# MASSACHUSETTS ASSOCIATION OF SCHOOL SUPERINTENDENTS

## SUMMER EXECUTIVE INSTITUTE
## 2017


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# I. ARBITRATIONS UNDER THE ERA

## A. *DONNA BARTLETT AND STOUGHTON PUBLIC SCHOOLS*

AAA Case No. 001-15-0004-5785 (May 17, 2016)
Arnold M. Zack, Arbitrator
Dismissal Upheld

### Introduction

Arnold Zack upheld the dismissal of a teacher with professional teacher status following an encounter with a 3rd grade student who had documented behavioral problems during which the teacher placed her hands on the student. Before teaching in Stoughton beginning in 2007, the teacher had taught 3rd grade in Carver and 4th grade in Middleborough. She was employed in Stoughton as a 4th and 5th grade teacher before being assigned to a 3rd grade class for the 2014-2015 school year. Ms. Bartlett was also elected as Building Representative for the Stoughton Teachers' Association in May of 2014. According to her testimony, at that point she began to have difficulties with the building principal.

### Facts

The contretemps began over an assignment to teach 1st grade for the 2014-2015 school year. A grievance was filed protesting the assignment which was followed shortly thereafter by a summative evaluation that required Bartlett to go onto a performance plan. The grievance was resolved by a change in her evaluation rating to proficient and an assignment during the 2014-2015 year to a 3rd grade class, rather than a 1st grade class. The class for 2014-2105 had 19 students, 6 of whom had special needs. She had no prior disciplinary record and had never been accused of misconduct. There was some evidence that she had been assigned to attend a behavior management program in the fall of 2014.

The facts giving rise to the dismissal occurred on December 10, 2014 following a student's misbehavior in class. In such cases, teachers were expected to contact the guidance

counselor or the adjustment counselor for assistance. Alternatively, teachers would fill out a "blue slip" which was sent to the principal prior to a student's visit to the office. According to the school committee, the normal disciplinary referral procedures need not be followed if there is an emergency. Between September and December of 2014, Bartlett had sent 6 blue slips to the principal's office asking for assistance with this student. The student's parents objected to involvement of the counselors. Instead, Stoughton personnel agreed that Bartlett could call the father to deal with the child's behavioral problems. She did this several times and had several meetings in the fall of 2014 with the child's parents. After the fact, the parent testified that he did not want the child to participate in counseling services, but that he never intended that the counselors not speak with the child.

On December 10, 2014, at approximately 9:15 a.m., Bartlett was teaching her class. The paraprofessional customarily assigned was not present. The student got into a dispute with another student resulting in Bartlett telling them they would have to discuss the matter with her during recess. The 3rd grader replied that he was not coming in during recess and became disruptive, kicking his chair, "draping himself over the desk, and yelling out random answers."

These behaviors prompted Bartlett to call the principal's office, where she said she requested a secretary's assistance in locating the principal. It appears from the arbitration award that the secretary testified she did not recall receiving a phone call from Bartlett on that date and she testified that there was "no evidence" of Bartlett calling that day. Bartlett testified that she filled out a blue slip which was delivered to the office by a student to notify the principal she needed help. She stated that at this time, the student was under his desk and that he was "taking a fit." There was a blue slip submitted into evidence which had originally been dated December

4th but, according to the arbitration award, "was changed at some point to read December 10, 2014."

After the student crawled under his desk the teacher asked him to step into the hallway. He allegedly began crawling to the door and then spread out on the floor. The teacher believed he was creating a safety risk for other students. She then "lifted… [him] up off the floor with her hands up under his shoulders to a standing position" and "guided him out of the classroom into the hallway." The teacher denied dragging or holding him down and claims she made a second call to the principal's office. The student's behavior did not improve in the hallway. He was hunched over and Bartlett appeared to wait for the principal from three or four feet away. She testified that she waited for about 15 minutes and then at about 9:45, the school's psychologist came by and observed the teacher and the student in the hallway. The psychologist testified that the student was calm and was just sitting there. After remaining at the scene for about 5 or 10 minutes, the psychologist offered to stay with the student until the principal arrived, allowing the teacher to return to her duties. According to the psychologist, the student said he felt fine and that he could return to the classroom. She knocked on the door, the teacher opened it, the student re-entered the classroom and the door was closed.

Another staff member, a special education teacher whose office was across the hall from the teacher's classroom, testified that she heard a loud noise and a voice in the hall. "She peeked… out" of her office door and saw the teacher talking with the student, who was on the floor. The special education teacher said the school psychologist was present. The special education teacher saw there was no purpose in her intervening so she did not.

Testimony from two other witnesses, both paraprofessionals, suggested that a second incident occurred on the same day sometime between 9:00 and 11:00 a.m. They were on their

way to the previously-referenced special education teacher's office to obtain supplies. The paraprofessionals were sequestered during arbitration but related similar observations. One testified that she saw the student sitting on the floor, cross legged with arms also crossed, and that the teacher was facing the student "with a hand on each side of this body trying to drag him into the classroom." The paraprofessional testified that she did not believe the teacher saw her. The second aide testified to "the same observation" which occurred while they were walking from the stairwell to the special education teacher's office. The second aide said "she was trying to get him get him into the room. She was dragging him into the room." The paraprofessionals reported this to the special education teacher. The special education teacher indicated that this happened closer to 11:00 that morning. The teacher took notes and related the matter to the principal. Ms. Bartlett denied that the second hallway incident had occurred.

The schedule at the elementary school provided for preparation/lunch break from 11:30 to 1:00 p.m. According to the arbitrator, there was no evidence that the teacher sought out the principal during this period of time to report the incident. The principal never appeared at the grievant's classroom that day, and the teacher testified that the blue slip she submitted earlier was located in her mailbox "at the end of the day." She said that she asked the principal the next day "why had he not come." The principal responded that he didn't hear about the request until 11:30 a.m. The principal conducted an investigation of various witnesses resulting in his recommendation to the superintendent in mid-January that the teacher be dismissed for conduct unbecoming a teacher. The principal referenced that the teacher had been aggressive with three (not two) 3rd grade students.

Approximately a week later, the superintendent adopted the recommendation and drafted a Section 42 notice of intent to dismiss outlining various reasons constituting conduct

unbecoming a teacher "by the manner in which [she]… interacted with students in class." The superintendent cited the incident on December 10th, yelling and screaming at students in the classroom in a call and response manner, which was heard in an adjacent classroom, grabbing the student by the wrist, using her body to redirect students, and creating an unsafe classroom environment in which students feared that she would be physically aggressive with them. At the statutory meeting the teacher denied the second December incident. The superintendent, wisely, conducted a further investigation with the assistance of district counsel. About 10 days after the Section 42 meeting, the superintendent reported the results of the further investigation, particularly focusing on the December 10th incident. The superintendent adopted the principal's recommendation and terminated the teacher. A timely petition for arbitration was filed on May 26th in which the grievant requested that statutory proceedings be held in abeyance pending resolution under contract procedures. The same day counsel for the teacher requested that her petition for statutory arbitration be activated.

**Arbitrator's Award**

The arbitrator reviewed the position of the parties. The district argued just cause for dismissal existed, based upon teachers holding a position of public trust and the expectation that they use sound judgment and appropriate behavior in handling student discipline. Further, the district cited the statutory requirement that the best interest of pupils and the need to elevate performance standards be addressed in dismissal cases. Relying on the factual evidence from the paraprofessionals, the district argued that there were two incidents, contrary to the teacher's assertion that there was only one event on December 10th.

The teacher asserted that the dismissal was in retaliation for union activities and that she had been deliberately assigned by the principal to difficult students. (The arbitrator noted that

placement decisions for students for the next grade were decided by two teachers and not the principal.)

Further, the teacher alleged that she had properly restrained the child given the context of events. The teacher also alleged that the parents' instruction to withhold counseling services somehow limited her ability to follow the normal protocols in difficult disciplinary cases. On behalf of the teacher, the Association also asserted that there were additional grounds put forth by the superintendent in the original notice, which suggested there was a "witch hunt" and these charges, even if true, were insufficient to support discharge. Finally, the Association argued that the seriousness of the consequences, including a loss of tenure and jeopardizing of a future career outweighed any misconduct.

The arbitrator wrote that his findings of fact were "based upon the sworn testimony of sequestered witnesses." He wrote that he did not consider hearsay statements by people who did not testify and were not subject to cross examination, including those of the student and his classmates.

The grounds for dismissal cited by the superintendent included physically lifting and dragging the student across the classroom, yelling and screaming at students in the classroom and in the hallway, grabbing a student's wrist away from a computer, using a body to redirect the student and creating an unsafe class where students fear the teacher's potential physical aggression. While there was substantial evidence directed at the relationship between the teacher and the building principal, the arbitrator concluded that "the triggering event" was what occurred in the hallway on December 10th. The arbitrator concluded that even if the teacher were to establish the truthfulness of all her other assertions or defenses, her conduct in the hallway that morning "if proven, would constitute sufficient grounds for the imposition of discipline."

The arbitrator concluded there was sufficient testimony to establish there were two instances during which the pupil was removed from the classroom into the hallway on December 10th. The testimony of the paraprofessionals reporting to the special education teacher would technically constitute hearsay as to the substance of the conversation, but is evidence that they reported an incident to the special education teacher which apparently occurred subsequent to the special education teacher's initial observation. The testimony of the paraprofessionals persuaded the arbitrator that the teacher did place her hands on the student and she was trying "drag him back into the classroom, and that such conduct in fact constitutes conduct unbecoming a teacher."

This conduct constituted just cause, in the eyes of the arbitrator, for the imposition of discipline. The arbitrator did acknowledge that the teacher was under "unusual constraints and pressures" trying to handle the student's behavioral problems. He noted, however, that she failed to follow procedures under the school's restraint policy. There was evidence to establish that she had access to the school's policy and had attended the school's restraint training, which included discussion about measures to be taken with difficult students when assistance was needed, such as contacting the counselors, teacher or another staff member who is in the hall and removing the student if the circumstances are not safe. In addition to concluding that she had been properly trained, Arbitrator Zach observed that she could have but did not contact another teacher, including the special education teacher who was right across the hall, she could have let the student remain on the floor while making additional efforts to contact the principal or the counselors, and she could have obtained the assistance of an observer to watch her as she restrained the child. Finally, after she dragged the student out of the classroom, she failed to

report the incident to the principal. In sum, she ignored "the availability of tools" which could be used to intervene prior to restraining a student and failed to promptly report it.

Concluding that the allegations against her had been proved, the arbitrator moved to consideration of whether the penalty was appropriate. He noted that he was bound by two decisions from the Supreme Judicial Court, the *Geller* and the *Lexington* cases, both standing for the proposition that discipline is to be determined by the superintendent or principal and that if the charges are established, the arbitrator is not empowered to impose a different remedy or to adjust the discipline selected. Thus, Mr. Zach concluded that there was just cause under Section 42 to dismiss the teacher.

**B.** ***KRISTEN BILBO AND PLYMOUTH PUBLIC SCHOOLS***
AAA No. 11-20-1400-0061 (June 17, 2014)
Richard Boulanger, Arbitrator
Teacher Reinstated

**Introduction**

In a procedurally complicated matter, both the Massachusetts Appeals Court and an American Arbitration Association ("AAA") Arbitrator considered a teacher dismissal case involving the question of how an excused break in service for maternity leave affects the calculation of time served for a teacher to attain professional teacher status ("PTS") under G.L. c. 71, § 41. Without reaching the merits of the dispute, the Appeals Court ruled that the question of whether the teacher had PTS, and was therefore entitled to arbitrate her dismissal pursuant to G.L. c. 71, § 42, was for an arbitrator to decide. Devising a novel way to view the years of service requirements for attaining PTS under G.L. c. 71, § 41, the Arbitrator ruled that the teacher in this case had attained PTS and, therefore, her non-renewal was invalid. He reached that conclusion by deciding that the teacher earned PTS on the sixty-first day of her fourth year

of teaching because, by that date, she had "made up" for the sixty days of maternity leave she took during the initial three-year period of service.

**Background**

The facts in this case were undisputed. The teacher began working as a special education teacher in Plymouth in March of 2008. The following year, the 2008-2009 school year, she was absent 60 work days, from February 23, 2009 to May 23, 2009 for maternity leave under the Family and Medical Leave Act ("FMLA"). The teacher also accessed the contractual sick leave bank during her absence. By accessing the sick leave bank, the teacher was paid during her leave.

The teacher then worked two complete school years, the 2009-2010 and 2010-2011 school years. Pursuant to the parties collective bargaining agreement ("CBA"), Plymouth teachers were required to work at least 181 days, which is one day more than required by Massachusetts regulations requiring schools to operate at least 180 days per year. 603 CMR 27.03. During the 2011-2012 school year, the teacher took another maternity leave of 56 work days (not including vacations) from February 1, 2012 through April 27, 2012. Again, the teacher's maternity leave was covered under the FMLA and she accessed the sick leave bank to be paid during her leave. The teacher then worked the entirety of the 2012-2013 school year.

Before the conclusion of the 2012-2013 school year, in May of 2013, the Superintendent sent the teacher a non-renewal notice. The parties stipulated at arbitration and in court that the notice would satisfy the requirements of both the CBA and G.L. c. 71, § 41 to non-renew a teacher without PTS but would not satisfy the due process requirements of G.L. c. 71, § 42 to dismiss a teacher with PTS. Thus, the dispute centered on whether the teacher had attained PTS prior to May 2013. The District maintained that, in light of her maternity leaves, the teacher had

not yet met the prerequisites for attaining PTS at the time she was non-renewed. The Union argued that she had already attained PTS.

Pursuant to the non-renewal notice, the teacher was separated from employment in the District at the conclusion of the 2012-2013 school year. As discussed more below, the Union and the teacher initiated arbitration under G.L. c. 71, § 42 to review that decision.

**Legal Framework**

Pursuant to G.L. c 71, § 41, a teacher who has taught for three consecutive school years is entitled to PTS unless he or she received written notice of non-renewal by June 15 of the third school year PTS confers upon a teacher a host of protections and benefits. G.L. c. 71, § 42. For example, a teacher with PTS may be dismissed only for cause and only after receiving due process, including a notice of intent to dismiss and a hearing prior to termination. *Id.* Additionally, a teacher with PTS who has been terminated may petition for arbitration to review the termination decision under G.L. c. 71, § 42. A teacher without PTS does not have those statutory rights.

According to long-standing precedent, including *Fortunato v. King Philip Regional School District Committee*, 10 Mass. App. Ct. 200 (1980), in order to satisfy the statutory requirement of serving three consecutive school years to attain PTS, teachers must work complete school years, with only minor deviations. If a teacher works less than a complete school year, *Fortunato* and its progeny hold that the year in which the teacher worked fewer than the required number of school days (181 in the case of Plymouth) would not count toward the three-years-of-service requirement for PTS under G.L. c. 71, § 41.

In another case considering the interplay between maternity leave and the requirements for PTS, *Solomon v. School Committee of Boston*, 395 Mass. 12 (1985), the Supreme Judicial

Court ("SJC") held that a teacher's absence due to maternity leave would not interrupt the consecutive nature of the service under G.L. c. 71, § 41. In other words, although G.L. c. 71, § 41 requires teachers to complete three consecutive years of service, if a teacher takes maternity leave in that three-year period, she does not need to start over at year one. The SJC did not answer, however, whether a teacher would need to serve a full additional year or if the teacher could receive partial credit for work performed in the year(s) she took maternity leave.

**Procedural History**

Following her non-renewal, on June 17, 2013, the Plymouth teacher and the Union petitioned the Commissioner of Elementary and Secondary Education ("Commissioner") for arbitration "to determine her PTS status" pursuant to G.L. c. 71, § 42. The District objected on the grounds that the teacher was not entitled to arbitration under § 42 because she did not have PTS. The Commissioner nonetheless forwarded the petition to AAA on January 9, 2014. In the cover letter, the Commissioner instructed the arbitrator to resolve the question of arbitrability before addressing the merits.

On February 18, 2014, Plymouth filed a civil action in the Plymouth Superior Court seeking, among other things, a stay of arbitration. The District simultaneously moved for a preliminary injunction, which the Court denied on March 4, 2014. On March 27, 2014, the Union and the teacher moved to dismiss the Superior Court litigation. While that motion was pending, the arbitration moved forward. Because the parties largely agreed on the facts, they submitted stipulated facts to the Arbitrator, Richard Boulanger, rather than having a full hearing.

Before the Arbitrator issued his decision, a second Superior Court Judge denied the teacher's motion to dismiss, on the grounds that the question of whether the teacher had PTS was

for the Court, and not the arbitrator, to decide. Arbitrator Boulanger agreed to hold his decision in abeyance pending resolution by the Court.

On December 17, 2014, the parties filed cross motions for summary judgment in the Superior Court. The Court ruled in favor of Plymouth, declaring that the teacher did not have PTS at the time she was not renewed and that the non-renewal did not violate the FMLA or Massachusetts parental leave statute, G.L. c. 159, § 105D. The Court also ordered a permanent stay of the arbitration. The teacher and the Union appealed.

**Discussion of Appeals Court Decision**

The Massachusetts Appeals Court recognized that whether the teacher had attained PTS was the threshold question to determine whether she was entitled to arbitration. 89 Mass. App. Ct. 643 (2016). Although the Court then referred to the "chicken [or] the egg" type of problem that arises when an arbitrator decides that threshold question of arbitrability, the Court nonetheless concluded that the question of whether the teacher attained PTS was for the arbitrator. *Id.*

In reaching that conclusion, the Court relied on its own precedent. *Turner v. School Comm. of Dedham*, 41 Mass. App. Ct. 354 (1996) and *Lyons v. School Comm. of Dedham,* 440 Mass. 74 (2003). In the *Plymouth* case, like the *Turner* and *Lyons* cases, the Court considered the public policy favoring arbitration and the Education Reform Act of 1993, which "'took away the right of teachers to challenge their dismissal by filing an action in the Superior Court,' and instead 'established arbitration as the sole remedy for all dismissals.'" *Plymouth*, 89 Mass. App. Ct. at 647, *quoting Turner*, 41 Mass. App. Ct. at 357-58 (internal punctuation omitted).

Accordingly, the Appeals Court reversed the Superior Court decision and held that the teacher was entitled to arbitration on whether she had PTS and, if she did have PTS, then she was entitled to arbitration on the merits of her dismissal. *Id.* at 650.

**Discussion of Arbitration Award**

Following the Appeals Court's decision in June 2016, Arbitrator Boulanger released his award, which had been written two years earlier, in June 2014. Devising a novel and impractical way to calculate PTS, Arbitrator Boulanger concluded that the Plymouth teacher attained PTS on the sixty-first day of school in the 2011-2012 school year, which would have been her fourth school year, not counting the half a year she worked in 2008. To reach that conclusion, Arbitrator Boulanger "tacked on" sixty days to "offset" the sixty days of maternity leave she took in the 2008-2009 school year. Although Arbitrator Boulanger's decision is limited to that case, we expect teachers' unions to rely on its reasoning in future cases where a teacher's PTS status is at issue.

**Arbitrability**

Because the arbitration award was decided before the Superior Court and Appeals Court reached the issue, the arbitrator addressed arbitrability in his award. Relying on the same precedent as the Appeals Court, namely the *Turner* and *Lyons* decisions, as well as *Goncalo v. School Comm. of Fall River*, 55 Mass. App. Ct. 7 (2002), the Arbitrator found the question of whether the teacher had attained PTS to be arbitrable.

**FMLA and PTS**

Before turning to his opinion, the Arbitrator summarized the parties' positions. In short, the teacher and the Union argued that because her maternity leave was contractually excused and she remained on the payroll (due to her accessing the sick-leave bank), those absences should be credited toward the teacher's acquisition of PTS. In the alternative, the teacher and the Union

argued that she should have received credit for her partial years of teaching based on the FMLA's requirement that credit be given for time served. Thus, the Union argued that she attained PTS either at the end of the 2010-2011 school year (if her absences were treated the same as time served) or no later than the sixty-first work day of the 2011-2012 school year (to make up for her 60 days absent the previous school year). In either event, the Union argued that the teacher had PTS at the time she was non-renewed, rendering the non-renewal invalid.

The District argued that the teacher did not earn PTS as of May 31, 2013. The District reached that conclusion by relying on long-standing precedent, including *Fortunato*, that teachers must work complete school years, with only minor exceptions, for those years to count toward the three years of consecutive service required to obtain PTS under G.L. c. 71, § 41. Further, while *Solomon* made clear that maternity leaves would not break the consecutive nature of the service, it did not sanction partial years of credit or counting absences the same as time served, as the Union would have it. To the contrary, the PTS system, whereby a teacher attains PTS if not non-renewed by June 15 of the third year of teaching, relies upon using full years of service and a date certain for non-renewal, rather than using a teacher's anniversary date or some other date. Thus, the partial years the Plymouth teacher worked did not count toward the three years of service required under G.L. c. 71, § 41 and the District properly non-renewed her before she attained PTS. That result was consistent with the FMLA, the District argued, because the teacher was neither denied benefits nor attained undue benefits from her leave, which is the type of balance the FMLA attempts to strike.

The Arbitrator began his discussion on the merits by quoting G.L. c. 71, § 41's definition of PTS. He then stated that "in *Solomon*,[1] the Supreme Judicial Court (SJC) modified the

[1] *Solomon* was decided pre-Ed Reform and was based on the Massachusetts Maternity Leave statute.

consecutive year requirement." Award at 16. The Arbitrator noted that, pursuant to *Solomon*, when a teacher's three years of consecutive service are interrupted by maternity leave, the teacher need not begin a new three-year period upon her return from maternity leave. As noted above, however, the *Solomon* Court did not address "whether or not a partial year of teaching offsetting a commensurate partial maternity leave absence would satisfy the requirements of" G.L. c. 71, § 41 because in *Solomon*, the teacher had already worked a fourth year and, thus, was entitled to PTS. Award at 17-18.

Responding to the District's argument that neither the statutory framework, which establishes a June 15 date for non-renewal notices, nor *Solomon* sanctions counting partial teaching years for the satisfaction of § 41, the Arbitrator reasoned that *Solomon* likewise "did not [rule] out the partial year credit." *Id.* at 18. He then recognized that the District properly cited *Fortunato* for the proposition that only minor deviations from working a full year would satisfy the requirements of G.L. c. 71, § 41 but then deviated from SJC and Appeals Court precedent to find that *Fortunato* also made an exception for excused absences.[2]

The Arbitrator then cited the CBA, which provided various options for maternity leave, to which the teacher availed herself. Relying on his interpretation of *Fortunato*, the Arbitrator then ruled that, because the teacher's maternity leave was sanctioned under the contract, her

[2] Both the Union and the Arbitrator rely on broad language in *Fortunato*, which states, in relevant part that "absences which are excused or sanctioned by the contract or by the School Committee would not weigh against the teacher's entitlement to tenure." Award at 19, *quoting Fortunato*, 10 Mass. App. Ct. at 206. The SJC and Massachusetts Appeals Court previously have ruled, however, that that language is not intended to be interpreted as the Union and Arbitrator interpret it. Specifically, in *Matthews v. School Comm. of Bedford*, the Appeals Court held that the "dictum" on which the Union and Arbitrator rely "has been confined in application to consideration of the consecutiveness of a teacher's service" by the Supreme Judicial Court in *Solomon v. School Committee of Boston. Matthews v. School Committee of Bedford*, 22 Mass App. Ct. 374, 378 n.9 (1986).

maternity leave "does not weigh against [the teacher's] entitlement to PTS status." Award at 20 (internal punctuation omitted).

The Arbitrator proceeded to discuss how his conclusion comported with the FMLA, which ensures that leaves "'shall not result in the loss of any benefit accrued prior to the date on which the leave commenced.'" Award at 20, *quoting* 29 U.S.C. § 2614(a)(2). He also cited the FMLA for the proposition that an employee must be restored to an equivalent position with equivalent benefits following an FMLA leave. The Arbitrator then reasoned that not crediting the teacher with teaching time before and after taking maternity leave would be contrary to those dictates of the FMLA. Award at 20-21.

The Arbitrator also relied on a 1996 U.S. Department of Labor, Wage and Hour Division ("DOL") opinion, based on the law in Illinois, which required teachers to complete a two-year probationary term, based on the teacher's anniversary date. The DOL reasoned in that opinion that if the probationary time were based on the completion of either hours or days worked, "'the employer could delay granting contractual continued service by an amount reflecting the amount of unpaid FMLA leave.'" Award at 23-24, *quoting* DOL Opinion, 1996 WL 1044777. Without citing precedent, the Arbitrator then reasoned that "[t]hat analysis has applicability to the Massachusetts PTS system because here PTS is based on a 'certain number of days worked[]' (i.e., five hundred forty (540) days)." Award at 24.

Having determined that the teacher must be given credit for the partial years she worked, the Arbitrator then had to determine how to apply that conclusion to the facts of the case. He first dispatched with the Union's argument that the time the teacher was on leave should count the same as time worked, relying on language from *Solomon* rejecting that argument. Award at 24-25. Instead, the Arbitrator determined that the teacher had to "make up" the sixty days of

leave and "tacked on" 60 days of "probationary time" onto what would have been her fourth year of service, the 2011-2012 school year. Accordingly, the Arbitrator ruled that the teacher attained PTS as of the sixty-first day of the 2011-2012 school year. Because the teacher had attained PTS prior to being non-renewed in May of 2013, the non-renewal notice was invalid, as it did not meet the requirements for terminating a teacher with PTS under G.L. c. 71, § 42.

**Licensure**

The Arbitrator rejected the District's argument that not all of the teacher's time counted toward PTS because she was not properly licensed for the classes she taught. In reaching that conclusion, the Arbitrator noted that at all relevant times, the teacher possessed a moderate special needs pre-K through grade 9 license and that there was no evidence that she taught students in grades 10-12 more than 20% of her time, as is permissible under 603 CMR 7.15(9)(a). Therefore, the teacher had a license appropriate to her teaching assignment, as required to obtain PTS. Award at 26-29, *citing Rantz v. School Comm. of Peabody,* 396 Mass. 383 (1985).

**Comment**

The Arbitrator's ruling, if applied universally, would upend the well-crafted PTS system established under G.L. c. 71, § 41, which establishes a date certain (June 15) by which Superintendents know they must non-renew teachers and a date that teachers know is the last day for them to receive a non-renewal notice. While the Arbitrator's Award applies to only the matter before him, school districts should expect to see similar arguments from the teachers' unions going forward and should prepare accordingly.

We recognize that making decisions about non-renewing teachers shortly after a maternity leave and prior to the expiration of the three-year period may cause school districts to confront an unenviable choice between non-renewing a teacher shortly after a leave, thus risking

retaliation or discrimination claims (even if meritless), or having a teacher work another year, thus risking an arbitrator finding that she attained PTS by creating a new method of measuring years of service. Superintendents should consult local counsel to navigate this path.

## C. ***KEVIN FAGAN AND BOSTON PUBLIC SCHOOLS***

AAA Case No. 01-14-0001-4691 (April 11, 2016)
Sarah Kerr Garraty, Arbitrator
Termination of Teacher on Improvement Plan Overturned, Teacher Reinstated

### Introduction

This case involves the dismissal of a twenty-year educator following an unsatisfactory performance rating while on an Improvement Plan. The teacher was dismissed near the end of the 2012-2013 school year, which was his second year at a new school and under a new evaluating principal. Prior to his termination, the teacher suffered three deaths in his family in close proximity (his uncle, mother, and grandmother all passed away between September of 2011 and October of 2012), causing him to take bereavement, FMLA, personal, and medical leave. Before the 2012-2013 school year, the teacher had consistently received the highest ratings available under the evaluation system that was in effect through the end of the 2011-2012 school year, despite suggested areas for improvement being noted, particularly in his earlier evaluations. A new evaluation system went into effect in September of 2012.

