 49452.8 that pertains to oral health assessment. For more about the changes in this section, go to the State Department of Education website at www.cde.ca.gov and click on Laws and Regulations.

On or after July 2016, absent medical reasons, immunization for infectious diseases listed in the code such as diphtheria, hepatitis B, measles, mumps, whooping cough, and chickenpox is required for students enrolled for the first time at a private or public elementary or secondary school, child care center, day nursery, nursery school, family day care home, or development center or being admitted or advancing to grade 7. If there is good cause to believe a student has been exposed to one of the listed diseases and there is no documented proof of immunization, the student may be temporarily excluded from school until the local health officer is satisfied that the student is not at risk of developing or transmitting the disease.

The changes are not to prohibit a student who qualifies for an individualized education program from accessing special education and related services as stated in the student’s individualized educational plan (IEP). The changes also do not apply to home-based private schooling or an independent study program that does not encompass classroom-based instruction.

A student who prior to January 1, 2016 has a letter or affidavit on file at any of the above institutions stating beliefs opposed to immunization is allowed attendance until the student enrolls in the next grade span. A grade span means birth to preschool, kindergarten and grades 1-6 including transitional kindergarten, and grades 7-12. While the exemption from existing specified immunization requirements based on personal beliefs has been eliminated, an exemption based on both medical reasons and personal beliefs is allowed from future immunization requirements deemed appropriate by the State Department of Public Health.

A motion filed by a group of parents in federal court for a preliminary injunction to halt enforcement of the immunization changes as violating their federal rights on a number of grounds was rejected. *Whitlow v. California*, 203 F.Supp.3d 1079 (S.D. Cal., 2016). The court noted that “There is no question that society has a compelling interest in fighting the spread of contagious diseases through mandatory vaccination of school-aged children. All courts, state and federal, have so held either explicitly or implicitly for over a century.”

Page 57: Assuring Safety: Students Not to be Left Unattended on School Buses.

Provisions of the Education Code pertaining to school buses require that superintendents of county schools, superintendents of school districts, leaders of charter schools, and the owners or operators of private schools that provide transportation to or from school or school activity develop a safety plan to assure student safety (Educ. Code §§ 39831.3, 39860). The plan now is to include procedures ensuring that a student is not left unattended on a school bus. The same is true for any contract negotiated for student transportation. Drivers who fail to comply with this requirement are to have their certificate revoked by the Department of Motor Vehicles. The plan

also is to include procedures and standards for designating an adult chaperone other than the driver to accompany students on a school student activity bus. In addition, the California Motor Vehicles Department is to develop regulations before the 2018-2019 school year requiring that each school bus, school student activity bus without one or more adult chaperones, youth bus, and child care motor vehicle for more than eight persons including the driver is to be equipped with a child safety alert system at the interior of the bus so that the driver can be sure that students are not left unattended (Calif. Vehicle Code § 28160).

Page 57: Removing the Term “Redskins”

Beginning January 1, 2017, public schools are prohibited from using the term “Redskins” as a school or athletic team name, mascot, or nickname. An exception is allowed for uniforms or other materials bearing that name which were purchased before January 1, 2017 if (1) the school selects a new school or athletic team name, mascot, or nickname; (2) the school refrains from purchasing or selling uniforms to students or employees that bear the “Redskins” name unless necessary to replace damaged uniforms up to 20 percent of the total number of uniforms used by a team or band at the school during the 2016-2017 school year and purchased prior to January 1, 2019; (3) the school refrains from purchasing or acquiring for distribution to students or employees any yearbook, newspaper, program, or similar material that includes the name in its logo or cover title; and (4) the school does not purchase or construct a marquee, sign, or fixture that includes the “Redskins” name, and for facilities that already bear the name, the name shall be removed during maintenance. (Educ. Code §§ 221.2-221.3).

Pages 57-58: Civil Center Act Correction and Addition.

Education Code Section 38134 of the Civil Center Act that requires a school governing board to permit nonprofit organizations such the Girl Scouts, Boy Scouts, parent-teacher associations, and the like that promote youth and school activities to use its facilities no longer conditions doing so on no alternative facilities being available. This requirement was removed in 2012. In 2016, the legislature added to the list of nonprofit organizations having access to school facilities a recreational youth sports league that charges participants an average fee of no more than \$60 per month.

Page 59: Can the Theft of a Cell Phone by a Student in Locker Room Be Reduced from a Felony to a Misdemeanor Following Enactment of Proposition 47 Known as the Safe Neighborhood and Schools Act?

In 2014 Penal Code Section 459.5 was added by Proposition 47 making shoplifting not exceeding \$950 in a commercial establishment a misdemeanor rather than a felony. A high school student in Santa Clarita admitted to a school resource deputy that he had stolen a cell phone from another student’s locker in the high school locker room. He was charged with a burglary offense as a felony and placed on probation. Following the enactment of Proposition 47, the student sought to reduce his felony offense to misdemeanor shoplifting under Section 459.5, arguing that the school falls into the “commercial establishment” category. The California appellate court agreed with the juvenile court that, while a cafeteria or school bookstore might fall into this category, a school locker room is not a commercial establishment in the sense of buying and selling of goods or services. Thus, the cell phone theft was felony and could not be reduced to a misdemeanor. *In re J.L.*, 195 Cal. Rptr.3d 482 (Cal. App. 2 Dist. 2015).

Page 60: Changes in the Gun-Free School Zone Act (See Table 2.1).

This law has been amended to permit persons holding a valid license to carry a concealed firearm but not ammunition in an area that is in an area within 1000 feet of, but not on, the grounds of a public or private school. Only active and retired law enforcement officers can bring concealed firearms onto school grounds. An unloaded firearm and ammunition or reloaded ammunition can

be on school grounds if kept in a motor vehicle in a locked container or in the locked trunk of the vehicle. (Penal Code §§ 626.9 and 30310).

Page 61: Enactment of Legislation to Promote Student Healthy Eating and Physical Activity After School.

In recent years, legislation has been enacted to promote student health and safety on and off campus in a number of ways. These include the 21st Century High School After School Safety and Enrichment for Teens (ASSETs) program and the After School Education and Safety Program (ASES). The former can be found in Education Code Sections 8420-8428 and provides grants through the California Department of Education (CDE) that partner traditional public and charter schools with communities to provide academic support and constructive alternatives for high school students and that support college and career readiness. The latter can be found in Education Code Sections 8482-8484.6 and provides grants through CDE for educational and literacy support and enrichment encompassing technical education and physical fitness, among others, to kindergarten through ninth grade students.

In 2014, the Distinguished After School Health (DASH) Recognition Program focusing on addressing childhood obesity was enacted. This law requires CDE to develop a process for identifying high quality after-school programs under ASSETs, ASES, and similar initiatives that focus on healthy eating and physical activity. Schools will have the option of creating a certificate and supporting document demonstrating how the program meets criteria set forth in the statute. CDE will post on its website a list of recognized schools meeting the criteria. Details of the DASH program are set forth in Education Code Sections 8490-8490.7.

Page 61: Student Applications for Free or Reduced Price Meals.

In the interest of improving access to free or reduced price meals by children from refugee and immigrant households, Education Code Section 49557 has been amended to require that in addition to paper applications, school district governing boards and county superintendents of schools are to make applications available online subject to specified requirements including a link to the website on which translated applications are posted by the U.S. Department of Agriculture with instructions on how to submit it. The instructions are to be clear for families that are homeless or migrants.

Page 61: Enactment of the Child Hunger Prevention and Fair Treatment Act of 2017.

Enacted in 2017, Education Code Section 49557.5 requires public schools, school districts, county offices of education, and charter schools serving free or reduced-price meals during the school day under the federal National School Lunch Program or the federal School Breakfast Program to ensure that students whose parent or guardian has unpaid meal fees is not shamed, treated differently, or served a meal that differs from those served other students. Nor shall disciplinary action taken against a student result in denial or delay of a nutritionally adequate meal. For related requirements, see the section by going to www.cde.ca.gov and clicking on Laws and Regulations under the “Resources” heading.

Page 61: Changes in Anti-Smoking Laws.

Smoking is now prohibited for persons under 21 in this state. Education Code Section 48901 that prohibits smoking or use of a tobacco product on public school grounds, while attending school-sponsored activities, or while under the supervision of school employees now incorporates the use of an electronic smoking device that creates an aerosol or vapor and any oral smoking device for the purpose of circumventing the prohibition of smoking. In addition, any school district, charter school, and county office of education that receives a grant from the State Department of Education for anti-tobacco education programs is to address the consequences of tobacco use,

reasons why adolescents use tobacco, peer norms and social influences that promote tobacco use, and skills for resisting social pressure promoting tobacco use. (Health and Safety Code § 104420).

Page 62: Changes to Automatic External Defibrillator Laws.

A provision has been added to the Education Code that permits public schools to seek non-state funds to acquire and maintain an automatic external defibrillator (AED). The provision also specifies that compliance with Health and Safety Code Section 1714.21 regarding AED use/non-use insulates the school employee and the school or district from civil damages resulting from any act or omission in rendering emergency care or treatment, except in instances of gross negligence or willful or wanton misconduct resulting in personal injury or wrongful death (Educ. Code § 49417).

In addition, Health and Safety Code Section 1797.196 now requires principals to ensure that when an AED is placed in a public or private K-12 school, administrators and staff receive information describing sudden cardiac arrest and the school's emergency response plan. The principal also is to ensure that all administrators and staff understand proper use of the AED. Principals also are to ensure that instructions on how to use an AED are posted in 14-point type next to every AED and that at least annually school employees are notified as to the location of all AEDs on the campus. The provision on designating trained employees to respond to an emergency that may necessitate use of an AED has been removed since all employees now must know how to do this.

Page 62: New Laws Enhancing Student Protection.

In 2016, the legislature added Section 33133.5 to the Education Code requiring the Superintendent of Public Instruction to develop a poster notifying children of the appropriate telephone number to report abuse or neglect and to post downloadable version of the poster on the California Department of Education's website on or before July 1, 2017. Among specific elements, the poster is to include dialing "911" in case of an emergency and to be produced in five languages. School districts, charter schools, and private schools are encouraged to display appropriate versions of the poster in areas where students congregate.

Education Code Section 215 has been added requiring school districts, county offices of education, state special schools, and charter schools serving students in grades 7-12 to adopt a policy on student suicide prevention in collaboration with school and community stakeholders, school-employed mental health professionals, and suicide prevention experts. The policy is to specifically address the needs of high-risk group as spelled out in this section and be developed prior to the 2017-2018 school year.

California Health and Safety Code Section 104495 has been amended to prohibit persons in playground and sandbox areas including those located on public or private school grounds where a youth sports event takes place from using a tobacco product within 250 feet of the event. Failure to comply will result in a \$250 fine for each violation.

Page 62: School Counselor Not Immune from Liability for Allegedly Giving Suspected Child Abuse Report to Students' Father.

See updates for Chapter 12.

Page 62: Restrictions on Assigning Students to Course Periods without Educational Content.

In response to a lawsuit focused on high school students being assigned to content-absent courses because of lack of funds or teachers, Sections 51228.1 and 51228.2 have been added to the Education Code specifying that personnel in school districts with any 9-12 grades are prohibited

from assigning students enrolled in one of these grades to a course period without educational content for more than one week in a semester. An exception is if the parent or guardian of a student who has not reached the age of majority gives written consent and the school official believes the student will benefit from such an assignment. A school's having insufficient course offerings is irrelevant.

The term "course period without educational content" encompasses (1) sending a student home or releasing the student from campus before the conclusion of the school day; (2) assigning a student to a service, instructional work experience, or an otherwise named course in which the student is to assist a certificated employee but not complete curricular assignments during that period and where the ratio of certificated employees to students assigned to the course for curricular purposes is less than one to one; and (3) assigning the student to no course during the relevant course period. This restriction does not affect other curricular programs such as community college dual enrollment, evening high school, independent study, work-study courses or work experience education. It also does not apply to students enrolled in alternative schools, community day schools, continuation schools, and opportunity schools.

A similar restriction applies to assigning a high school student to a course the student has already completed and received a grade sufficient to satisfy admission requirements to a California public postsecondary institution and the school's graduation requirements. An exception is if the parent or guardian consents in writing for students who have not reached the age of majority and the school official believes that student will benefit from being assigned to the course period. Another exception is if the student needs to take the course more than once because of curricular changes and can benefit from doing so. And as above, this provision does not apply to dual enrollment programs, evening high school, alternative schools, and so on.

The statutes set forth a process for complaint filing and also require the superintendent for public instruction to set forth regulations to be adopted by the state board of education for implementing this law.

Page 62: Lawsuit Brought by Hindu Organization Challenging Portrayal of Hindu Religion in State Board of Education's History-Social Science Content Standards Partially Dismissed. California Parents for the Equalization of Educational Materials (CAPEEM) that seeks to promote an accurate portrayal of the Hindu religion filed a lawsuit against several members of the State Board of Education (SBE) and the California Department of Education (CDE) asserting that the history-social science sixth grade standards and framework are patently anti-Hindu. Among other claims, CAPEEM alleged the standards do not describe Hinduism as virtuous and do not mention Hinduism's divine origins and central figures. The SBE sought to dismiss all the claims.

