



## Education Law Alert June 2014

### **California Teacher-Tenure Laws Ruled Unconstitutional**

In what will have a wide-ranging impact nationwide, the Superior Court of the State of California (County of Los Angeles) ruled this month that the State's teacher-tenure laws violate the California Constitution. In [Vergara v. California](#) (Case No. BC484642), nine public school students alleged that the challenged laws "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." The Court agreed with Plaintiffs and concluded that the laws had a disproportionate impact on minority and low-income students and denied students' rights to an equal public education. The [Vergara](#) decision is available at the following link: [Vergara](#).

Source: [Huffington Post](#).

The U.S. Secretary of Education (Arne Duncan) also issued a [statement](#) regarding the [Vergara](#) decision.

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### **Supreme Court Rules in Favor of Employee in First Amendment Free Speech Retaliation Case**

In a seminal case concerning the right to free speech of public employees under the First Amendment of the Constitution, the U.S. Supreme Court recently held that a public employee fired for testifying on certain matters should not have been fired. The case of [Lane v. Franks](#) (Case No. 13-483) concerned an employee fired after he testified pursuant to an FBI investigation regarding payroll issues at a community college in Alabama. The employee's testimony also involved an individual who was on the community college's payroll.

The U.S. Supreme Court justices ruled that the First Amendment "protects a public employee who provided truthful sworn testimony, compelled by subpoena, outside the course of his ordinary job responsibilities." While the First Amendment does not protect communications of public employees that are speaking pursuant to their official duties, the Court held that the sworn testimony was speech as a citizen on a matter of public concern and was indicative of what the First Amendment protects.

A copy of the Court's opinion is available at the following link: [Lane](#).

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### **Supreme Court to Consider Case Involving Threats on Social Media**

The U.S. Supreme Court has agreed to review the Third Circuit's decision in [Elonis v. United States](#) (Case No. 13-983) related to threats made on social media sites. Although the case involves a criminal appeal, it has implications for employers and school administrators as to whether an employee or student must have a subjective intent to threaten, as required by the Ninth Circuit and the supreme courts of Massachusetts, Rhode Island, and Vermont, or whether it is enough to show that a "reasonable person" would regard the statement as threatening, as held by other federal courts of appeals and state courts of last resort. In the underlying case, the Defendant, a 27-year old amusement park worker, was brought up on federal charges for making unlawful threats against schoolchildren and his ex-wife through numerous rants on his Facebook page. One rant stated: "I'm checking out and making a name for myself. Enough elementary schools in a ten mile radius to initiate the most heinous school shooting ever imagined. And hell hath no fury like a crazy man in a kindergarten class, the only question is ...which one?"

A copy of the Third Circuit's opinion is available at the following link: [Elonis](#).

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### **Mother Seeks Damages for Son's On-Campus Bullying and Off-Campus Suicide**

In a suit filed by a mother in response to her son's suicide, a New York trial court recently ruled that her son's school may be liable for on-campus bullying but not for his off-campus suicide. In [Elissa v. City of New York](#) (Case No. 14840/11), the Court granted in part and denied in part a motion for summary judgment jointly filed by the City of New York and the New York City Department of Education. In doing so, the Court dismissed the suit against the City of New York entirely, as it ruled the City cannot be responsible for actions committed by the school or its employees because the City is a separate entity.

The deceased son's suicide was prompted by several years of bullying which occurred at school. His mother claimed the school was negligent in its duty to supervise her son and sought to recover damages sustained by her and her deceased son stemming from the on-campus bullying and off-campus suicide. The Court denied the Defendants' motion as it pertained to the mother's claim for emotional injuries sustained by her deceased son while at school but granted the motion as it related to damages from the suicide. The Court explained that the school had a duty to supervise students only while students were on campus. Since the suicide was off-campus, the Court ruled the school was not responsible for damages arising from the suicide.

A copy of the Court's opinion is available at the following link: [Elissa](#).

Source: [Education Law Prof Blog](#).

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### **Professor Files Title IX Lawsuit Against Northwestern University**

The influx of Title IX lawsuits continues to draw media attention in the college and university setting. While most of the recent cases have addressed harassment and gender discrimination involving male and female students, a lawsuit was filed this month in an Illinois federal court (Case No. 1:14-cv-04614) by a current and well-known professor at Northwestern University alleging that his Title IX rights were violated during a female student's Title IX sexual harassment investigation involving the professor. In the Complaint, Professor Peter Ludlow asserts multiple claims, including a Title IX gender discrimination claim in which he alleges as follows:

Defendant Northwestern intentionally discriminated against Plaintiff on the basis of his gender in violation of Title IX when it issued a discriminatory and baseless investigative report which failed to consider or even cite relevant evidence in favor of Plaintiff, when it found that he had violated its sexual harassment policy, and when it communicated these flawed and biased findings internally.

Additional information related to the lawsuit is available at the following link: [Chicago Tribune](#).

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### **New Florida Law Requires Heightened Reporting and Disclosure Requirements for Universities and Colleges Regarding Sexual Offenders**

Recently-enacted Senate Bill 524 heightens the requirements of *nonpublic* colleges and universities in Florida to inform students and employees of information concerning sexual offenders in Florida. The law specifically requires as follows:

Each nonpublic college, university, and school shall inform students and employees at orientation and on its website of the existence of the Department of Law Enforcement sexual predator and sexual offender registry website and the toll-free telephone number that gives access to sexual predator and sexual offender public information.