### Facts

Kevin Fagan ("Mr. Fagan") was employed by the Boston Public Schools ("BPS") for twenty years prior to his dismissal in 2013. He was first employed by BPS as a paraprofessional in the middle and elementary schools, then as a high school biology and middle school science teacher, before teaching for thirteen years in three BPS elementary schools. First assigned to Bates Elementary ("Bates") in September of 2011, he was initially assigned to teach fourth-grade literacy, math and social studies. He was then assigned to teach fifth-grade math, with no literacy

assignment, during the 2012-2013 school year. Until the 2012-2013 school year, during which he was dismissed by Bates Principal Kelly Hung ("Ms. Hung"), Mr. Fagan consistently received the highest ratings available under the evaluation system that was in effect through the end of the 2011-2012 school year. Despite these high ratings, suggestions for improvement were noted by his evaluators, particularly early in his teaching career.

Ms. Hung, who became the Principal of Bates in 2008, was Mr. Fagan's evaluating principal from the time he began working at Bates in 2011 through his dismissal during the 2012-2013 school year. The entirety of Ms. Hung's career with the BPS has been as an administrator, with the exception of her first year in the district, when she worked on a waiver as a third-grade co-teacher instructing students one-on-one in math.

During his first year employed at Bates, the 2011-2012 school year, Mr. Fagan took significant time off due to the death of his uncle and his mother's illness and death. He intermittently took approximately thirty-five days of FMLA leave, in addition to bereavement leave and personal leave. He was absent from work for one week in September, all of March and much of both February and April. Prior to the majority of this time away from work, Ms. Hung conducted an interim evaluation of Mr. Fagan on November 16, 2011. At the time, the BPS evaluation system offered evaluators only two choices in rating teacher performance: "Meets or Exceeds Standards" and "Does Not Meet Standards." Mr. Fagan earned the higher of the two available evaluation rating options from Ms. Hung in all seven "dimensions" that BPS used in evaluating teachers. She did note suggested areas for improvement.

On November 8, 2011, just a few days before she evaluated Mr. Fagan as meeting or exceeding standards, Ms. Hung sent him note emphasizing the importance of his students' timely arrival at lunch and at class game time. On January 18, 2012, Ms. Hung sent Mr. Fagan a

memorandum raising concerns about her observation of his literacy block on January 13 and his math block on January 17, requesting to speak with him about the feedback on January 20. Ms. Hung went on maternity leave shortly thereafter and did not communicate with him any further about his performance during the 2011-2012 school year.

BPS teacher evaluation procedures changed between Mr. Fagan's first and second years at Bates. The Massachusetts Department of Elementary and Secondary Education ("DESE") promulgated new regulations requiring more rigorous and comprehensive teacher evaluation procedures in June of 2011, G.L. c. 71, §38; 603 CMR 35.00 *et seq*. The new regulations set forth a five-step evaluation cycle, requiring development of an "Educator Plan." Teachers rated "exemplary" or "proficient" are placed on a "Self-Directed Growth Plan," while teachers rated "needs improvement" must be placed on a "Directed Growth Plan," and teachers rated "unsatisfactory" must be placed on an "Improvement Plan." Dismissal can occur if a teacher receives an overall performance evaluation of "unsatisfactory" at the end of the Improvement Plan period. During negotiations for the 2010-2016 collective bargaining agreement between the BPS and the Boston Teachers Union, the parties incorporated DESE's "Model Collective Bargaining Contract Language," inclusive of evaluation procedures. DESE's new evaluation regulations, the new evaluation language incorporated into the BPS teachers' contract, and the new BPS evaluation system all became effective in September of 2012.

In addition to the new DESE regulations and procedures, the Instructional Leadership Team at Bates, led by Ms. Hung, prepared the "Bates Priority Evaluation Elements 2012-2013," which Ms. Hung distributed to the Bates staff. The Bates elements were composed of a subset of six "priority" indicators from DESE's evaluation rubric, along with other items developed by

Ms. Hung and her team such as "seven habits," with the stated goal of making the rubric "more concrete and manageable."

Because Ms. Hung evaluated Mr. Fagan's performance during the 2011-2012 school year as "Meets or Exceeds Standards" under the former evaluation system, Mr. Fagan was placed on a Self-Directed Growth Plan under the new evaluation system at the beginning of the 2012-2013 school year, his second year teaching at Bates and being evaluated by Ms. Hung. As required by both DESE regulations and the BPS teachers' contract, Mr. Fagan drafted, and Ms. Hung approved, his "student learning" and "professional practice" goals. The start date of Mr. Fagan's Self-Directed Growth Plan and evaluation cycle was October 2, 2012.

On or about October 4, 2012, Mr. Fagan suffered the loss of another close family member, his live-in grandmother. Mr. Fagan took October 4 – October 5 as bereavement leave, followed by two additional days off on October 9-10. On October 11, Mr. Fagan saw his primary care practitioner, who advised he take two weeks off, stating in a medical note that he was experiencing severe emotional distress. Mr. Fagan testified that he was in great distress and was unable to sleep. Mr. Fagan returned to work on October 29, providing a second medical note stating that, while he could return to work, he might need intermittent medical leave. Mr. Fagan took six additional sick days between November of 2012 and March of 2013.

Despite Mr. Fagan being out on leave for most of October of 2012, Ms. Hung did not change the October 2 evaluation start date, nor did Mr. Fagan request any postponement. Ms. Hung actually began evaluating Mr. Fagan prior to October 2, observing his classroom on September 27 and again on October 2. Her feedback stated that Mr. Fagan frequently missed assignments and/or paperwork deadlines, that his lessons were lacking, that he did not address confusion/challenges presented by students, that he did not utilize written scaffolding of specific

strategies, anchor charts or posters, and that he did not adapt material for student accessibility. On October 11, Ms. Hung informed Mr. Fagan via letter that he would be receiving a formative assessment during the week of October 29, citing concerns about instruction and requesting that he begin collecting and uploading evidence. She also informed him that, because the evaluation period was shortened, he would not be assessed on his student learning or professional practice goals at the time. Because of Mr. Fagan's leave, Ms. Hung sent him a similar letter on October 29, indicating that the formative evaluation had been postponed to November 12, so that he had time to prepare.

On November 6, Ms. Hung observed Mr. Fagan's social studies class, submitting feedback on November 12. She stated that no objective was posted, that the learning goal of the lesson was unclear, that students offered low-level observations with no critical thinking/analysis offered by the teacher, that the teacher was late in transporting students to lunch/recess and that a student walked out of the classroom when he became upset.

Ms. Hung released Mr. Fagan's formative assessment on November 17, with performance ratings of "needs improvement" in "Family and Community Engagement," "unsatisfactory" in "Curriculum, Planning and Assessment," "Teaching All Students" and "Professional Culture," with an overall rating of "unsatisfactory." As a result, Ms. Hung moved Mr. Fagan from a Self-Directed Growth Plan directly to an Improvement Plan on December 12 2012, bypassing the Summative Assessment under the Self-Directed Growth Plan, and reset his goals. While Ms. Hung did meet with Mr. Fagan after releasing his formative assessment, informing him that he would be moved onto an Improvement Plan, she did not comply with the contract language requiring that an evaluator schedule a meeting with a teacher to discuss the Improvement Plan within ten school days of notification of Improvement Plan status, and that

the evaluator shall develop the Improvement Plan, which shall include "the provision of specific assistance" to the teacher. Ms. Hung also failed to comply with the contractual obligations that the Improvement Plan include signatures of the teacher and the supervising evaluator, and that a copy of the signed Improvement Plan be provided to the teacher, indicating the teacher's timely receipt.

Mr. Fagan's Improvement Plan duration was ninety (90) days, which is within the required thirty (30) calendar day to one (1) school year timeframe provided by 603 CMR 35.02. Ms. Hung testified that she was aware when she placed Mr. Fagan on the Improvement Plan that she was required under Section 19((I) (c) and (d) to recommend his dismissal if his performance rating remained unsatisfactory at the Plan's expiration.

Ms. Hung first observed Mr. Fagan under the Improvement Plan on December 17, 2012. She realized during or after the December 17 observation that Mr. Fagan was approximately two months behind in his math instruction, and had yet to administer an end-of-unit test scheduled for December 10. On January 8, 2013, Ms. Hung met with Mr. Fagan and his union representative, requiring Mr. Fagan to create a plan to cover elements essential for the mid-year assessment scheduled for January 15. Ms. Hung next observed Mr. Fagan under the Improvement Plan on January 15. She released her feedback from these two observations on January 5 and January 20, respectively.

Despite Ms. Hung's negative view of Mr. Fagan's math instruction and curriculum timeline, his students performed quite well on the end-of-unit test taken on December 20, 2012, with fifteen of nineteen students meeting or exceeding the standards and the average score being 7.53 out of a possible nine.

Ms. Hung released a formative assessment on January 25, 2013. Again, Ms. Hung rated Mr. Fagan "unsatisfactory" in three of the four standards, with an improvement to "proficient" in "Family and Community Engagement."

Mr. Fagan's Improvement Plan ended on March 2, 2013. On March 6, 2013, Ms. Hung released his summative evaluation, with the following ratings: "unsatisfactory" in "Curriculum, Planning and Assessment" and "Teaching All Students," and "needs improvement" in "Family and Community Engagement" and "Professional Culture." Ms. Hung rated Mr. Fagan's overall performance as "unsatisfactory," mandating a recommendation of dismissal.

On March 22, 2013, Ms. Hung sent Mr. Fagan a letter of intent to terminate, pursuant to G.L. c. 71, §42, for his "inefficiency, incapacity, incompetency" and his "failure to satisfy teaching performance standards," referencing his Improvement Plan and his "unsatisfactory" performance rating, stating the he did not "meet expectations." The letter stated that, despite Mr. Fagan "having been provided diagnoses and prescriptions aimed at improving [his] performance, [he] did not improve [his] performance," describing his continued employment by the BPS as "not in the best interests of the students whom we serve…"

**District Position**

BPS argued that an arbitrator's review of a teacher's dismissal under G.L. c. 71, §42 is limited where the evaluator articulates a "reasonably, objective and non-discriminatory basis" for concluding that the teacher has failed to satisfy performance standards, thereby meeting the employer's burden of proof. The district argued that, provided the evaluation process was conducted fairly and consistently, and in accordance with state requirements and the collective bargaining agreement, the arbitrator may not evaluate whether dismissal is appropriate, substitute his or her judgment for that of the BPS, or disturb the BPS decision to dismiss. BPS asserted that

Ms. Hung "substantially complied" with evaluation procedures, and that a "mere clerical error" such as Ms. Hung's "misconception" about the type of Educator Plan Mr. Fagan should have been placed on or a lack of signatures on his Improvement Plan.

**Union Position**

The Boston Teachers Union took the position that Ms. Hung did not meet the statutory cause standard, did not follow contractual evaluation procedures, and predetermined that Mr. Fagan was unsatisfactory based upon erroneous factors never disclosed to him, thereby denying his due process rights. The Union emphasized Ms. Hung's failure to consider what the substitute teacher had or had not covered during Mr. Fagan's leave, that she required her own evaluation standards outside of those adopted by the collective bargaining agreement without authority in mandating adherence to Bates "priority elements" and "seven habits" unilaterally imposed by Ms. Hung. The Union also highlighted that Mr. Fagan met his student learning goal, that he was penalized for his performance in Family and Community Engagement relative to a time period that he was out on approved leave, that Ms. Hung blamed him for failing to create a behavior plan for a special education student, the responsibility of his special education co-teacher, and erroneously blamed him for scheduling a meeting with a noncustodial parent.

**Arbitrator's Award**

BPS carried the burden of proof in establishing that the district had proper cause to terminate Mr. Fagan. Because Mr. Fagan had achieved "professional teacher status," the only legitimate grounds for his dismissal under the Education Reform Act were "inefficiency, incompetency, incapacity, conduct unbecoming a teacher, insubordination or failure…to satisfy teacher performance standards." In this case, the arbitrator's award of reinstatement turned on what the arbitrator characterized as deficiencies in evaluation procedures, as outlined below.

**Compressed Timetable**

The arbitrator found that Mr. Fagan's evaluation cycle "was compressed" "in every aspect," with time constraints being "exacerbated" by Mr. Fagan being out of work on approved medical leave for most of October of 2012. While on a Self-Directed Growth Plan for the 2012-2013 school year, Mr. Fagan had only nine school days to incorporate suggestions for improvement prior to his formative assessment and only five school days to incorporate suggestions for improvement between Ms. Hung's first and second unannounced observations. Further, the formative assessment, which the BPS teachers' contract refers to as a "mid-cycle" assessment, occurred approximately three months ahead of the target cycle (target being the end of year one of a two year cycle). Mr. Fagan was then placed on a 90-day Improvement Plan. While this 90-day period satisfies the regulatory minimum of 30 days required for an Improvement Plan, the arbitrator found that the 90-day timeframe was "too constrained to afford the grievant sufficient time to improve," given the goals and objective measures set forth in his Improvement Plan relative to student mastery rates and the development of rigorous lesson plans with scaffolding support.

The arbitrator gave great weight to Mr. Fagan never having received an unsatisfactory performance rating in any category while a BPS teacher from 1998 through the 2011-2012 school year, inclusive of Ms. Hung's own evaluation of him as meeting/exceeding expectations early in the 2011-2012 school year. He expressed a lack of understanding of Ms. Hung's "hurried flight through the steps of the evaluation process" given Mr. Fagan's "long and untroubled employment history." He also found the pace to have been "exacerbated" by two additional factors: (1) 2012-2013 being the first year of a new and complex evaluation system, with which Mr. Fagan reported at times having technical difficulties, and (2) Mr. Fagan's

medically documented period of emotional distress during the fall and winter of 2012, stemming from the third death of an immediate family member within six months.

**Conflicting Standards**

Despite the BPS having adopted the Massachusetts Model System for Educator Evaluation promulgated by ESE, which includes 33 indicators of teacher success rubrics to be applied to four evaluation standards, the Bates Leadership Team, led by Ms. Hung, chose to focus on just six "priority" indicators selected by the Team, as well as creating the Team's own list of "must see" and "must have evidence of" measures for each of the six priority indicators, the vast majority of which were inconsistent with the BPS teachers' contract and incorporated DESE model. The arbitrator found no evidence that BPS developed the Bates priorities or that DESE reviewed them. This resulted in "inconsistency," having "a substantive and detrimental impact on the evaluation process that led to [Mr. Fagan's] termination."

**The Summative Evaluation and Recommendation of Dismissal: "Moving the Goal Post"**

The arbitrator viewed Ms. Hung's dismissal of Mr. Fagan as moving the target. She was troubled that Ms. Hung rated Mr. Fagan "unsatisfactory" relative to a specific assessment-measured student learning goal that he had met as it was articulated in his Improvement Plan. Arbitrator Garraty did not accept Ms. Hung's after-the-fact attempt at justification, stating that the issue is complex and "not as simple as one raw score on one test…nor is it one set of test results that indicates teacher effectiveness…it is a combination of many factors." The arbitrator faulted Ms. Hung not only for failing to better articulate her evaluation of this goal to Mr. Fagan, but for failing to satisfy a contractual mandate to schedule a meeting with Mr. Fagan to discuss the Improvement Plan within ten days. Such a meeting would have afforded her an opportunity to elaborate on the plan's stated goals. The arbitrator also criticized Ms. Hung for not informing

Mr. Fagan, prior to the summative evaluation resulting in his dismissal, that she had concerns about the progress of his students at the end of the 2011-2012 school year. According to Ms. Hung, those concerns prompted her to add a co-teacher to his classroom to teach ELA, resulting in Mr. Fagan forfeiting his former literacy responsibilities. Mr. Fagan was not on notice that Ms. Hung perceived him as providing "ineffective instruction" during the 2011-2012 school year, during which he received a positive performance evaluation with no properly documented negative observations or assessments.

**Conclusion**

Fealty to evaluation process matters. Here, the arbitrator ultimately found that BPS failed to meet its burden of proof in establishing proper cause to dismiss Mr. Fagan because his termination was "procedurally defective in numerous ways," which had a "substantive negative impact." These missteps cost the district a lot of money, time, and administrative capital. The arbitrator awarded Mr. Fagan reinstatement as an elementary school teacher within the BPS, with lost wages and benefits, less any interim earnings.

## D. *MARC MERTZ AND NORFOLK COUNTY AGRICULTURAL HIGH SCHOOL*

AAA Case No. 01-14-0000-6422 (January 25, 2017)
Mark L. Irvings, Arbitrator
Dismissal Upheld

**Introduction**

Superintendents faced with off-duty employee misconduct often face difficult decisions about whether that conduct has sufficient nexus to the employee's job to warrant dismissal or other discipline. In this case, however, where the teacher was dismissed after being arrested for complaints of exposing his genitals in public in the middle of January, Arbitrator Mark Irvings dispatched the Union's arguments and upheld the school district's dismissal of the teacher for conduct unbecoming. Although the teacher had been well-liked and "an outstanding citizen of

the school," exposing himself in public raised concerns about the well-being of students and the parents' confidence in the school, despite the fact that the conduct occurred outside of school. The matter also had been widely reported in the media and damaged the District's reputation. Although the Union urged the Arbitrator to conclude that the passage of time between the teacher's dismissal and the arbitration (approximately three years) would have muted the adverse impact of the negative publicity, the Arbitrator declined to reverse the dismissal decision "from a three year retrospective."

**Facts**

Marc Mertz was a certified vocational teacher and arborist. He taught at the Norfolk County Agricultural High School ("Norfolk Aggie" or "District") from 1994 until he was terminated on March 18, 2014. By all accounts, Mertz was a well-liked, hard-working, and dedicated teacher. He developed an urban forestry curriculum at Norfolk Aggie, coached several sports, and routinely took students to arborist-related activities on his own time and without compensation.

Prior to his dismissal, Mertz had been subject to discipline one or two times in the early 2000s. Mertz was suspended at the start of the 2002-2003 school year and barred from coaching an athletic team for a season for conduct occurring during a field trip the year before. Specifically, Mertz had taken twelves students in a van and did not comply with the administrative requirements for the trip and damaged the van. Even more egregious, Mertz and one of the students also pretended to be father and son as a prank in a variety store that involved the student pretending to have a tantrum. Ultimately, police were called and Mertz was arrested in front of the students. The second disciplinary matter involved "[g]ross malfeasance of [Mertz's] duties as a teacher" for which he received a notice of intent to suspend in December

2003. The arbitration award does not have more details on the second matter since it was ultimately determined that he was not suspended and that incident was not considered in the ultimate dismissal decision.

At issue in this case were events that occurred at Mertz's home on January 20, 2014, which was Martin Luther King Day. Mertz rented a house in Walpole, which house was situated on a narrow two-way road bordered by woods on both sides. The land across from Mertz's house belonged to Norfolk Aggie as part of its 365-acre campus but the main entrance and buildings at Norfolk Aggie were either a mile drive or a 20-minute walk through the woods.

Around 7:30 in the morning of June 20, a middle-aged woman, Paula Sullivan, drove by Mertz's house on her way to an appointment. She testified that she saw "a large, hefty, bearded man in the driveway wearing a gray cap, a t-shirt, swim goggles, and a towel wrapped around his waist." Award at 3. About 20 minutes later, on the way back from her appointment, Ms. Sullivan drove past Mertz's house again, with the house on the right. She saw the same man standing by his mailbox, bordering the street, still with the towel around his waist. She then saw him remove his towel, exposing his genitals. At arbitration, she testified that she saw the man doing something with his genitals and the mailbox, though she did not include that account in her report to the police. Sullivan then called 911, which connected her to the Westwood Police Department. She recounted what she had seen to the police.

Following Sullivan's report, the Westwood police contacted the Walpole police. Walpole dispatched a police officer to the area. The officer saw in his rearview mirror a man in a towel but by the time he reversed direction, the man was gone.

At around 9:20 that same morning, Officer Scott Koenig rode his motorcycle by Mertz's house and observed a man in the yard in a gray ski cap and towel. Koenig dismounted his

motorcycle but lost sight of the man. Koenig went to the front door and Mertz answered wearing a dark t-shirt and shorts. Mertz identified himself by name and as a forestry teacher at Norfolk Aggie. Koenig asked if Mertz had been out in a towel earlier and Mertz said that he had gone out in a towel to get something from his truck. Koenig reported that there had been a complaint about someone walking in the area in the nude and advised Mertz not to go outside undressed. Mertz responded that he understood.

Less than an hour later, Alice O'Brien, who lives near Mertz observed "sort of a burly mountain man, wearing a ski hat and light shoes and carrying something like a piece of clothing in his hands, and otherwise was exposed, completely naked." Award at 5. Scared, O'Brien pulled over and called 911. She reported that she saw a stark naked man near Mertz's house. Although O'Brien testified that the event occurred around 10:15, the police report indicated that she called the police around 9:50.

In response to O'Brien's call, four officers were dispatched to the area near Mertz's house. Koenig and another officer went to speak with Mertz, who denied being outside. Koenig again warned Mertz not to go outside without clothes on. Koenig then interviewed O'Brien and prepared an incident report. The incident report did not contain Sullivan's report or Koenig's earlier interaction with Mertz, but rather began with O'Brien's encounter.

Shortly before 1:00 on the same day, Koenig drove by Mertz's house again. Koenig saw that Mertz was outside and naked from the waist up but could not see Mertz from the waist down. Koenig stopped and again dismounted his motorcycle. While he did so, Mertz went into his house. Koenig rang the bell and saw a dark shirt resting on the stairs. After about a minute, Mertz opened the door wearing a dark shirt and shorts. Koenig then advised Mertz of the several reports of him standing outside nude and that such behavior could lead to felony charges.

Koenig also asked if Mertz was on medication or needed medical care relative to his standing outside nude. Mertz answered that he did not need to see anyone and would stop standing outside naked. Koenig wrote a report of that interaction.

The next morning, Koenig learned that in July 2012, Mertz had been involved with the Natick police for appearing nude in public near a lake. In that incident, Mertz reported that he enjoyed swimming "au natural," thought he was alone at the time, and would use common sense going forward. The Natick Police concluded that Koenig did not intend to harm anyone and did not charge him.

Based on those various interactions with Mertz and what Koenig understood to be Mertz's admission of being outside naked the day before, Koenig decided to charge Mertz with Open and Gross Lewdness (a felony) and Disturbing the Peace (a misdemeanor). Koenig obtained an arrest warrant on January 23, 2014 and Koenig was arrested, arraigned, and released on bail.

By January 23, the school resource officer had provided the District with copies of the police reports. Based on those reports, the Superintendent and Principal decided to place Mertz on administrative leave, with pay. The Superintendent delivered that notice to Mertz at his arraignment hearing.

The next day, local and national media were widely broadcasting reports of Mertz's arrest and the underlying charges. The reports included claims that Mertz exposed himself to women, claims that he had previously exposed himself to boaters in Natick, and claims that Mertz had "dry humped" his mailbox. The articles also contained Mertz's mug shot and identified him as a Norfolk Aggie teacher.

As would be expected, the school community responded immediately. Administrators and members of the Board of Trustees received many calls from concerned parents, including a parent whose child previously had been abused and who was concerned Mertz's presence in school would be a "trigger" for her child.

On February 14, 2014, after having conferred with counsel, the Superintendent and Principal sent Mertz a written notice of intent to dismiss. The letter stated that he would be dismissed effective February 19, 2014 for conduct unbecoming a teacher. The letter specifically referenced appearing nude and exposing his genitals on January 20, 2014 on property adjacent to the school, being arrested for his behavior and charged with lewdness and disturbing the peace, and having engaged in similar behavior in Natick in June 2012. The noticed also referenced the previous discipline for inappropriate behavior in school in August 2002 and December 2003. The letter explained that Mertz had 10 days to request a meeting or respond to the charges.

On February 26, 2014, Mertz's lawyer wrote to the District, stating that if Mertz was terminated on February 19, then the District had violated G.L. c. 71, § 42, since February 19 was only five (not 10) days from Mertz receiving notice of the intent to dismiss him. Saving the District from later claims of due process violations, the District sent a revised notice of intent to dismiss on March 3, omitting any reference to the effective date of dismissal. No meeting was held because of Mertz's ongoing criminal case.

On March 18, 2014, the administration sent Mertz a letter confirming his dismissal. By that time, the Superintendent and Principal had reviewed his file and were unable to find corroborating evidence for the 2003 suspension so they did not include consideration of that matter in the decision. Instead, the decision was based on the poor judgment reflected in the public nudity matters and portrayal of the school in a negative light.

Mertz timely appealed to DESE and proceeded to arbitration pursuant to G.L. c. 71, § 42. Hearings were held on August 30 and 31 and November 1, 2016.

Between the time that Mertz was dismissed and arbitration began, his criminal matter was resolved. Mertz's jury-waived, bench trial was held on October 21, 2015. Mertz did not testify. The judge found him not guilty of the felony Lewdness, Open and Gross charge but guilty of the misdemeanor Disturbing the Peace charge. Mertz was assessed a $150 fine and the case was dismissed.

At arbitration, Mertz called a number of co-workers, former students, and parents of former students to testify on his behalf. More noteworthy, however, is that Mertz testified at the hearing to a previously undisclosed version of the events of January 20, 2014. At arbitration, Mertz testified that he went outside of his house twice wearing a hat, black t-shirt, shoes and a towel. The first time was to check the mail. He testified that even though it was a federal holiday and no mail would be delivered, he only checked his mail once a week. Mertz testified that the second time he went outside in that state of dishabille was to get something out of his car. Mertz recalled speaking with Koenig but testified that each time, he had told Koenig that he had been wearing a towel. He also testified about his difficulty finding work following his dismissal and how much he missed teaching.

**Arbitrator's Award**

The Union made several arguments for overturning Mertz's dismissal. The Arbitrator rejected them and upheld the dismissal decision.

First, the Arbitrator looked for credible evidence of misconduct. To reasonably conclude Mertz was guilty of conduct unbecoming a teacher, the Arbitrator needed to find that he exposed himself to Sullivan and O'Brien since he would not have been dismissed if he had been outside

and remained wrapped in a towel, as Mertz claimed had been the case. In concluding that there was credible evidence of Mertz exposing himself, the Arbitrator relied on the fact that two different and unrelated women felt compelled to call 911, which calls "attest to their amazement about what they had just seen." Award at 16. Although there may have been questions about whether those witnesses accurately recalled all of the details of what transpired on that day,[3] the fundamental conclusion and core assertions that Mertz appeared in his driveway without pants, was credible.

Further, although Koenig's observations were not dispositive, they supported the claims of the two women. For example, that Mertz went inside and put on shorts once he saw Koenig indicated that Mertz knew it was "odd, if not suspicious" that he was outside in only a towel. Award at 17. Nonetheless, Mertz must have taken off his shorts and appeared outside again after he put on shorts to talk to Koenig since O'Brien observed Koenig in the towel and later nude, after Mertz's first encounter with Koenig. Once again, when Koenig returned, Mertz put clothes back on.

Moreover, Mertz offered no credible reason for being outside the house with just a towel multiple times over the course of many hours in the middle of winter. For example, he did not have a spa on the premises. Absent a credible explanation for Mertz's repeated ventures outside in a towel, the Arbitrator found that the Norfolk Aggie administrators were "justified in concluding that the reports of the two women were reliable and Mertz's behavior was inscrutable and seriously troubling." Award at 18.