The federal district court ruled that the standards do not intrude on the liberty rights of parents to control their children's upbringing under the Fourteenth Amendment due process clause, do not violate the right of parents to freely exercise their religious beliefs under the free exercise clause of the First Amendment, and do not discriminate against Hinduism in violation of the Fourteenth Amendment equal protection clause. However, the court denied the state's motion to dismiss the claim that the standards and framework constitute a violation of the First Amendment establishment clause. The judge cited as an illustration the comments of a sixth grade student that when her class was divided into castes, she felt discriminated against based on her religion because she said other students and the teacher considered Hinduism as cruel, primitive, and unjust. The judge noted that the student formed this impression from the framework's statement to teachers to make clear that the caste system was both a social/cultural structure as well as a religious belief. Based on this assertion, the judge denied the SBE's motion to dismiss the

establishment clause claim. *California Parents for the Equalization of Educational Materials v. Torlakson*, 2017 WL 2986222 (F.Supp.3d N.D. Cal., 2017)

Page 65: Native American Studies.

Added in 2017, Education Code Section 51226.9 requires the Instructional Quality Commission to develop on or before December 31, 2021 and the State Board of Education to approve on or before March 31, 2022 a model curriculum in Native American studies. The model curriculum is to be developed with the assistance of Native American tribes in California and to serve as a guide for school districts and charter schools to adapt related courses to reflect student demographics in their communities. Following adoption of the model curriculum, each school district and charter school maintaining any grades of 9 to 12 that does not offer a standards-based Native American studies curriculum is encouraged to offer such a course of study as a social sciences or English language arts elective. The course is to be made available in at least one year of a student's enrollment. An outline of the course is to be submitted as an A-G course for admission to the University of California and California State University.

Pages 69-70: Proposition 227 Curtailing Bilingual Education Repealed.

In the November 2016 election a majority of voters successfully endorsed a 2014 legislature measure known as the California Education for a Global Economy Initiative repealing Proposition 227 that largely replaced bilingual education with English immersion. The changes to Education Code Section 300 and following sections go into effect in July 2017. Under the new measure, parents have the opportunity to choose a language acquisition plan that best suits their child's needs. School districts and county officers of education are to provide English learners with a structured English immersion program so that these students have access to the core academic content standards and become proficient in English. Districts and county offices also are encouraged to provide to the extent possible opportunities for native English speakers to become proficient in one or more other languages. The right of parents in the former English immersion statute to sue for enforcement and be awarded damages and attorneys' fees has been deleted.

In a related manner, Section 313.2 of the Education Code that requires the Department of Education to ascertain and disseminate information on the number of students in each traditional public and charter school who are, or are at risk of, becoming long-term English learners has been amended to include the manner in which English development programs will meet student needs and age-appropriate academic standards. Schools can comply with this provision by sending this information to parents and guardians if the definitions of English learners and long-term English learners are broader than those in state law.

Page 70: Provisions Pertaining to Gifted and Talented Students (GATE) Repealed.

As noted in the next chapter updates, the enactment of the Local Control Funding Formula (LCFF) ended several categorical funding programs, channeling the money into general funds provided to school districts. GATE was one of the categorical programs repealed.

Page 72: Change in Credentialing System.

As of 2017, the multi-subject teaching credential may include a baccalaureate degree in professional education (Educ. Code § 44225 (a)(1)).

Pages 82-83: Enactment of New Internet Privacy Rights Laws.

Provisions have been added to the California Business and Professions Code protecting minors from commercial marketing by Internet providers (Bus. & Prof. Code §§ 22580-22582). Federal law (the Children's Online Privacy Protection Act (COPPA)) already requires operators of

commercial Internet sites or online services to provide notice of what personal information is collected and used, and gives parents the option of refusing to permit collection of additional data for children under age thirteen. Entitled the Privacy Rights for California Minors in the Digital World, the new California law expands this protection to minors under age eighteen by prohibiting operators of websites, online services, online applications, or mobile applications from marketing or advertising certain products or services to them. The restrictions apply as well to advertisers. The long list of restrictions includes alcoholic beverages, firearms, aerosol paint containers capable of defacing property, tobacco, drug paraphernalia, electronic cigarettes, and obscene matter. Disclosure of personal information about minors to third parties is prohibited. Operators also must permit minors who are registered users to remove or request to be removed content or information posted by them. This does not apply to information posted by third parties.

Another law added to the California Business and Professions Code is the Student Online Personal Information Protection Act (§§ 22584-22585). Effective January 1, 2016, this detailed law prohibits operators of Internet websites, online services, online applications, or mobile applications used primarily for K-12 school purposes from using student information to target advertising to students, parents, or guardians; using covered information to amass student profiles; or selling student information. Disclosure of covered information is also prohibited unless in furtherance of a K-12 purpose germane to the site, service, or application under certain conditions set forth in the statute. Operators are to establish security measures and are required to delete student information if requested by the school or district. Operators are allowed to disclose information if required by federal or state law or if for legitimate research purposes. The law also allows the use of de-identified student information for certain purposes. Given both its importance and complexity, the statute should be viewed in its entirety.

A provision has been added to the Education Code requiring school districts, county offices of education, and charter schools to inform parents of programs they propose to use to monitor their students' social media activities and to collect and store the data and postings (Educ. Code § 49073.6). Many schools seek to gather this information to help prevent bullying, sexting, school violence, and student suicide. An opportunity for public comment must be provided at a regularly scheduled board meeting before such a program is adopted. Presumably to deter litigation over invasion of personal privacy, the statute gives students and their parents the right to examine information collected about them from social media and to make corrections or deletions. To protect student privacy over the long term, all such information must be destroyed within one year after the student turns eighteen or is no longer enrolled. This legislation applies as well to third parties hired by the governing board to undertake this task.

Another provision added to the Education Code protects student privacy rights when schools enter into a contract with third parties to provide services including those that are cloud-based for digital storage, management, and retrieval of student records (Educ. Code § 49073.1). The law does not apply to existing contracts in effect before January 1, 2015 when the new law went into effect until their expiration, amendment, or renewal.

As digital learning become increasingly incorporated in school instructional programs, more federal and state laws protecting parent, student, and teacher privacy are likely to be enacted.

Page 86: NCLB Replaced by Every Student Succeeds Act (ESSA).

The No Child Left Behind Act discussed on these pages and referred to elsewhere in the book has now been replaced by the much less controlling Every Student Succeeds Act (ESSA). The revision eliminates the need for waivers from requirements such as assuring adequate yearly progress toward all students becoming proficient on math and reading tests or face loss of federal

funding. The annual yearly progress requirement has been eliminated along with escalating consequences for schools that don't measure up. ESSA still requires that students be tested in reading and math from third to eighth grade and at least once in high school. States are to intervene to assist low performing schools including those with underperforming subgroups. And school evaluation is to include at least one other measure beyond student test scores such as graduation rates or English proficiency for nonnative speakers. Given California's changes in student assessment and financial accountability as described below and in the updates for Chapter 3, the state is well along in complying with ESSA's provisions.

Pages 87-95: Replacement of the Standardized Testing and Reporting (STAR) System and Ending of CAHSEE.

In accord with the movement to implement common core curriculum content standards, Senate Bill 484 signed by the Governor Jerry Brown in October 2013 embraces the development of academically rigorous content standards in all major subject areas and sets forth a new assessment system. The purpose is to model and promote high-quality teaching and learning activities across the curriculum so that students can acquire the knowledge, skills, and processes needed for success in the information-based global economy of the 21st century (Educ. Code § 60602.5).

The student assessment system is designed to hold schools and districts accountable for the achievement of all students in meeting the standards. Identified as the Measurement of Academic Performance and Progress (MAPP) in SB 484, the new system has been renamed the California Assessment of Student Performance and Progress (CAASPP). It replaces most of STAR (Educ. Code § 60640). The new system is based on the work of a multistate organization called the Smarter Balanced Assessment Consortium that is developing assessments aligned with the common core state curriculum standards. In 2017, the California High School Exit Exam (CAHSEE) was ended, given its lack of linkage to the common core.

The current assessment system reports student academic performance in relation to state academically rigorous content and performance standards and in terms of college and career readiness skills. When appropriate, the performance reports include a measure of growth describing the student's status in relation to past performance. As in the past, students with special needs are to be given appropriate accommodations in CAASPP testing requirements and, if unable to participate in the testing, given an alternate assessment (Educ. Code § 60640 (k)).

CAASPP encompasses a summative assessment in English language arts and mathematics for grades three through eight and grade eleven that measures content standards adopted by the State Board of Education (SBE); grade-level science assessments in grades five, eight, and ten until a successor assessment is implemented; the California Alternate Performance Assessment (CAPA) in English language arts and mathematics in grades two to eleven and in science in grades five, eight, and ten until a successor instrument is implemented; a voluntary early assessment program for grade eleven students in English language arts and mathematics; and a primary language assessment program aligned to English language arts standards for students enrolled in dual language immersion programs. By March 1, 2016, the Superintendent of Public Instruction (SPI) was to submit to the State Board of Education (SBE) recommendations for expanding CAASPP to include additional assessments in such subjects as history-social science, technology, and visual and performing arts.

CAASPP assessment in English language arts and mathematics was field-tested in the 2013-2014 school year. There was no assessment in these areas pursuant to the old California Standards Text because the common core curriculum together with CAASPP transforms databases and disrupts

trend analysis. Adding to the transition was the adoption of the Local Control Funding Formula (LCFF), highlights of which are set forth in the update for Chapter 3 below.

The adoption of the new assessment system affects the calculation of school and district Academic Performance Index (API) scores.

In addition to the above, Senate Bill 484 addressed a number of matters relating to student assessment and school accountability. Several of the more significant include:

- Based on recommendations from the SPI, the SBE is to set forth performance standards on the CAASPP summative tests. Once adopted, these performance standards are to be reviewed by the state board every five years (Educ. Code § 60648).
- The CDE is to determine how school districts are progressing toward implementation of a technology-enabled assessment system and the extent to which assessments aligned to the common core standards in English language arts and mathematics can be fully implemented (Educ. Code § 60648.5).
- A paper and pencil version of any computer-based CAASPP assessment is to be made available for students who are unable to access the computer-based version of the assessment for a maximum of three years after a new operational test is first administered (Educ. Code § 60640 (e)).
- With approval of the SBE, the CDE is required to develop a three-year plan of obtaining independent technical advice and consultation regarding ways of improving CAASPP. Areas to examine include studies focused on validity, alignment, testing fairness and reliability, reporting procedures, and special student populations such as English learners and students with special needs (Educ. Code §60649).

For the latest information about CAASPP, go to www.caaspp.org.

CHAPTER 3 EQUITY, ADEQUACY, AND SCHOOL FINANCE

Pages 115-118, 121-123, 130: Local Control Funding Formula (LCFF) Replaces Revenue Limit Funding and Most State Categorical Grants. Accompanying Local Control and Accountability Plan (LCAP) Has Significant Implications for School Administrators.

As noted on page 130, when the third edition of *California School Law* was being written, the legislature and governor were preparing legislation to replace revenue limits and most categorical funding with a weighted student formula funding system that includes a variance in per-student funding depending upon student needs. Known as the Local Control Funding Formula (LCFF), the legislation went into effect in the 2013-2014 school year. Over an eight-year period, the amount of funding gradually will increase for full implementation of the LCFF.

Basically, the LCFF provides a base grant for school districts and charter schools that varies by grade level. There is an adjustment of 10.4 percent on the base grant for kindergarten through grade three, provided that progress is made toward an average class size of no more than twenty-four students unless the collective bargaining agreement provides otherwise. There is an adjustment of 2.6 percent on the base grant amount for grades nine through twelve. The LCFF provides a supplemental grant equal to 20 percent of the adjusted base grant for English learners, low-income students, and foster youth. There is a concentrated grant equal to 50 percent of the adjusted base grant for targeted students exceeding 55 percent of a local education agency's enrollment. There also is additional funding to assure that all districts are restored to their 2007-

2008 state funding levels, adjusted for inflation, and that guarantees a minimum amount of state aid. Home-to-school transportation and Targeted Instructional Improvement Grant funding are add-ons to the LCFF. LCFF does not encompass state funding for programs like special education and the After School Education and Safety program, some local funding like parcel taxes, and federal dollars.

The LCFF also requires school districts, charter schools, and county offices of education to develop, adopt, and annually update a three-year Local Control and Accountability Plan (LCAP) using a template developed by the CDE. The LCAP is required to identify goals and measure progress for student subgroups across multiple performance indicators. The School Accountability Report Card (SARC) that provides parents and others with information about school performance will be linked to LCAP. The State Board of Education (SBE) is required to adopt and refine over time evaluation rubrics to assist both local education agencies and oversight entities evaluate strengths, weaknesses, areas that require improvement, technical assistance needs, and where interventions are warranted. A new entity called the California Collaborative for Educational Excellence (CCEE) has been set up to assist struggling school districts in improving student performance in compliance with their LCAP.

In effect, LCFF and LCAP place primary responsibility on school governing boards and administrators to allocate resources in such a way that all students reach desired levels of achievement and have the necessary skills and knowledge to go on to postsecondary education and employment. As noted on p. 85, given the changing demographics of the California student population, meeting their needs in many schools is challenging. With the limited success of categorical funding and rigid forms of state-level accountability, it is not surprising that state policymakers are deferring to the judgment of local school officials. Now more than ever, those closest to the education scene have the discretion to tailor the educational process to meet the needs of all their students.

For further information about LCFF and its accountability components, go to the CDE website at www.cde.ca.gov/fg/aa/lc

Clearly, the adoption of common core standards, the new CAASPP assessment system, and the LCFF for school funding likely will significantly affect future operation of public schools in California.

Pages 124-125: More on Charter School Facility Grant Program.

Grant eligibility has now been expanded for charter schools under the 70 percent free or reduced-price meals requirement. If the California School Finance Authority finds that funding remains after allocations based on these criteria have been made, the Authority is to expand additional charter school eligibility by reducing the 70 percent requirement 1 percent at a time but in no case below 60 percent (Educ. Code § 47614.5 (c)). Charter schools receiving funding under this program are now subject to audit under Education Code Section 41020.