In addition to the requirements for nonpublic colleges and universities, *public* institutions also have additional responsibilities. The new law mandates as follows:

Each Florida College System institution as defined in s. 1000.21, state university as defined in s. 1000.21, and career center as provided in s. 1001.44 shall inform students and employees at orientation and on its website of the existence of the Department of Law Enforcement sexual predator and sexual offender registry website and the toll-free telephone number that gives access to sexual predator and sexual offender public information pursuant to F.S. 943.043.

A copy of Senate Bill 524 is available at the following link: [2014-3](#).

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### **North Carolina Tenure Law Repealed**

A judge in Wake County, North Carolina, recently entered an Order invalidating North Carolina's teacher tenure repeal statute. In [North Carolina Association of Educators, Inc., et al. v. The State of North Carolina](#), (Case No. 13 CVS 16240), Plaintiffs demonstrated that the elimination of career status protections makes it harder for schools to attract and retain quality teachers. In contrast, the State was unable to produce any evidence demonstrating that career status protections prevented school districts from eliminating ineffective teachers. The Court found that those teachers who attained career status prior to the tenure repeal statute had a vested contractual right in their career status and that any repeal of that right would be an impairment of contract. In addition, the Court found that any career status repeal constituted a taking without just compensation.

A copy of the Court's opinion is available at the following link: [NCAE](#).

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### **Advocacy By Teacher's Union Representative is Protected Speech**

In [Pekowsky v. Yonkers Board of Education](#) (Case No. 12 Civ. 4090 (DLC)), a New York federal district court denied an employer's motion for summary judgment in a case concerning First Amendment retaliation. Plaintiff, a public teacher and teachers' union representative, alleged that he was transferred to a different school and a letter of reprimand was placed in his employment file after he advocated on behalf of other teachers. The Court held that Plaintiff was engaged in protected activity under the First Amendment since, in his role as a union representative, he was speaking as a citizen on a matter of public concern.

A copy of the Court's opinion is available at the following link: [Pekowsky](#).

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### **West Virginia Supreme Court Upholds Discharge of Teacher that Called Students "Hoes" on Social Media and Posted Improper Student Pictures**

The West Virginia Supreme Court upheld the termination of a cheerleading coach/school cook who took semi-nude pictures of her students and called them "hoes" in a social media posting. In 2007, the cheerleading coach, who also served as the school cook, took the cheerleading squad to an unauthorized overnight trip to a cabin in a neighboring county. When school officials found out about the trip, they told her all future trips outside the school jurisdiction would require the principal's approval.

Despite this warning, the coach took the cheerleaders on another cabin trip the following year. During the trip, a photograph was taken of the coach sitting in the cabin's hot tub surrounded by several of female cheerleaders. All of the cheerleaders were minors and many in the picture were topless (covering their breasts with their hands and arms). Although that picture was not posted on-line, other photographs were posted on the coach's social media site. One photograph had the cheerleaders wearing Santa Claus hats with the caption "my girls acting like their self [sic] . . . hoers [.]". The photographs were discovered, and the County Board of Education terminated the coach for insubordination, sexual harassment, and immorality (similar to "conduct unbecoming").

The West Virginia Public Grievance Board reversed the termination as to the school cook position finding that there was no sexual harassment; therefore, there could be no immorality on the coach's part. In reinstating the termination, the Court noted, "The ALJ erroneously rejected the immorality claim by finding that these girls were all friends, they frequently changed clothes in one another's presence (such as before or after cheerleading events), and that nothing sexual occurred. However, the girls were not simply changing their clothes in the photograph." The Court also found that the "hoers" caption should have been considered in the termination.

The Court's opinion is available at the following link: [Kanawha County Board of Education v. Kimble \(Case No. 13-0810\)](#).

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### **From the Lighter Side: Sunbathing Custodian – Not a Victim of Retaliation**

A long-time custodian for a school district in Kansas decided to spend an afternoon sunbathing in the nude on the roof of the elementary school at which he worked. Rather than dismiss the 20+ year employee, the district suspended him for 30 days without pay. Over the next five years, the custodian applied unsuccessfully for seven different promotions. Amazingly, the Tenth Circuit affirmed the district court's dismissal of the custodian's retaliation claim. Perhaps a decision-maker concluded that the custodian was unworthy of a promotion in light of his obvious lapse of judgment. In any event, what is clear is that not all speech or activity is "protected."

Source: [Google Scholar](#).

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### **Firm News**

**Terry J. Harmon** presented on topics of child abuse reporting, the importance of documentation, social media, cyberbullying, and exceptional student education to school district administrators from St. Johns, Escambia, Santa Rosa, Walton, and Okaloosa County, as part of professional development for members of the [Florida Association of School Administrators \(FASA\)](#).

**Michael P. Spellman** and **Jeffrey D. Slanker** coauthored an article entitled "The Fair Labor Standards Act: Separating Myth from Fact, and Avoiding Common Pitfalls" which the Florida Defense Lawyers Association published in its Spring 2014 edition of Trial Advocate Quarterly.

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### **Past Issues of the Education Law Alert Available on Website**

You may view past issues of the Education Law Alert on the Firm's website: [www.sniffenlaw.com](#). After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.