Second, the Arbitrator considered the Union's argument that even if Mertz did expose his genitals to O'Brien and Sullivan, that conduct did not amount to conduct unbecoming a teacher.

[3] For example, there were questions about whether Sullivan's testimony about Mertz "dry humping" his mailbox was based on her own recollections or news stories reporting Mertz had done so.

The Arbitrator rejected that argument. "The normal analysis is that off-duty misconduct can only form the basis for disciplinary action by an employer if there is an established nexus between the misconduct and the person's employment." Award at 18-19. Here, although Mertz's conduct did not occur directly on school property, it did occur in the town where he was employed, adjacent to school property. Also, although Mertz's conduct occurred on a school holiday, Norfolk Aggie maintains a farm that requires attention every day. A student, parent, or colleague easily could have driven past Mertz exposing himself and, even if not, Mertz's decision to expose his genitals on a road abutting the school "represented high-risk behavior, and evidenced extremely poor judgment." Award at 19. The Arbitrator reasoned that"[t]he administration had the right to expect its teachers, who do serve as role models and safe mentors, would have the good sense not to create potentially deleterious situations for the students." *Id.* The administration also has the right to expect teachers to avoid conduct that would place the District in a very bad light. Here, as discussed above, Mertz's conduct created a "blizzard" of media reports and bad publicity, as well as community concern, for Norfolk Aggie.

Third, the Arbitrator considered the best interest of the pupils. That consideration, the Arbitrator noted, is what made this a difficult case. There was no question that Mertz was a talented and dedicated teacher and "an outstanding citizen of the school." Award at 20. The Arbitrator also stated that "[t]he students certainly suffered as a result of his termination." *Id.* Nonetheless, the administration's decision to dismiss Mertz, at the time, was in the best interest of all students. Mertz gave no explanation for his troubling behavior and "there was reason to question his emotional state." *Id.* The administration reasonably considered the welfare of its students, the concerns of parents and the community, as well as the negative reputation sustained as a result of Mertz's high profile arrest in deciding to dismiss Mertz.

In reaching the conclusion that the administrators properly exercised their judgment in dismissing Mertz, the Arbitrator also rejected the Union's argument that the passage of time muted the negative publicity and also made it so that only Norfolk Aggie seniors were in school at the time of Mertz's arrest. Noting that the Union certainly would object if an employer attempted to justify a dismissal decision based on later-obtained evidence, the Arbitrator stated that he "cannot view a decision made in March, 2014 from a three year retrospective."

Thus, the Arbitrator upheld the dismissal decision. He did note, however, that the District could, in its discretion, re-employ Mertz if it decided that his credentials and the passage of three years would, on balance, benefit the school. The Arbitrator added that G.L. c. 71, § 42 did not confer him with that discretion.

**Comment**

This case offers a relatively straight-forward example of when off-duty conduct may warrant dismissal. It is particularly heartening that the Arbitrator here was not swayed by the employee's strong record and that the Arbitrator refused to consider the passage of time as a consideration for his decision. It is also helpful that the Arbitrator upheld the dismissal despite the fact that Mertz was found guilty of only a misdemeanor and punished with a small fine. Oftentimes, Superintendents must make decisions long before the criminal justice process has been completed. This case is one example where dismissal was warranted even though the employee was not found guilty of the most serious criminal charges.

**E.** ***CATHY MURPHY AND LAWRENCE PUBLIC SCHOOLS***
AAA Case No. 001-14-0001-3044 (December 28, 2015)
Roberta Golick, Arbitrator
Dismissal Upheld

**Introduction**

This is a case involving the dismissal of a teacher for inability to meet performance standards. The case illustrates a number of elements found in a successful defense of arbitration claims under Section 42. The evaluation process took place over more than one school year, involved multiple observations, multiple evaluators, establishment of an improvement plan, balanced evaluations containing positive and negative feedback, changes in management expectations based on new evaluation regulations, and changing circumstances (in the form of a DESE takeover) for the Lawrence Public Schools.

**Factual Background**

The teacher, Cathy Murphy, was hired in 2007 as a health instructor at Lawrence High School. As noted by Arbitrator Roberta Golick, a busy and highly regarded arbitrator, "her employment between 2007 and 2011 was uneventful." Her performance was satisfactory. The school to which the teacher had been assigned had seven principals over a seven year period.

In November of 2011, the Lawrence Public Schools were placed in receivership due to poor student performance. A receiver was appointed in January of 2012. The receiver (Jeff Riley) submitted a turnaround plan in May of 2012 hoping to improve on the district's Level 5 designation.

The turnaround plan included putting in place the new evaluation system designed by DESE in 2012. The new evaluation plan resulted in extensive training for teachers, particularly in the development of effective lesson plans, improved classroom practices, and a software

program which would allow staff and administrators access to evaluation materials, feedback, and other relevant information.

According to Murphy, she had an argument with her principal in September of 2012. She knew the principal before he came to the high school. She related that prior to September of 2012, they were on friendly terms. She testified that she observed him leaving an open house night dressed in basketball togs. She communicated with him later that he had been observed by other teachers leaving. She said she warned him that if he "wanted the respect of the teachers in the building, he shouldn't go play basketball and leave all the teachers just standing there" while the parents' night continued. According to Murphy, the principal responded in a profanity-laced tirade emphasizing his status as her boss. From that date, she claimed the principal was prejudiced against her and was not objective in his evaluation of her.

**2012-2013 Evaluation Leads to Improvement Plan**

Over the course of the 2012-2013 school year, Ms. Murphy was observed on October 26, 2012, December 4, 2012, in January, and in early February of 2013, prior to the issuance of her formative assessment. The classroom observations were not positive. It was said her classroom was insufficiently rigorous but that, on the other hand, there was a lot of energy in the room, student engagement was high, and classroom management skills were on display. Several weeks later, both building administrators (the principal and the assistant principal) met with the teacher to discuss what they believed to be her negative demeanor and attitude in a professional development session, during building meetings and in informal encounters in the hallway. According to the assistant principal's testimony, the teacher profanely declined an offer to become part of the administrative "team" in the building. The teacher testified that she was getting upset and she just said to the administrators "What the fuck do you want me to do?" She claimed the principal gestured in a way that caused her to become very scared. She complained

that the professional development was not oriented towards her health assignment, and that she was not allowed to attend sessions that she thought were more beneficial, such as a CPR program. The two observations early in the winter of 2013 preceded a February 22, 2013 formative assessment. The observations again made note of positive aspects of teaching, and areas in which there was some improvement since the most recent observation. For example, despite professional development efforts focused on lesson planning there was no objective posted for a lesson and students appeared to be confused. Ms. Murphy received a "Needs Improvement" on her February 2013 formative assessment. Although she had made some progress in student learning goals, and professional practice goals she was found "lacking in all four" standards – curriculum/planning/assessment; teaching all students; family/community engagement; and professional culture. She was told that she must improve in all areas or risk being placed on an improvement plan.

About month after receiving the formative evaluation, the assistant principal scheduled another observation, this time with a consultant to the Lawrence Public Schools who was to serve as a "fresh set of eyes." Over the course of the year, it was common for the consultant to visit classrooms and provide feedback on lessons observed. The lesson observed by the assistant principal and the consultant "was not good." The teacher did not demonstrate improvement in many of the areas that had been discussed either at staff professional development or individually with her. Negative criticism included comments on weak instruction, her failure to illicit higher order of thinking, and her inadequate use of a "notebook" system for developing lesson plans. Approximately six weeks later, a fourth evaluator observed Ms. Murphy. This evaluator, like the consultant initially brought in by assistant principal, was a retired superintendent of schools.

The evidence at hearing was that the fourth evaluator was not provided any advance information about any of the teachers she was to observe, as she liked to "go in with a clean slate and do the observation." As with previous observations, deficiencies were noted. Again, comments were made about the lack of higher order thinking and the inadequate rigor of the program. It was reported the teacher did not appear to challenge the students, she failed to "scaffold" material to enable a student to understand what is being taught, she did not post objectives on the board and did not engage in "bell to bell" teaching, and she did not appear to be fully prepared for each activity. The evaluator told Murphy that she would write up the observation and file it in the computer program, and invited Murphy to meet with her to discuss what was noted. The teacher did not ask to meet.

A seventh observation was scheduled for mid-May of 2013. There, the assistant principal noted there was improved higher order thinking demonstrated in the class, but parts of the class were "still very low in rigor," and two students were sleeping in the class. In a follow-up meeting to provide feedback, the teacher said that she felt that the lesson had gone well and that the assistant principal was "gunning" for her.

In early June, a summative evaluation was issued. The rating was Unsatisfactory on standards 1, 2, and 4. She received a needs improvement on standard 3. She received an overall rating of Unsatisfactory and was placed on an Improvement Plan.

**2013-2014**

At about the same time, the teacher left on an approved medical leave under the Family Medical Leave Act. The improvement plan, therefore, did not go into effect until she returned to teaching in md-October of 2013. She received a copy of the improvement plan on October 24th. It was scheduled to end on December 18th. She was expected to improve her planning and delivery of learning activities, and those activities must be relevant to instructional goals. She

was expected to increase the level of rigor in her classes, to submit fully-developed lesson plans for review by her evaluators, and incorporate suggestions given to her, including developing and maintaining professional relationships with colleagues. Further, aspects of the improvement plan required improved "communication and interacting with the school community, participation in school programs, activities, professional development sessions, building meetings, trainings and projects."

A couple of weeks after the teacher returned under the improvement plan, a classroom observation was scheduled by the principal and assistant principal. There was a dispute about whether the room in which the class was to occur had been properly scheduled by the teacher as it was filled by another class. The lesson was determined to be unsatisfactory. There was no direct or clear instruction and nothing new was covered in the class. Students appeared confused, unsure of what was expected of them, and were not engaged. It also lacked rigor and higher order thinking. As Arbitrator Golick wrote, "they found that Murphy's instruction did not meet some of the most basic standards of professional performance." About a week later, another evaluation was conducted by the evaluator who had previously observed the teacher in the Spring of 2013. This evaluator did note some improvements but rated the lesson unsatisfactory overall, characterized by a lack of sense of urgency and a failure to challenge students. According to this evaluator, however, the teacher did require the student to engage in deep thinking.

The improvement plan also required that the teacher work with a coach. The coach observed her three times in the fall of 2013 and provided recommendations. The coach then conducted a formal observation and rated her work as poor. The coach described some positive features and then commented on a number of negative aspects. The activities in October and

November of 2013 were capped by a formative evaluation that was unsatisfactory. The teacher subsequently complained that the improvement plan was unfair and that the various ratings of unsatisfactory were undeserved and unreasonable. She alleged she was being treated differently than other teachers and that she was being harassed. At that point, the chief operating officer asked two administrators from outside the building to conduct observations. (This brought the total number of evaluators observing Ms. Murphy to 6.) In the course of scheduling new evaluators, the improvement plan was extended for an additional month, into the middle of January 2014. Observations by the two new evaluators occurred in early December. Both criticized the lessons, one for the absence of measures for student comprehension and the other because students did not appear to understand the purpose of the activity. The second evaluator noted that students did not use actual note-taking techniques and that they began packing up and engaging in side conversations towards the end of class. Again, the lesson did not demonstrate a need for students to display higher order thinking skills. A third observation occurred in early January where it was again observed that there were no "checks" in place for assessing student understanding.

On January 15th a summative evaluation issued noting that she had received support and feedback throughout the improvement plan process, but there was no demonstrated overall growth. The summative evaluation concluded with a recommendation that Murphy be dismissed.

**Arbitrator's Award**

At arbitration, the teacher argued that she had been the victim of bias for over two years, that she was deprived of opportunities to participate in meaningful professional development, that she had received erroneous performance ratings, and that she did not receive any helpful

feedback. She characterized the situation of one of "constant intrusion" into her classroom. She claimed that her lessons were rigorous and did call for the demonstration by students of higher order thinking skills.

The arbitrator initially considered the context of these events. Lawrence had suddenly been designated a Level 5 school district and there was a massive transition underway in the system, beginning with the evaluation process and the professional development program. The arbitrator reviewed the contentions of the parties and noted that, but for the teacher's assertion that she had been singled out as a result personal animus, "the district's evidence would amply support its position" that she be dismissed. According to Arbitrator Golick the question was whether she had been discharged as a result of that animus. She ultimately concluded that the teacher's argument "failed to gain traction."

According to the teacher, the problems stemmed from the blowup following the parents' night incident in September of 2012. The arbitrator concluded that even if the principal overreacted to a well-intended tip or "heads up," the whole issue did not rise beyond a simple misunderstanding between friends. Further, the initial observations in that school year were conducted by the assistant principal, not the principal. There was no evidence that the principal had colluded with or attempted to suborn the assistant principal into supporting his improper motives. This conclusion would also apply to the other five evaluators. The evidence, *i.e.*, six or seven evaluators came to the same conclusions, defied the teacher's argument that it was all personal. The arbitration record "lacks a shred of evidence that the six or seven [evaluators] colluded together." In fact, the record established that some of the evaluators were not aware of the history or the reason why they had been assigned to evaluate Ms. Murphy. Further, the district responded to the teacher's concerns by assigning others to conduct some observations.

There was no evidence that she was mistreated or that the evaluators' assessments should be discounted. The evaluations contained positive and negative observations.

As to the teacher's complaint that the professional development offered was not relevant to her work, the arbitrator concluded that the district's professional development was focused on the development of lesson elements, lesson planning, teacher strategies on effective instruction, best practices, and the evaluation instrument. The teacher received the same training as her colleagues. In short, there is no evidence to suggest that she was denied access to meaningful professional development.

Finally, the arbitrator rejected the teacher's argument that the committee violated the evaluation process when some of the evaluations were not posted on the district's computerized document system. The evidence was that the teacher would be given an opportunity to discuss each of these observations, at length, and that as a result, she received the feedback intended. The failure to post them on the document system was not fatal or a violation of due process. At bottom, the matter of the quality of Ms. Murphy's teaching came down to a question of judgment. Here, seven evaluators were uniform in their conclusions which were based upon "legitimate pedagogical concerns."

In conclusion, the Arbitrator concluded that the district did not violate G.L. c. 71, § 42 when it discharged Ms. Murphy.

**F.** ***ANN O'KEEFE AND BOSTON PUBLIC SCHOOLS***
AAA Case No. 001-15-0003-8995 (February 7, 2016)
Phillip Dunn, Arbitrator
Discharge not procedurally arbitrable

**Introduction**

In this case, Arbitrator Phillip Dunn determined that a demand for arbitration filed on May 4, 2015, approximately seven months after formal notice of discharge was sent to the

teacher, was not filed in a timely manner. As a result, Arbitrator Dunn found that the case was not arbitrable.

**Facts**

The relevant facts occurred between late August and mid-October of 2014. O'Keefe had professional status but was on a medical leave of absence from March of 2014 through early September of 2014. In late August 2014, she filed a request for a continuation of her medical leave through March 16, 2015. The Boston Public Schools advised her that she needed to file appropriate documentation, including a physician's certificate signed by a doctor. Eight or ten days later, a second notice was forwarded from the Boston Public Schools directing O'Keefe to submit the requested medical documentation. The second request for appropriate documentation was followed by a certified letter sent to her address, which reminded the teacher that a failure to report for a period of 30 consecutive days constituted a resignation from service. The postal service "made multiple efforts to deliver the certified letter" but there was no authorized recipient.

By October 8, about 30 days after the certified mail was sent, the postal service returned the letter to the Boston Public Schools. The teacher had not reported to work. Between the issuance of the certified letter on September 10 and late September, the teacher had not submitted medical documentation and had been on unauthorized absence for 17 days. She was terminated effective September 25, 2014. From the award, it does not appear that the Boston Public Schools issued a notice of intent to terminate that satisfied the requirements of Section 42. On September 30, 2014, O'Keefe's doctor forwarded a fax to the Boston Public Schools indicating that she was unable to return to work.

On October 2, 2014, O'Keefe emailed human resources asking for a clarification as to whether her leave of absence was denied or whether she was involuntarily terminated. The Boston Public Schools replied that she had failed to provide the medical documentation, that they had attempted to contact her by certified mail, and that her documentation was not submitted until after it was due, resulting in her termination effective September 25. Boston also notified the teachers' union that O'Keefe had been terminated or resigned effective September 24.

The Boston Public Schools' correspondence to the teachers' union garnered a reply dated October 16, 2014. The union alleged the committee had violated various provisions of the collective bargaining agreement and requested that O'Keefe be returned to active service. The October 16, 2014 union correspondence did not contain a reference to the statutory dismissal proceedings or the statutory process for initiating arbitration. Subsequently, the union told Boston that it intended to arbitrate the dismissal but did not cite as a grounds for the grievance/arbitration Boston's failure to issue a proper statutory notification under Section 42.

A demand for arbitration with the Commissioner of Education was filed on May 4, 2015. The case went to hearing on December 3 where Boston "raised for the first time" a claim that O'Keefe's request for arbitration was not procedurally proper as it had not been filed within 30 days after receiving notice of a dismissal as required by Section 42.

**Arbitrator's Award**

The union argued that Boston's September 25 notification failed to meet the statutory notice requirements under Section 42. As the arbitrator observed, a petition for arbitration under the statute was the only remedy available to contest her dismissal because claims under the collective bargaining agreement's grievance and arbitration provisions are inapplicable to teacher

dismissal cases. The union argued that Boston should have been required to disclose what it believed to be a procedural defect in her case earlier in the proceedings than the first day of arbitration. The arbitrator rejected this claim, noting that objections to procedural and substantive arbitrability may be raised at the arbitration hearing and need not be disclosed earlier than that.[4] The arbitrator then concluded that O'Keefe could have raised procedural defects or substantive defects in her May 4, 2015 petition to the Commissioner and Boston's procedural errors did not relieve O'Keefe of her duty to file a petition for arbitration within 30 days. As her petition was filed many months too late, the arbitrator determined the case was not arbitrable.

## G. ***MARY WESTCOAT AND SEEKONK PUBLIC SCHOOLS***

AAA Case No. 16-0000-2429 (November 26, 2016)
Mary Ellen Shea, Arbitrator
Dismissal Upheld

### Introduction

In this case, the arbitrator was tasked with determining whether the Seekonk Public Schools ("Seekonk," "district") had good cause to dismiss assistant middle school principal Mary Westcoat ("Ms. Westcoat") in accordance with G.L. c. 71, § 41. The arbitrator found that Seekonk had established good cause because the assistant principal demonstrated poor judgment (1) in failing to report missing student medication and (2) in allowing video camera installation in the nurse's office without obtaining approval from or informing the building principal or the superintendent. The arbitrator determined that the administration's requirement that Ms. Westcoat obtain approval from the principal or superintendent was "not arbitrary, irrational, unreasonable or irrelevant," and that her failure to comply with that requirement was a

[4] Delaying objections to procedural and substantive arbitrability is needlessly risky. Such defenses should be articulated as early in the process as possible to avoid claims of surprise or unfairness which inevitably flow from a tardy disclosure of procedural defenses, and which claims of unfairness after often receive favorable treatment.

"reasonable basis for imposing discipline," despite her positive and lengthy employment history. While the arbitrator opined that someone other than the principal should have conducted the investigation, and that it was "unfortunate that the [e]mployer did not choose a lesser discipline" in light of her work history, she articulated that the level of discipline imposed "remains the prerogative of the employer, not the arbitrator," in cases such as this one, "where the grounds for discipline are not arbitrary or unreasonable and good cause for discipline has been established."

**Facts**

At the time of her dismissal, Ms. Westcoat had been employed by the Seekonk Public Schools for approximately ten years. She worked as a substitute teacher, then as a teacher, and finally as an assistant middle school principal, a position that she held for approximately seven years before being dismissed for cause on November 13, 2015. She was well-respected in the district, receiving good performance evaluations and some awards.

In September of 2015, the school nurse in Ms. Westcoat's building approached the building principal, informing him that student medication was missing from the locked medication box in her office, which she said had occurred in the past. The nurse then told the principal that, earlier that day, she had her husband[5] install a video surveillance camera in her office in an attempt to ascertain who was taking the medication. The nurse explained to the principal that student medication had been taken from her office previously, in February of 2015, at which time Ms. Westcoat had approved the nurse's suggestion that her husband install a surveillance camera in the nurse's office. That camera had been removed after two to three weeks without incident. The nurse indicated that she had not consulted with or obtained any

[5] The nurse's husband was a district vendor, who had been providing and installing surveillance and camera equipment for the district for five years.

approvals from Ms. Westcoat relative to the currently missing medication, or her husband's second installation of a camera in the nurse's office that day.

The principal reported what the nurse had told him to the superintendent, informing the superintendent that he had not approved the cameras, nor had he been informed of their installation prior to his conversation with the nurse. Seekonk informed local law enforcement about the missing medication, the camera was removed from the nurse's office, and both the nurse and Ms. Westcoat were placed on administrative leave. The superintendent instructed the principal to investigate the missing medication, the surveillance camera installation, and both the nurse's and Ms. Westcoat's actions. The principal conducted several interviews, issuing an investigation report to the superintendent on October 2, 2015.

The investigation report included the nurse's statement that Ms. Westcoat had told the nurse to "keep it between us" when the nurse inquired as to whether Ms. Westcoat had discussed her approval of the first video camera installation with the building principal. The nurse stated in her interview with the principal that Ms. Westcoat had no knowledge of and did not approve the second, recent video camera installation. The nurse admitted that protocol required her to report missing medication to the Department of Public Health and to her supervisor. She conceded that she had not reported the medication that had recently gone missing to the student's parents, the Department of Public Health or any school administrator. When asked by the principal why she had not discussed the matter with him, the nurse stated that Ms. Westcoat had instructed her after the initial incident (as stated, Ms. Westcoat was aware of the initial, but not the recent, instance of missing medication and related video camera installation), to keep the matter just between the two of them, in an attempt to increase the chances of catching the person taking the medication.

Ms. Westcoat stated in her interview that she did not intentionally withhold information from the principal. She explained that she informed the nurse's husband, who had installed the video camera, that students could not be recorded in the nurse's office because of confidentiality considerations. She stated that he responded that the camera would not be recording students, as it only records when motion activated, and only between the hours of 3:00 p.m. and 6:00 p.m. Ms. Westcoat indicated that she did not believe the camera recorded audio. She admitted approving the initial installation, and instructing the nurse not to tell anyone, to not "defeat the purpose." She denied intentionally keeping the information from the principal, admitting that she should have told him and saying she just got "busy."

On the same date, October 2, 2015, the principal submitted a letter to the superintendent recommending Ms. Westcoat's termination, due to what he characterized as her lack of "good judgment." The principal stated in the letter that, "on more than one occasion, she has made a decision that could have jeopardized the safety, security, and well being of the staff and/or students." More specifically, he stated the reasons for her termination as follows: (1) installing a video recording device without consent of the building principal; (2) withholding the information from the building principal for over nine months; (3) demonstrating lack of oversight regarding district and state reporting policies and protocols (relative to medication tampering); and (4) disregarding serious implications regarding potential FERPA violations (relative to videotaping students without their knowledge in the nurse's office – where there is an expectation of privacy).

On October 13, 2015, the superintendent issued a Notice of Intent to terminate Ms. Westcoat for her: (1) failure to report the missing medication to the building principal or central administration; (2) lack of oversight regarding district and state reporting policies and protocols

relating to medication tampering; (3) failure to report to parents and/or guardians that their student's medication had been stolen; (4) failure to obtain principal or superintendent approval of covert video camera installation; (5) violation of district policy and state law regarding confidentiality and privacy due to installation of a video camera that could record staff and students in an area where there is an expectation of privacy; and (6) potential violation of FERPA. The superintendent also mentioned Ms. Westcoat's "poor judgement" and "inappropriate action," taken on her own "outside of established protocols," relating to an earlier incident regarding a student's wellness, for which Ms. Westcoat had been "admonished" and "advised in writing" of her "obligation to follow district protocols." The superintendent thereby dismissed Ms. Westcoat for "violating a number of statutory provisions, including but not limited to, inefficiency, incompetency, conduct unbecoming an assistant principal, or other good cause." The letter of intent informed Ms. Westcoat of her right to request a review of the decision, and to be represented by an attorney or other representative at the meeting.

On November 9, 2015, Ms. Westcoat and her attorneys met with the superintendent, challenging her dismissal. The challenge was unsuccessful, and the superintendent issued Ms. Westcoat's Notice of Dismissal that same day. Ms. Westcoat filed a petition for arbitration, seeking reinstatement, on November 24, 2015.

**District's Position**

Seekonk argued that the arbitrator should uphold Ms. Westcoat's dismissal because the district had good cause to terminate Ms. Westcoat, she was afforded sufficient due process, and proper discharge procedures were followed. Seekonk emphasized Ms. Westcoat's lack of judgment and violation of both statutory provisions and district protocols in her approval of the covert video camera without authorization and her failure to report missing medication. The

district highlighted the fact that Ms. Westcoat had previously been "disciplined in writing" for violating a student's privacy in an earlier, unrelated incident, arguing that the current matter was not her first exhibition of poor judgment in her role as an assistant principal.

**Ms. Westcoat's Position**

Ms. Westcoat argued that the district did not have good cause to terminate her because the grounds for her dismissal "are either arbitrary, irrational, unreasonable or irrelevant." She stated that the district did not have a policy or protocol in place relative to missing student medication, that she had not been provided with any related policy or training, and that the law required the school nurse, not her, to report missing medication to parents and authorities. Ms. Westcoat also argued that the district had previously installed a similar camera in the prior school nurse's office because of medication theft, and had failed to establish that the camera violated any district policy or state law. She emphasized that the camera in the instant case was "utilized in good faith and for the limited purpose [of] apprehending a potential thief." She stated that she had no intention of concealing information from the building principal, and that student privacy and FERPA were not violated.

In addition, Ms. Westcoat argued that her dismissal was procedurally defective. She pointed to the fact that the investigation was conducted by the principal himself, when the matter involved her acting without his approval or knowledge, resulting in an investigation that she claimed was therefore not objective or fair. She also argued that the superintendent's Notice of Dismissal relied on an incorrect statute and standard, which she claimed was evidenced by the letter's statement that she had violated "a number of statutory provisions, including but not limited to, inefficiency, incompetency, [and] conduct unbecoming . . .," language appearing in statutory provisions relating to teacher, rather than assistant principal, dismissals.

It was Ms. Westcoat's position that the district's decision to dismiss her should be vacated for both substantive and procedural reasons. She requested reinstatement to her former position with an award of full back pay, benefits and attorneys' fees.

**Arbitrator's Award**

The arbitrator analyzed whether Seekonk had good cause to dismiss Ms. Westcoat, relying on G.L. c. 71, § 41, which provides that an assistant principal "shall not be dismissed or demoted except for good cause," and sets forth required procedures for dismissal, including notification and a reasonable opportunity for a hearing. The parties agreed and the arbitrator stated that "good cause" means "any ground which is put forth by the [school] committee in good faith," *citing Marlborough School Committee v. Leonard Morley,* Middlesex Sup. Ct., C.A. No. 95-6633 (Oct. 11, 1996). The arbitrator remarked that it was undisputed that Ms. Westcoat failed to report missing medication and did not obtain approval for the installation of a video camera in the nurse's office, recognizing the disputed issue to be whether her actions warranted dismissal.