Page 127: Helping Teachers with Housing Expenses.

As noted on this page, while California teacher salaries are among the highest in the country, the cost of living in this state is very high. The Teacher Housing Act of 2016 allows a school district to establish and implement programs helping school district employees find affordable rental housing by leveraging nonprofit and fiscal resources to housing developers, promoting public and private partnership, and fostering innovative financing opportunities (Health and Safety Code § 53570 and following sections).

Page 130: Robles-Wong Lawsuit Challenging the California School Finance System Rejected.

In 2016 a California court of appeal rejected two related lawsuits challenging the state’s current school finance system as a violation of the state constitution. In arguing for an adequate school finance system to assure a quality education for all schoolchildren, the appellants cited Section 1 of Article IX requiring the legislature to “encourage by all suitable means the promotion of intellectual, scientific, moral, and agricultural improvement” in the interest of a general diffusion of knowledge and intelligence, and Section 5 requiring the legislature to establish a system of free common schools. The majority in this two-to-one decision ruled that neither provision sets forth a right to a public school education of a particular quality. Nor do the provisions require the legislature to provide a particular level of funding. While agreeing with the appellants that a quality education is an important societal goal, the constitutional sections cited do not give the courts the authority to “dictate to the Legislature, a coequal branch of government, how to best exercise its constitutional powers to encourage education and provide for and support a system of common schools throughout the state.”

In August 2016 the California Supreme Court by a 4-3 vote denied the appellants’ petition for appeal. While the majority gave no reason for the rejection, Justice Goodwin Liu in a lengthy dissent noted that “It is regrettable that this court, having recognized education as a fundamental right in a landmark decision 45 years ago (*Serrano v. Priest* (1971) [citation omitted]) should now decline to address the substantive meaning of that right. The schoolchildren of California deserve to know whether their fundamental right to education is a paper promise or a real guarantee. I would grant the petition for review.” The denial of review and Justice Liu’s dissent is included in the court of appeal’s decision. *Campaign for Quality Education et al. v. State of California/Robles-Wong v. State of California*, 209 Cal.Rptr.3d 888 (Cal. App. 1 Dist. 2016).

CHAPTER 4
UNIONS AND COLLECTIVE BARGAINING

Page 133-134, 166: Correction on Application of NLRA to Lay Teachers in Catholic Schools.

While it is true that the National Labor Relations Act provides full bargaining rights to employees in the private sector, this is not true for lay teachers in Catholic schools contrary to what is stated on these pages. The 1977 U.S. Supreme Court *Catholic Bishop* decision referenced on p. 166 held that both religious and lay faculty at religious schools must be excluded from NLRA coverage because in enacting the act Congress had not expressed an intent to include teachers in church-operated schools. The Court sidestepped the question of religious entanglement. However, several states in the East have enacted laws that do permit lay faculty at religious schools to unionize. And several Catholic dioceses themselves permit teachers to unionize. Here on the West Coast, teachers, librarians, and counselors at four secondary schools operated by the Roman Catholic Archdiocese of San Francisco are represented by the San Francisco Archdiocesan Federation of Teachers, an affiliate of the California Federation of Teachers.

Page 142: New Employer Requirement Added to Educational Employment Relations Act.

A public school employer must now give reasonable written notice to a recognized union of the employer’s intent to make any change to matters within the scope of representation for purposes of giving the union a reasonable time to negotiate the proposed changes (Govt. Code §3543.2 (a)(2)).

Pages 158-159: Having to Pay Membership Fees Does Not Violate Union Members’ Free Speech Rights; Union Agency Fee Requirement for Nonmembers Continues.

In 2015, a California federal district court rejected a lawsuit brought by four dues-paying members of several teacher unions contending that having to join their union and pay dues forces them to support certain union political and ideological views with which they disagree, thus violating their free speech rights. If they choose not to pay union dues but only a fair share service fee (often referred to as an agency fee), they argued that they forfeit certain benefits available to dues-paying union members. Either way, their First Amendment free speech rights are compromised. The district court rejected the contention, noting that unions are not state actors and thus the First Amendment doesn't apply to them. The terms of dues-paying membership are not determined by the state but rather by the union. *Bain et al. v. California Teachers Association et al.*, 156 F.Supp.3d 1142 (C.D. Cal. 2015).

About the same time, a case reached the U.S. Supreme Court involving California teachers who argued that requiring non-members in a public sector bargaining unit to pay a fair share service fee for union activities violates their First Amendment rights. Both the Ninth Circuit and the federal district court refused to rule on the matter, citing the *Abood* decision discussed on p. 159. In March 2016 the Supreme Court in an equally divided decision affirmed the lower court decisions without opinion. *Friedrichs v. California Teachers Association*, 136 S.Ct. 1083 (2016). The split vote means that the fair share service fee or agency fee requirement anchored in the *Abood* decision discussed on this page continues.

CHAPTER 5 EMPLOYMENT

Pages 175 and 177: Former Certificated Employee Rehired as a Substitute is Not Entitled to Permanent Status Immediately Upon Rehire.

Under Education Code Section 44931 a permanent certificated employee who resigns and is reemployed by the same school district within 39 months of his or her last day of paid service is entitled to return to permanent status.

The question for the court was whether Section 44931 applied if the employee is rehired as a substitute teacher. *Edwards v. Lake Elsinore Unified School District*, 228 Cal. Rptr.3d 383 (Cal. App. 4 Dist. 2014). The court held that Section 44931 does not apply when the former permanent certificated employee is rehired as a substitute teacher.

Lori Edwards served as a certificated employee of the Lake Elsinore Unified School District from the commencement of the 2003-04 school year until July 2006 at which time she voluntarily resigned. In January 2007 she applied for reemployment with the district as a substitute teacher. Various records – including time sheets and retirement documents – completed by Lori and the district referred to her as a substitute teacher.

Lori alleged that the district improperly classified her as a substitute teacher upon her rehire and should have classified her as a permanent certificated employee. Retroactive pay was the primary remedy she sought because the district ultimately classified her as a permanent certificated employee effective August 2008.

Lori first argued that she was a permanent employee because the district had not given her an employment contract identifying her as a substitute employee. The court, however, observed that because Lori was hired as a substitute rather than a temporary employee she was not entitled to a written employment contract under Education Code Section 44916 at the time of her reemployment in January 2007. The court also held that Lori was not entitled to a written

employment contract under Education Code Section 44909, which applies to certain categorically funded positions, because she was not hired to fill a categorically funded position.

Lori next argued that Education Code Section 44918 entitled her to retroactive pay. The court disagreed and noted that Section 44918 merely provides for retroactive credit of one year of time served as a probationary teacher for a substitute teacher who works in a certificated position for at least 75 percent of the school year and is hired as a probationary teacher for the next school year.

The court also rejected Lori's argument that she was entitled to retroactive benefits under Section 44931 because the evidence established that she was rehired in January 2007 as a substitute employee and not as a permanent certificated employee.

Pages: 181, 192, and 195: Trial Court Decision Declaring Certain Teacher Employment Laws Unconstitutional Overruled.

In June 2014, a superior court judge in Los Angeles triggered considerable controversy when he ruled in *Vergara v. State of California* that sections of the Education Code pertaining to the two-year probationary period (44929.21), teacher dismissal (44934, 44938 (b)(1) and (2), 44944), and last in-first out layoff (44955) violate the equal protection clause of the California Constitution. The plaintiffs in the case were nine public school students alleging that the statutes result in "grossly ineffective teachers obtaining and retaining permanent employment, and that these teachers are disproportionately situated in schools serving predominately low-income and minority students." In doing so, the plaintiffs argued that the statutes violate their fundamental right to equal educational opportunity. The judge agreed and ruled that laws fail to meet the strict level of judicial scrutiny necessary when they intrude on constitutional rights.

Two years later, a California appellate court reversed the trial court's decision. First, the court found that which students are assigned grossly ineffective teachers is not specifically identifiable for purposes of an equal protection challenge because the student group varies from year to year. In effect, the subset of students is basically a random assortment. This is particularly true when, according to the trial court's findings, only 1 to 3 percent of California teachers are allegedly grossly effective. Second, the court pointed out that it is not the laws that assign poorly performing teachers to schools serving large numbers of low income and students of color but school administrators who decide which teachers they want in their schools and which teachers should be transferred to other schools. This so-called "dance of the lemons" results from staffing decisions. Declaring the statutes facially unconstitutional would not prevent administrators from continuing to assign ineffective teachers to schools serving mostly low-income students and students of color.

In August 2016, the California Supreme Court by a 4-3 vote declined to take up the matter, thus leaving the appellate court decision standing. The majority issued no opinion for the rejection. In his dissent, Justice Mariano-Florentino Cuellar noted that "Beatriz Vergara and her fellow plaintiffs raise profound questions with implications for millions of students across California. They deserve an answer from this court. Difficult as it is to embrace the logic of the appellate court on this issue, it is even more difficult to allow that court's decision to stay on the books without review in a case of enormous statewide importance." The appellate court ruling later was reissued to include the California Supreme Court's dissenting opinions. *Vergara v. State of California*, 209 Cal.Rptr.3d 532 (Cal. App. 2 Dist. 2016).

Page 187: Notice of Nonreelection Sufficient Despite Reference to Incorrect Code Section.

Shanna Petersil was hired as a temporary certified employee by the Santa Monica-Malibu Unified School District in August of 2008. Shanna worked a single day for the district before signing a

contract identifying her as a temporary employee. In March of 2009, the district sent a notice of nonreelection to Shanna and then rehired her as a temporary employee in July of 2009. The district sent another notice of nonreelection to Shanna in March of 2010. The notices referred to Shanna as a temporary employee and referenced the Education Code section permitting the nonreelection of temporary employees.

Shanna argued to the court that the notices of nonreelection were not sufficient because she was actually a probationary employee by virtue of working a day before signing her employment contract and therefore not given sufficient notice of nonreelection as the nonreelection notices from the district only made reference to the Education Code section pertaining to nonreelection of temporary employees. The court agreed with Shanna that she was in fact a probationary employee because she worked a day before signing the contract designating her as a temporary employee but held that the reference in the nonreelection notices to the incorrect code section did not invalidate the district's nonreelection. The court noted that Education Code Section 44929.21 (b) merely requires that the probationary employee be notified of the board's decision to reelect or not reelect before March 15 of the second year of employment. Shanna further argued that the first notice of nonreelection was insufficient because it was not personally served on her but instead sent by certificated mail. The court rejected this argument and noted that Shanna acknowledged actual receipt of the notice, which was sufficient. *Petersil v. Santa Monica-Malibu Unified School District*, 161 Cal. Rptr.3d 851 (Cal. App. 2 Dist. 2013).

Pages 189 and 195-196: California Legislature Adds Egregious Conduct to Dismissal Statute as Part of Teacher Dismissal Reform Bill and Modifies the Teacher Dismissal Process.

Governor Brown signed AB 215 on June 25, 2014. The law brings about substantial changes to teacher discipline and dismissal proceedings, including the addition of egregious conduct as a new ground for dismissal.

AB 215 amends Education Code Section 44932 to permit dismissal of a teacher for "egregious conduct", which is defined "exclusively as immoral conduct that is the basis for an offense described in Section 44010 [sex offense] or 44011 [controlled substance offense] . . . or in Sections 11165.2 [neglect of a child] or 111.65.6 [child abuse or neglect], inclusive, of the Penal Code."

Section 44934.1 has been added to the Education Code to provide for a separate hearing process for cases based solely on egregious conduct. The hearing process for an egregious conduct case is outlined in Section 44934.1 and contains unique features including adjudication by the Office of Administrative Hearings (OAH) instead of the panel which comprises the Commission on Professional Competence, admission of evidence that is more than four years old for certain sex offenses and child abuse, and the opportunity for the prevailing party to recover attorneys' fees if the OAH decision is appealed and upheld by the court.

Other changes have been made to the existing dismissal process. Education Code Section 44934 was revised to permit a school district to amend written charges to suspend or dismiss a teacher less than 90 days before the hearing upon a showing of good cause. Education Code Section 44936 was amended to permit the provision of written notice to a teacher of suspension or dismissal at any time during the year with the exception that a notice of unsatisfactory performance can only be given during the instructional year at the schoolsite where the employee is located. The prehearing procedures also have been revised with limitations placed on discovery unless egregious conduct is the only charge. Education Code Section 44939 permits an employee against whom suspension or dismissal is being pursued under Section 44934 to file a motion with

the OAH seeking immediate reversal of the suspension without pay that accompanies such charges. Review of the motion is limited to a determination of whether the facts alleged, if true, are sufficient to warrant immediate suspension.

Section 44939.5 has also been added to the Education Code to prohibit a school district from entering into an agreement with a teacher that would prevent a mandatory report of egregious conduct or expunging from a teacher's personnel file "credible complaints of, substantiated investigations into, or discipline for egregious conduct."

Pages 194 and 196: Board's Failure to Consider or Formulate Written Charges Prior to Initiating Termination of Permanent Certificated Employee Does Not Invalidate Termination.

Vincent DeYoung was a permanent certificated employee of the Hueneme Elementary School District. The district's governing board voted to dismiss him based on charges that he had physically and abusively disciplined his students. The dismissal hearing proceeded and Vincent's contract was terminated.

Education Code Section 44934 requires a governing board to file or formulate written charges prior to voting for the dismissal of a permanent certificated employee. The district's governing board did not file or formulate written charges before voting for Vincent's dismissal and he argued that their failure to do so invalidated his termination.