The arbitrator found that the district's absence of a specific policy, protocol or training relating to missing medication or the use of surveillance cameras, did not mean "that Ms. Westcoat was free to take any action or that the actions she took were proper." The arbitrator implied that the district's expectation that Ms. Westcoat use "common sense" and "good judgment" in her role as an administrator was reasonable. The arbitrator also found that the principal's initial response to the first instance of missing medication in instructing Ms. Westcoat to "handle it" "cannot be reasonably equated with advance authorization that Ms. Westcoat could take any action on her own (including the unusual step of installing a surveillance camera)." The arbitrator did not give credence to Ms. Westcoat's argument that the district had used a

surveillance camera in the prior nurse's office in the past, when in that instance the principal arranged for law enforcement's installation of the security camera and the superintendent was aware of and viewed the installation.

The arbitrator also found that Ms. Westcoat's dismissal was not procedurally flawed. Ms. Westcoat received a Notice of Intent and had the opportunity to meet with the superintendent regarding the dismissal. The arbitrator determined that the Notice of Intent's inclusion of language contained in the teacher dismissal statute did not "alter which statute or standard governs the dismissal process or the arbitral review of Ms. Westcoat's dismissal." The arbitrator agreed with Ms. Westcoat's argument that her 2013 letter from the principal relative to student privacy was "not a disciplinary action," but found that no evidence existed that the 2013 letter impacted the district's decision-making in the current matter. While stating that someone other than the principal should have performed the investigation, and that he should have also been interviewed during the investigation, the arbitrator found that the district's dismissal of Ms. Westcoat was procedurally proper, as the principal appeared at the arbitration hearing, testified under oath, and was subject to thorough cross-examination.

**Conclusion**

Despite describing it as "unfortunate" that the district did not "choose a lesser discipline," the arbitrator found that the district had good cause for Ms. Westcoat's dismissal, finding that the grounds for her termination were not "arbitrary, irrational, unreasonable or irrelevant." This case illustrates that, even if an arbitrator is not in complete agreement with an employer's procedures or decision, she cannot substitute her judgment for that of the employer where an employee is afforded due process in accordance with statutory requirements, and where disciplinary grounds establish good cause and are not arbitrary or unreasonable.

## H. ***BARBARA WHITTIER AND BLACKSTONE VALLEY VOCATIONAL REGIONAL SCHOOL DISTRICT***

AAA Case No. 001-15-0002-9235 (August 31, 2016)
Timothy J. Buckalew, Arbitrator
Finding of no PTS/no arbitration rights

### Introduction

As far as we know, this is the first arbitration award issued under the ERA following the decision in *Plymouth Public Schools v. Education Association of Plymouth and Carver*, 89 Mass. App. Ct, 643 (2016), in which the Appeals Court determined that arbitrators would decide whether an educator has professional status. *See supra at Section I.A.*

Additionally, the arbitrator commented critically on the Commissioner's dismissal of the petition for arbitration. The Commissioner wrote that he did not believe the teacher had professional status. Prior to the *Plymouth* decision, many attorneys for school districts had requested that the Commissioner refuse to issue a list of arbitrators when the professional status of an educator was in dispute. According to Arbitrator Buckalew, under Section 42, the Commissioner's duty to issue a list of arbitrators upon a receipt of a petition, "is essentially a ministerial duty."

### Facts

Over a period of almost eight school years, Ms. Whittier's duties and responsibilities repeatedly changed or were modified. She began her employment in the 2003-2004 school year as an athletic trainer. The trainer position did not require a teaching license. The athletic trainer's hours were varied, depending on the scheduling of student practices and athletic contests. The position was not covered by the teachers' collective bargaining agreement and her compensation was set at an hourly rate. The number of hours she was expected to work and her earnings were capped. The hourly rate increased each year of her employment for six years, when she was placed on a weekly salary. From the beginning of her employment, she made

contributions to the state retirement system, not the Massachusetts Teachers' Retirement System. She was evaluated annually and was consistently praised as an outstanding performer. During the course of her third year of employment (2005-2006), when grant funds became available, she assumed additionally duties as a fitness specialist. The grant was limited to 18 hours a week and 120 hours in total. She held the fitness specialist position through the 2011-2012 school year.

At the end of her third year of employment, Whittier obtained a preliminary license as a physical education teacher for grades 5-12. She subsequently earned a second preliminary license in Health/Family and Consumer Science. No full-time physical education teaching position was available immediately, but Whittier later undertook additional duties addressing modifications to the school's physical education program as the high school principal was seeking to introduce an ergonomics and injury prevention element to the physical education program. In effect, the school was beginning to de-emphasize a sports or athletics based physical education model. The new curriculum duties came with a relatively small stipend for work to be done outside regular job hours and responsibilities.

Three years after revising and rewriting the physical education curriculum, the district laid off all four physical education and health teachers due to a financial reduction in force. Following the elimination of those positions in June of 2010, the principal developed an occupational physical education curriculum (OPE) for the 2010-2011 school year. This OPE program picked up on some of Whitter's earlier work revising the physical education curriculum. During the 2010-2011 school year, she was charged with an overhaul of the OPE curriculum during the regular school day. At the close of the regular school day, she changed hats, again functioning as an athletic trainer. During this time, Whittier also continued her work as a fitness specialist.

The integration of the new OPE program required changes to the manner and method of teaching, particularly for vocational shop teachers. There were complaints about interference with the sequencing of their lessons and interruption of the typical vocational schedule, which rotates between the vocational and the academic class schedule. Further, students "did not take OPE seriously" because their work and participation was not graded and did not appear on the official class schedule. That was corrected in the following school year (2011-2012), when students were advised that their shop grade would incorporate an evaluation of their performance in OPE.

Also during the 2010-2011 school year, Whittier asserted that she taught two physical education classes. She said these were available because the 1 part-time physical education teacher the district had retained was not able within his schedule to meet all students. She maintained that she was responsible for teaching these classes by developing lesson plans and by teaching sports activities which were similar to those taught by the other physical education teacher. According to the arbitrator, neither the physical education teacher nor the direct supervisor corroborated Whittier's version of her involvement in the physical education classes.

After the development of OPE, Whittier was hired in the 2012-2013 and the 2013-2014 school years as a physical education teacher. At the end of her second year, she received a typical non-renewal notice, which the Association grieved. The Association and the teacher took the position that she had acquired PTS because she began serving as a teacher in 2010 and 2011, when she was providing assistance to the remaining physical education teacher. In particular, she argued that she taught lessons, performed assessments, graded students, and provided the educational services of a licensed teacher on a daily basis.

**Arbitrator's Award**

In a factually complex case, the experienced arbitrator zeroed in on the statutory criteria for acquiring professional status. G.L. c. 71, § 41 extends professional status to a teacher "who has served in the public schools of the school district for the three previous consecutive school years." There is no doubt that Whittier was a teacher within the meaning of Section 41 in the 2012-2013 and 2013-2014 school years when she was specifically appointed to a position as a physical education teacher. The question to be decided was whether she was a teacher in 2010-2011 and 2011-2012.

In examining the factual history and the statute, the arbitrator observed that the word "teacher" has a technical meaning "informed by a long line of court cases both before and after the Educator Reform Act." It is clear, wrote the arbitrator, "that time spent teaching without the appropriate license does not count towards tenure." Whittier's early acquisition of a certificate satisfied that aspect of the analysis. The cases, however, also look to the substantive service or work performed to determine whether an individual is a "teacher" or possesses some other status. Noting that the teacher worked "almost entirely independently, without day-to-day supervision" the arbitrator focused on the teacher's testimony for the job duties she performed in 2010-2011 and 2011-2012.

In examining the substance of the relationship, Mr. Buckalew concluded that her job titles did not reflect her actual duties, and that her duties had changed over the years. These changes had resulted, in large part, from the district's "decision to essentially eliminate its physical education/health department" through a reduction in force. The arbitrator credited the teacher's testimony that she had taught physical education classes to students who could not be scheduled into the part-time physical education teacher's slot. At the same time, the arbitrator

concluded that the school principal and her supervisor were not aware of the depth of her work in the regular physical education curriculum or the OPE curriculum. This service appeared to be teaching, but Mr. Buckalew observed that "service that a school employee undertakes on her own initiative, without the authorization or knowledge of the administration, cannot count towards professional teacher status." In effect, granting professional teaching status "cannot be accomplished by an employee acting on her own." Relying on some of the specific services Whittier provided (and those she did not provide), he commented that the school district did not "treat her" as a teacher. Also, she was not part of the new teacher induction program, she did not belong in the teachers bargaining unit, and did not receive any of the contractual benefits under the teachers' contract. She was a member of the state retirement system and not the Teachers' Retirement System prior to her hiring in August of 2012. She was evaluated in accordance with procedures used for support staff, not teachers. Her lessons plans did not follow the district's required format, and she did not attend faculty meetings and in-service days. She did not supervise aides and paraprofessionals in the class, and did not handle disciplinary decisions.

For all of these reasons, Arbitrator Buckalew determined that Ms. Whittier was not a teacher for the three previous consecutive school years and, therefore, did not have professional status within the meaning of Section 41. As are result, he dismissed her petition for arbitration seeking review of her dismissal.

## II. JUDICIAL DECISIONS INVOLVING BULLYING

Although the anti-bullying statute, G.L. c. 71, § 37O does not provide a private right of action against schools for peer bullying alleged to have occurred in schools, that has not precluded students and parents from suing school districts and their employees for school bullying based on other theories of recovery, often alleging violations of various civil rights and

raising multiple tort claims. To date, these plaintiffs have not been met with much success, as the following cases indicate. Nonetheless, we continue to see an uptick in these kinds of cases and the First Circuit has not foreclosed all "duty to protect" cases. If plaintiffs ultimately find a theory on which they can prevail, we can expect many more.

Further, even if plaintiffs do not prevail on civil rights or torts claims, bullying allegations can form the basis for OCR or PQA complaints and may have significant impact on BSEA special education matters. Thus, school districts should continue to follow the requirements of G.L. c. 71, § 37O and implement their anti-bullying plans fastidiously.

## A. *MORGAN V. TOWN OF LEXINGTON*, 823 F.3D 737 (1ST CIR. 2016)

### Introduction

Rejecting a novel theory that a public school district had a constitutional duty to protect a student who was allegedly bullied in school by his peers, the First Circuit in *Morgan v. Town of Lexington* upheld the District Court's dismissal of a civil rights case the student's mother brought against the Lexington Public Schools ("Lexington" or "District"), its superintendent, and its middle school principal. 823 F.3d 737 (1st Cir. 2016). The mother's primary allegation on appeal was that the District's failure to protect her child from bullying violated his substantive due process rights. Also on appeal was the District Court's denial of the mother's motion to amend her complaint to add a sex discrimination claim under Title IX. The First Circuit upheld the District's Court's denial of the mother's motion to amend since the amendment would have been futile.

### Factual and Procedural Background

Because the First Circuit was reviewing the District Court's decision to grant Lexington's motion to dismiss, as required under the Rules of Civil Procedure, the First Circuit accepted as

true all well-pleaded allegations in the plaintiff's complaint and made all reasonable inferences in the plaintiff's favor. *Id.* at 742.

According to the complaint, the plaintiff's twelve-year-old son, RM, was bullied by his middle school peers. *Id.* at 740-42. Specifically, the plaintiff alleged that in the fall of 2011, several students repeatedly beat RM in school, which beating was captured on video. *Id.* at 740. The school administration was given a copy of the video and investigated. Through the investigation, the principal determined that the beating was part of an initiation in to a group of students known as the "Kool-Aid Club" and that RM initially had agreed to it. Although RM was not an aggressor and was not in trouble, based on RM's conduct, which impeded the investigation, RM was barred from participating in a school track meet. *Id.*

One of the Kool-Aid Club students who was disciplined as a result of the beating confronted RM and told him they would "get him back." RM reported the threat to the assistant principal, who told RM to stay away from those students. *Id.*

Throughout the remainder of the fall of 2011, RM was repeatedly insulted, pushed, tripped, punched, "pantsed," and otherwise bullied by other students on school premises. *Id.* On December 21, 2011, students pushed RM into a locker, causing him to break his watch. *Id.* at 741-42. That same day, his mother emailed the principal stating that RM was bullied but feared reporting the bullying would cause his peers to retaliate. The mother specifically referenced the school's anti-bullying policy and the anti-bullying statute, G.L. c. 71, § 37O. *Id.* at 742. In response, the principal asked the mother to bring RM to school so that administrators could hear his concerns and take appropriate actions. On December 23, the mother met with administrators and reported enough information for the District to begin an investigation. *Id.*

On January 2, 2012, RM expressed fear of going to school and refused to attend. *Id.* On January 4, 2012, when RM still had not appeared at school, the principal directed the Lexington police to visit RM's house, as required by G.L. c. 76, § 1. RM was absent again on January 5, 2012 and again the police were dispatched to his house. According to the complaint, RM experienced a "panic attack" as a result of two officers appearing at RM's house to meet with his mother about RM's truancy. *Id.*

The mother and administrators met several more times. On January 20, 2012, the principal reported that several students admitted to pulling down RM's pants and "table-topping" him, which involves an elaborate process to cause someone to fall. According to the complaint, the principal told the mother none of the students involved would be disciplined. *Id.*

In February 2012, RM was enrolled in a private school. He completed the 2011-2012 school year there but returned to public school in October of 2012. According to the complaint, RM continued to feel anxiety in public school and missed 112 days of school from October 2012 through the end of the 2012-2013 school year. *Id.*

On October 3, 2014, the mother filed a complaint in federal court against the District, the superintendent, and middle school principal, alleging, among other claims, a violation of RM's substantive due process rights under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983. *Id.* at 741-42. The defendants moved to dismiss the case for failure to state a claim on which relief can be granted. The mother moved to amend her complaint to add a Title IX claim. The District Court for the District of Massachusetts granted the defendants' motion to dismiss and denied the plaintiff's motion to amend on the grounds of futility. On appeal, the mother challenged the dismissal of the § 1983 claim and the denial of the motion to amend to add a Title IX claim. *Id.* at 742.

**Section 1983 Substantive Due Process Claim**

The First Circuit reviewed the dismissal of the § 1983 due process claim de novo and, like the District Court, found that claim to be without merit. *Id.* at 742-45.

The plaintiff's § 1983 claim alleged that the Lexington "defendants deprived R.M. of a 'protected liberty interest in bodily integrity, specifically, the right to be free from the abuse and injuries' related to the bullying he endured, in violation of his substantive due process rights protected under the Fourteenth Amendment." *Id.* at 742. To establish that claim, the plaintiff had to show a deprivation of a protected right caused by governmental conduct.

Typically, a state's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause. *Id.* Indeed, as the *Lexington* court made clear, in two prior cases, the First Circuit had affirmed dismissals of due process claims involving harm befalling juveniles after the government failed to act. One case involved a teen-aged girl who was murdered following her testimony in a murder trial, and after the police promised to protect her. Although the case "shocked the conscience," the plaintiff had to show the police had caused the deprivation of the right. *Id.* at 742-43 (discussing *Rivera v. Rhode Island*, 402 F.3d 27 (1st Cir. 2005)). Because the plaintiff in that case failed to meet that standard, the due process claim was properly dismissed.

The second case involved a student who tried to commit suicide in an unattended locker room after receiving a reprimand from a teacher. There, the plaintiffs alleged that the school defendants did not take the steps necessary to prevent the suicide attempt given their knowledge of the student's past, including a recent rape. The First Circuit rejected that claim. The Court declined to hold that schools owe a general constitutional "duty to protect" its students but it also explained that it was not foreclosing future due process claims arising out of inaction by school

staff. In that case, however, the behavior by school staff was not "'so extreme as to shock the conscience.'" *Id.* at 743 (quoting *Hasenfus v. LaJeunesse,* 175 F.3d 68 (1st Cir. 1999) (internal quotations omitted)).

In the *Lexington* case, the plaintiff's claim also fell within the "state created danger theory." *Id.* That theory holds that the Due Process Clause may be implicated when a state actor acts in such a way to increase the risk of harm from a third-party or prevents the individual from receiving assistance. *Id.* Essentially, the plaintiff mother argued that the defendants "turned a blind eye" to RM's bulling. *Id.* at 744. She also alleged school staff took "affirmative steps" to disregard RM's complaints, including "punishing" RM by not letting him participate in the track meet after the investigation into the Kool-Aid Club incident, sending officers to RM's house, and declining to discuss certain claims during one of the meetings with the parent. The plaintiff did not explain how those alleged actions caused RM to be bullied or increased the risk to him. *Id.*

The First Circuit concluded that "[a]n alleged failure of the school to be effective in stopping bullying by other students is not action by the state to create or increase the danger." *Id.* The Court elaborated: "These routine acts of school discipline, truancy enforcement, and administrator-parent conferences are not the vehicle for a substantive due process constitutional claim." *Id.* Concluding that the "[t]he alleged acts in [the] complaints here simply do not approach the threshold of a state-created danger," the First Circuit agreed with the lower court that the plaintiff's § 1983 substantive due process claim failed. *Id.*

**Title IX Claim**

The First Circuit reviewed the District Court's denial of the mother's motion to add a Title IX claim for abuse of discretion. *Id.* at 742.

Title IX concerns discrimination on the basis of sex. Although sexual harassment in schools can give rise to an actionable Title IX claim, including in cases where sexual harassment leads to a hostile environment and including cases where other students are the harassers, the illegal actions taken must be on the basis of sex. Here, although RM's pants were pulled down in a co-ed environment, there was no evidence or even allegation of any sex- or gender-based animus aimed at RM and such animus could not be inferred from the complaint. *Id.* at 745.

Moreover, the complaint did not describe RM being "pantsed" so as to conclude that the conduct was "severe" or "pervasive" enough to warrant a sexual harassment claim under Title IX. *Id.* Looking at all of the circumstances, the conduct appeared to be bullying, without regard to sex, and not sexual harassment.

Accordingly, the First Circuit affirmed the District Court's dismissal of the complaint and the denial of her motion to amend.

## B. ***HARRINGTON V. CITY OF ATTLEBORO*, 172 F. SUPP. 3D 337 (D. MASS. 2016)**

**Introduction**

In another example of a lawsuit against a school district arising out of alleged bullying, the plaintiffs in *Harrington v. City of Attleboro*, a student and her mother, raised various civil rights and tort claims against the public school district and a number of its employees. 172 F. Supp. 3d 337 (D. Mass. 2016). Specifically, the plaintiffs alleged violations of Title IX, the Equal Protection Clause, the Massachusetts Declaration of Rights, the right to be free from sexual harassment and sexual discrimination, and the Massachusetts Equal Rights Act. They also alleged claims of negligence and loss of consortium. The defendants moved to dismiss the case for failure to state a claim on which relief could be granted and the plaintiffs moved to have

their Declaration of Rights claim dismissed without prejudice. All of the claims were dismissed except for a Title IX gender discrimination claim, which was allowed to proceed.

**Factual and Procedural Background**

Because this case involved a motion to dismiss for failure to state a claim on which relief could be granted, in accordance with the Federal Rules of Civil Procedure, the Court accepted the alleged facts as true and made reasonable inferences in the plaintiff's favor. *Id.* at 341. In short, the complaint alleged a female student, Noelle, was bullied throughout middle school and her first two years of high school in the Attleboro Public Schools ("Attleboro" or "District"), from 2008 until she withdrew from school on March 1, 2012. The complaint identified a number of students who repeatedly called Noelle names, including "slut," "whore," "fat ass," "bitch," "dyke," and "faggot." *Id.* at 341-42. One of the male aggressors would ask the plaintiff for a date then insult her when she declined. The complaint alleged the student's peers would also make statements to the effect that the world would be better without her and she should die. *Id.*

Noelle's mother informed school administrators about the conduct and was told that the administrators would "deal with it." *Id.* at 342. The complaint alleges that the bullying continued. Ultimately, in January of 2012, the student was put on a "Safety Plan," which acknowledged the student's right to report harassment, to see the nurse when stressed, and to leave class early to travel the hallways before her aggressors were there. The student's schedule was also rearranged so that she would not be in the same classes as some of the worst aggressors. Although some of the aggressors were disciplined, including at least one 3-day suspension, the bullying continued. *Id.* The family attempted to file complaints with the police but the police stated that the school resource officer should handle such a complaint.

The bulling also occurred outside of school. In one instance, one of the bullies followed Noelle and her family home. The mother told the bully to leave and threatened to call the police. The mother also reported the matter to the school, which responded that it could not address out-of-school conduct.

In February of 2012, the mother noticed that Noelle made some Facebook posts suggesting that she might commit suicide because of the bullying. The mother printed those posts and brought them to the high school administrators. According to the complaint, an administrator told the mother that the school could not provide assistance and that the student needed professional intervention. The complaint alleges that the mother then attempted to transfer Noelle but the administrators would not help. Ultimately, the student was placed at Westwood Lodge hospital for psychotherapeutic care and withdrew from Attleboro High School in March 2012.

The plaintiffs then brought suit in Bristol Superior Court in February 2015. The defendants removed the case to federal court and moved to dismiss for a failure to state a claim on which relief can be granted.

**Discussion**

When a case is being evaluated at the motion to dismiss stage the Court must determine whether the complaint includes "'enough facts to state a claim to relief that is plausible on its face.'" *Id.* at 341, *quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). Although complaints need not contain "a high degree of factual specificity," mere "[l]abels and conclusions or a formulaic recitation of the elements" of a claim are insufficient. *Id.* (internal punctuation, quotations, and citations omitted). Here, the Court applied those standards and ruled that all of the claims, except the Title IX claim, should be dismissed.

**Title IX Claim**

The first count of the complaint, and the only claim to survive dismissal, alleged a violation of Title IX due to the District's failure to protect the plaintiff from peer-to-peer sexual discrimination and harassment. To make a claim for student-on-student sexual harassment under Title IX, the plaintiff must show (1) that he or she was the subject of "'severe, pervasive, and objectively offensive' sexual harassment by a school peer," (2) the harassment caused the victim to be deprived of "educational opportunities or benefits," (3) the district knew of the harassment, (4) "in its programs or activities," and (5) the district was "deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances." *Id.* at 343-44, *quoting Porto v. Town of Tewksbury*, 488 F.3d 67, 72-73 (1st Cir. 2007).

In this case, the Court found that the complaint "plausibly state[d] a Title IX claim because Noelle appears to have been the subject of discrimination because of her sex." *Id.* at 344. The names the bullies called Noelle, such as "bitch" and "whore" are "gendered words' "charged with anti-female animus." *Id.* (internal citation and punctuation omitted). Further, the complaint alleged that the aggressors would ask Noelle out then call her a "dyke" or "faggot" when she turned them down, and also called her names and assaulted her based on sexual stereotypes. Those allegations were sufficient at the motion to dismiss stage of the litigation to support a claim that Noelle was bullied because of her sex, and that the bullying was so severe that it interfered with her education.

The question, thus, turned on whether the District was "deliberately indifferent to the harassment such that its response (or lack thereof) [was] clearly unreasonable in light of the known circumstances." *Id.* at 344-45. "Deliberate indifference is 'a stringent standard of fault' that requires proof that a [defendant] "disregarded a *known or obvious* consequence of his action

or inaction.'" *Id.* at 345, *quoting Porto*, 488 F.3d at 73. Claims that a school district could or should have done more to stop harassment are insufficient. *Id.* at 345. The District Court recognized, however, that the First Circuit has suggested that a school district might be found to be deliberately indifferent "if it had notice of sexual harassment or discrimination and did nothing or failed to take additional measures after its initial measures were ineffective." *Id.* In the present case, although the school district did take some action to curb the student being bullied, the bullying persisted for approximately four years during middle and high school. Since the complaint at least plausibly alleged that the District failed to take additional measures upon learning that its initial measures were unsuccessful, the Court reasoned that the plaintiffs sufficiently pleaded this element to survive dismissal.

The motion to dismiss the Title IX claim was denied and the claim was allowed to proceed. *Id.* at 345. Because the threshold for surviving a motion to dismiss is quite low, that the claim survived dismissal does not mean that plaintiffs ultimately will prevail.

**Equal Protection Claims**

The plaintiffs also brought claims under § 1983 against the District and its employees alleging a violation of the student's rights under the Equal Protection Clause. The thrust of those claims were that the District and its administrators failed to provide Noelle with equal educational opportunity without sexual discrimination or harassment. The Court dismissed those claims because the plaintiffs did not sufficiently allege that Noelle was afforded a lesser level of protection from harassment than anyone else. In particular, the plaintiffs failed to allege any facts that Attleboro treated the plaintiff's harassment any differently than any of her peers, or that such a difference in treatment was because of her membership in a protected class.

**Tort Claims**

The Court also dismissed tort claims against Attleboro which alleged "'injuries caused by the negligent acts and omissions' of its employees and Administrators in handling Noelle's bullying and harassment," negligence in failing to properly investigate and discipline students, and negligent hiring by the District. *Id.* at 346, *quoting* the Complaint.

First, the Court noted that, under the Massachusetts Tort Claims Act, G.L. c. 258, § 4 ("MTCA"), parties seeking to bring negligence claims against public bodies must first present the complaint in writing to the public body. *Id.* at 346-47. "Presentment is a condition precedent to Plaintiffs' negligence claims and must be made in strict compliance with the statute." *Id.* at 347 (internal quotations omitted). Presentment must be made within two years of the cause of action arising and the plaintiff's status as a minor does not toll the two-year presentment requirement. *Id.* Here, the plaintiffs alleged that they met the presentment requirement by filing a written demand with the mayor's office on February 28, 2014. Since plaintiffs' claims must be liberally construed at the motion to dismiss stage, the court ruled that the question remained whether the bullying continued through February 28, 2012 but assumed *arguendo* that the presentment requirement was satisfied.

Second, defendants argued that the plaintiffs' claims failed because the defendants had not waived sovereign immunity under the MTCA. Section 10 of the MTCA states that a municipality does not waive immunity for claims (1) based on the performance or failure to perform a discretionary function or duty or (2) based on an act or failure to act to diminish harmful consequences not originally caused by the public employer. G.L. c. 258, §§ 10(b), (j).

Here, the complaint questions the discretion of the District employees in dealing with student disputes. Courts previously have ruled that basic supervision of students is generally an operational function not immunized under the MTCA, but that methods for managing student

conflicts are discretionary and immunized under the MTCA. *Id.* at 347-48. Those earlier decisions came at the summary judgment stage, however, after discovery, whereas the present case was at its nascent stage. Moreover, the plaintiffs here also alleged that the District was negligent for not implementing its own anti-bullying policy. Thus, in light of the liberal standards at the motion to dismiss stage, the Court could not conclude that §10(b) of the MTCA barred the plaintiffs' claims.

The Court then considered whether § 10(j), which bars claims for failure to diminish harm by third parties, required that the tort claims be dismissed. In support of their claims, the plaintiffs argued that the District's failure to implement its own anti-bullying policies and failure to properly investigate and discipline the bullies waived Attleboro's sovereign immunity. The Court rejected that argument, however, because, even accepting the allegations in the complaint as true, the District was not the "original cause" of the bullying and the plaintiffs did not adequately allege that the District or its employees "materially contributed" to creating a situation that would cause the District to be seen as the "original cause" of the bullying. *Id.* at 348-49.

The plaintiffs' claims that negligent hiring of administrators constituted the "original cause" of the bullying also failed because there was no evidence that the administrators were unfit to address the harassment and bullying. Likewise, the claims that the District improperly trained and supervised the administrators also failed because these assertions still amounted to "failure to mitigate harm" claim barred by § 10(j) of the MTCA. *Id.* at 349.

Because the tort claims were barred by § 10(j) of the MTCA, they were dismissed with prejudice. *Id.*

**Massachusetts Declaration of Rights Claim**

The Plaintiff's fourth claim was made pursuant to the Massachusetts Declaration of Rights. They admitted that it was a "novel claim," however, and asked the Court to dismiss the claim without prejudice so it could be developed in Massachusetts Courts. The Defendants did not oppose this motion. Accordingly, the Court agreed to dismiss the Declaration of Rights claim without prejudice. *Id.* at 350-51.

**Freedom from Sexual Harassment Claim**

Plaintiffs brought a claim that the District and its administrators violated the student's right to be free of sexual harassment in receiving public education under G.L. c. 151C, § 2(g). The Court dismissed that claim with prejudice because G.L. c. 151C, § 2 does not apply to peer-to-peer sexual harassment and the plaintiffs did not allege that any Attleboro employees harassed her. *Id.* at 351-52. The Court based its conclusion on a previous Federal District Court case that § 2 applies only when the institution, itself, acts as the harasser. *Id.* at 352 (*citing Doe v. Town of Stoughton*, No. 12-cv-10467-PBS, 2013 WL 6498959 (D. Mass. Dec. 10, 2013), which case relied on the MCAD decision in *Buschini v. Newburyport Pub. Schs.*, 18 Mass. Disc. L. Rep. 216, 217 (1996)).

**Freedom from Sexual Discrimination in a Place of Public Accommodation**

The plaintiffs next claimed that the District and its administrators violated the student's right to be free from discrimination on the basis of her sex and sexual orientation in receiving public education pursuant to G.L. c. 272, § 98 and G.L. c. 76, § 5. *Id.* at 352-53. The plaintiffs admitted, however, that their § 98 claim was not viable. They then argued that their claim was based on G.L. c. 76, § 16, although the complaint refers to § 5. *Id.*

Section 16 provides remedies for children improperly excluded from school. Even if the administrators' failure to prevent bullying constituted an exclusion of the student from "the

advantages, privileges and courses of study of such public schools," § 16 required the parents to make a written application to the school committee and the school committee to respond. Here, however, the plaintiffs did not allege that they sought redress with the School Committee. *Id.* at 353. In any event, the claim likely would have been barred by § 10(j) of the MTCA. Thus, the Court dismissed this count. *Id.*

**Massachusetts Equal Rights Act**

Claims under the Massachusetts Equal Rights Act, G.L. c. 93, § 102(a) ("MERA") were also dismissed. *Id.* at 354. The MERA protects the right to make and enforce contracts, among other things. Here, the plaintiffs did not identify any contractual relationship or allege that the District impeded the student's ability to make or enforce a contract or exercise any other right under the MERA. *Id.*

**Loss of Consortium**

The mother brought a claim against the District and its administrators for loss of consortium. Although she did not sufficiently allege how she suffered such a loss, the Court assumed the claim was based on G.L. c. 231, § 85X, which permits the parents of a minor child to bring loss of consortium claims against "any person" legally responsible for causing the serious injury that caused the loss of consortium. *Id.* As another Massachusetts District court had already found, however, that loss of consortium statute does not apply to government entities. *Id.* The plaintiffs did not point to any contrary authority and the Court could not locate any. *Id.* Further, loss of consortium claims cannot stand without an underlying tortious act and, here, the Court already dismissed the torts claims. Thus, the loss of consortium claim was also dismissed with prejudice. *Id.*

## III. JUDICIAL DECISIONS INVOLVING SPECIAL EDUCATION

### A. *ENDREW V. DOUGLAS COUNTY SCHOOL DISTRICT*, 137 S.CT. 988 (2017)

**Introduction**

On March 22, 2017, the U.S. Supreme Court clarified the standard for determining whether a school district has offered a special education student a free and appropriate public education ("FAPE"). Specifically, in *Endrew v. Douglas County School District*, the unanimous Supreme Court held: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." 137 S.Ct. 988, 999 (2017). In reaching that conclusion, the Court rejected the standard used by the Tenth Circuit, which required that an IEP be calculated to "confer an 'educational benefit that is merely more than *de minimis.*'" *Id.* at 997, *citing* Tenth Circuit Decision, 798 F.3d 1329, 1338 (10th Cir. 2015) (internal punctuation omitted).

While this is an important decision that clarifies school districts' obligations to students eligible for IEPs and resolves an apparent split among Circuit Courts of Appeals, we expect there to be little practical effect of this decision[6] in most cases in Massachusetts, where Courts and the BSEA have long interpreted the IDEA to require IEPs to be reasonably calculated to allow the student to make effective progress commensurate with his or her abilities.

**Factual and Procedural Background**

The student at issue, Endrew, had been diagnosed with autism and was on an IEP. He attended his public school in Douglas County, Colorado. By fourth grade, his parents were dissatisfied with the education Endrew was receiving in public school and unilaterally placed him in a private school for students with autism. The parents' position was that, in public school,

[6] It can be expected that BSEA and the First Circuit will have to issue decisions making clear that the standard they have long applied for FAPE is the same as the standard set forth in *Endrew* or to otherwise clarify differences.

Endrew's progress in functional and academic areas had stalled, as evidenced by the fact that his IEP largely carried over the same goals and objectives annually.

At the private school, Endrew's behavior improved significantly, which, in turn, allowed him to make progress academically. Six months after Endrew's parents unilaterally placed him, the parents and representatives of the school district met. The district proposed a new IEP, which the parents believed did not differ meaningfully from the previous IEPs. The parents rejected that proposed IEP and filed for a hearing, seeking reimbursement for Endrew's private school tuition.

To prevail at the hearing, the parents had to show that the district had not provided Endrew FAPE in a timely manner before his enrollment in private school. Referencing long-standing Supreme Court precedent articulated in the *Rowley* decision (discussed more below), the parents argued that the proposed IEP was not reasonably tailored to enable Endrew to receive educational benefits and, therefore, denied Endrew FAPE. The administrative law judge disagreed and denied relief.

The parents appealed to the Federal District Court, which recognized that Endrew's performance under the previous IEPs "'did not reveal immense educational growth'" but concluded that the annual modifications to Endrew's IEP objectives "were 'sufficient to show a pattern of, at the least, minimal progress.'" *Id.*, *quoting* District Court decision, 2014 WL 4548439 (D. Colo., Sept. 15, 2014). The District Court reasoned that if Endrew had made that type of progress under the previous IEPs, then he would be expected to make the same progress under the proposed IEP. The District Court, thus, affirmed the administrative law judge's decision. *Id.*

The parents appealed to the Tenth Circuit, which also affirmed. The Tenth Circuit based its decision on its interpretation of the *Rowley* case's instruction that IEPs must be reasonably calculated to confer "some educational benefit." Under the Tenth Circuit's interpretation of *Rowley*, IEPs need only be calculated to confer "an 'educational benefit that is merely more than *de minimis.*'" *Id.*, *citing* 798 F.3d at 1338 (internal punctuation omitted). The Tenth Circuit held that the IEP offered Endrew FAPE because it was reasonably tailored to allow him to make *some* progress.

The parents appealed to the Supreme Court, which granted certiorari. As discussed more below, the Supreme Court reversed the Tenth Circuit, rejecting the "merely more than *de minimis*" standard and remanded the case for further proceedings under the correct standard.

**Discussion**

**The *Rowley* Decision**

The Supreme Court began its opinion with an in-depth discussion of the 1982 *Rowley* decision. In that case, the Court held that the IDEA "establishes a substantive right to a 'free appropriate public education' for certain children with disabilities" but declined to "endorse any one standard for determining 'when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act.'" *Id.* at 993, *quoting Rowley*, 458 U.S. at 202. Since the lower courts' decisions hinged on their (incorrect) interpretation of that precedent, the Supreme Court began by summarizing both the *Rowley* decision and the IDEA's general dictates. The IDEA offers states federal funding to assist with educating students with disabilities if the state agrees to comply with various statutory conditions, including providing FAPE to all eligible children. FAPE includes both "special education" and "related services." *Id*. at 993-94, *citing* 20 U.S.C. § 1400 *et seq.* The statute defines "special education" as "'specially designed instruction … to meet the unique needs of a child with a disability" and "related services" as "the

support services 'required to assist a child … to benefit from' that instruction." *Id*. at 994, *quoting* 20 U.S.C. § 1401. *Rowley* was the first time the Court addressed the FAPE requirement.

The *Rowley* case involved Amy Rowley, a first grader with a hearing impairment. Amy's school district offered her an IEP under which she would be educated in an inclusion classroom where the teacher would use a school-provided FM device to amplify the teacher's speech. The parents argued that the school district should provide a sign language interpreter in order to meet its obligation to offer Amy FAPE. The District Court agreed with the parents. Although Amy was performing better than average in class and easily advanced from grade to grade, the District Court noted that Amy understood less than her classmates because of her hearing impairment. The District Court then reasoned that to provide Amy FAPE, the school district had to provide her "'an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children.'" *Id*. at 995, *quoting Rowley,* 458 U.S. at 185-86. The Second Circuit agreed with the District Court and affirmed. *Id.*

On appeal, the Supreme Court reversed. Before the Supreme Court, the parents argued that the school district was obligated to provide Amy with an education and services that would provide her an "'equal educational opportunity'" to here non-disabled peers. *Id*. at 995. The school district argued that "the IDEA 'did not create substantive individual rights,'" but rather "the FAPE provision was […] merely aspirational." *Id.* The *Rowley* Court did not accept either argument.

Instead, the *Rowley* Court "charted a middle path," holding that the FAPE requirement is satisfied "if the child's IEP sets out an educational program that is 'reasonably calculated to enable the child to receive educational benefits.'" *Id.* at 995-96, *quoting Rowley,* 458 U.S. at 207. Since Amy was making "excellent progress" in her inclusion classroom, was able to

advance from grade to grade, and received specialized instruction, the Court in *Rowley* concluded that the school district offered her FAPE. The Court limited its decision to the facts of that case, however, and "declined 'to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act.'" *Id*. at 996, *quoting Rowley,* 458 U.S. at 202.

**Standard for FAPE Established in *Endrew***

In the *Endrew* decision, the Supreme Court answered the "difficult question" left open in the *Rowley* case and established a standard for determining whether a school districted has offered an eligible student FAPE. That standard is as follows: "To meet its substantive obligation under the IDEA, a school must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances." *Id*. at 1001.

The Court declined to elaborate on what "appropriate" progress would look like in any given case, reasoning that "[t]he adequacy of a given IEP turns on the unique circumstances of the child for whom it was created." *Id.* The Court further explained that courts adjudicating disputes about the appropriateness of an IEP should give some deference to school districts, "based on the application of expertise and the exercise of judgment by school authorities." *Id.* That said, "[a] reviewing court may fairly expect those authorities to be able to offer a cogent and responsive explanation for their decisions that show the IEP is reasonably calculated to enable the child to make progress appropriate in light of his circumstances." *Id.* at 1002.

The Court explained its holding with reference to the IDEA and the *Rowley* decision. With respect to the use of the phrase "reasonably calculated," the Court stated that that language references the need for some "prospective judgment by school officials," informed by their expertise and the input of the parents. *Id.* at 999. That language also makes plain that the IEP

need not be "ideal." As the Court explained: "Any review of an IEP must appreciate that the question is whether the IEP is *reasonable*, not whether the court regards it as ideal." *Id.*

Further, the Court noted that tying the appropriateness of a student's IEP to the student's progress in light of his or her circumstances "should come as no surprise" since "[a] focus on the particular child is at the core of the IDEA." *Id.* The Court explained that the IDEA was an "'ambitious'" piece of legislation, with the broad purpose of addressing the perception that students with disabilities "'were either totally excluded from schools or [were] sitting idly in regular classrooms awaiting the time when they were old enough to drop out.'" *Id., quoting Rowley,* 458 U.S. at 179 (internal quotations omitted). "A substantive standard not focused on student progress would do little to remedy the pervasive and tragic academic stagnation that prompted Congress to act." *Id.*

**Court Rejects Parties' Arguments**

Rejecting the school district's attempts to minimize the IDEA's requirements with respect to the contents of the IEP as mere procedural, rather than substantive requirements, the Court concluded that the IDEA's requirements that IEPs contain a description of the student's current level of achievement, a discussion of how the child's disability affects his or her progress, a statement of measurable annual goals, and a description of the specialized instruction and services the student will receive "provides insight into what it means, for purposes of the FAPE definition, to 'meet the unique needs' of a child with a disability." *Id.* at 1000.

For children like Amy in the *Rowley* case, where progress may be monitored through the typical systems used in inclusion classrooms, an IEP should be "'reasonably calculated to enable the child to achieve passing marks and advance from grade to grade'" under the general curriculum. *Id., quoting Rowley,* 458 U.S. at 203-04. That goal may not be appropriate for all children, however. Nonetheless, while ["t]he goals may differ, […] every child should have the

chance to meet challenging objectives." *Id.* Providing a child with an education that allows for "merely more than *de minimis*" progress, the standard applied by the Tenth Circuit, does not suffice. The Court preempted arguments that a student *must have* been offered FAPE if he or she progressed from grade to grade in a footnote, stating: "We declined to hold in *Rowley,* and do not hold today, that every handicapped child who is advancing from grade to grade … is automatically receiving a FAPE." *Id.* at 1000, n.2 (internal quotations and punctuation omitted).

In addition to overturning the Tenth Circuit's "merely more than *de minimis*" standard, the Court rejected both parties' positions. The school district took the position that *Rowley* "established that an IEP need not promise any particular *level* of benefit," so long as it is reasonably calculated to provide *some* benefit, as opposed to *none.*" *Id.* at 997-98, *quoting* Br. for Respondent at 15 (internal quotations omitted). To support that position, the school district relied on various statements in *Rowley*, which the Supreme Court concluded were taken in isolation, and out of context. *Id.* at 998. The Court elaborated that the school district's arguments ran counter to other key points in *Rowley*, including statements about the difficulty in determining when benefits were "sufficient" or "adequate." The Court reasoned that "[i]t would not have been 'difficult' for us to say when educational benefits are sufficient if we had just said that *any* educational benefit was enough.'" *Id.* Moreover, if "any benefit" were the standard, it would not have been difficult for the *Rowley* court to announce a standard for determining whether a school district has offered FAPE. *Id.*

The Court also rejected the parents' argument that FAPE is "'an education that aims to provide a child with a disability opportunities to achieve academic success, attain self-sufficiency, and contribute to society that are substantially equal to the opportunities afforded children without disabilities.'" *Id.* at 1001, *quoting* Br. for Petitioner at 40. The Court reasoned

that the parents' position was "virtually identical" to Justice Blackmun's "formulation" in his concurring opinion in *Rowley*. Since the majority rejected that position in *Rowley* and Congress did not materially change the statutory language relative to FAPE, the Court "decline[d] to interpret the FAPE provision in a manner so plainly at odds with the Court's analysis in" *Rowley*. *Id.*

Having found that the lower courts' "merely more than *de minimis*" standard was too low a bar for measuring FAPE, the Supreme Court reversed and remanded for further proceedings consistent with its decision.

**Comment**

As noted above, we do not anticipate the Supreme Court's holding in *Endrew* to have much impact in Massachusetts, where the long-standing standard for FAPE has been that an IEP be reasonably calculated to allow an eligible student to make effective progress commensurate with his or her abilities. We do expect, however, that the BSEA and First Circuit will need to issue rulings to that effect. In particular, the Court's reference to a student's "circumstances" as opposed to a student's "abilities" may lead to some arguments about what Teams should consider when developing IEPs.

Additionally, it is worth noting that although the Supreme Court struck down the low bar the Tenth Circuit had set for school districts, much of the language in the case is deferential to school districts and their personnel. For example, as noted above, the Court expressly instructed reviewing bodies to give some deference to school district decisions and was clear that IEPs need to be "reasonable," not "ideal."

Accordingly, while there may be some initial discussion about how the *Endrew* decision may change the analysis for a small group of cases, we expect that there will be little impact in Massachusetts.

## B. ***FRY V. NAPOLEON COMMUNITY SCHOOLS*, 137 S. CT. 743 (2017)**

### Introduction

In *Fry v. Napoleon Community Schools*, the Court clarified when the IDEA procedures must be exhausted prior to parents or special education students bringing suit in federal or state court. 137 S.Ct. 743 (2017).

The IDEA "requires that a plaintiff exhaust the IDEA's procedures before filing an action under the [Americans with Disabilities Act ("ADA")], the Rehabilitation Act, or similar laws when (but only when) her suit 'seek[s] relief that is also available' under the IDEA." *Id.* at 752. The *Fry* Court held that "to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes 'available.'" *Id.* To determine whether the plaintiff seeks relief that is also available under the IDEA, Courts must look to the "substance, or gravamen," of the complaint. *Id.*

In reaching this conclusion, the Court rejected the Sixth Circuit's decision that the IDEA's exhaustion requirements apply if the "complained-of harms were 'educational' in nature.'" *Id.* Justice Kagan delivered the opinion of the Court. Justice Alito wrote a concurring opinion, which was joined by Justice Powell. There were no dissents.

### Factual and Procedural Background

The *Fry* case arose in the context of a school district's obligation to allow a student with a disability to use a service dog in school. Here, the student at issue, E.F., has "a severe form of cerebral palsy, which 'significantly limits her motor skills and mobility.'" *Id.* at 750. On the

advice of E.F.'s pediatrician, E.F.'s parents obtained a service dog, Wonder, to enable E.F. to live more independently. Wonder was trained to assist E.F. with various life activities, such as helping her to balance, picking up dropped items, helping her take off her coat, and helping her transfer to and from the toilet. *Id.*

When E.F. was in kindergarten, her parents asked the school district to allow Wonder to accompany E.F. to school. The district declined on the grounds that it already provided E.F. with a 1:1 aide throughout the day, rendering Wonder unnecessary. The school district ultimately agreed to short trial period of having Wonder accompany E.F. to school, with restrictions, but at the conclusion of the trial period, the district again took the position that Wonder would not be permitted in school. *Id.* at 751.

In response, the parents removed E.F. from her public school and began home schooling her. The parents also filed a complaint with the U.S. Department of Education's Office of Civil Rights ("OCR"). The parents' OCR complaint alleged that the district's exclusion of Wonder violated E.F.'s rights under Title II of the ADA and Section 504 of the Rehabilitation Act. OCR investigated the claims and agreed. In its decision letter, OCR explained that a school could offer FAPE to a student but violate the law's antidiscrimination provisions. To illustrate the point, OCR explained that the school district barring Wonder because of the presence of a 1:1 aide was analogous to "'requiring a student who uses a wheelchair to be carried by an aide or requiring a blind student to be led around by a teacher instead of permitting him to use a guide dog or cane.'" *Id.*, *quoting* OCR Letter (internal quotations and punctuation omitted).

Following the OCR decision, the school district agreed that E.F. could return to school with Wonder. The parents, however, declined to return E.F. to that school because they were concerned that the administration would resent her and make her return difficult. Instead, the

parents enrolled E.F. in a different public school in a different school district. The new school "enthusiastically received both E.F. and Wonder." *Id.*

The parents then filed suit in federal court against the original school district and the elementary school principal. In the complaint, the parents alleged that the district violated Title II of the ADA and Section 504 by denying E.F. equal access to the public school and its programs, refusing to accommodate her service animal, and otherwise discriminating against a person with disabilities. The complaint alleged E.F. suffered emotional distress, pain, embarrassment, and mental anguish, and sought monetary damages for those injuries, as well as a declaration that the school district violated Title II and Section 504.

The school district moved to dismiss the claims, which motion the District Court granted on the grounds that the parents were required to exhaust the IDEA's administrative procedures before raising the claims in a court. The Sixth Circuit affirmed on the same grounds, holding that § 1415(l) of the IDEA's exhaustion requirements apply if the alleged injuries "'relate to the specific substantive protections of the IDEA,'" which means "exhaustion is necessary whenever 'the genesis and the manifestations' of the complained-of harms were 'educational' in nature." *Id.* at 752, *quoting* 788 F.3d 622, 625, 627 (2015). Because the alleged harms to E.F. were "educational" in nature, the divided Sixth Circuit reasoned that the family had to exhaust the IDEA's procedures before bringing suit in court.

The Supreme Court granted certiorari "to address confusion in the courts of appeals" and vacated the Sixth Circuit's decision.

**IDEA's Exhaustion Requirements**

The Supreme Court began its decision with an overview of the IDEA and, in particular its exhaustion requirements. Under the IDEA, states are eligible to receive federal funds in

exchange for providing eligible students FAPE. In the event a dispute arises concerning the provision of FAPE, the IDEA contains formal dispute resolution procedures for parents and school district to follow. The first step involves preliminary meetings with the parents and school district, which may advance to mediation or a "due process hearing" at the applicable state agency. In Massachusetts, that agency is the BSEA. Pursuant to the IDEA, "[a]ny decision of the [hearing] officer granting substantive relief must be 'based on a determination of whether the child received a [FAPE].'" *Id.* at 749, *quoting* 20 U.S.C. § 1415(f)(3)(E)(i). A party who disagrees with the BSEA hearing officer's decision may appeal the outcome in state or federal court.

In addition to the IDEA, other federal statutes protect the rights of students with dishabilles. In the *Fry* case, the parents invoked two statutes that cover children and adults with disabilities in public settings. Specifically, the parents raised claims under Title II of the ADA, which forbids public entities from discriminating against individuals based on disability, and Section 504, which applies that prohibition to federally-funded programs and activities. *Id.* Those statutes each require public entities to make reasonable modifications to accommodate individuals with disabilities. Both statutes also allow individuals to bring civil suits for injunctive relief or monetary damages if they believe those statutory rights have been violated.

The Supreme Court considered "interaction between such laws and the IDEA" in the 1984 *Smith v. Robinson* case.[7] *Id.* at 750, *citing Smith v. Robinson,* 468 U.S. 992 (1984). In that case, the parents brought suit seeking FAPE for their child with a disability. That suit asserted claims under the IDEA, as well as "'virtually identical'" claims under Section 504 and the Equal Protection Clause of the Fourteenth Amendment. *Id., quoting Smith,* 468 U.S. at 1009. The

[7] *Smith v. Robinson* dealt with an earlier version of the IDEA, which was known as the Education of the Handicapped Act.

Court ruled in that case that the "IDEA altogether foreclosed those additional claims" and that the IDEA was "'the exclusive avenue' through which a child with a disability (or his parents) could challenge the adequacy of his education." *Id., quoting Smith,* 468 U.S. at 1009.

In response, Congress amended the IDEA to make clear that the IDEA would not preclude non-IDEA claims. Congress also added language, carefully defining an exhaustion requirement for IDEA claims. The relevant language states:

> "Nothing in [the IDEA] shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the [ADA], title V of the Rehabilitation Act [including § 504], or other Federal laws protecting the rights of children with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under [the IDEA], the [IDEA's administrative procedures] shall be exhausted to the same extent as would be required had the action been brought under [the IDEA]."

*Id., quoting* 20 U.S.C. § 1415(l).

Thus, Congress has made plain that the IDEA does not prevent parents and eligible students from asserting claims under other laws, even if those claims allege the denial of FAPE. The caveat, however, is that, pursuant to the second half of the above-quoted paragraph, parents or eligible students wishing to raise claims under the ADA, Rehabilitation Act, or similar law must first exhaust the IDEA's administrative procedures, described above, if the plaintiff is "'seeking relief that is also available under' the IDEA." *Id., quoting* 20 U.S.C. 1415(l).

**The *Fry* Decision**

The *Fry* decision addresses the open question of when parents or eligible students are seeking relief that is also available under the IDEA, thus triggering the IDEA's exhaustion requirements. The Supreme Court held that "to meet that statutory standard, a suit must seek relief for the denial of a FAPE, because that is the only 'relief' the IDEA makes available.'" *Id.*

at 752. The Court further held "that in determining whether a suit indeed 'seeks' relief for such a denial, a court should look to the substance, or gravamen, of the plaintiff's complaint." *Id.*[8]

At the Supreme Court, the parents and school district agreed that "[t]he only relief that an IDEA officer can give—hence the thing a plaintiff must seek in order to trigger § 1415(*l* )'s exhaustion rule—is relief for the denial of a FAPE." *Id.* at 753. The Court agreed with the parties.

The Court next considered the plain language of the statute, as required under the basic tenets of statutory construction. Examining the plain language of "relief" and "available" under the IDEA, the Court concluded that it must determine the circumstances in which a person may obtain redress or access a benefit under the IDEA to establish the scope of § 1415(l). "That inquiry immediately reveals the primacy of a FAPE in the statutory scheme." *Id.* Notably, the IDEA states that ensuring all eligible students receive FAPE is a primary purpose of that statute and FAPE is referenced as both a guarantee to eligible students, as well as "the yardstick for measuring the adequacy of the education that a school offers to a child with a disability." *Id.*

Likewise, "the IDEA's administrative procedures test whether a school has met that obligation—and so center on the Act's FAPE requirement." *Id.* at 754. The Court explained that a hearing officer's decision on a request for substantive relief must be based on a determination of whether the child received FAPE.[9] Thus, for example, if a parent complains about a school's

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[8] In footnote 4, the Court explicitly left open the question of whether exhaustion is required "when the plaintiff complains of the denial of a FAPE, but the specific remedy she requests—here, money damages for emotional distress—is not one that an IDEA hearing officer may award." *Id.* at 752 n.4. Both the parents and the Solicitor General, who submitted an amicus brief on behalf of the United States, argued that exhaustion would not be required in that instance. Since the parents argued that their complaint was not about a deprivation of FAPE, however, the Supreme Court noted that the open question would not need to be addressed unless the lower courts rejected the Frys' view of their lawsuit on remand. *See also* footnote 8 (reiterating same).

[9] Of note, footnote 6 states that "[w]ithout finding the denial of a FAPE, a hearing officer may do nothing more than order a school district to comply with the Act's various procedural requirements [] for example, by allowing parents to 'examine all records' relating to their child."

failure to provide an accommodation for a child with a disability, the hearing officer must order relief if the accommodation is needed to meet the IDEA's FAPE requirement. If the accommodation is not needed to meet the FAPE requirement, the hearing officer cannot order the requested relief, even if the accommodation would be appropriate, or even required, under another law, such as the ADA. According to the Supreme Court, the hearing officer's "role, under the IDEA, is to enforce the child's 'substantive rights' to a FAPE. And that is all." *Id.* (internal citations omitted).

Accordingly, "§ 1415(*l* )'s exhaustion rule hinges on whether a lawsuit seeks relief for the denial of a free appropriate public education. If a lawsuit charges such a denial, the plaintiff cannot escape § 1415(*l* ) merely by bringing her suit under a statute other than the IDEA." *Id.* If, however, the plaintiffs bring suit under a different statute and the remedy sought is not for the denial of FAPE, then the plaintiff need not exhaust the IDEA's procedures. Indeed, even if the conduct that underlies the complaint involves a school's treatment of a disability, a plaintiff need not meet the § 1415(l) exhaustion requirement if the harms alleged are "independent of any FAPE denial." *Id.*

Presumably recognizing that the holding was not providing the clarity required, the Court next addressed how a court can "tell when a plaintiff 'seeks' relief for the denial of a FAPE and when she does not." *Id.* at 755. The Court held that to answer that question, courts must look to "the crux—or, in legal-speak, the gravamen—of the plaintiff's complaint." *Id.* That means that courts should consider the substance of the complaint, rather than the presence or absence of any key words or phrases. If the "gravamen of a complaint seeks redress for a school's failure to provide a FAPE, even if not phrased or framed precisely in that way," then Section 1415(l)'s exhaustion requirements apply. *Id.*

The Court then provided a pair of hypothetical questions courts can ask to determine whether a complaint concerns the denial of FAPE or addresses disability-based discrimination under Title II and Section 504 apart from the IDEA's FAPE obligation. The first such hypothetical question is: "could the plaintiff have brought essentially the same claim if the alleged conduct had occurred at a public facility that was *not* a school—say, a public theater or library?" *Id.* at 756. "[S]econd, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance?" If the answer to both questions is yes, then a complaint that does not expressly allege the denial of FAPE likely does not involve the IDEA's FAPE requirement and the exhaustion requirements need not be met. That is because in those other situations, where either another public entity is involved or a non-student is involved, the suit could go forward without involving the IDEA. If, however, the answer to those questions is no, "then the complaint probably does concern a FAPE, even if it does not explicitly say so; for the FAPE requirement is all that explains why only a child in the school setting (not an adult in that setting or a child in some other) has a viable claim." *Id.*

In addition to those hypothetical questions, the Court stated that courts can examine the history of the proceedings to ascertain the gravamen of a complaint. Specifically, courts may examine whether a plaintiff previously invoked the IDEA's formal procedures to handle the dispute, thus "starting to exhaust the Act's remedies before switching midstream." *Id.* at 757. Those actions may indicate that a parent's concerns relate to a denial of FAPE.