The court observed that while Section 44934 requires the governing board to file or formulate written charges before voting on dismissal, the statute does not specify a remedy for a governing board's failure to do so. The court thereafter held that in the absence of some prejudice to Vincent – and the court found none – the governing board's failure to file or formulate written charges before voting for the dismissal did not invalidate the subsequent termination of the contract. *DeYoung v. Commission on Professional Competence of the Hueneme Elementary School District*, 175 Cal. Rptr 3d 383 (Cal. App. 2 Dist. 2014).

Page 198: Reed Litigation Involving Teacher Layoffs in the Los Angeles Unified School District Settled.

The parties in this case agreed in 2014 that to exempt teachers at the low-performing schools involved in the litigation from seniority-based layoffs across the district, the district must provide funding to attract, mentor, and retain teachers at these schools. Each school will receive an additional assistant principal and counselor, a special education coordinator, and several mentor teachers. In the event of future layoffs, the settlement provides that the district must establish that its teacher training justifies exempting teachers at these schools.

Page 200: School District Expending Funds for Personnel Training Must Consider Needs of Classified Personnel.

Sections 45390 and 45391 have been added to the Education Code. These sections require a school district expending funds for the professional development of any schoolsite staff also to consider the professional development needs of its classified employees. The professional development may be in any of a number of areas relevant to public schools, including working with at-risk youth, curriculum, and special education.

Page 205: California Legislature Extends Differential Pay for Certificated Employees to Maternity and Paternity Leave.

Education Code Section 44977.5 provides additional differential pay benefits to a certificated employee in the form of up to 12 school weeks of maternity or paternity leave. The 12-week

period is be reduced by any period of sick leave, including accumulated sick leave, taken during the paternity or maternity leave. Each certificated employee may only receive one 12-week period per maternity or paternity leave and to the extent Section 44977.5 conflicts with an existing collective bargaining agreement, the section shall not apply until expiration or renewal of the agreement. Birth of an employee's child and placement of a child with an employee in connection with the adoption or foster care of the child are included within the section's definition of maternity or paternity leave.

Page 205: Leave Rights for Public Employees Who Are Military Veterans.

A certificated employee hired on or after January 1, 2017, who is a military veteran with a military service-connected disability rated at 30 percent or more by the U.S. Department of Veterans Affairs is entitled to a leave of absence for illness or injury with pay of up to 10 days for undergoing medical treatment for the military service-connected disability. For certificated employees, the days of treatment are 12. These provisions do not affect a collective bargaining agreement that provides greater leave rights. For more details, see Education Code Sections 44978.2 and 45191.5.

Page 207: Title VII Update and Correction.

Title VII now encompasses discrimination based on sexual orientation. The statement regarding Title VII and sexual orientation in the middle of this page and again on p. 211 needs to reflect the change. Also, the reference in the bottom paragraph on p. 207 that straightforward allegations of discrimination are termed disparate treatment claims was misplaced. These are known as intentional discrimination claims. Disparate impact claims are those as described in the next sentence in this paragraph.

Pages 208, 211: Can a Female Management Math Consultant Be Paid Less Than Her Male Counterparts?

It depends. Aileen Rizo, a Fresno County Office of Education math consultant, filed a federal lawsuit maintaining that basing her current lower salary on her prior salary level violates (1) the federal Equal Pay Act (29 U.S.C. §206(d)), (2) Title VII of the 1964 Civil Rights Act, and (3) the California Fair Employment and Housing Act. The U.S. Court of Appeals for the Ninth Circuit focused only on the Equal Pay Act, since it had ruled previously that standards under Title VII are the same and since there was no assertion that equal pay standards under the California Fair Employment and Housing Act are any different than under federal law. In this case, the county office of education asserted that while there was a pay differential, this was caused by Rizo's lower prior salary, not her gender. The Ninth Circuit returned the case to the trial court to determine if there was justification for the county office's claims that the prior salary differential was based on factors such as encouraging persons to leave previous employment and the judicial use of taxpayer dollars. If prior salary alone was responsible for the differential, the Equal Pay Act is being violated. *Rizo v. Vovino*, 854 F.3d 1161 (9th Cir. 2017).

CHAPTER 6
RIGHTS OF EXPRESSION

Page 218: U.S. Supreme Court Rules that Public Employee Testimony in Judicial or Administrative Hearings is Constitutionally Protected.

The case involved an Alabama community college administrator, Edward Lane, who was hired on a probationary basis to direct a statewide training program for underprivileged youth. Lane dismissed Suzanne Schmitz, an Alabama State Representative who was employed by the training program but regularly did not show up for work. Lane's action triggered considerable public attention and prompted an FBI investigation into Schmitz's employment based on public

corruption concerns. Lane testified before a federal grand jury and later trial against Schmitz about his reasons for firing her. Subsequently when the training program experienced budget shortfalls, Lane was one of 29 probationary employees who were dismissed by Steve Franks, the new community college president.

Lane sued Franks alleging that his dismissal was in retaliation for his grand jury and trial testimony. Both the trial and appellate courts relied on *Garcetti v. Ceballos* to reject the lawsuit because Lane's speech, even if considered a matter of public concern, was based on what he had learned as an employee pursuant to his official duties. The U.S. Supreme Court overturned this part of the appellate court decision, ruling that the First Amendment protects public employees from retaliation for providing truthful sworn testimony under oath even if the content of the speech is learned while acting as an employee. This is so because sworn speech "is a quintessential example of speech as a citizen" and is protected by *Pickering v. Board of Education* when on a matter of public concern. Further, there was no evidence that Lane's testimony was false or erroneous or undermined his effectiveness as an employee (see the *Pickering* discussion regarding when free speech even on matters of public concern lose its protection). *Lane v. Franks*, 134 S.Ct. 2369 (2014).

Page 219: No Free Speech Protection for High School Campus Supervisor Who Told Students to Video-Record Police Brutality During a Fight in the School Parking Lot.

A Bear Creek High School campus supervisor contended that she had a First Amendment right to direct students to video-record police arrest of a female African-American student they had taken to the ground during a fight between students and non-students in the school parking lot. The supervisor allegedly yelled that the arrest "was police brutality" and "bullshit" before she told students to do the video-taping. The judge held that the campus supervisor was speaking out as a public official to students within the scope of her employment and thus there was no violation of her First Amendment rights when school officials reprimanded her and recommended termination of her employment for escalating the turmoil. *Toney v. Young*, 238 F.Supp.3d 1234 (E.D. Cal. 2017).

Page 221: More on Employee Complaints Made During the Scope of Employment.

An Edmonds, Washington, middle school special education teacher who managed the district's Educational/Behavioral Disorders program challenged her dismissal as retaliation for speaking negatively to school administrators and parents about the program. In upholding the trial court's rejection of her claims, the Ninth Circuit, which has jurisdiction for a number of western states including California, cited the U.S. Supreme Court's *Garcetti v. Ceballos* decision in noting that the comments were made within the scope of her employment and thus not protected by the First Amendment. *Coomes v. Edmonds School District No. 15*, 816 F.3d 1255 (9th Cir. 2016).

What is interesting about the ruling is that the judges noted that the teacher's job description encompassed both up-the-chain complaints and speaking to parents. So her complaints embedded in a chain of emails to both were unprotected. The Ninth Circuit did not address how encompassing a job description can be, a matter that the U.S. Supreme Court justices cautioned against. The judges also sidestepped the teacher's assertion that speaking to her union about the matter was constitutionally protected as made outside the scope of her employment since she hadn't argued that point. Whether her complaints may have been protected under Washington State law also was not addressed and the case returned to the trial court on this issue. As noted in *California School Law*, employee speech may be more protected under state law than under the First Amendment.

Page 236: U.S. Court of Appeals for the Ninth Circuit Rules on When Student Off-campus Speech via an Electronic Communication Device Loses its Free Speech Protection.

In a cautious 2013 decision that examines the complex dimensions of student off-campus speech, the Ninth Circuit upheld the ten-day suspension and later ninety-day expulsion of a Nevada student who sent a series of MySpace messages to his fellow students about a planned school shooting. Included in the postings from his home computer were discussions of the weapons he possessed, his admiration for Adolph Hitler, and his intention to conduct a school shooting on April 20. The latter is the date of Hitler's birth and the Columbine massacre. For example, in one posting he stated "I wish then I could kill more people / but I have to make due with what I got. / 1 sks & 150 rds / 1 semi-auto shot gun w/sawed off barrel / 1 pistle." Some of his friends were sufficiently concerned that they alerted school officials. The student challenged the disciplinary action on several grounds, one of which was violation of his rights of free speech.

Rather than craft a one-size fits all standard, the appellate judges noted that "when faced with an identifiable threat of school violence, schools must take disciplinary action in response to off-campus speech that meets the requirements of *Tinker*." These requirements encompass material interference with school activities and invasion of the rights of others. In this case, they noted that it was reasonable for school officials to take seriously what the student had said about causing violence at school. Indeed, the student admitted to a police officer that he had weapons and ammunition at his house. And clearly the student's threatening the entire student body and targeting specific students by name constituted invasion of the rights of others. Thus, the *Tinker* standards were met. At the same time, the judges noted that their decision did not imply approval of the school's action. They noted, for example, that school officials could have opted for a less punitive approach that encompassed in part counseling by a mental health professional. *Wynar v. Douglas County School District*, 728 F.3d 1062 (9th Cir. 2013).

Three years later the Ninth Circuit relied in part on *Wyman* in affirming a lower court decision that an Oregon school district did not violate a seventh grade student's free speech rights by suspending the student for verbally sexually harassing two fellow seventh graders with disabilities on the way home after school. The harassment started a few hundred feet from the school along a path that begins at the school door and runs from school fields across a public park to a street. There is no fence or other boundary marker that separates the park from school property. The judges agreed that school administrators could reasonably foresee that the effects of the harassment would affect the victims' school experience. Indeed, the two students did tell the assistant principal that they felt uncomfortable, and there was some discussion about it among students at lunch. What is important about this decision is that goes beyond off-campus electronic communication to focus on face-to-face student comments. *C.R. v. Eugene School District 4J*, 835 F.3d 1142 (9th Cir. 2016).

Page 242: Banning Students from Wearing Clothing Displaying the American Flag on Cinco de Mayo Day Does Not Violate the First Amendment.

The U.S. Court of Appeals for the Ninth Circuit has upheld a federal district court ruling that school administrators had sufficient justification for asking three high school students to remove their shirts displaying the American flag or turn them inside out on Cinco de Mayo day. Given ongoing racial tension and gang violence between Hispanic and white students on the campus, the administrative directive fell within the reasonable forecast of disruption condition set forth in *Tinker v. Des Moines School District*. The appellate court noted that officials did not enforce a blanket ban on American flag apparel. Several students were allowed to wear their shirts with less prominent flag imagery to class when it was clear that the shirts were not likely to make them targets of retaliation. In effect, both the trial and appellate courts deferred to the judgment of

school officials, based on the facts as presented. *Dariano v. Morgan Hill Unified School District*, 767 F.3d 764 (9th Cir. 2014).

Page 242: Messages Displayed on Uniforms.

As noted on this page, in 2008 the U.S. Court of Appeals for the Ninth Circuit ruled two-to-one in *Jacobs v. Clark County School District* that a Nevada school district did not violate student expression and free exercise of religion rights when it forbid the display of messages on a school uniform. Consisting of plain-colored tops and bottoms, the uniform policy did permit display of school logos but the majority viewed these as less a form of expression than as an identification mark.

In another Nevada case involving a similar elementary school dress code policy, two three-judge panels disagreed with one another in a case requiring students to display the motto “Tomorrow’s Leaders” above the school logo on the school required shirt and also permitting an exemption from complying with the dress code for nationally recognized youth organizations like Boy Scouts or Girl Scouts on regular meeting days. The motto display, the first panel ruled, is a form of compelled speech. And the policy is not content-neutral because it permits an exemption for certain youth organizations. Because of the free speech implications, the judicial standard of strict scrutiny must be made to assure that it is narrowly tailored to serve a compelling state interest. The Ninth Circuit returned the case to the trial court to apply this standard to the dress code policy to determine if it violated student First Amendment rights. *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014). Before the trial court ruled on the matter, the school board of trustees adopted a new policy under which school uniforms could have a logo with the school name and mascot but no other language. This meant that “Tomorrow’s Leaders” could no longer be displayed on school uniforms and the elementary principal so informed parents. The trial court subsequently ruled in favor of the defendants.

The case was then appealed again to the Ninth Circuit, and this time a different panel disagreed with the first panel on the standard to apply to the matter, though agreeing that the matter was moot in light of the change in the uniform policy. This three-judge panel maintained that intermediate scrutiny rather than strict scrutiny should have been used. And, if this standard were used, the “Tomorrow’s Leaders” motto and the exemption for nationally recognized youth organizations would not violate the First Amendment. But because all the judges on the Ninth Circuit had refused to hear the case a second time, this panel deferred to the judgment of the first panel on the strict scrutiny standard and upheld its ruling. It sent the case back to the trial court to determine if the individual school employees could be subject to damages. *Frudden v. Pilling*, 877 F.3d 821 (9th Cir. 2017). How the Ninth Circuit will deal with matters involving school uniforms in the future remains to be seen.

CHAPTER 7 THE SCHOOL AND RELIGION

Page 263: Football Coach Went Too Far in Praying on Football Field After Games.

The U.S. Court of Appeals for the Ninth Circuit that has jurisdiction for a number of western states including California agreed with a federal district court in Bremerton, Washington, that a high school assistant football coach's speech while kneeling in prayer on the football field following games in presence of students and spectators was not private speech but public speech by a school employee that could be subject to content control by the school district under the U.S. Supreme Court’s *Garcetti v. Ceballos* decision (see p. 218 in the previous chapter). Here, the district had placed the coach on administrative leave after he continued to pray on the fifty-yard line immediately after games contrary to the school district’s directives to avoid religious

endorsement in his coaching capacity. *Kennedy v. Bremerton School District*, 869 F.3d 813 (9th Cir. 2017).

Page 265: See Update For Page 62 Above Regarding Lawsuit Brought by Hindu Organization Challenging Portrayal of Hindu Religion in State Board of Education’s History-Social Science Content Standards.

Page 269: Yoga Classes in the Encinitas School District Ruled Not to Advance Religion.

Based on a detailed review of evidence produced in the trial court, a California court of appeal has ruled that incorporation of yoga in physical education for elementary students in the Encinitas Union School District does not advance religion contrary to the establishment clause in Article I, Section 4 of the California Constitution. The court noted that when the program was initiated, some parents complained that it was advancing Hinduism. The program was funded by a grant from the KP Jois Foundation, which promotes Ashtanga yoga as explained in Hindu texts. The district responded by revising the program to remove features that could be construed as religious (e.g., Sanskrit language, Ashtanga tree poster, guided meditation scripts). Character quotations from religious figures were replaced with those from famous persons like Babe Ruth and Martin Luther King. The appellate court noted that while a reasonable person might know that a grant from the Jois Foundation was linked to Hinduism, that same person "would also be aware that, as implemented (*italics*), the District's yoga program was clearly not (*italics*) Astanga eight-limbed yoga." The yoga teachers were from the district, and the district itself was not involved with the Jois Foundation. The latter's involvement in the program other than funding it was in assisting the district in ensuring that yoga teachers would be proficient teaching yoga poses to students. *Sedlock v. Baird*, 185 Cal. Rptr.3d 739 (Cal. App. 4 Dist. 2015).

CHAPTER 8 STUDENTS WITH DISABILITIES

Pages 297-298 and 308-311: California Code of Regulations, Title 5, Revised to Conform to Federal Law.

Effective July 1, 2014, various sections of Title 5 of the California Code of Regulations relevant to special education were revised to conform to federal law.

The eligibility categories in the Title 5 regulations are now identical to those contained in federal law. As a result, the definitions of autism and specific learning disability have been revised. These changes are significant in that the revised specific learning disability definition now permits school districts to utilize a response to intervention or pattern of strengths and weaknesses analysis to qualify a student under the eligibility category of specific learning disability and the revised autism definition contains different criteria than the prior definition for “autistic-like behaviors”. The revised eligibility categories are found in California Code of Regulations, Title 5, Section 3030. Other amendments to the Title 5 regulations include replacing the phrase “designated instruction and services” with “related services” and clarifying qualifications for individuals to provide special education and related services.

Page 300: United States Supreme Court Revisits Educational Progress Required Under Free Appropriate Public Education Standard.

In March of 2017 the United States Supreme Court revisited the amount of educational progress required under the free appropriate public education (FAPE) standard for the first time since the Court’s decision in *Board of Education v. Rowley*.

The case concerned Andrew F. who is eligible for services under the category of autism and attended Douglas County School District in Colorado from preschool through the fourth grade. Unsatisfied with the individualized education program (IEP) made available to Andrew, his parents filed an administrative due process hearing against the district and later appealed that decision – which was favorable for the district – to a federal district court and the Tenth Circuit Court of Appeals. The administrative law judge, federal district court, and the Tenth Circuit Court of Appeals all found that the IEPs developed for Andrew by the District were reasonably calculated for Andrew to make some progress which they defined as “merely more than *de minimis*.” *De minimis* means trivial.

The Court reversed the Tenth Circuit Court of Appeals and held that a FAPE requires that an IEP be reasonably calculated to enable the child to make appropriate educational progress in light of the child’s circumstances and that sufficient progress means a level of benefit greater than “merely more than *de minimis*.” The Court declined to establish a bright line rule as to what constitutes appropriate progress but did note that a FAPE requires a school district to design a program which allows the student to advance appropriately toward attaining IEP goals and, when possible, be involved in and make progress in the general curriculum. The Court also acknowledged that grade level advancement may not be a realistic goal for all children with IEPs but that these children are nonetheless entitled to an educational program that is “appropriately ambitious in light of the [child’s] circumstances.”

The Court’s decision does not appear to fundamentally alter the legal analysis of a FAPE in California as the Office of Administrative Hearings has for many years required that a child receive “meaningful” educational benefit and that the child’s unique, disability-related needs are to be considered in determining if meaningful educational benefit was attained. *Andrew F. v. Douglas County School District*, 137 S.Ct. 988 (2017).

Page 306: U.S. Court of Appeals for the Ninth Circuit Holds that School District Should Have Suspected Autism for Child, District’s Failure to Conduct Autism Assessment Could Not Be Excused by District’s Possession of Third Party Autism Report, and District’s Failure to Conduct Its Own Autism Assessment of the Child Denied the Child a Free Appropriate Public Education.

The Ninth Circuit addressed whether a school district could be excused from conducting its own assessment of a child in the area of autism because the district received an autism report for the child completed by an evaluator not subject to the assessment criteria in the IDEA. The Ninth Circuit held that the Paso Robles Unified School District could not and that by doing so the district denied the child, Luke, a free appropriate public education. The decision emphasizes the importance of school districts conducting their own appropriate assessments of children in all areas of suspected disability.

The district evaluated Luke in 2009 shortly before his third birthday to determine if he was eligible for special education services. The assessment plan governing the district’s assessment of Luke did not identify “social/adaptive behavior” – the category covering autism – as an area of assessment and no assessment tools were utilized during the assessment to evaluate Luke to determine if he did satisfy the eligibility category of autism. A district school psychologist, however, did informally observe Luke while he was being assessed by other district employees and determined that it was not necessary for the district to evaluate Luke in the area of autism.

Two days before the district convened an IEP team meeting to review its initial evaluation of Luke the district received a report from the regional center. Regional centers provide non-educational services to children with disabilities. The regional center report provisionally

diagnosed Luke with Pervasive Developmental Disorder, Not Otherwise Specified, which is a disorder on the autism spectrum. At the IEP team meeting, no mention was made of the school psychologist's observation of Luke or the regional center report. The IEP team determined that Luke satisfied the eligibility criteria for speech or language impairment.

Luke's parents later filed a due process hearing request with the Office of Administrative Hearings (OAH) against the district. They alleged, among other claims, that the district violated the IDEA by failing to assess Luke in the area of autism and failing to address Luke's autism-related needs at school. The OAH denied the parents' claims and found that regardless of whether the district's initial evaluation was deficient there was no need for the district to conduct assessment of Luke in the area of autism because the report from the regional center thoroughly assessed Luke in that area.

Luke's parents appealed to federal district court which affirmed the decision of the OAH. The court held that it was not necessary for the district to conduct an autism assessment of Luke because the school psychologist did not observe Luke exhibiting obvious characteristics of autism during the observation and further held that even if such an assessment were warranted any failure to assess in the area of autism was harmless error because the IEP team made appropriate recommendations for Luke in consideration of the regional center report.

The Ninth Circuit reversed the district court and focused its analysis on the school district's failure to assess Luke in all areas related to his suspected disability. The Ninth Circuit noted that a disability is "suspected", and therefore must be assessed by the school district consistent with the requirements of the IDEA, when the district has notice that the child has displayed symptoms of the disability. Informed suspicions of parents or outside experts are sufficient to place a school district on notice that a particular disability is "suspected" and it is for this reason that the Ninth Circuit held that once the district received the regional center report, it was on notice that autism was a suspected disability for Luke and therefore an area in which the district must evaluate Luke consistent with the requirements of the IDEA. The Ninth Circuit thereafter held that the school psychologist's informal observation of Luke was not an appropriate assessment under the IDEA because, among other flaws, the parents were not made aware of the observation or the opinion formed after the observation which the IDEA requires through the provision of an assessment plan to parents identifying the areas to be assessed and the subsequent generation of reports from those assessments with review of the reports by an IEP team. The Ninth Circuit further held that the regional center report did not excuse the district's failure to evaluate Luke in the area of autism because the assessment conducted for that report was not performed consistent with the requirements of the IDEA and there was no evidence that the report was actually considered by the IEP team.

A failure to assess in an area of suspected disability is a procedural violation of the IDEA. The IDEA states that a procedural violation in and of itself, however, does not deny the child a FAPE. Rather, to deny the child a FAPE, the violation must seriously impair the parents' opportunity to participate in the formulation of the child's IEP, result in the loss of educational opportunity for the child, or cause a deprivation of the child's educational benefits. The Ninth Circuit determined that the district's failure to assess Luke in the area of autism was a substantial procedural violation that both deprived him of educational benefit and substantially hindered his parents' participation in the IEP process.

The lesson of the case is clear. If a school district is on notice that a child is suspected of having a disability, the district must conduct its own IDEA-compliant assessment of the child in the area of

suspected disability and provide an assessment report to the IEP team for review. *Timothy O. v. Paso Robles Unified School District*, 822 F.3d 1105 (9th Cir. 2016).

Page 308: U.S. Court of Appeals Determines that Classroom Supports Provided to Student Without IEP Were Special Education Services Which in Combination with Educational Impact Resulting from Absences Related to Child’s Psychiatric Hospitalizations and Suicide Attempts Demonstrated that Child Was Eligible for Special Education Services Under the IDEA.

The IDEA sets forth two criteria for a child to be determined eligible for special education services: The child must meet one or more of the IDEA’s eligibility categories (e.g., autism, specific learning disability, etc.) and, by reason thereof, require special education and related services. In this case the Ninth Circuit addressed whether L.J., a student the parties agreed satisfied three eligibility categories, required special education and related services and therefore an IEP. The Ninth Circuit determined that L.J. did require special education and related services, should have been determined eligible for an IEP by the Pittsburg Unified School District, and was denied a free appropriate public education by the district’s failure to determine L.J. eligible for special education services and develop an IEP for him.

L.J. demonstrated both physically and verbally aggressive behaviors in the 2nd through 5th grades including hitting and kicking his teachers and calling teachers and students names. In the 2nd grade he responded to a teacher disciplining him by saying he wanted to kill himself. An emergency suicide evaluation diagnosed him with ADHD, Oppositional Defiance Disorder, and Bipolar Disorder. The district provided L.J. – even though he did not have an IEP – with a paraeducator to support him in the classroom. The district evaluated L.J. for special education services toward the end of his 3rd grade year and determined that he was not eligible for special education services. Later that summer L.J. was admitted for psychiatric hospitalization and detained as a danger to himself and others for banging his head and making threats.

L.J.’s parents thereafter filed a due process hearing request with the OAH against the district. The parties resolved the case by agreeing that the district would reevaluate L.J. and place him at a different school site for his 4th grade year. In September of that year L.J. was suspended for throwing rocks and threatening to kill the principal. L.J., however, continued to receive the support of the paraeducator and other special accommodations and his academic performance was satisfactory. The IEP team considered the district’s reevaluation of L.J. and determined once again that he was not eligible for special education services under the IDEA.

L.J.’s parents filed another due process hearing request against the district, and the OAH determined that L.J. did not satisfy any of the IDEA’s eligibility categories and did not require special education services. L.J.’s parents appealed the decision of the OAH to federal district court, and the court disagreed with the OAH’s decision that L.J. did not satisfy any of the IDEA’s eligibility categories. The court determined that L.J. satisfied the criteria for specific learning disability, other health impairment, and serious emotional disturbance but nonetheless ruled for the school district by determining that L.J. did not need special education services because of his satisfactory performance in the general education classroom.

L.J.’s parents appealed the district court’s decision to the Ninth Circuit. Neither party challenged the district court’s determination that L.J. satisfied three of the IDEA’s eligibility categories. The parties focused their arguments on whether L.J. required special education services. In ruling for L.J., the Ninth Circuit focused on the types of supports the district had provided to L.J. when he did not have an IEP and determined that these supports were not general education interventions and instead special education. The Ninth Circuit held that general education instruction does not

provide for the one-to-one direction L.J. received from a paraeducator, the mental health services L.J. received through a school wide mental health program, nor the clinical interventions L.J. received from a behavior specialist who advised staff on how to address L.J.'s behaviors. The Ninth Circuit concluded that although L.J. made progress in his educational program without an IEP the progress was attributable in substantial part to the special education services he received. The Ninth Circuit further supported its determination that L.J. was eligible for an IEP by noting that L.J.'s emotional issues negatively impacted his attendance and that his absences interfered with his education.

As schools increasingly provide school-wide interventions to general education students to improve educational outcomes, this case serves as a good reminder of the careful consideration that should be given to how those interventions figure into the analysis of whether a particular student requires special education services under an IEP. *L.J. v. Pittsburg Unified School District*, 835 F.3d 1168 (9th Cir. 2016).

Page 319: Effective July 1, 2013, Title 5, California Code of Regulations Functional Analysis Assessments and Behavior Intervention Plans are no Longer Required.

Assembly Bill (AB) 86 aligns those portions of the Education Code addressing behavior for children with disabilities with the requirements of the IDEA. AB 86 eliminates the requirements previously found in the Title Five, California Code of Regulations that school districts undertake a functional analysis assessment and the requirement that a school district develop a behavior intervention plan. The California Education Code now provides that a school district should undertake a functional behavioral assessment or FBA (an evaluation of behavior) for students that require behavioral interventions and, where appropriate, develop a behavior intervention plan or BIP (a plan identifying how to address the student's behaviors) to support these students. The term BIP as it is now used in the Education Code is derived solely from the IDEA and is not a reference to the detailed document previously known as a BIP under the Title 5 regulations. AB 86 also adds language to the Education Code addressing the use of emergency behavioral interventions such as physical restraint. These same requirements regarding emergency were previously in the Title 5, California Code of Regulations. The above-noted additions to the Education Code are at Section 56520 and following sections.