Having formulated the parameters for addressing the exhaustion requirements, the Supreme Court remanded the case for further proceedings.

**Comment**

The *Fry* decision comes at a time when parents and their advocates appear to be including a number of non-IDEA claims in their special education cases against school districts. The BSEA, which has jurisdiction over IDEA and Section 504 claims, has not been consistent in its treatment of non-IDEA or Section 504 claims but its trend has been to at least find facts on all educational matters, even if it does not make rulings on the other claims. We expect parents and school districts will need to litigate how the *Fry* case will be applied in those circumstances.

Also, since *Fry* left open cases where the parents allege a deprivation of FAPE but seek relief not offered under the IDEA, such as monetary damages, we expect there will be additional litigation on that question.

Finally, although the *Fry* case does not directly address the family's request that the student at issue be permitted to use a service dog in school, this case does illustrate possible implications when parents and students seek accommodations for disabilities. While it is extremely rare that these kinds of cases proceed to the Supreme Court, these kinds of cases, which may entail monetary damages, can be costly and time consuming. Thus, we take this opportunity to remind school districts to consult with local counsel when faced with questions about whether to grant requests for accommodations.

## C. *C.D., V. NATICK PUBLIC SCHOOL DISTRICT,* CIV. A. NO. 15-13617-FDS , 2017 WL 2483551 (D. MASS., MARCH 28, 2017)

**Introduction**

On March 28, 2017, the United States District Court for the District of Massachusetts issued a Memorandum and Order remanding a July 24, 2015 Massachusetts Board of Special Education ("BSEA") decision to the BSEA. The Court remanded the matter to the BSEA for the hearing officer to indicate which "free and appropriate public education" ("FAPE") standard she

applied in evaluating the substance of and procedures associated with the Plaintiff student's "individualized education programs" ("IEPs"). The BSEA's 2015 order was in the Defendant Natick Public School District's ("Natick") favor, finding that the student's IEPs were appropriate and that proper procedures had been followed under the Individuals with Disabilities Education Act ("IDEA").

**Factual and Procedural Background**

The FAPE standard employed in this matter is at issue because, before the Court rendered a decision on the action for review of the BSEA's decision in favor of Natick, filed by the Plaintiff on October 21, 2015,[10] the United States Supreme Court issued its decision in *Endrew F. v. Douglas Cty. Sch. Dist.*, 137 S.Ct. 988 (March 22, 2017). In *Endrew*, the Supreme Court held that an IEP must be "reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" to provide FAPE. *See Endrew* at 999. In doing so, the Supreme Court reversed a Tenth Circuit holding indicating that FAPE is provided as long as "'some educational benefit,' meaning 'more than [a] *de minimis*' benefit, is provided." The Supreme Court's decision in *Endrew* also addressed the question left open decades earlier in *Board of Educ. v. Rowley*, 458 U.S. 176, 203 (1982), when the Court held that a student has received FAPE if his or her IEP is "reasonably calculated to enable [him or her] to receive educational benefits," without defining what constitutes "educational benefits."

**Discussion**

In *Natick*, the United States District Court for the District of Massachusetts emphasized that a question remains as to whether the *Endrew* decision changes the FAPE standard in the First Circuit, which has been articulated as, "an IEP is appropriate if it provides 'some

[10] Plaintiffs moved for summary judgment. The Court held a hearing on that motion on December 1, 2016.

educational benefit,' but an 'optimal or an ideal level of educational benefit' need not be provided." *See Lessard v. Wilton Lyndeborough Coop. Sch. Dist*., 518 F.3d 18, 23-24 (1st Cir. 2008).

The BSEA order stated that IEP proposed by Natick must be "designed to meet the child's unique needs" and be "reasonably calculated to enable the child to receive educational benefit." The District Court found the order "unclear as to whether the standard applied by the hearing officer" "was materially inconsistent with the Supreme Court's holding in [*Endrew]*," and directed the hearing officer to, at a minimum, indicate whether the FAPE standard she applied was in accordance with the *Endrew* standard. Staying the action pending the BSEA's resolution of this issue, and denying the Plaintiff's motion for summary judgment without prejudice, the Court wrote that, if the standard the hearing officer applied in her order was "materially different," from *Endrew*, she should indicate whether she would have reached the same result if she had applied the *Endrew* standard, and whether further BSEA proceedings should follow.

**Conclusion**

The ultimate disposition of this case will likely prove illustrative relative to the FAPE standard to be employed in the First Circuit subsequent to the *Endrew* decision.

## D. *DOE V. BRADSHAW,* 203 F.SUPP.3D 168 (D. MASS. AUG. 26, 2016)

**Introduction**

In this case, a female high school student brought several sexual abuse related claims against her abuser, a paraprofessional/soccer coach employed by the Mashpee School Committee, as well as several Mashpee town and school officials. The plaintiff's claims fall into two categories: (1) constitutional, tort and sexual harassment claims relating to the time period

up until school officials acquired actual knowledge of the school employee's sexual abuse of the student, and (2) the time period following school officials' acquisition of actual knowledge of the sexual abuse perpetrated on the student by a school employee. This summary focuses solely on the latter, regarding the defendants' responsibility to assess the plaintiff student for special education eligibility and provide her with different educational resources following the trauma of being sexually abused by a school employee, her soccer coach.

The plaintiff alleged that the Town and the School Committee violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act by failing to refer her for a special education evaluation until March of 2010, one year after school officials learned of the sexual abuse, and after a significant decline in her mental health and her ability to access her education. The U.S. District Court for the District of Massachusetts denied both parties' motions for summary judgment as to these claims, finding that a jury must determine at trial whether school officials engaged in "disability-based animus" or were "deliberately indifferent" to the plaintiff's disability.

**Facts**

Despite two different reports being made to School Committee members and/or school officials as early as the fall of 2007, at least one of which was made by a teacher, of the defendant paraprofessional providing alcohol to minors, and being in an inappropriate relationship with a student, the defendant was later hired as a soccer coach during the summer of 2008. The hiring was either announced or approved at an October 1, 2008 School Committee meeting.

In November of 2008, the coach picked the plaintiff student up from her home, took her to a secluded location, and sexually assaulted her. The facts are contested as to whether the

defendant had previously touched the plaintiff's leg inappropriately while driving her home from practice in October of 2008. The coach allegedly continued to engage in "a substantial amount of inappropriate behavior with multiple students, including sexual relations, graphic text messages, inappropriate comments, and the related purchase of alcohol," and may have continued to harass the plaintiff, throughout the fall of 2008.

In February of 2008, a student asked the School Committee Chairwoman why it was "okay" for the coach to date a student, stating that "everybody knows" he was dating a student. A fourth report of the coach's misconduct may have been made in the spring of 2008, when school officials questioned students and parents regarding whether he was dating a student. The facts of this alleged report and investigation are contested, and there is no evidence in the record regarding what prompted the investigation or with it was discussed.

The evidence is also contested as to whether school officials' investigations of these reports were rigorous or cursory, whether there were two reports in February of 2008, whether there were additional sources, and whether there was an ongoing investigation of the coach in the spring of 2008. It is undisputed, however, that both the Superintendent and members of the School Committee had received at least one report of the coach's misconduct prior to him being hired as the soccer coach in 2008.

In January of 2009, a Mashpee Boys & Girls Club staff member heard students discussing the coach's inappropriate relationship with a student. The staff member reported to the Mashpee High School principal and assistant principal, who in turn reported to the Superintendent. The Superintendent instructed the principal and assistant principal to investigate. Their investigation cleared the coach. On March 6, 2009, two gym teachers reported to the

Mashpee High School principal that the coach was engaged in sexual relations with one student and was explicitly texting with another student.

Soon after, on March 9, 2009, school officials first acquired actual knowledge of the coach's sexual abuse of the plaintiff, informed by a friend of the plaintiff's father, who was also a coach. The defendant coach was sent home the same day. He was placed on leave on March 10. Law enforcement was called on March 12, 2009, when school officials became aware of the details of the defendant's assault on the plaintiff. In December of 2009, the defendant coach pleaded guilty to indecent assault and battery of a minor, buying alcohol for a minor and sending inappropriate materials to a minor.

**Events Relating to Section 504 and ADA Claims**[11]

It is undisputed that the plaintiff "suffered severe trauma as a result of her sexual abuse." The evidence shows that her grades and attendance declined dramatically, though the parties dispute the details of her academic decline. In December of 2008, the plaintiff was enrolled in a school-run anger management class. In March of 2009, she started rape counseling outside of school. The plaintiff's mother requested educational accommodations, which the school denied because she was not a special education student. Her mother was unaware of her right to request a special education evaluation at that time.

In January of 2010, the plaintiff's condition worsened. She attacked a stranger in a convenience store for "looking at her," after previous attempts to cut her own wrists. She was then admitted to a Community Based Acute Treatment Unit, where she was diagnosed with post-traumatic stress disorder, mood disorder NOS, R/O bipolar disorder, and poly-substance abuse.

[11] The Court granted the defendants' motion to dismiss as to plaintiff's parents' Individuals with Disabilities Education Act ("IDEA") claims. *See Doe v. Bradshaw*, 2013 WL 5236110 (D. Mass. Sept. 16, 2013).

She returned to Mashpee High in early February, where she struggled, before being hospitalized then returning to a Community Based Acute Treatment Unit in April of 2010.

From February of 2009 through April of 2010, the Mashpee Child Study Team (the gateway to special education services in Mashpee) discussed the plaintiff at least thirteen times, but neither the Team not her teachers ever recommended a special education evaluation. Only general education accommodations were made. The plaintiff's eligibility for special education services was evaluated at the request of a state agency in March of 2010, one year after school officials learned of the sexual abuse she suffered, and after a significant decline in her mental health and her ability to access her education. On May 13, 2010, the school determined that the plaintiff was eligible for special education services. Her individualized education program ("IEP") was developed in July of 2010.

**Discussion**

As discussed herein, the plaintiff alleges that the Mashpee School Committee and the Town of Mashpee violated Section 504 of the Rehabilitation Act and the Americans with Disabilities Act, by failing to refer her for a special needs evaluation until March of 2010. The parties do not contest that the student's psychological conditions, at least by that time, constituted a disability under both Section 504 and the ADA, or that her eventual evaluation resulted in eligibility for special education services. The Court stated in its analysis, "[t]he inference that [the student] could have benefitted from an earlier intervention is both inescapable and confirmed by a hearing officer of the state Bureau of Special Education Appeals, whose findings deserve some deference on matters within his educational expertise," *citing Frazier v. Fairhaven School Comm*., 276 F.3d 52, 61 (1st Cir. 2002).

The Court reduced the viability of the plaintiff's Section 504 and ADA claims to the "state of mind with which the school officials acted in denying [the plaintiff] the potential benefits of an earlier referral" for special education services. Discrimination claims brought under either statute require that a showing of "disability-based animus" be made. The Court relied on the First Circuit's and other circuits' suggestion that "deliberate indifference" is enough to satisfy that intentional discrimination requirement, in finding that the plaintiff's Section 504 and ADA claims could proceed upon a finding that the school had acted "deliberately indifferent" to the plaintiff's needs.

The Court denied both parties' motions for summary judgment as to the plaintiff's Section 504 and ADA claims. The Court recognized that a jury could reasonably find that the school blamed the plaintiff for her needs, showing animus toward behavioral manifestations of her disability, or at least deliberate indifference to her needs. The Court also recognized that, in the alternative, a jury could reasonably conclude that the Child Study Team, having met many times to discuss the plaintiff, had worked in good faith to appropriately respond to the plaintiff's needs. Coupled with the fact that none of the plaintiff's teachers had recommended a special needs evaluation, this could be perceived as not recognizing a potential eligibility for special education services, being unaware that any deprivation of rights was likely, rather than as a showing of deliberate indifference, or any indifference at all.

**Conclusion**

Relative to the Section 504 and ADA claims presented in this case, the ultimate outcome will turn on school officials' state of mind. The crux of the issue under both statutes is whether school officials acted with disability-based animus or, at a minimum, deliberate indifference, in failing to more expediently refer the student for a special education evaluation.

## IV. JUDICIAL DECISIONS INVOLVING STUDENT DISCIPLINE

### A. *I.U. V. PIONEER VALLEY CHINESE IMMERSION CHARTER SCHOOL*, C.A. NO. 14-CV-12709-MAP, 2016 WL 4792182 (D. MASS. SEPT. 14, 2016)

**Introduction**

In this case, the school imposed a one-day in-house suspension on a third-grade student, I.U., for allegedly hitting a student, pushing and cornering a student in the bathroom, and pouring water on another student in school. I.U. denied those allegations. The Federal District Court for the District of Massachusetts granted summary judgment in favor of the defendants on civil rights and breach of contract claims that I.U. and his parents brought against the school and some of its employees. C.A. No. 14-cv-12709-MAP, 2016 WL 4792182 (D. Mass. Sept. 14, 2016). The Court dismissed without prejudice the remaining reckless infliction of emotional distress claim so that the plaintiffs could refile that claim in state court. *Id.* at *1-*2. The Court made that dismissal ruling in large part because state law has not yet been sufficiently developed on the evidence required in a reckless infliction of emotional distress case involving school discipline.

**Factual Background**

Because this case was decided on summary judgment, in accordance with the Federal Rules of Civil Procedure, the Court considered the record in the light most favorable to the plaintiffs and made all reasonable inferences in plaintiffs' favor. *Id.* at *3. The facts recited in the decision reflect those standards.

In 2011, I.U. was a third-grade student at the school. I.U.'s English teacher, Ms. Hall, thought of him as a particularly sensitive child and I.U. visited the nurse more frequently than other students. *Id.* at *1. Prior to the incidents giving rise to the litigation, I.U. had not been disciplined and did not appear to have any behavioral issues in school.

On March 23, 2011, an administrator at the school, Ms. Kusek, told the principal, Ms. Wang, that I.U. had punched her first-grade daughter at the water fountain. The next day, Ms. Kusek's wife reported to Ms. Wang that the punch had hurt the child and she was afraid of I.U. That same day, Ms. Kusek reported two other incidents to Ms. Wang, one involving I.U. pushing and cornering a younger child in the bathroom and one involving I.U. dumping water on a younger student's head. I.U. denied the first two incidents and claimed that he spilled water on another child by accident. The child alleged to have been cornered and another student witness supported Ms. Kusek's report about the bathroom incident. A teacher confirmed that I.U. spilled the water by accident. *Id.*

Ms. Wang spoke with I.U. and his mother at the end of the school day on March 24, 2011. During those conversations, Ms. Wang did not allow I.U. to present his version of the facts, told him that he was a "bad boy" and that police might have been involved if he had been older, and stated that I.U.'s dead grandfather would not approve of his conduct. *Id.* at *2. At that time, Ms. Wang did not tell I.U.'s mother that he would be punished for those incidents. After the meeting, Ms. Wang spoke with Ms. Kusek about what the consequences should be.

The next morning, I.U. was required to serve an in-school suspension. *Id.* He was brought to a small room where he previously had taken the MCAS. Ms. Wang did not know how long the suspension would last when she instituted the discipline but decided to see how it went. *Id.* I.U. tried to explain that he had not done what he was accused of, begged not to be put in the room, and was crying. His peers knew that I.U. was being punished. Ms. Hall declined I.U.'s request to call his mother to comfort him. I.U. was not permitted to draw, see his friends, or attend gym, recess, lunch, or in-school parties. Instead, he was required to write apologies to the students he allegedly harmed and work on an English essay. A teacher's aide sat outside the

room, with the door open, and brought I.U. lunch, escorted him to the bathroom, and allowed him to use the water fountain as long as no other children were present. At some point, Ms. Hall slapped I.U. on the back of the arm, though he was not in any physical pain. *Id.*

On the morning of the in-school suspension, I.U.'s mother sent Ms. Wang an email about a positive interaction she had with a parent of one of the children involved in the incidents underlying the discipline. Ms. Wang responded by email but did not mention the in-school suspension. Even when the mother picked up I.U. at the end of the day, Ms. Wang did not mention the suspension or the conditions in which I.U. was kept. Instead, she told the mother that they had decided to "keep I.U. quiet and safe and the other kids safe and to give I.U. an opportunity to catch up on school work." *Id.* at 2.

According to the student handbook, parents will be notified of major disciplinary infractions by way of an Incident Report. Parents are expected to sign and return that report the next day for the child to be readmitted to class. *Id.* at *3.

The in-school suspension was not normal for the school. Students typically do not receive all-day suspensions or time-outs and the room in which I.U. was kept is not typically used for those purposes. The school nurse thought the discipline was too harsh and the plaintiffs' expert concluded that the school's actions were "outside of the acceptable standard of care in disciplining I.U." *Id.* In June of 2011, the school's Board of Trustees suspended Mses. Wang and Hall for their roles in the discipline of I.U. *Id.*

The student returned to school on March 29, 2011 and was admitted to class. *Id.* at *14. At some point thereafter, his parents began home-schooling I.U. *Id.* at *6 n.2.

The parents and I.U. filed suit in state court. The defendants successfully removed the case to Federal District Court, then moved to dismiss two of the claims. The defendants later

moved for summary judgment on all of the claims and admitted that the summary judgment motion rendered their motion to dismiss moot. The Court, thus, dismissed the motion to dismiss for mootness and issued the present summary judgment decision.

**Discussion**

"Summary judgment is appropriate where 'the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Id.* at *3, *quoting* Fed. R. Civ. P. 56(a). In reviewing motions for summary judgment, the Court views the record in the light most favorable to the non-moving party and makes all reasonable inferences in that party's favor. *Id.* at *3. Following those standards, the Court considered each of the claims at issue in turn.

**Reckless Infliction of Emotional Distress**

Plaintiffs claiming intentional or reckless infliction of emotional distress must show: "'(1) that [the defendants] intended, knew, or should have known that [their] conduct would cause emotional distress; (2) that the conduct was extreme and outrageous; (3) that the conduct caused emotional distress; and (4) that the emotional distress was severe.'" *Id.* at *4, *quoting Polay v. McMahon,* 10 N.E. 3d 1122, 1128 (Mass. 2014). That standard is "'very high.'" *Id., quoting Doyle v. Hasbro,* 103 F.3d 186, 195 (1st Cir. 1996). Intentional infliction of emotional distress cannot be based on "'mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities,'" even if the defendant acted with tortious or criminal intent. *Id., quoting Polay,* 10 N.E. 3d at 1128. The complained of conduct "'qualifies as extreme and outrageous only if it goes beyond all possible bounds of decency, and is regarded as atrocious, and utterly intolerable in a civilized community.'" *Id., quoting Polay,* 10 N.E. 3d at 1128. (internal punctuation omitted).

Here, the defendants challenged the sufficiency of the plaintiffs' claim on only the second element, arguing that the alleged conduct does not rise to the level of "extreme and outrageous" as a matter of law. *Id.* Since reasonable people on a jury could differ on whether conduct rises to the level of "extreme and outrageous," the court must determine whether the evidence, when considered in the light most favorable to the plaintiffs, "is sufficient to permit a reasonable person to conclude that Defendants' conduct was extreme and outrageous." *Id.* Courts should consider the totality of the circumstances, including whether the victim is known to be particularly susceptible to emotional distress. *Id.*

In considering this claim, the Court first discussed various cases from other states that both parties identified. The Court found none of the cases to be of particular use, however. The Court also noted that this case is not analogous to the Massachusetts or First Circuit cases the parties cited and that neither party identified any cases of intentional or reckless infliction of emotional distress under Massachusetts law that was brought by a child based on school discipline. *Id.* at *5.

The Court then cited three reasons why it was denying the defendants' motion for summary judgment on the reckless infliction of emotional distress claim. First, based on the student's young age and evidence that he was sensitive and visited the nurse more often than his peers, the evidence could support a finding that he was "particularly susceptible to emotional distress," which finding would entitle him to additional protection. The Court reasoned that "Massachusetts courts might not accord great deference to school administrators who recklessly exercised their disciplinary authority on a particularly vulnerable victim, a situation which the evidence here could substantiate." *Id.* at *6.

Second, another District Court case suggested "that it would not be inclined to take a hands-off approach to unmerited school discipline as a basis for a claim of intentional infliction of emotional distress." *Id., citing Tynecki v. Tufts Univ. Sch. of Dental Med.*, 875 F. Supp. 26, 34 (D. Mass. 1994). Here, I.U. claims that he was wrongly accused of misconduct, that the investigation was incomplete, that he was denied an opportunity to explain himself, and he was subjected to unusually harsh discipline.

Third, whereas some of the other jurisdictions that have addressed similar situations have taken on the role of "gatekeeper," in Massachusetts, judges are not formally designated to evaluate whether claims rise to the level of extreme and outrageous. *Id.* at *6.

Here, the plaintiffs "have produced evidence that, if believed, might show more than 'bad manners and mere hurt feelings.'" *Id., quoting Agis v. Howard Johnson Co.*, 355 N.E.2d 315, 19 (Mass. 1976) (internal quotations omitted). Considering the totality of the record in the light most favorable to the plaintiffs, the evidence shows that the school failed to properly investigate the alleged misconduct and wrongly punished a nine year old who was known, at least to some, as being particularly sensitive. Additionally, Ms. Wang consulted with only Ms. Kusek in deciding on the punishment. Since Ms. Kusek was the parent of one of the alleged victims, it can be inferred she was "unsympathetic" to I.U. *Id.* Further, during the March 24 meeting, Ms. Wang made unduly harsh comments to I.U., such as references to police involvement had he been older and his grandfather being disappointed in him. In terms of the punishment, I.U. was "treated like a pariah and a threat to all of the other students at the School throughout the day," and was denied a phone call with his mother to comfort him, despite being known as particularly sensitive. Moreover, Ms. Wang did not notify the parents of the discipline either at the meeting beforehand or when the mother picked him up.

Thus, Court agreed that although the case was "very close," and "[t]he jury should decide, from its own experience, whether these facts are sufficient to meet the requirements" of a reckless infliction of emotional claim. *Id*. at *7, *quoting McCarthy v. Szostkiewicz,* 188 F. Supp. 2d 64, 73-73 (D. Mass. 2002) (internal punctuation and quotations omitted). As noted above, the District Court dismissed this claim without prejudice so that this issue could be resolved in state court.

**Procedural Due Process Claim**

The Court next assessed plaintiffs' procedural and substantive due process claims that were raised pursuant to 42 U.S.C. § 1983. To establish a procedural due process claim, the plaintiffs "'must identify a protected liberty or property interest and allege that the defendants, acting under color of state law, deprived them of that interest without constitutionally adequate process.'" *Id.* at *7, *quoting Aponte-Tores v. Univ. of P.R.*, 445 F.3d 50, 56 (1st Cir. 2006) (internal punctuation and quotations omitted).

The plaintiffs relied on the Supreme Court's ruling in *Goss v. Lopez* for the proposition that "'a student's legitimate entitlement to a public education [is] a properly interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.'" *Id. quoting Goss,* 419 U.S. 565, 574 (1975). The Defendants responded that because a one-day in-house suspension is a de minimis deprivation of I.U.'s property interest in a public education, no process was due before the school imposed the suspension. *Id.*

Considering the facts of this case and case law addressing in-school suspensions, the court ruled that "[w]hile there may be circumstances in which an in-school suspension would deprive a student of his or her constitutionally protected property interest in a public education, I.U.'s is not such a case." *Id.* at *8. I.U. was in school the entire day under the supervision of an

aide and given an academic assignment to complete. The plaintiffs did not cite and the Court did not find any cases suggesting that similar circumstances would constitute a deprivation of a protected property right. Accordingly, summary judgment issued in favor of the defendants on this claim.

**Substantive Due Process**

Plaintiffs also raised a substantive due process claim. "'The touchtone of [substantive] due process is protection of the individual against arbitrary action of government.'" *Id., quoting City of Sacramento v. Lewis,* 523 U.S. 833, 845 (1998). The standard for proving a substantive due process violation is "extremely high," and is often described as requiring the government's actions to "shock the conscience." *Id.* at *8-*9.

In this case, the defendants' actions were not so egregious as to meet that standard. The defendants performed an investigation, however incomplete, before deeming some discipline warranted. *Id.* at *9. Further, even if the punishment were unduly harsh and ineffective, there was no evidence that the school "intended to injure I.U. in some way unjustifiable by the School's interest in maintaining discipline, or was inspired by malice or sadism rather than a careless or unwise excess of zeal." *Id.* Even construing Ms. Hall's slap of I.U. as corporal punishment, courts have held that similar levels of physical force do not rise to the level of a substantive due process violation. *Id*. at *10.

Accordingly, the Court granted summary judgment in favor of defendants on the substantive due process standard. In doing so, the Court noted "a certain measure of cognitive dissonance" in allowing the emotional distress claim to proceed while granting summary judgment on the due process claim because the conduct at issue does not shock the conscious. The Court explained that the different results were based on the different frameworks and standards used for the two different claims. *Id.*

**Qualified Immunity**

The defendants further argued that even if they violated I.U.'s due process rights, Mses. Wang and Hall were entitled to qualified immunity because the constitutional rights that were infringed were not sufficiently established as of the time of the discipline in March 2011. *Id.* at *11. "Qualified immunity protects public officials from liability for damages except for the plainly incompetent and those who knowingly violate the law." *Id.* (internal quotations and punctuation omitted). In reviewing qualified immunity claims, courts first consider whether the plaintiffs established a constitutional violation. Here, they did not.

Even if they had, however, the right claimed to be violated must be clearly established. Here, the federal courts that have considered whether an in-school suspension during which a student participates in the educational process requires advanced notice and an opportunity to be heard have ruled that they do not. Likewise, as noted above, neither the plaintiffs nor the Court located any cases in which school officials' conduct similar to that in this case formed an adequate basis for a substantive due process claim. Accordingly, those rights were not sufficiently established such that Mses. Hall and Wang should have understood they were violating them. *Id.* at *11-*12.