Page 325: U.S. Court of Appeals for the Ninth Circuit Emphasizes Necessity of School Districts Initiating Due Process Hearings to Resolve Program Disputes.

Education Code Section 56346 requires a school district to initiate a due process hearing if the district determines that a component of the proposed special education program to which the parent does not consent is necessary to provide a FAPE to the child. The question for the Ninth Circuit in this case was whether the Los Angeles Unified School District's failure to initiate a due process hearing for a period of one and one-half years while the parent and district disagreed over the placement offer in the child's IEP was unreasonable and denied the child a FAPE. The Ninth Circuit determined that the district waited too long to file a due process hearing request and thereby denied the child a FAPE because the child remained in an inappropriate placement.

A November 2010 IEP recommended that I.R., a second grader eligible under the category of autism, attend a special day class. I.R.'s mother refused to consent to the special day class and insisted that I.R. instead attend a general education classroom with a one-to-one aide. Subsequent IEPs through 2012 continued to recommend that I.R. attend a special day class and I.R.'s mother maintained her position that I.R. attend a general education classroom. The district did not initiate a due process hearing to address the placement dispute and I.R. remained in the general education classroom preferred by her mother.

In May 2012 I.R.'s parents filed a due process hearing request against the district alleging that the district denied I.R. a FAPE on various grounds, including on the basis that the district failed to comply with Section 56346 by requesting its own due process hearing to resolve the placement dispute. The OAH found in favor of the district for the most part and determined that the district's failure to request a hearing did not deny I.R. a FAPE because the IEP team offer of a special day class was appropriate for I.R. and it was the refusal of I.R.'s mother to consent to the placement which had denied I.R. a FAPE.

The federal district court affirmed the decision of the OAH, but the Ninth Circuit reversed. The Ninth Circuit held that the goal of Section 56346 is to ensure that placement disputes are resolved promptly and that while school districts must have some flexibility to consider the reasons for a parent's refusal to consent to an IEP, the one and one-half year delay by the district in not filing a due process hearing request despite the placement dispute was too long. The Ninth Circuit further held that the district's failure to timely file a hearing request was a procedural violation of the IDEA which denied I.R. a FAPE because I.R. lost educational opportunity by remaining in an inappropriate placement. *I.R. v. Los Angeles Unified School District*, 805 F.3d 1164 (9th Cir. 2015).

Page 325: U.S. Court of Appeals for the Ninth Circuit Clarifies Application of Two-Year Statute of Limitations for Filing Administrative Due Process Hearing Complaints.

The underlying dispute arose in 2009 when the parents of G.A. – a child eligible for services under the category of autism – challenged the Spokane School District 81's assessment and individualized education program (IEP) for their child. The administrative hearing request that followed, however, included allegations that the district should have identified G.A. as a child with a disability as early as 2006.

The administrative law judge primarily ruled in favor of the district and held that the claims concerning an alleged failure to identify G.A. as a child with a disability in 2006 were time-barred by the two-year statute of limitations applicable to due process hearing complaints under the Individuals with Disabilities Education Act. The administrative law judge reasoned that because the parents filed their complaint on April 26, 2010, that any allegations predating April 26, 2008, were barred by the statute of limitations.

A federal district court affirmed the administrative decision but the Ninth Circuit reversed the federal district court and held that an inquiry must be made as to when G.A.'s parents "knew or should have known" about the conduct that formed the basis for their complaint. The Ninth Circuit's decision clarifies that the two-year statute of limitations is not applied robotically and must take into consideration whether the parents knew or should have known about the conduct forming the basis for their complaint before a determination is made to bar claims based on the statute of limitations. For example, if a school district evaluates a child in 2006, convenes an IEP team meeting that same year, and informs the parents that their child is not eligible for services, the parents will likely be barred from attempting to challenge the 2006 IEP team decision in a 2010 hearing request because the parents were aware of the district's determination of non-eligibility in 2006 and therefore should have filed a hearing request no later than 2008. *Avila v. Spokane School District 81*, 852 F.3d 936 (9th Cir. 2017).

Page 326: U.S. Court of Appeals for the Ninth Circuit Holds that School District's Unilateral Alteration of Individualized Education Program Constitutes a Denial of a Free Appropriate Public Education and Failure to Respond to Parents' Hearing Request Violates the Individuals with Disabilities Education Act.

M.C. suffers from a genetic disease which renders him blind and M.C. also has deficits in all academic areas. M.C.'s mother filed a due process hearing complaint against the Antelope Valley Union High School District challenging the procedural and substantive appropriateness of the individualized education programs developed by the district for M.C. Among the areas of dispute was the specific offer of services from a teacher of the visually impaired (TVI services) and the district's failure to comply with the IDEA by issuing a written response to the administrative due process hearing complaint.

The district's individualized education program (IEP) – to which M.C.'s mother consented – made 240 minutes per month of TVI services available to M.C. On the first day of the due process hearing, however, the district took the position that the offer of 240 minutes per month of TVI services was a clerical error and that the actual offer of TVI services was 240 minutes per week. The district thereafter sought to defend the appropriateness of the IEP based on its position that the IEP offer was for 240 minutes per week. The Ninth Circuit held that the district's unilateral revision of the amount of TVI services offered in the IEP denied M.C. a free appropriate public education (FAPE) because it "vitiates the parents' right to participate at every step of the IEP drafting process." The Ninth Circuit further held that if the district discovered that the IEP did not reflect the understanding of the parties' agreement, that the district was required to notify M.C.'s mother of this discovery and seek her consent for any amendment.

After a school district receives a due process hearing request from parents, the district must issue a written response to the hearing request no later than 10 calendar days after receipt of the request. 20 U.S.C. section 1415(c)(2)(B)(i). The District never issued a written response to M.C.'s due process hearing complaint. The Ninth Circuit held that this failure violated the Individuals with Disabilities Education Act and remanded the case to the federal district court to determine the degree of prejudice that M.C. suffered to determine an award of appropriate compensation. The Ninth Circuit also held that should a school district make this same mistake in the future that the administrative law judge must not permit the hearing to proceed and instead order the district to issue a response to the hearing request and shift the cost of any related delay in the hearing process to the district. *M.C. v. Antelope Valley Union School District*, 858 F.3d 1189 (9th Cir. 2017).

Page 330: U.S. Court of Appeals for the Ninth Circuit Addresses Standard for School Districts to Recover Attorneys' Fees in Special Education Disputes.

A school district may recover attorneys' fees and costs for frivolous claims pursued against the district by a parent under the IDEA, the Americans with Disabilities Act (ADA), Section 504 the Rehabilitation Act of 1973 (Section 504), and/or 42 U.S.C. Section 1983. The Ninth Circuit held that a school district may recover attorneys' fees against the attorneys of a parent and/or the parent if any of the parent's claims under these statutes are frivolous. The Ninth Circuit further held that a claim is frivolous if the outcome of the claim is plainly obvious or the arguments supporting the claim are completely without merit.

The case initiated with the school district filing a due process hearing request to defend its assessment of a student in lieu of granting the parent's request for the district to fund an independent educational evaluation (IEE). An IEE is an evaluation of the child that is undertaken by an individual not employed by the school district and typically sought as a second opinion regarding the child's needs by the parent. The IDEA requires a school district to, without unnecessary delay, respond to a parent's request for an IEE by either granting the IEE or filing a hearing request to demonstrate the appropriateness of the district's assessment of the student (34 C.F.R. § 300.502(b)(2)). The school district prevailed in the hearing by demonstrating that its assessment of the child was appropriate.

The parent's attorney thereafter sent a letter to the district offering to forego an appeal of the hearing decision if the district funded an IEE for the child and paid attorneys' fees and costs to the parent's attorney. The district's attorney responded with a letter declining the settlement offer and noting the district's reservation of its right to seek sanctions in response to any such appeal which the district viewed as frivolous in consideration of the hearing decision.

The parent thereafter appealed the administrative decision to federal district court and raised claims against the district under the ADA, Section 504, and a claim for money damages under Section 1983 – all predicated on allegations arising from or related to the request for the IEE, subsequent hearing, and the district's rejection of the settlement offer from the parent's attorney.

Before the federal district court, the school district not only prevailed with the judge affirming the underlying decision of the due process hearing but the judge invited the district to file a motion for attorneys' fees because the bases for the parent's appeal were frivolous. The judge subsequently awarded the district \$94,602.34 in attorneys' fees and \$2,058.21 in costs against the parent who thereafter appealed.

The Ninth Circuit reversed the district court's award of attorneys' fees to the school district under the IDEA and Section 504 based on the determination that the parent's claims under these statutes, while described by the court as poorly plead and argued, did not rise to the level of being frivolous because there was at least some basis for the claims. However, the Ninth Circuit affirmed the determination of the district court that the parent's claims under the ADA and Section 1983 were frivolous because the claims under these statutes had no support under the law. A retaliation claim under the ADA cannot be predicated on an alleged violation of the IDEA, and California school districts cannot be sued for money damages under Section 1983. Because the bulk of the litigation focused on the IDEA and Section 504, it is likely that on remand to the federal district court that the ultimate award against the parent will be significantly less. *C.W. v. Capistrano Unified School District*, 783 F.3d 1237 (9th Cir. 2015).

Page 330: U.S. Court of Appeals for the Ninth Circuit Holds that Parents Obtained More Relief Through Due Process Hearing as Compared to School District's Statutory Offer of Settlement and that Parents Were Substantially Justified in Rejecting the Offer.

If a school district issues a settlement offer to a parent more than 10 days before the commencement of a due process hearing and the parent rejects the offer and obtains less favorable relief from the hearing decision, the parent may not be able to recover attorneys' fees generated subsequent to receipt of the offer (34 C.F.R. § 300.517(c)(2)). Because attorneys' fees liability often represents a school district's greatest potential financial exposure in a due process hearing, a well-crafted statutory offer of settlement can significantly reduce the district's exposure. However, this potential limitation on recovery of a parent's attorneys' fees does not apply if a court determines that the parent was substantially justified in rejecting the school district's offer.

The Ninth Circuit analyzed and applied these aspects of the IDEA's statutory offer of settlement provision to hold that the parents of T.B., a child with brain damage and physical problems, not only obtained more relief than the San Diego Unified School District's settlement offer through the due process hearing decision but that the parents were also substantially justified in rejecting the district's offer.

The parties participated in a due process hearing before the OAH in 2007. While the district prevailed on most of the issues, the OAH held that T.B. prevailed on issues pertaining to his

health care plan and a transition plan designed to increase T.B.'s access to a school program – findings that led to a determination that the district did not make a FAPE available to T.B. Both parties appealed to federal district court, and T.B. raised additional claims against the district under Section 504 and the ADA.

Prior to the commencement of the due process hearing the parties engaged in settlement negotiations and the school district sent a settlement offer to the parents comprised of \$150,000 per year in funding for T.B.'s educational program.

The federal district court affirmed the underlying OAH decision and held that the parents established prevailing party status and an entitlement to reasonable attorneys' fees based on their partial success. In the ensuing litigation regarding attorneys' fees, the school district argued that the parents should not be permitted to recover any attorneys' fees incurred after the date of the settlement offer and the federal district court agreed.

In reversing the federal district court's determination that the school district's settlement offer cut off the parents' entitlement to attorneys' fees generated after the date of the offer, the Ninth Circuit first observed that comparison of a school district's settlement offer versus the result of the litigation must be made from the perspective of the parents. The Ninth Circuit thereafter identified the following reasons as to why the settlement offer was not more favorable than the relief obtained by the parents through the due process hearing: The settlement offer did not clearly provide for reasonable attorneys' fees and costs and required the parents to waive any claimed entitlement to such fees and costs, while the parents preserved their claim for fees and costs by proceeding to hearing; the settlement agreement terminated T.B.'s right to stay put under his last agreed upon educational program and instead defined stay put as whatever placement the school district offered at the end of the settlement period, while T.B.'s right to stay put was not limited in this way while the parents proceeded to hearing; and the settlement offer required the parents to coordinate and supervise T.B.'s educational program on their own with an amount of money that would not have covered all of the necessary expenses and precluded T.B.'s enrollment in a public school for at least some period of time.

The Ninth Circuit's decision emphasizes the importance of a school district's carefully crafting its settlement offer to mirror the type of relief the parents may obtain from the OAH without including additional terms or conditions which a court may later determine to be less favorable than the relief obtained from the OAH or justify the parents' decision to reject the offer. *T.B. v. San Diego Unified School District*, 806 F.3d 451 (9th Cir. 2015).

Page 331: U.S. Court of Appeals for the Ninth Circuit Holds that Parents' Consent to Implementation of the IEP Does Not Bar Claims for Damages Under Section 504 and the ADA.

The Ninth Circuit addressed whether the parents' consent to an IEP developed under the IDEA operated as complete defense to claims for damages the parents were pursuing against the Paradise Valley Unified School District under Section 504 and the ADA. The student, A.G., was attending seventh grade in Vista Verde, a district school, in 2010 and enrolled in a program for students with high IQs and one or more learning or behavioral disabilities. A.G.'s behaviors at that time were aggressive, disruptive, and noncompliant. An IEP team meeting was held for A.G. and the team proposed that A.G. attend the Roadrunner School, a non-public school primarily designed for children with emotional disturbances. A.G.'s parents visited Roadrunner, agreed that it would be an appropriate placement for A.G., and consented to implementation of the IEP.