**School's Liability**

The Court next considered the school's liability. Under § 1983, the school may be liable "'for actions taken pursuant to an official policy or an official custom that violated the Constitution.'" *Id.* at *12, *quoting Walden v. City of Providence, R.I.,* 596 F.3d 38, 53 (1st Cir. 2010). The plaintiffs alleged that the school was liable because Ms. Wang, as principal, "had final policymaking authority as to student discipline." *Id.* Whether an individual is a final policymaker is a question of law for the judge to decide. Here, the Court ruled that based on the bylaws of the school, which establishes the Board of Trustees as final policymakers, Ms. Wang

was not a policymaker with the authority to establish school policies. Instead, she was responsible for implementing the policies the Board of Trustees established. *Id.* Further, there was no evidence that Ms. Wang acted at the behest of the Board of Trustees when she disciplined I.U. To the contrary, she was later disciplined for her decision. *Id.*

Since Ms. Wang was not a final policymaker and there were no allegations of patterns or practices of constitutional violations, the plaintiffs failed to satisfy their burden. Accordingly, summary judgment issued on behalf of the defendants. *Id.* at *12-*13.

**Breach of Contract**

Finally, the Court considered the plaintiffs' breach of contract claim. *Id.* at *13. The plaintiffs claimed that the student handbook's provisions regarding student discipline created a reasonable expectation that the parents would be notified prior to the imposition of major discipline, such as an in-school suspension. In particular, the handbook states that when a major infraction occurs, the school will send home a written incident report, which the parents must sign and return the next day for the student to be readmitted to class. By failing to give that prior notice, the plaintiffs contended the defendants violated the handbook.

For purposes of the summary judgment motion, there was no dispute that the student handbook was in the nature of a contract between the plaintiffs and the school and that the principles the Massachusetts Supreme Judicial Court set forth in *Schaer v. Brandeis Univ.*, 735 N.E. 2d 373 (Mass. 2000) apply. According to *Schaer*, "the court should 'employ the standard of reasonable expectation – what meaning the party making the manifestation, the [School], should reasonably expect the other party to give to it.'" *Id.*, *quoting Schaer*, 735 N.E. 2d at 378 (internal quotations omitted). The interpretation of the contract and whether it is ambiguous are questions of law for the Court to decide. *Id.*

Here, the plaintiffs argued that based on the handbook language regarding incident reports, they could reasonably expect to receive that report prior to the discipline being implemented. As the Court concluded, however, the relevant language does not provide a timeframe for the school to send the report relative to the infraction. The language only requires that the report be sent home and the parents sign it. *Id.* at *14. Thus, the parents did not have a reasonable expectation, based on the relevant handbook language, to receive prior notice of the suspension.

The Court further noted that, according to the record, it appeared as if the school treated the in-school suspension as a major disciplinary infraction but did not send home an Incident Report. *Id*. That was not the basis of the plaintiff's breach of contract claim, however, and even if it were, it would not have been a material breach of the contract, especially since the parents were informed of the events of March 24 and 25 before I.U. returned to school on March 29.

**Conclusion**

The District Court Judge adopted the magistrate's recommendations, granting defendants summary judgment on all claims except for the reckless infliction of emotional distress claim. The Court dismissed that claim without prejudice so that the plaintiffs could assert it in state court. *Id.* at *1-*2.

## B. *GOODWIN V. LEE,* 475 MASS. 280 (2016)

**Introduction**

In *Goodwin v. Lee*, the Massachusetts Supreme Judicial Court ("SJC") held that a suspended student was not required to exhaust administrative remedies under G.L. c. 71, § 37H½ prior to commencing a Superior Court action under a different statute for damages against the district because her suspension was not valid. 475 Mass. 280 (2016). The Superior Court had

previously granted the district's motion to dismiss, holding that the student could not recover damages stemming from her allegedly improper suspension because she had failed to exhaust administrative remedies. . The SJC reversed and remanded the matter to Superior Court for consideration of the plaintiff's claims against the district. The Supreme Judicial Court held that the student's failure to obtain a statement from the School Committee outlining the district's reasons for her suspension was not a bar to her seeking tort damages, which were available to her under G.L c. 76 § 16.

**Factual Background**

The Plaintiff was a former high school student at Lee Middle and High School. She was suspended by the school principal pursuant to a school policy stating that any student charged with a felony would be suspended even if the conduct occurred off of school grounds, in accordance with G.L. c. 71, § 37H½.[12] She was suspended for the entirety of her last semester of senior year and excluded from participation in graduation because the principal erroneously believed that she had been charged with a felony relating to the theft of a firearm. The student was subsequently charged with a misdemeanor for receipt of stolen property but was never charged with a felony. Her suspension was lifted and she ultimately obtained her high school diploma but she was not permitted to attend graduation with her classmates. After refusing the school's offer of a solo graduation for her upon her completion of online classes (she did not return to school after being told she could not attend graduation), the Plaintiff brought an action against the district in Superior Court to recover tort damages. She sought "compensation" for the "grief and stigmatization" resulting from the district's refusal to allow her to "participate in her

[12] Under § 37H½, (1), a student may be suspended "[u]pon the issuance of a criminal complaint charging a student with a felony ... if [the] principal or headmaster determines that the student's continued presence in school would have a substantial detrimental effect on the general welfare of the school."

last year of school on school grounds and in the rite of passage that is graduation." The district moved to dismiss, arguing that the student had not exhausted administrative remedies available under § 37H½ and had not sought certiorari review under G.L. c. 249, § 4. The plaintiff countered with the argument that an alternative route to recovery was available to her under G.L c. 76 § 16.[13]

**Discussion**

The SJC held that the Superior Court erred in granting the district's motion to dismiss due to the plaintiff's failure to exhaust administrative remedies under § 37H½ because G.L. c. 76, § 16 "provides a separate and distinct remedy from that available under § 37H½." The Court articulated that G.L. c. 76, § 16, "provides a suspended student a parallel and distinct avenue for relief" apart from § 37H½ and its cumbersome administrative remedy requirements. The Court went on to note that "§ 37H½ is plainly designed to afford suspended students an immediate opportunity to have their suspensions lifted and to be readmitted to school, to have their suspensions shortened, or to be admitted to alternative educational programs." In contrast, G.L. c. 76, § 16 allows the payment of damages to a student, without "relief from the immediate deprivation of a free and appropriate public education." The SJC held that nothing in § 37H½ prevents a student from seeking tort damages under G.L. c. 76, § 16, even if he or she has not first pursued/succeeded on a suspension appeal raised under § 37H½.

[13] G.L. c. 76, § 16, entitled "Children excluded from school; remedies," states: "Any pupil who has attained age eighteen, or the parent, guardian or custodian of a pupil who has not attained said age of eighteen, who has been refused admission to or excluded from the public schools or from the advantages, privileges and courses of study of such public schools shall on application be furnished by the school committee with a written statement of the reasons therefor, and thereafter, if the refusal to admit or exclusion was unlawful, such pupil may recover from the town or, in the case of such refusal or exclusion by a regional school district from the district, in tort and may examine any member of the school committee or any other officer of the town or regional school district upon interrogatories."

**Conclusion**

A student's failure to exhaust administrative remedies under § 37H½ does not preclude the same student's recovery of tort damages under G.L. c. 76, § 16 under the same facts. Also, many districts casually pursue information about criminal charges against students. As § 37H½ specifically rests on felony charges, be sure principals have an accurate recitation of the charges and an opportunity to review these procedures with district counsel. Simply stated, the first information received about the nature of the charges is often incorrect. School officials should verify, before invoking Section 37H ½, that a criminal felony complaint has issued.

## V. JUDICIAL DECISIONS INVOLVING EMPLOYMENT DISPUTES

### A. *CHADWICK V. DUXBURY PUBLIC SCHOOLS*, 475 MASS. 645 (2016)

**Introduction**

In a case with an unusual procedural posture, the Supreme Judicial Court has resolved a discovery dispute by determining that there is no statutory or common law privilege under G.L. c. 151B protecting union members' communications with union representatives. Generally, the law recognizes four common law privileges: attorney/client, doctor/patient, clergy/penitent, and a spousal privilege. Other privileges against compelled testimony have been created by specific legislative authority, such as a social worker's or mediator's privilege.

The case involved allegations of employment discrimination brought pursuant to G.L. c. 151B as a civil action in the Superior Court, although the record does also reflect allegations that a complaint was filed at MCAD. The MCAD complaint was not part of the record at the Supreme Judicial Court.

**Background**

The plaintiff served as President of the DTA for about 6 years. She began working in Duxbury as an English teacher in 2006. She retired in 2015. She was a member of the Duxbury Teachers' Association. Well before she was employed in Duxbury she was diagnosed with post-traumatic stress disorder, the symptoms of which were managed until about 2009. Beginning in 2009 the teacher manifested many symptoms of her PTSD. These included panic attacks, anxiety, hypervigilance and sleep problems which she attributed to work conditions; she also alleged that she was bullied and harassed by her direct supervisor. About three years after the symptoms surfaced, her attorney notified Duxbury that she had PTSD and requested that a new supervisor be named for her. In response, the superintendent identified a new administrator to conduct performance evaluations but refused to change the "subject matter supervisor" for the teacher's English courses.

In December of 2013, an evaluation was completed. The teacher alleged it contained false and unwarranted criticisms. Thereafter, the parties exchanged communication about other alleged performance issues and met in May of 2014 to discuss performance. The day of the May 2014 meeting, the teacher's attorney transmitted correspondence to the superintendent reminding him of the teacher's PTSD and again requesting limits on contact between the immediate supervisor and the teacher. A couple of weeks after the meeting, an educator plan was issued that would have permitted the teacher's discharge at the end of the following school year. About six months later, in December of 2014, the plaintiff filed suit seeking monetary damages under G.L. c. 151B, the state's anti-discrimination law.

As is the typical course in most civil cases, the discovery process ensued. The school district requested the production of various documents and interrogatories, some of which were

directed at obtaining the identification of persons with whom the teacher had talked, and copies of any documents that the teacher had provided to, or had received from, her union, union representatives, and the statewide association. The school's document request sought copies of emails, phone text messages or chat messages. The teacher objected "claiming a union member-union privilege." She did provide, however, a privilege log for 92 email messages which were withheld from production Typically a privilege log identifies the parties to the communication, the date it was sent and a generic description of the subject matter, as well as the claimed basis for privilege and non-disclosure.

The discovery dispute resulted in a ruling from a Superior Court judge which ordered the teacher to disclose the requested discovery. The trial court's order appears, at least in part, to have been based on the conclusion that no such privilege existed in c. 150E.

**Discussion**

The Supreme Judicial Court identified the case as one of first impression in Massachusetts. The teacher argued that there was either an implied privilege under c. 150E or a common law privilege protecting communications between union members and their representatives. The Supreme Judicial Court rejected the teacher's claim.

The provisions of c. 150E authorize employees to act in concert and prohibit employers from interfering with restraining or coercing employees in the exercise of any right guaranteed by c. 150E. Further, it is unlawful for an employer to dominate, interfere or assist in the formation, existence or administration of any employee organization. *See* G.L. c. 150E, §10(a)(1)(2). Here, because the action apparently arose under the provisions of c. 151B, the state law prohibiting employment discrimination, the court concluded that the terms of 150E did not apply to a civil action based on a different statute. The specific language of c. 150E, §10(a)(1)

references claims "under this chapter." The teacher's claims related to discriminatory actions allegedly taken against her in her capacity as an employee, not with respect to her union activity. The court took pains to identify Massachusetts Labor Relations Commission cases holding that, in the context of a labor dispute under c. 150E, there is a confidentiality of communications between unions and their members. The Supreme Judicial Court looked to the National Labor Relations Act, which extends to communications between an employee and a union representative during the grievance process. Because the protections in c. 150E for union activity does not extend to suits brought under other provisions, such as c. 151B, the Supreme Judicial Court determined that there was no foundation for inferring from §10(a)(1) and (2) that communications between an employee and his or her union were privileged or exempt from discovery in cases other than under c. 150E.

After dispatching with the implied privilege argument under c. 150E the court rejected the plaintiff's argument that a common law privilege existed for such communications. Common law privileges to withhold evidence are based only on the constitution, state law, or rules promulgated by the Supreme Judicial Court or the common law. The court observed that the power to create a privilege against production of evidence is used sparingly. While there are other jurisdictions which do recognize common law employee/union communication privileges, notably, Alaska, the Supreme Judicial Court also observed that courts in New Hampshire and California refused to recognize such a common law privilege. The court concluded that "the question whether to create such a privilege is better left to the legislature." Finally, in addition to the creation of such a privilege being more properly a legislative question the Supreme Judicial Court observed that they had not created such privileges in the past despite speculation or conjecture as to adverse consequences on the absence of such a ruling.

Given the unusual posture of this case, the ruling may have limited applicability to day-to-day labor relations. One should generally assume activities conducted pursuant to c. 150E are cloaked in an employee/union privilege. Civil actions that are not brought under G.L. c. 150E, however, are not subject to these rules and communications between employees and union representatives may be fair game. Even with this change, however, we do not believe the decision would run to communications between an employee and a union attorney where the more commonly encountered attorney-client privilege protects client communications.

## B. *THOMPSON V. CIVIL SERVICE COMMISSION*, 90 MASS. APP. CT. 462 (2016)

### Introduction

*Thompson v. Civil Service Commission* is an appeal of a Superior Court's review of a Civil Service Commission ("Commission") decision following the termination of ten Boston police officers for violation of a substance abuse policy. 90 Mass. App. Ct. 462 (2016). The Commission had upheld the termination of four officers and ordered the other six officers to be reinstated with back pay. The Superior Court upheld that decision but modified the back pay award to the reinstated officers. On appeal, the four terminated police officers challenged the decisions upholding their dismissal and the Boston Police Department ("BPD") appealed the Superior Court's modification of the back pay award. The Appeals Court affirmed the Superior Court's decision.

### Factual and Procedural Background

Under the applicable collective bargaining agreements ("CBA") between the BPD and the Boston Police Patrolman's Association ("Union"), unit members were subject to annual hair testing for drugs as part of the BPD's substance abuse policy. *Id.* a 464-65. The CBA states that

personnel who receive verified positive test results are subject to termination, except for a first offense, for which voluntary rehabilitation is offered. *Id.* at 464.

Before adding the annual hair testing provision into the CBA, the BPD and Union extensively researched and discussed that provision. In particular, both parties to the CBA met with counsel and a scientist from Psychemedics, Inc., the company the parties chose to perform the testing. Psychemedics assured the parties that the hair testing was "'state of the art" and could distinguish between voluntary ingestion of drugs and environmental exposure. *Id.* at 465. The parties also agreed to the threshold level of drug present in the system to be considered a "positive" test result, and agreed to a "second 'safety net' retest." *Id.*

Consistent with those provisions of the CBA, between 2001 and 2006, the ten BPD officers involved in these proceedings submitted hair samples, which samples tested positive for cocaine. *Id.* at 463. In accordance with Rule 111 of the CBA, the BPD terminated the officers for violation of the substance abuse police.

The ten officers appealed to the Commission. *Id.* The Commission held hearings over 18 days between October of 2010 and February of 2011. The hearings included testimony from each of the ten officers, expert witnesses, and additional fact witnesses. The Commission received 202 exhibits into evidence and in February 2013, issued a 132-page decision. In that decision, the Commission upheld the termination of four of the officers and overturned the terminations of the other six officers. The Commission ordered the BPD to reinstate the six officers with back pay and benefits to the date the hearings commenced. *Id.* at 463-64.

A key issue before the Commission was the scientific reliability of the hair test, especially its ability to distinguish between voluntary ingestion and environmental exposure. The question was whether the results of the hair tests alone formed a sufficient basis for the BPD

to dismiss the ten officers. The parties produced competing expert witnesses and other evidence on the reliability of the hair tests. *Id.* at 465-66. Ultimately, the Commission decided that the hair tests were sufficiently reliable to be used as a tool to enforce the substance abuse policy and could be used as some evidence of drug use. The tests were not sufficiently reliable, however, to serve as the sole basis for an officer's termination. *Id.* at 465.

Reviewing the hair tests along with the additional evidence presented at hearing, the Commission ruled that the additional evidence presented by six of the officers outweighed the positive drug test and ordered their reinstatement, with back pay commencing from the date the Commission hearing began. *Id.* at 466. The Commission upheld the termination of the other four officers based on the totality of the evidence. *Id.*

All ten officers and the BPD filed complaints in the Superior Court seeking judicial review of the Commission's decision. *Id.* The BPD's complaint argued that (1) the Commission's ruling that the positive hair tests alone were insufficient to warrant dismissal was erroneous, (2) the Commission ignored the language of the CBA, and (3) the Commission's decision reinstating six officers was unsupported by substantial evidence. *Id.* The four officers whose dismissals were upheld argued that the Commission did not have authority to act on any ground other than the hair tests and that the decision was not supported by substantial evidence. *Id.* The six reinstated officers appealed on the grounds that they were entitled to back pay dating back to their individual terminations, rather than the date of the haring. *Id.* The Superior Court affirmed the Commission's decision with the exception of the back pay award. *Id.* at 466-67. On that issue, the Superior Court agreed with the six reinstated officers and awarded back pay and benefits dating back from their terminations.

The four terminated officers and the BPD appealed, reasserting the arguments they raised before the Superior Court. On appeal, the BPD also objected to the Superior Court's modification of the back pay award.

**Discussion**

On appeal of a Civil Service Commission decision, the Court "need[s] only inquire whether the commission's decision was 'legally tenable,' accepting the commission's factual determinations unless they are unsupported by 'substantial evidence on the record as a whole.'" *Id.* at 464, *quoting Comm'r of Health and Hosps. of Boston v. Civil Serv. Commn.,* 23 Mass. App. Ct. 410, 411 (1987). Further, the Appeals Court defers entirely to the Commission on issues of credibility and weight of the evidence. *Id.* at 469. The Court reviewed the case based on those standards.

The Appeals Court first considered the implication of a positive drug test result. The BPD argued that, under a preponderance of evidence standard, a positive hair test result alone should be sufficient to dismiss an officer. *Id.* at 467. The four dismissed officers, for their part, argued that since the termination notices cited only the positive hair tests as the bases for their terminations, once the Commission determined that the tests were not sufficiently reliable to warrant dismissal on their own, the hearings should have ended and all ten officers should have been reinstated. *Id.* The Court rejected both of those arguments. *Id.* at 467-68.

The Court noted that the Commission "hears evidence and finds facts anew." *Id.* at 467. In so doing, the Commission may consider all evidence before it; the Commission need not limit its review to only information available to the public employer at the time the decision was made. *Id.* In this case, the Commission undertook an extensive review of the facts, including the reliability of the hair testing. Based on the information presented at the Hearing, including

evidence that the cutoff levels for a positive result shifted over time, that there was a lack of general acceptance in the field, and that there was no industry standard, the Commission decided that a positive hair test was not conclusive of voluntary ingestion instead of environmental exposure. *Id.* Given the risk of a false positive, the Commission determined that more than a positive hair test was required to meet the just cause standard for terminating a police officer. *Id.* Thus, the Court rejected the BPD's argument that the Commission improperly elevated the employer's burden of proof.

The Court likewise rejected the four officers' argument that the Commission's inquiry should have ended after it determined that the hair samples alone were insufficient to support a termination. The Court explained that even though the notices of termination identified the positive test results as the basis for the termination, "a reasonable officer would have understood that the reason he or she was facing termination was for violating department rules and regulations related to substance abuse, with the positive hair test results as evidence supporting the violation." *Id.* at 468. Thus, the Commission's decision was properly based on the reasons specified in the dismissal notice

The Court next addressed the BPD's argument that the Commission ignored the controlling language of the CBA, which provided that an officer could be terminated based solely on a positive drug test. *Id.* at 468-69. The Court noted that the Commission's decision "reveals a direct conflict between the CBA and the civil service law: namely, that while G.L. c. 31, §§ 41 and 43, permit termination only for just cause, the CBA allows the appointing authority to terminate even when the test result may not reflect actual misconduct." *Id.* (internal citation omitted). The Appeals Court agreed with the Commission that the just cause requirement of the civil service law controls. *Id.* at 469. Although Courts try to read the civil

service and collective bargaining laws harmoniously, when there is a conflict, the civil service law controls because it is not one of the statutes enumerated in G.L. c. 150E, § 7(d) that can be superseded by a CBA. *Id.* Since the civil service law controls, the Commission did not improperly ignore the CBA language.

Next, the Court considered the parties' competing claims that the Commission's decision was not supported by substantial evidence. "Substantial evidence is defined as 'such evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id.*, *quoting Boston Gas Co. v. Assessors of Boston*, 458 Mass. 715, 721 (2011). Here, the Commission considered all of the facts of each of the ten officers' cases and considered whether the BPD met its burden in each case. In reaching its conclusions, the Commission focused on the level of cocaine present in the positive tests, the independent hair test results (where available), and the credibility of the witnesses. *Id.* With respect to the four dismissed officers, each of their tests returned results well above the cut off. *Id.* at 468-69. Two of the officers did not have independent hair tests done and one "prevaricated," ultimately admitting that his independent test was also positive. *Id.* Further, the Commission found each of the four dismissed officers to lack credibility. In contrast, the six officers who were reinstated all had positive tests that were barely above the cut off limit and each presented independent tests with negative results. All six of the reinstated officers also presented credible explanations for their original positive tests. *Id.* at 470. Accordingly, the Court agreed that ample evidence supported the Commission's decision.

Finally, the Court addressed the BPD's appeal of the Superior Court's modification of the back pay award. Here, the Commission ordered back pay dating back to the start of the hearing based on some unique circumstances, including delay, lack of improper motive, and failure of the officers to mitigate their damages. The civil service law, however, provides that if the

Commission reverses the decision of the employer, then "'the person concerned shall be returned to his position without loss of compensation or other rights.'" *Id.*, *quoting* G.L. c. 31, § 43. That language is unequivocal and contains no exceptions. Thus, once the Commission reversed the dismissal decisions as to the six officers, it was required to order back pay and benefits retroactive to each officers' termination date. Accordingly, the Appeals Court affirmed the decision of the Superior Court to modify the Commission's back pay award.

## C. ***SCHOOL COMMITTEE OF BOSTON V. BOSTON TEACHERS UNION,*** **91 MASS.APP.CT. 1118 (APRIL 24, 2017)**

### Introduction

The Appeals Court affirmed the Superior Court's decision upholding the portion of an arbitrator's award prospectively applying the Boston Teachers Union ("Union") paraprofessionals' contract terms to eleven vendor company tutors hired by the School Committee of Boston ("School Committee"), and vacating the retroactive portion of the arbitrator's award as a violation of public policy. The Appeals Court affirmed the Superior Court's finding that the School Committee had violated the contract because the tutors had been performing the duties of Union member paraprofessionals, without the Union being recognized as their representative. The governing collective bargaining agreement entered into by the Union and the School Committee covers paraprofessional employees, who are defined in the contract as "non-certified individual[s] employed by [the School Committee]" "to assist teachers and other school personnel." The contract states in its "Recognition" clause that the Union "[i]s the exclusive bargaining representative for all [paraprofessionals] employed by" the School Committee, including employees "who now or hereafter perform the duties of [paraprofessionals]."

**Factual Background**

Subsequent to the enactment in 2010 of "An Act Relative to the Achievement Gap," St. 2010, c. 12, two Boston public schools were designated as "Level 4" "turnaround" schools, meaning that the schools were underperforming to the extent that they were at risk for being taken over by the state. See G.L. c. 69, § 1J; 603 CMR 2.02. During the 2012-2013 school year, the state notified the School Committee that the two schools would likely drop to a "Level 5" designation and be placed in receivership, unless the Committee chose a service provider from an approved vendor list to assist.

In response, the School Committee hired eleven (11) math tutors from nonprofit organization, the Blueprint Schools Network, Inc. The tutor positions were funded by one-year, service-based government fellowship programs, such as AmeriCorps. While the School Committee did not fund the tutor positions, the tutors were paid via the Committee's payroll system, because Blueprint lacked a payroll system.[14] The School Committee did provide the Blueprint tutors with health care coverage, and they were included in the public retirement system in the same manner as bargaining unit paraprofessionals. The tutors did not receive any other benefits provided to the paraprofessionals under their contract.

At the conclusion of the 2012-2013 school year, the Union grieved the School Committee's employment of the tutors as a violation of its collective bargaining agreement. The arbitrator found that the tutors were performing paraprofessionals' duties and that the Committee's hiring of the tutors without recognition of the Union as their bargaining

[14] Other third-party vendors are paid directly through their employers.

representative violated the "Recognition Clause" of the agreement. The arbitrator granted the Union's request for a prospective order that the terms of the paraprofessionals' contract be applied to the tutors, and that the tutors be made whole for any sustained damages directly resulting from the Committee's violation of the contract.

The School Committee brought suit to vacate the arbitrator's award. The Superior Court affirmed the arbitrator's findings that the tutors had been performing the duties of paraprofessionals without recognition and that the terms of the paraprofessionals' contract must be prospectively applied to the tutors. However, the Superior Court determined that the arbitrator had exceeded his authority in awarding a retroactive remedy, ruling that a retroactive back pay award conflicted with the "well-defined and dominant public policy" requiring the two "turnaround" schools to get assistance from a third-party education provider – Blueprint – in order to avoid being taken over by the state. The Appeals Court affirmed the entirety of the Superior Court's decision upon the Union's appeal. The School Committee did not cross-appeal.

**Discussion**

On appeal, neither party argued that the arbitrator erred in finding that the School Committee breached the collective bargaining agreement, which arbitrators have broad discretion to interpret. *See Leahy v. Local 1526, Am. Fedn. of State, County & Mun. Employees*, 399 Mass. 341, 353 (1987).

The Appeals Court held that no error existed relating to the prospective remedy, as arbitrators "have broad discretion 'in providing complete relief to an aggrieved party,'" citing *Leahy*, and that Union member paraprofessionals were aggrieved by the School Committee's hiring of tutors without recognition or application of the paraprofessionals' contract terms. The Appeals Court found that the Committee's manner of employment of the tutors violated federal

law in addition to the paraprofessionals' contract. Under 45 C.F.R. § 2540.100(d), (e)(2012), "Americorps grants may not be used to 'impair existing contracts for services or collective bargaining agreements' or 'to duplicate an activity that is already available in the locality of a program.'" In addition, the Court articulated that the arbitrator's prospective award "promotes public policy and allows [the Union] to fulfill its statutory mandate to act 'primarily for the good of all employees,'" not just members.

The Appeals Court also affirmed the Superior Court's ruling that the arbitrator's award of the retroactive remedy must be vacated because it exceeded the arbitrator's authority in that it violated public policy, citing G.L. c. 150C, § 11(a)(3), inserted by St. 1959, c. 546, § 1; *Massachusetts Bay Transp. Authy. v. Boston Carmen's Union, Local 589*, 454 Mass. 19, 25 (2009); *School Committee v. Hanover v. Curry*, 369 Mass. 683, 685. The Appeals Court agreed with the Superior Court's finding that "the retroactive award offends a 'well defined and dominant' public policy established by the Massachusetts Constitution, statutes, regulations, and case law," it being a "paramount goal of the [C]ommonwealth to provide a public education system of sufficient quality to extend to all children…the opportunity to reach their full potential." *See* G.L. c. 69, § 1, as amended through St. 2002, c. 218, § 1A.

The Court emphasized that DESE has set forth detailed requirements governing turnaround schools in pursuit of this public education goal,[15] and that the retroactive award is in conflict with these statutory and regulatory requirements.[16] The School Committee is required to assist its schools in educating students, and "its ability to do so [would be] directly impaired by an award that draws money from [the Committee's] budget to back-pay tutors for whom no

[15] *See* G.L. c. 69, § 1J(c), as appearing in St. 2010, c. 12, § 3; c. 69, § 1J(d); 603 CMR 2.03(6)(b)(2012); § 2.05(5)(a)5 (2012).