On A.G.'s second day of attendance at the Roadrunner School she resisted entering school and had to be physically escorted onto campus by staff and led to the "Intervention Room". During that incident, A.G. kicked a paraprofessional in the face. An off-duty police officer who worked security at the school was summoned and arrested A.G. for aggravated assault and criminal damage. A.G. was placed in handcuffs and detained until her mother arrived. A bit over a month later the same off-duty officer was called to escort A.G. to the Intervention Room and A.G. resisted, allegedly poking the officer in the eye and thereafter scratching the officer's face and neck. A.G. was handcuffed and arrested for aggravated assault and transported to the police precinct.

A.G.'s parents thereafter filed an administrative due process hearing request against the school district under the IDEA and filed a lawsuit in state court against the school district, the City of Phoenix, and the officer who arrested A.G. alleging tort claims and violations of Section 504 and the ADA. A.G. and the district reached a settlement resolving only the IDEA claims. A separate settlement was thereafter executed between A.G. and the City of Phoenix and the officer which resulted in dismissal of all claims against those defendants. A.G.'s parents, however, continued to litigate the Section 504 and ADA claims against the district.

A.G.'s parents alleged that the district violated Section 504 by denying A.G. meaningful access to public benefits. A.G. claimed that the placement at Roadrunner School was not, as Section 504 requires, designed to meet her needs as adequately as the needs of nonhandicapped persons are met because she did not have access to elective classes available at Vista Verde and the Roadrunner School was not the least restrictive environment. A.G.'s parents also alleged that the district violated both Section 504 and the ADA by failing to provide her with an aide and behavioral supports at Vista Verde which would have enabled her to remain there instead of being placed at the Roadrunner School by the IEP team.

The federal district court granted summary judgment for the district and dismissed A.G.'s Section 504 claim by reasoning that her parents' consent to the IEP placing A.G. at the Roadrunner School waived this claim. The federal district court also dismissed A.G.'s ADA claim by holding that there was no evidence to establish that the provision of additional behavioral supports would have enabled A.G. to remain at Vista Verde. The federal district court also noted that there was no evidence that A.G.'s parents had made a request to the district for A.G. to receive any additional behavioral supports at Vista Verde. A federal district court grants summary judgment when the court determines there is no genuine dispute as to any material fact and that the party that filed the motion for summary judgment – the school district in this case – is entitled to judgment as a matter of law.

A.G.'s parents appealed the federal district court's summary judgment ruling, and the Ninth Circuit reversed the federal district court. The Ninth Circuit observed that consent to an IEP does not operate as a waiver of any rights held by A.G. under Section 504. This means that even though A.G.'s parents were in agreement with the Roadrunner School and consented to A.G. attending the school, their cooperation in the IEP process did not waive A.G.'s right to later claim that the placement at the Roadrunner School violated her rights under Section 504. The Ninth Circuit also noted that the plaintiff in an ADA case has no obligation to first request an accommodation to preserve a failure to accommodate claim under the ADA. In reversing the federal district court, the Ninth Circuit took no position on whether A.G. would ultimately prevail on her claims but merely held that the federal district court's dismissal of her claims under a summary judgement ruling was not warranted. The case was remanded to the federal district court for further fact finding.

This case highlights the levels of complexity which arise when plaintiffs seek redress under Section 504 and the ADA for school district conduct which is taken under the IDEA. *A.G. v. Paradise Valley Unified School District*, 815 F.3d 1195 (9th Cir. 2016).

Page 334: U.S. Court of Appeals for the Ninth Circuit Holds that School District’s Compliance with IDEA for Deaf or Hard-of-Hearing Child Does Not Necessarily Establish Compliance with the ADA.

The Ninth Circuit addressed whether a school district’s compliance with its obligations to a deaf or hard-of-hearing child under IDEA also established compliance with its effective communication obligations to that child under Title II of the ADA. The decision involved two cases in which high school students with hearing disabilities requested that their respective school districts provide Communication Access Realtime Transcription (CART) as a classroom accommodation. CART is a word-for-word transcription service in which a trained stenographer provides real-time captioning that appears on a computer monitor. In each case, the school districts denied the request for CART but offered other accommodations. And in each case the OAH and a federal district court determined that the accommodations made available by the school districts satisfied the IDEA. The federal district courts also held that the school districts’ compliance with the IDEA foreclosed any alleged violations of the ADA based on the school districts’ denials of the requests for CART.

Title II of the ADA includes a so-called “effective communications regulation” which requires public entities to ensure that communications with individuals with disabilities are as effective as communications with others and identifies CART as one type of auxiliary aide or service which may be provided. On appeal before the Ninth Circuit, the plaintiffs argued that the effective communications requirement of the ADA provides a substantively different legal standard with which school districts must comply as compared to the IDEA and that a school district’s compliance with the IDEA does not necessarily establish the school district’s compliance with the effective communications regulation of Title II of the ADA. The Ninth Circuit agreed.

The Ninth Circuit carefully analyzed the relevant statutes and regulations of Title II of the ADA and the IDEA and concluded that a court reviewing an alleged violation of the effective communication regulation under Title II of ADA and IDEA must analyze the allegations separately. It was on this narrow point that the Ninth Circuit reversed the decisions of the federal district courts and remanded the cases for the courts to undertake a fact-specific analysis of whether the school districts complied with the effective communication regulation of Title II of ADA. The Ninth Circuit emphasized that a school district’s offer of accommodations for a student with a hearing disability through an IEP may very well comply with both IDEA and Title II of ADA but that a court’s analysis must separately review the school district’s actions under each statute. *K.M. v. Tustin Unified School District and K.H. v. Poway Unified School District*, 725 F.3d 1088 (9th Cir. 2013).

CHAPTER 9
STUDENT DISCIPLINE

Pages 346-349: Education Code Amended to Limit Use of Suspension and Expulsion for Disrupting School Activities and Willfully Defying School Personnel.

Education Code Section 48900 has been amended to prohibit the suspension or expulsion of students enrolled in kindergarten through the third grade under 48900 (k), which authorizes discipline for disrupting school activities or otherwise willfully defying the valid authority of supervisors, teachers, administrators, school officials, or other school personnel engaged in the performance of their duties. The amendment also prohibits the expulsion of any student

regardless of grade for a violation of 48900 (k). The amendment to section 48900 (k) does not remove the authority of a teacher to suspend a student from class under Education Code Section 48910 as discussed on page 341.

Page 360: Definition of “Electronic Act” Extends to Communications Created or Transmitted On or Off Campus for Purposes of Disciplining Cyberbullying.

Education Code Section 48900 (r) has been amended to state that an electronic act for purposes of cyberbullying includes a communication originated created or transmitted on or off the school site. Under an earlier drafting error the section had defined an “electronic act” as the creation and transmission of a message of electronic posting. The amendment clarifies that creating or transmitting a prohibited message is sufficient for discipline. Even with these amendments to Section 48900 (r) school personnel should carefully evaluate any situation in which discipline is contemplated for an electronic act to ensure that the discipline does not violate the free speech rights of the offending student.

Pages 360-361: California Court of Appeal Upholds School’s Authority to Involuntarily Transfer Student.

A California court of appeal has upheld the Clovis Unified School District’s involuntary transfer of a student under Education Code Section 48432.5. The district suspended a high school student for entering school grounds under the influence of a controlled substance and recommended his involuntary transfer to a continuation school under Section 48432.5. The student was given written notice of the recommendation and an opportunity to participate in a meeting to question the recommendation. Later the district transferred the student to continuation high school. The district made the findings required by Section 48432.5 including a determination that the student’s conduct violated the Education Code, the student’s presence on campus posed a danger to others or threatened to disrupt the education process, and other means of correction had failed to bring about improvement in the student’s behavior.

The student challenged the involuntary transfer by suing the school district. The trial court upheld the transfer and the student appealed. The student argued that Section 48432.5 mandates exhaustion of all other means of correction before a student can be involuntarily transferred and that judicial review of an involuntary transfer should use a heightened “independent judgment test” instead of the “substantial evidence” standard applied by the trial court. The substantial evidence standard affords more deference to a school district’s disciplinary decisions.

The court of appeal held that Section 48432.5 does not require exhaustion of all other means of correction before imposition of an involuntary transfer and noted that several means of correction had been utilized with the student consistent with the section. The judges further upheld the substantial evidence standard of review utilized by the trial court and noted that while access to public education is a fundamental interest, an involuntary transfer to a continuation school does not affect this interest because the student is not being denied access to a public education. The student still received a public education albeit at a different school site. *Nathan G. v. Clovis Unified School District*, 169 Cal. Rptr.3d 588 (Cal. App. 5 Dist. 2014).

Pages 360-361: New Law Pertaining to Transfer of a Student Convicted of Violent Felony or Misdemeanor.

In 2016 the legislature enacted a law pertaining to the transfer of a student convicted of a violent felony or a misdemeanor under provisions of the Penal Code to another school in the district if the student and the victim of the crime are enrolled in the same school. The new law, Section 48929 of the Education Code, requires the school district’s governing board to first adopt a policy that gives the student and the student’s parent or guardian a right to request a meeting with the

principal or designee, requires prior attempts to resolve the conflict through such measures as counseling, states whether the transfer decision is subject to periodic review pursuant to a specified procedure, and describes the process by which the board approves or disapproves the principal's recommendation. Once approved, the policy is to be included in the district's annual notice to parents and guardians of their rights and responsibilities as set forth in Education Code Section 48980.

Page 361: Student's Dismissal from Charter School is not an Expulsion and Does Not Invoke Education Code Procedures Applicable to Expulsions.

Scott B. was a student at Orange County High School of the Arts, a charter school. Scott exhibited a knife at school and was subsequently suspended and dismissed from the school. Scott sued the school and requested that the court reverse his dismissal.

As discussed on page 31, charter schools are subject to some but not all of the laws applicable to traditional public schools. Of particular relevance to Scott's lawsuit is the fact that Education Code Section 48918, which provides for an expulsion hearing, does not apply to students in charter schools. The court recognized that there is a difference between being expelled and being dismissed and that Scott was merely dismissed and therefore not entitled to the procedural protection of an expulsion hearing. The court observed that Scott was free to immediately enroll in his traditional public school of residence upon being dismissed from the charter school. Such is not the case for an expelled student, who must generally serve the term of expulsion before being admitted to another school in accord with Section 48915.2 (a).

Scott nonetheless argued that his dismissal should be reversed because the school's decision to dismiss him was arbitrary and capricious. The court rejected Scott's argument and noted that his dismissal was justified because he brought a knife to school. *Scott. B. v. Board of Trustees of Orange County High School of the Arts*, 158 Cal. Rptr.3d 173 (Cal. App. 4 Dist. 2014).

Page 378: Federal District Court Clarifies "Basis of Knowledge" for Determining When Students without an Individualized Education Program Are Nonetheless Entitled to the IDEA's Disciplinary Protections.

The Anaheim Union High School District recommended a disciplinary removal of J.E., a student with a Section 504 plan, but without an individualized education program under the IDEA. The District disciplined J.E. as a general education student and did not convene a manifestation determination meeting. J.E. challenged the removal before the Office of Administrative Hearings (OAH) and argued that the district had a "basis of knowledge" based on J.E.'s behavior in class, comments made during a Section 504 meeting, and information provided to the district by J.E.'s mother. If a school district is deemed to have a "basis of knowledge" that a student is a child with a disability, the district must adhere to the IDEA's procedures, including convening a manifestation determination meeting no later than ten school days after recommending a disciplinary removal that constitutes a change of placement. One way in which it may be determined that a district has a basis of knowledge that a student is a child with a disability is if the teacher of the child or other personnel of the district express specific concerns about a pattern of behavior demonstrated by the child directly to the director of special education or the agency or to other supervisory personnel. OAH agreed with J.E. that the district had a basis of knowledge, thereby violating the IDEA by not timely convening a manifestation determination meeting. The district appealed the OAH decision to a federal district court.

On appeal, the district argued that the above-noted phrase "pattern of behavior" necessarily implicates behavior related to disciplinary issues and should be interpreted to only apply when the behavior is disciplinary in nature. In an unreported but informative decision, the court rejected the

district's argument and held that a "pattern of behavior" is not limited to disciplinary issues and may well include behavior which is associated with a potential disability but does not implicate any discipline. In regard to J.E., the court held that sufficient information, including teacher concerns, a reported psychiatric hospitalization, and a reported suicide attempt, was available to the district and established a pattern of behavior such that the IDEA's disciplinary procedures applied to J.E. and the district's recommendation for his disciplinary removal from school. *Anaheim Union High School District v. J.E.*, 2013 WL 2359651 (C.D. CA 2013) (unpublished).

CHAPTER 10 PUBLIC ACCESS, PRIVACY, AND STUDENT SEARCH AND SEIZURE

Page 396: Immigration Status Now Included in California Student Civil Liberties Act.

Education Code Section 200 and following sections now include immigration status as entitling students to equal rights and opportunities in educational institutions of the state.

Page 397: U.S. Dept. of Education Issues New Guidance on Student Records.

School officials will find new information from the U.S. Department of Education especially useful on how to provide information about student achievement while at the same time protecting student privacy. The Department's Privacy Technical Assistance Center's (PTAC) *Transparency Best Practices for Schools and Districts* can be found at <http://ptac.ed.gov>. For a user-friendly site for parents, students, and school officials on the Family Educational Rights and Privacy Act (FERPA), go to <http://familypolicy.ed.gov>.

Pages 400-401: Updates on Records for Foster and Homeless Children.

Education Code Section 49073 was amended in 2013 to restrict the release of directory information regarding a homeless student as defined in the McKinney-Vento Homeless Assistance Act (42 U.S.C. § 11434a(2)) without the written consent of a parent or of the student when the student reaches eighteen or attends a postsecondary educational institution.

Education Code Section 49076 also was amended to permit a student aged 14 or over to have access to his or her school records if the student is both homeless and unaccompanied as defined in the McKinney-Vento Act. These records also can be released to an individual who completes the Caregiver's Authorization Affidavit as provided in Family Code Section 6552 and signs the affidavit for the purpose of enrolling a minor in school.

Page 401: See Update for Pages 82-83 Above Regarding Gathering and Protecting Student Social Media Data.

Page 409: More on Locker Searches.

What about conducting a search of another student's locker where the student in question may have stored illicit items? This arose in the Richmond High School in West Contra Costa Unified School District when a female student alerted campus security officers that student T.H. shot someone on a city bus the day before and she had heard that he had taken the weapon to school. The campus security officers alerted the police. One of the campus security officers noted that T.H. did not spend time at his locker but rather at one of the nearby lockers and had done so with his girlfriend on the day of the shooting at a time when students were required to be in class or at lunch. The campus security officers knew that students often store illicit items in other students' lockers. When the campus security officers opened this particular locker, nothing was found. They then searched other lockers in the area where T.H. had been seen. In one of these lockers assigned to student J.D. they found the butt of a sawed-off shotgun along with papers containing T.H.'s name.

When police officers questioned J.D. after reading him his Miranda rights, J.D. admitted the weapon belonged to him. In a delinquency proceeding, J.D. challenged the search of his locker as a violation of his privacy rights. The appellate court rejected the argument, noting that student privacy concerns need to be balanced against the need for campus safety. Here there was reasonable cause for school officials to search J.D.'s locker, knowing that students often stored illicit items in lockers assigned to other students and that T.H. had frequented the locker area where the weapon was found. *In re J.D.*, 170 Cal. App.3d 464 (Cal. App.1 Dist. 2014).

Page 410: School Administrator's Search of a California Student's Cell Phone Upheld.

An assistant principal at Antioch High School became concerned about suspicious behavior of two students who were not in class, one of whom was suspected of bringing a firearm to school but then discarding it in a campus trash can. The two students were taken to two adjoining rooms in the vice principals' office for questioning. Meanwhile, the firearm was found and taken to the office. Another student was observed walking back and forth by the office. The administrators were concerned, as they did not yet know who brought the firearm to school. The student was directed to enter the office but did not do so. He was escorted back to the office. The administrators noticed that he was fidgety and reaching down into his pocket. Concerned that he had a concealed weapon in his clothing and was resisting their checking, they took him to the ground. The cell phone was found. Concerned that this student was communicating with one of the other two students detained in the office about the firearm since they knew each other and had argued earlier that morning, one of the administrators removed the phone from the student's pocket to keep him from manipulating it. The student had turned off the cell phone. So the assistant principal plugged it into a USB cable, which brought it back on line. The assistant principal viewed the student's collection of text messages and photographs showing him holding the firearm that later was recovered from the trash can.

When questioned about his potential involvement in the gun incident by a second vice principal, the student became irate and screamed profanities. According to this assistant principal, he said "Those are my photos. You can't do that." After becoming belligerent, the student was subdued by campus supervisors. The Antioch police were contacted. When the student contested the cell phone search at a juvenile court hearing as a violation of his Fourth Amendment rights, the judge rejected it and declared the juvenile a ward of the state. The California appellate court concurred with the ruling, noting that the discovery of a firearm and its magazine cartridge on school property coupled with the student's connection with the other two students in the office fell within the reasonable grounds for a student search. "This is particularly true," wrote the judges, "when one considers the gravity of the situation that initially gave rise to the search – the discovery of a firearm and magazine on school grounds." *In re Rafael C.*, 200 Cal. Rptr3d 305 (Cal. App. 1 Dist. 2016).

CHAPTER 11
RACE AND GENDER DISCRIMINATION

Page 439: Single Gender Academies Pilot Program Repealed Effective January 1, 2016.

Page 439: New Law Allows Single Gender Schools and Classes.

In 2017, the legislature enacted Education Code Section 232 and following sections allowing school districts with an average daily attendance of 400,000 or more students as of July 1, 2017 and charter schools authorized by school districts of this size to maintain single gender schools or classes under certain conditions for the purpose of determining their value. Among the numerous conditions is compliance with Title IX, enrollment of no more than 700 students in a single

gender school, enrollment of no more than 1,000 students in a coeducational school maintaining single gender classes, voluntary enrollment, and conducting evaluations at least every two years. Among other things, the evaluations are to include the impact of the single gender school or class on students who identify as LGBTQ or gender nonconforming. Given the detailed nature of these provisions, they should be viewed directly by going to www.cde.ca.gov and clicking on Laws and Regulations under the “Resources” heading. These code provisions are effective only until January 1, 2025.

Pages 439-441: New Law Requires Internet Posting of Title IX Information.

Effective on or before July 1, 2017, all California public and charter schools as well as private schools receiving federal funds are required to post on their website specific information about Title IX. Included is the name of the Title IX coordinator, rights provided by Title IX, responsibilities of the school under Title IX, how to file a complaint and how it will be investigated, and a link to the U.S. Department of Education Office for Civil Rights website (Educ. Code § 221.61). A public school that does not have a website is to have the information posted on the school district or county office of education website.

Page 440: Ninth Circuit Affirms *Ollier* Decision; Adopts Title IX Tests.

In a lengthy decision that examines the Sweetwater case in detail, the U.S. Court of Appeals for the Ninth Circuit affirmed the federal district court decision. In doing so, the appeals court adopted the three-part test set forth by the Office of Civil Rights in 1979 to determine compliance with Title IX in the context of athletics: (1) whether participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments, or (2) whether the institution can show a history and continuing practice of athletic program expansion demonstrably responsive to the developing interest and abilities of the number of the underrepresented sex, or (3) whether it can be demonstrated that the interest and abilities of the underrepresented sex in athletics have been fully and effectively accommodated by the present program when the institution cannot show a continuing practice of athletic program expansion. *Ollier v. Sweetwater Union High School District*, 768 F.3d 843 (9th Cir. 2014).

Page 441: Transgender Students Now Allowed to Participate in Programs and Use Facilities Consistent with their Gender Identity.

California’s Sex Equity in Education Act has been amended to allow students to participate in school programs and activities and to use school facilities consistent with how they view their gender regardless of the gender listed on school records. Thus, for example, transgender students can use restroom facilities that are consistent with how they view their gender. Programs and activities include athletic teams and competitions (Educ. Code § 221.5). See also the update on p. 396 above regarding student immigration status.

Pages 441-442: Reporting of Gender Data in Competitive Athletics Required.

Traditional public and charter elementary and secondary schools participating in competitive athletics are now required under the Sex Equity in Education Act to report at the end of the year student athletic participation data by gender (Educ. Code § 221.9). These data encompass the enrollment of the school by gender, the number of boys and girls who participate in athletics, and the number of boys’ and girls’ teams classified by sport and by competitive level. The data are to be posted for at least three years on the school’s website or if no website on the district’s or charter operator’s website. The purpose is to call attention to gender gaps as the first step in addressing them for the purpose of increasing the benefits of competitive athletics for female students.

Page 446: Limitations on Removing Survey Questions Pertaining to Sexual Orientation and Identity.

Section 51514 was added to the Education Code in 2017 prohibiting a local educational agency that administers a voluntary survey already including questions pertaining to sexual orientation and gender identity from removing those questions. The reason is to collect accurate data to effectively implement and deliver critical state services and programs.

Page 446: U.S. Department of Education Confirms Application of Title IX to Sexual Orientation.

As noted on this page, a federal district court in California ruled some years ago that Title IX encompasses same-sex harassment. In April 2014 the U.S. Department of Education issued a Dear Colleague Letter stating that Title IX protects all students at recipient institutions from sex discrimination, including sexual violence: “Any student can experience sexual violence: from elementary to professional school students; male and female students; straight, gay, lesbian, bisexual and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins.”

Page 447: Court Allows Parent to Sue School District His Son Previously Attended Where He was Subjected to Discrimination and Bullying.

Because there is a manifest public interest in enforcing anti-discrimination and anti-bullying laws in public schools, a California court of appeal has overruled a trial court decision that the parent of a special needs child who no longer attended the public school where the bullying had occurred could not sue the district for damages. As a citizen and taxpayer, the parent has standing to seek enforcement of these laws. *Hector F. v. El Centro Elementary School District*, 173 Cal. Rptr.3d 413 (Cal. App. 4 Dist. 2014).

CHAPTER 12
LEGAL LIABILITY

Page 464: More Protection for Student Athletes.

In 2014 the legislature added Section 35179.5 to the Education Code restricting school districts, charter schools, and private schools from conducting more than two full-contact practices per week for high school or middle school football teams during the preseason or regular season. A practice includes a team camp session. The full-contact portion of a practice is not to exceed 90 minutes in a day. No full-contact practice is to be held during the off-season, meaning a period extending from the end of the regular season until 30 days before the commencement of the next regular season. The California Interscholastic Federation (CIF) is urged to develop rules to implement these provisions.

Education Code Section 49475 also was amended to provide that if a licensed health care provider – meaning one trained in concussion management – determines that a student athlete has sustained a concussion or head injury, the athlete is to complete a graduated return-to-play protocol of no less than seven days under supervision of the provider. The CIF is urged to work with the American Academy of Pediatrics and the American Medical Society for Sports Medicine to develop implementing procedures.

Starting on July 1, 2017, the Eric Paredes Sudden Cardiac Arrest Prevention Act requires the State Department of Education (SDE) to post on its website information and training information about sudden cardiac arrest and encourages all schools to do the same. In addition, each year before a student participates in an athletic activity whether governed by the California Interscholastic Federation or not, the public or private school that conducts the athletic activity

must have the parent or guardian of participating students acknowledge receipt of the information posted on the SDE's website about sudden cardiac arrest symptoms and warning signs. Athletic personnel are to remove any student who passes out or faints while participating in or immediately following an athletic activity. The student is not to be allowed to participate until cleared to return in writing by a physician and surgeon or a nurse practitioner or physician assistant knowledgeable in this area. In addition, coaches are to complete the sudden cardiac arrest training course posted on the SDE website and to retake it every two years. For details, see Education Code Section 33479 and following sections.

Page 464: More on Assumption of Risk.

While students must assume some degree of assumption of risk when they participate in dangerous athletic activities as noted in the *Lilley* decision discussed on this page, that assumption does not eliminate the general requirement of providing student supervision. This point was made by a California court of appeal in a nonathletic case involving a middle school student who was seriously injured when forced to perform a flip by another student while engaging in break dancing in an unsupervised classroom. The court noted testimony that teachers were not to leave classrooms unsupervised and that students had been told not to perform flips. The court also noted testimony from the teacher that he did not think it was necessary to tell the school administration that he had opened his classroom for early morning physical activity to help them prepare for a talent show and had them sign a release form [not clear what this stated], was unaware of the no-flipping directive, and left his classroom only briefly. Given that the injury to the student could have been caused by failure to enforce the no flipping rule, lack of informing teachers about it, and/or negligent classroom supervision, the appeals court returned the case to the trial court. *Jimenez v. Roseville City School District*, 202 Cal. Rptr.3d 536 (Cal. App. 3 Dist. 2016). The lesson is for school administrators to make sure that teachers are fully aware when new student rules are made and that students are not left in unsupervised classrooms where physical activity can spiral into bodily harm.

Page 477: School Counselor Not Immune from Liability under the Tort Claims Act for Allegedly Giving Suspected Child Abuse Report to Students' Father.

Two male high school students in the Grossmont Union High School District reported to a school counselor that they were being verbally and physically abused by their mother. Some years before, the mother had been given sole legal and physical custody of the two boys. Later, she had allowed the father to move back into the home so he could take care of the sons while she was at work. In accord with the Child Abuse and Neglect Reporting Act (CANRA), the school counselor as a mandated reporter submitted a child abuse report to Child Welfare Services and to the school's resources officer based on what the boys had told her. According to the counselor, she was advised to give a copy of the child abuse report to the boys' father, who had transported the boys to school, and to allow the father to take the boys to the sheriff's department. The father instead took the boys and the report to the courthouse where he sought to be awarded custody of his sons. The family court later rejected his claim, affirming the mother's right to sole legal and physical custody. Subsequently, the mother sued both the school counselor and the school district under the Tort Claims Act, alleging a violation of her right to privacy under CANRA when the counselor gave the boys' father a copy of the child abuse report. The trial court dismissed the lawsuit, and the mother appealed.

The court of appeal overruled the trial court, pointing out that in the interest of privacy protection, the CANRA expressly prohibits a mandatory reporter from disclosing a suspected child abuse report to someone like the boys' father who is not one of the individuals or entities identified in Section 11167.5 of the Penal Code. Thus, the counselor was not exercising discretion under Section 820.2 of the Tort Claims Act when she released the suspected child abuse report to the

boys' father. The appellate court also ruled that the trial court's granting summary judgment to the school district was improper because the district could be vicariously liable for the counselor's conduct under Section 815.2 of the Tort Claims Act. *Cuff v. Grossmont Union High School District*, 164 Cal. Rpt.3d 487 (Cal. App. 4 Dist. 2013).

Page 482: *Belanger* Decision Affirmed. School Districts and County Offices of Education Remain Immune from Lawsuits under Section 1983.

The Ninth Circuit has ruled that neither the Local Control Funding Formula (LCFF) nor the Local Control and Accountability Plan (LCAP) that changed the way public schools and county offices of education are funded (see the discussion above in the update for Chapter 3). Thus Eleventh Amendment immunity from lawsuits under 42 U.S.C. Section 1983 continues. *Sato v. Orange County Dept. of Education*, 861 F.3d 923 (9th Cir. 2017).