[16] *See* G.L. c. 69, § 1J(a); 603 CMR 2.03(1).

money was allotted." The Appeals Court agreed, and the Union even conceded, that "[a]n arbitrator has no authority to award damages for breach of a provision in a collective bargaining agreement where no appropriated funds are available to implement that provision." The funds expended to pay the tutors at issue in this case were sourced exclusively from federal grants.

**Conclusion**

Generally, an arbitrator has the authority to interpret a collective bargaining agreement (and in the process misapply the law), to make employees whole if aggrieved by an employer's violation of the agreement, and to prospectively apply the terms/benefits provided for under a governing agreement to particular employees, regardless of membership status. An arbitrator does not have the authority, however, to award a retroactive benefit, such as back pay, if such an award would be in violation of a well-defined public policy. Such policy may be explicit or implicit, and may be derived from statute or case law, but it must stem from referenced laws and legal precedents, rather than from "general considerations of supposed public interests." *See Massachusetts Bay Transp. Authy. v. Boston Carmen's Union, Local 589*, 454 Mass. at 26.

## D. *PISANO V. AMBROSINO*, CIVIL ACTION NO. 13-11409-NMG, 2016 WL 3093372 (D. MASS. JUNE 1, 2016)

**Introduction**

This case considered a plaintiff crossing guard's claims against the city of Revere and its mayor, police captain and city solicitor alleging retaliatory termination motivated by his union activities.

**Factual Background**

In June of 2010, the mayor of Revere did not reappoint the plaintiff, a Revere resident who had worked as a crossing guard for the Revere Public Schools from 1994-2010, for the

2010-2011 school year. The city cited the plaintiff's long disciplinary record[17] as the mayor's motivation for nonrenewal, while the plaintiff alleged that he was not reappointed solely because of his union-related activities, most notably his efforts leading to crossing guard unionization in April of 2010. The plaintiff brought multiple causes of action against the city and its employees, alleging that he had suffered a retaliatory firing without the opportunity for a hearing or the opportunity to call witnesses in his defense.

The five counts set forth in the plaintiff's complaint include claims brought pursuant to: (1) 42 U.S.C. § 1983 for violations of his First, Fifth and Fourteenth Amendment rights via the defendants' "malicious and corrupt failure" to reappoint him; (2) 42 U.S.C. § 1985 for conspiracy to initiate false criminal complaints and deprivation of substantive and procedural due process rights; (3) state law for wrongful termination; (4) state law for intentional infliction of emotional distress; and (5) state law for negligent infliction of emotional distress.

On June 1, 2016, the Court allowed the defendants' motion for summary judgment on all claims except for the plaintiff's wrongful termination claim against the city and its mayor. The Court found that on the surviving count a genuine issue of material fact exists to be decided by a jury: whether the city was motivated by the plaintiff's history of discipline issues or by his union activities in deciding not to reappoint him to his long-held crossing guard position for the 2010-2011 school year.

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[17] According to Defendants, the plaintiff's disciplinary record includes documentation of the following between 2008-2010: a one-day suspension for insubordination and disrespectful behavior toward his supervisor; a formal complaint of chastising and assault made by a senior citizen volunteer; a subsequent investigation and disciplinary hearing related to that complaint; failure to cooperate and disrespectful behavior toward a police sergeant relative to the chastising/assault investigation and related hearing; two 10-day suspensions stemming from that incident, for disciplinary charges related to assaulting a senior citizen, failing to report to the police station as ordered, refusing service of the hearing notice, and disrespectful behavior toward a police sergeant; directing traffic through red lights; several instances of confronting drivers without authority during the 2009-2010 school year; and unlawful, against-orders videotaping of a union membership meeting held at the police station.

**Discussion**

**Wrongful Termination**

The Court allowed the defendants' motion for summary judgment on the plaintiff's wrongful termination claim against the police captain and the city solicitor because neither were the plaintiff's employer. The defendants' motion was denied, however, as to the city and its mayor, allowing the plaintiff's wrongful termination claim to proceed against two of the four defendants. Because the plaintiff's wrongful termination claim solely alleges wrongful termination due to his union-related activities, the long-established *McDonnell-Douglas* burden-shifting framework governed the Court's analysis of the plaintiff's claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Under the *McDonnell-Douglas* framework, the plaintiff employee bears the initial burden of making a *prima facie* showing that he was terminated based upon discriminatory or retaliatory motive(s). If the plaintiff meets this initial burden, the burden then shifts to the defendant employer to set forth a legitimate, non-discriminatory/non-retaliatory reason for the termination. If the employer can do so, the burden shifts back to the employee, who must then prove that the employer-proffered justification was merely a "pretext." Here, the Court held that a genuine issue of material fact exists in this analysis, *i.e.*, whether the city's disciplinary justification for the plaintiff's termination is legitimate or pretextual. The Court left that determination up to the trier of fact – the jury.

**42 U.S.C. § 1983**

Section 1983 a cause of action for municipal liability for a constitutional violation by municipal officers, but only where a plaintiff can establish that (1) a harm has been caused by a constitutional violation, (2) a municipal policy or custom led to the constitutional violation and caused the injury, and (3) the municipality was "deliberately indifferent' to the constitutional

right. *See Young v. City of Providence*, 404 F.3d 4, 25-26 (1st Cir. 2005). In the instant case, the Court agreed with the Defendants' assertion that the plaintiff had not identified the city's offensive customs or policies, or how such customs or policies had caused him injury.

**42 U.S.C. § 1985**

Section 1985 provides relief to a plaintiff who can establish (1) a conspiracy, (2) a conspiratorial purpose to deprive him of equal protection of the laws (with deprivation of equal protection requiring "some racial, or perhaps otherwise class-based invidiously discriminatory animus"), (3) an overt act in furtherance of the conspiracy, and (4) an injury to his person or property, or a deprivation of a constitutionally provided right. *See Perez-Sanchez v. Pub. Bldg. Auth.*, 531 F.3d 104, 107 (1st Cir. 2008). Because the only discrimination claim asserted by Pisano is based solely upon union-related activity, with no claim of racial or other class-based discriminatory animus, the Court dismissed the claim under § 1985 based on Supreme Court precedent establishing that this statute does not protect against discrimination on the basis of union membership. *See Perez-Sanchez,* at 108, *citing United Bros. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 838 (1983) (finding that § 1985(3) does "not reach conspiracies motivated by economic or commercial animus").

**Intentional Infliction of Emotional Distress**

To set forth a viable claim for intentional infliction of emotional distress , a plaintiff must establish that (1) the defendant intended to cause, or should have known that his conduct would cause, emotional distress, (2) the conduct was "extreme and outrageous," (3) the conduct caused the plaintiff distress, and (4) the plaintiff suffered severe distress. *See Sena v. Commonwealth*, 417 Mass. 250, 263-64 (1994). The Court found that the plaintiff failed to "set forth any specific facts in his pleadings that would create a genuine, triable issue of fact with respect to the severity of his distress."

**Negligent Infliction of Emotional Distress**

A claim for negligent infliction of emotional distress requires a plaintiff to establish (1) negligence, (2) emotional distress, (3) causation, (4) physical harm manifested by objective symptoms, and (5) that a reasonable person would have suffered emotional distress under the same circumstances. *See Opalenik v. LaBrie*, 945 F. Supp. 2d 168, 196 (D. Mass. 2013) (internal citations omitted). The Court agreed with the defendants' assertions that the plaintiff failed to present any evidence of physical harm.

**Conclusion**

While the outcome of this case is still pending and the city may ultimately prevail, employers should be wary of electing not to reappoint an employee who has engaged in union activity, particularly recent activity. Knee-jerk or reflexive decisions will linger in the mitigation mill even if an employee's personnel file includes documentation of insubordination and disciplinary charges for infractions as serious as assault. In these cases, with apologies to Benedict Kiely, there is always a deeper, darker and hotter hell about to commence.

## E. *FOX V. TOWN OF FRAMINGHAM,* CIV. A. NO. 14-CV-10337-LTS, 2016 WL 4771057 (D. MASS. SEPT. 13, 2016)

**Introduction**

In this case the plaintiff, a former Framingham High School social worker for over ten years at the time he resigned, alleged retaliatory constructive discharge against the Town of Framingham, the Framingham School Committee and three school officials, bringing claims under the Massachusetts Whistleblower Statute, 42 U.S.C. § 1983, Title IX and the Massachusetts Civil Rights Act. The plaintiff alleged that he was essentially forced to resign due to the defendants' attempts to silence and intimidate him when he raised concerns about a student's alleged sexual assaults on other students. The Defendants moved for summary

judgment on all counts. The United States District Court for the District of Massachusetts' Memorandum and Order allowed the defendants' motion for summary judgment on all claims except the following: (1) violation of the Massachusetts Whistleblower Act as to the Town of Framingham and the Framingham School Committee, and (2), violation of Title IX as to the Framingham School Committee only.

**Factual Background**

The plaintiff was employed as a school social worker at Framingham High School from August of 2002 through March of 2013. In early May of 2012, a female student confided in the plaintiff about what she described as an unwanted sexual encounter with a male student that had occurred in school. In response, the plaintiff made reports to the school resource officer and to the Department of Children and Families. The following day, the female student's mother called the plaintiff, providing additional details. The plaintiff informed the assistant principal of these details, and had a meeting with the principal and several other staff members.

The school's response was to try to keep the female student and the alleged male assailant student separated, by removing the male student from the study hall they shared and instructing him not to interact with or contact her, directly or indirectly. The plaintiff has expressed his feelings that the school's response was insufficient.

In early June of 2012, another female student informed the plaintiff that she too had experienced an unwanted sexual encounter with the same male student. As a result, the male student was suspended for five (5) days.

At the start of the 2012-2013 school year, the plaintiff pursued the school taking additional action against the male student, questioning why no charges had been filed against him. The plaintiff met with the principal and the assistant principal, advocating for the school to

involve the District Attorney's office. According to the plaintiff, with some statements being contested by the principal, at that point the principal reacted in what the plaintiff implied was a threatening manner. The principal purportedly asked how "public" the plaintiff wished to make the issue, leaning in physically and asking how well the plaintiff knew the District Attorney. According to the plaintiff, the principal suggested that he knew the District Attorney personally and said that he "would look into" a meeting with him. The plaintiff reported that, after he continued to complain about the administration's insufficient reaction to the assault complaints and the message that sent, the principal stated, "if you don't like my leadership style you don't have to work here."

On December 3, 2012, the special education department head emailed the principal, informing him that the plaintiff had not been meeting with a certain student, as was required by the student's Individualized Education Program ("IEP"). The very next day, the plaintiff emailed the principal, again stating his concerns with the school's response to the two sexual assault complaints as well as the broader issue of sexual assault. The plaintiff has claimed that the principal began to review his work records "shortly thereafter," and on December 7, 2012, formally reprimanded him for failing to provide counseling to a particular student. The plaintiff's defense was that he had never been notified of the student's counseling requirement. After a January 29, 2013 level III grievance hearing, a decision of the school superintendent, one of the defendants in this case, removed the reprimand from the plaintiff's file on February 12, 2013.

Following the superintendent's removal of the reprimand, the principal purportedly told the plaintiff to take a leave of absence, saying that he could "make" him take an administrative leave, and reportedly asked the plaintiff six different times if he intended to resign. The plaintiff declined to take a leave, and no evidence indicates that the principal pursued the issue further.

According to the defendants, the principal asked those questions only because the plaintiff had been suggesting to coworkers that he may resign, and had been seen cleaning belongings out of his office.

In early January of 2013, the "Framingham Whistleblower" page was launched on Facebook, providing information about the sexual assaults at Framingham High School. The page included confidential information, such as the names of the alleged victims. The principal then conducted an investigation, questioning the plaintiff as well as students, in an effort to determine how confidential information had been released. According to the plaintiff, the principal conducted an unwarranted interview of him with the goals of intimidating him and uncovering information "that could be used to terminate" him.

On March 27, 2013, the principal and other school officials arranged for an organization to put on an assembly about sexual assault at Framingham High School. The plaintiff was not specifically invited to participate, however the principal's flier for the event invited every faculty member and student to attend. The same day, the plaintiff submitted his resignation letter, effective immediately, which was published the following day in the Framingham Patch.

The plaintiff stated in the letter that he was resigning due to his "moral and ethical standards," and due to the principal's "indifference toward the emotional development" of students. The letter also mentioned the principal's "disregard for the expertise of social workers," the "binge drinking" and "unwanted sexual incidences" putting people at risk, and "leadership" turning a "blind eye toward the fraying social civility within the building." It went on to state that the principal had tried to discipline the plaintiff in a retaliatory manner, in an attempt to "quiet" him "relative to [the principal's] mishandling of sexual assault." The plaintiff stated that he had not created the Framingham Whistleblower Facebook page, but that "civic minded people

concerned about an institutional cover up did create the page" and that he admired "their activism."

**Discussion**

**Massachusetts Whistleblower Act, G.L. c. 149, § 185**

The Court articulated that, in order to prevail on a claim brought under the Massachusetts Whistleblower Act, the plaintiff must be able to establish that he "engaged in a protected activity" and that his participation in the protected activity "played a substantial or motivating part in the retaliatory action," *citing Pierce v. Cotuit Fire Dist.*, 741 F.3d 295, 303 (1st Cir. 2014) (internal citation omitted). The Massachusetts Whistleblower Act defines "retaliatory action" as "the discharge, suspension or demotion of an employee, or other adverse action taken against an employee in the terms or conditions of employment." See G.L. c. 149, § 185(a)(5). The plaintiff claimed that he was "disciplined, marginalized and threatened with job loss" to the point that he was "compelled to end his career and livelihood" and was "constructively discharged," in violation of the Massachusetts Whistleblower Act.

The Court found that the plaintiff failed to meet the objective (not subjective) standard to establish constructive discharge, which "typically 'refers to harassment so severe and oppressive that staying on in the job while seeking redress – the rule save in exceptional cases – is intolerable,'" where a "reasonable person would have felt compelled to resign," *citing Gerald v. Univ. of P.R.*, 707 F.3d 7, 25 (1st Cir. 2013) (internal citations omitted). The Court also found, however, that an "other adverse employment action taken against an employee in the terms and conditions of employment" may have occurred, given that the plaintiff had a long and "unblemished" record of performance until engaging in protected activity, which might suggest pretext. The Court therefore granted the defendants' motion for summary judgment relative to

constructive discharge, but otherwise denied it relative to a potential alternative whistleblower claim.

**Retaliation Under 42 U.S.C. § 1983**

The Court outlined that the plaintiff must prove (1) that he spoke (a) "as a citizen" (b) "on a matter of public concern," (2) that his interest in commenting "outweighed the defendant's interest in the efficient performance of its public services, and (3) that the "protected expression was a substantial or motivating factor in the adverse employment decision," in order to have a viable retaliation claim under § 1983. *See Decotiis v. Whittemore*, 635 F.3d 22, (1st Cir. 2011) (internal citations omitted). In its analysis, the Court assumed that sexual assault at the high school was a matter of public concern, but found after considering several factors that the plaintiff spoke as an employee / social worker of Framingham High School, not as a private citizen. The Court therefore allowed the defendants' motion for summary judgment relative to the plaintiff's § 1983 claims.

**Title IX of the Education Amendments of 1972**

The Court emphasized that Title IX not only provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . .," *See* 20 U.S.C. § 1681(a), but it also prohibits retaliation for complaints about Title IX violations. *See* 42 U.S.C. §§ 2000e-3 ("It shall be an unlawful employment practice for an employer to discriminate against any of his employees … because he has opposed any practice made an unlawful employment practice by this subchapter … or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

For the plaintiff to prevail on this claim, the Court outlined that he must be able to show that he (1) engaged in an activity protected by Title IX, (2) that the defendants knew of the protected activity, (3) that the defendants subsequently took action disadvantageous to the plaintiff, and (4) that a retaliatory motive played a substantial part in prompting the defendants disadvantageous action. *See Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002).

The Court found that, in this case, the plaintiff's Title IX claim hinges on whether the defendants took "any sufficient retaliatory action," as perceived by a "reasonable employee." Examples such as termination, demotion, decreased wages/salary, or a reduction in title, benefits or responsibilities, rather than "petty slights or minor annoyances," were cited. The Court denied the defendants' motion for summary judgment on this claim, finding that the plaintiff being threatened with administrative leave, being repeatedly asked if he planned to resign, and being faced with discipline that the superintendent removed, might have "dissuaded a reasonable worker" from making or supporting a sexual harassment or Title IX charge.

**Massachusetts Civil Rights Act**

The Court stated that the plaintiff must demonstrate that (1) "his exercise or enjoyment of rights" secured by the United States or Massachusetts Constitution or laws have (2) "been interfered with, or attempted to be interfered with," and (3) "that the interference or attempted interference was by 'threats, intimidation or coercion,'" in order to bring a viable claim against the principal for a violation of the Massachusetts Civil Rights Act. The plaintiff claims that he was threatened with consequences that would negatively impact his career for exercising his free speech rights.

The Court held that the plaintiff's First Amendment claim fails as a matter of law because the Massachusetts Civil Rights Act requires "an *actual* deprivation of constitutional rights" for a claim to be viable under the Act (emphasis added). The Court held that the plaintiff's claim that

he had a constitutional right to continued employment, absent any evidence of any contractual right to continued employment, is also not sufficient to sustain a viable claim under the Massachusetts Civil Rights Act.

**Conclusion**

Plaintiff's claims that were not dismissed at summary judgment, violation of the Massachusetts Whistleblower Act as to the Town of Framingham and the Framingham School Committee, and violation of Title IX as to the Framingham School Committee, will turn on whether a trier of fact perceives school officials' actions towards the plaintiff as truly retaliatory in nature. The plaintiff's long and positive employment history prior to complaining about school officials' handling of sexual assault is in the plaintiff's favor.

## F. *YOUNGBLOOD V. CITY OF BOSTON PUBLIC SCHOOLS,* NO. SUCV201500309C, 2016 WL 7189833 (MASS. SUPER. OCT. 31, 2016)

**Introduction**

*Youngblood v. City of Boston Public Schools* involves a teacher's claims that the Boston Public Schools ("BPS" or "District") and its administrators retaliated against her for raising claims of sexual harassment by a student. SUCV201500309C, 2016 WL 7189833 (Mass. Super. Oct. 31, 2016). The defendants moved to dismiss the case for failure to state a claim upon which relief can be granted. The Court determined that the plaintiff had set forth a *prima facie* case of retaliation and denied the motion to dismiss.

**Factual and Procedural Background**

Because this case involved a motion to dismiss, pursuant to the Massachusetts Rules of Civil Procedure, the Court accepted the facts alleged in the complaint as true, and drew reasonable inferences in favor of the plaintiff. Thus, the facts recited in the decision and below

reflect those set forth in the complaint and do not incorporate the District's responses. As usual in cases of this nature, there was a lengthy actual record.

Youngblood, taught ELA in the BPS beginning at least in the 2007-2008 school year. In the 2010-2011 school year, Youngblood was assigned to a middle school in East Boston, where defendant, Marco Curnen, served as principal. In December of that school year, Youngblood reported that at student, "John Doe," had given her a note that she had a "fat butt" and was sexually harassing her. In connection with that matter, Youngblood told Curnen that other male student asked her inappropriate questions and she suggested to Curnen that the school offer "gender based learning" to all students to avoid sexual harassment. The complaint alleged that Curnen responded that the problem probably arose because of how Youngblood interacted with her students. *Id.* at *1.

In April 29, 2011, Curnen issued Youngblood a written warning, which she and her union grieved. The complaint did not describe the facts of the warning, but merely characterized it as part of a "retaliatory campaign" against her. *Id.*

In June of 2011, Youngblood reported to Curnen that another male student was sexually harassing her. According to the complaint, Curnen asked Youngblood why she wanted that student to face consequences, and told her to handle it. Youngblood and the student participated in mediation. During the mediation, the student stated that Youngblood was not disrespectful to him and admitted he gave Youngblood a "hard time" because she would not allow him to say the "n-word" in school. *Id.*

Later that same month, Curnen evaluated Youngblood. The evaluation stated that Youngblood did not meet the school's standards regarding "'safe, respectful, [and] culturally sensitive and responsive learning communities.'" *Id.* at *2. The evaluation also raised concerns

about Youngblood's relationships with students and referenced that Youngblood "'continue[d] to define one inappropriate and mistaken decision by one student as 'sexual harassment from a student.'" *Id.* The Court presumed that language referenced the incident with John Doe from December 2010. The complaint alleges that in previous evaluations, Youngblood had met or exceeded all of the District's expectations and her students ranked in the 84th percentile on the ELA MCAS during the 2010-2011 school year. *Id.*

In September of 2011, Youngblood asked Curnen to sign the "Principal's Agreement" certification in support of her application to DESE's Performance Review Program for Initial Licensure ("PRPIL"). According to the complaint, DESE required Youngblood to participate in PRPIL. The complaint did not identify the sanction or penalty if Youngblood did not participate. Youngblood attempted to set up a meeting with Curnen to discuss that application through December but Curnen did not confirm a date. *Id.* He did, however, repeatedly ask Youngblood for more data on her students.

On Thursday, December 1, 2011, Curnen asked for specific data from Youngblood about her students and communications with parents by the next day. Youngblood responded that she would provide the information as soon as possible but was out sick the next day. The following Monday, Curnen asked for the data. Youngblood responded she needed one more day. When Youngblood presented the information at the end of the day, Curnen handed her a pre-printed evaluation for the fall term in exchange. That evaluation stated that Youngblood had not met expectations regarding "'equity and high expectations'" or "'instructional planning and implementation.'" *Id.* According to the complaint, BPS offered some peer assistance for teachers with poor reviews but Curnen never offered those services to Youngblood. He also declined an invitation to observe her in class. *Id.*

In January 2012, Curnen and Youngblood had a post-observation meeting. Again, Youngblood raised concerns with John Doe harassing her and stated that the conduct offended her as a woman. Youngblood alleged in her complaint that Curnen agreed John Doe's behavior was inappropriate but asserted it did not constitute sexual harassment. Youngblood also alleged that Curnen told her that "'her primary identity in the classroom was as a teacher, and her identity of "womanhood" was secondary.'" *Id.* at *3.

Later in January, Youngblood informed Curnen that John Doe told her she had a "'Brazilian bubble butt'" several times that day and she felt uncomfortable. She asked that BPS organize a meeting with John Doe and several men to instruct him on appropriate ways to interact with women. Curnen did not arrange that meeting but referred Youngblood to the BPS Equity Office.

On January 30, 2012, Youngblood told Curnen that he needed to sign the Principal's Agreement so she could submit her PRPIL application. Curnen signed it but noted that Youngblood's performance did not meet BPS standards. Youngblood submitted her application to DESE. *Id.*

Some time later, Curnen informed Youngblood that he had concerns about her performance. Youngblood responded that she was working with a peer and that she had been trying to meet with Curnen but that he had ben nonresponsive. Shortly thereafter, Youngblood spoke with the PRPIL director, who asked Youngblood to have Curnen call her. According to the complaint, Curnen ignored that request but on February 6, 2012, withdrew his signature from her PRPIL application, accusing Youngblood of not making the application a priority. *Id.*

On February 8, 2012, Youngblood attended a disciplinary meeting on allegations that she used in appropriate language in the classroom. The complaint also alleged that Curnen initiated

disciplinary procedures a second time at an unspecified date. The complaint did not give details on those matters. *Id.*

On February 16, 2012, Youngblood filed a complaint against Curnen with the BPS Equity Office. *Id.* at *4. The complaint alleged sex discrimination, student sexual harassment, and retaliation. On February 29, 2012, the Equity Office notified Curnen of the complaint. He issued Youngblood a written letter of reprimand the same day. *Id.* Although it was unclear if Curnen knew of the complaint before issuing the reprimand, the Court assumed he had because at the motion to dismiss stage, all reasonable inferences must be taken in favor of the plaintiff. *Id.* at *4 & n.8.

In March of 2012, the District's administration issued Youngblood a notice of a disciplinary hearing on May 9, 2012. *Id.* at *4. The notice stated that on January 27, 2012, the same day Youngblood complained about John Doe harassing her, Youngblood had addressed students in an inappropriate manner and made improper, disparaging comments about another BPS school. The complaint references another disciplinary hearing scheduled for March 22, 2012 but the basis for that meeting was unclear. On March 16, 2012, Curnen gave Youngblood a negative, but incomplete, interim evaluation. *Id.*

Youngblood filed a complaint with the Massachusetts Commission Against Discrimination ("MCAD") on April 18, 2012. She removed her case to Superior Court on February 2, 2015. Her original Superior Court complaint alleged claims of sex discrimination, retaliation, and hostile work environment against Curnen and the District. After some procedural back-and-forth, Youngblood withdrew here sex discrimination and hostile work environment claims and the Court dismissed the original complaint without prejudice. In April of 2016,

plaintiff filed an Amended Complaint, which complaint raised only a retaliation claim. The defendants moved to dismiss. *Id.* That motion was the subject of the present decision.

**Discussion**

The defendants filed a motion to dismiss. At this stage, a court accepts as true the allegations in the complaint and draws reasonable inferences in the plaintiff's favor. *Id.*

The defendants' first argument in support of their motion to dismiss was that the Amended Complaint was barred by the three-year statute of limitations set forth in G.L. c. 151B, § 9. *Id.* at *5. The Court rejected that argument, however, because the Amended Complaint was filed after some procedural wrangling and the Amended Complaint related back to the original complaint, which was filed on February 2, 2015. Although some of the allegations in the Amended Complaint arose before February 2, 2012, those events are relevant as background evidence in support of the plaintiff's claims. Accordingly, the Court rejected the defendants' statute of limitations argument.

The Court then considered the retaliation claim. To survive a motion to dismiss, Youngblood had to set forth a *prima facie* case of retaliation. Specifically, Youngblood's complaint had to show that she "(1) engaged in protected conduct; (2) suffered an adverse action; and [3] that a causal connection existed between the protected conduct and the adverse action." *Id.* at *6 (internal quotations omitted).

Youngblood met the first prong of showing that she engaged in protected conduct. Protected conduct may include activities such as filing a complaint. Here, the complaint alleged that Youngblood engaged in protected activity when she reported sexual harassment to Curnen and asked him to take action. She also engaged in protected conduct when she filed a complaint against Curnen at the BPS Equity Office. *Id.*

Youngblood also sufficiently alleged that she suffered adverse action, in accordance with the second prong. Although the defendants alleged that she could not satisfy that prong because she was not fired, demoted, denied benefits, transferred, or deprived of wages, the Court found that argument unpersuasive because an adverse action may also include "'effects on working terms, conditions, or privileges that are material.'" *Id., quoting King v. Boston,* 71 Mass. App. Ct. 460, 468 (2008). To meet this standard, there must be "'real harm.'" *Id.; quoting King v. Boston,* 71 Mass. App. Ct. 460, 468 (2008). "'Subjective feelings of disappointment and disillusionment will not suffice.'" *Id.* (internal quotations marks omitted). Here, Youngblood alleged she suffered adverse employment action when Curnen withdrew his signature from her PRPIL application, which the complaint characterized as a job requirement. She also alleged adverse employment action in the form of discipline and negative evaluations. Those allegations satisfied the second prong of the analysis.

Finally, Youngblood's complaint established a causal connection between her protected conduct and the adverse employment action. Although Curnen claimed to withdraw his support for Youngblood's PRPIL application because of concerns with her performance, Youngblood alleged in her complaint sufficient facts to suggest that Curnen completed her negative 2011 evaluation before he had proper data to sufficiently assess her. The Court reasoned that since Youngblood first complained about sexual harassment in December 2010, Curnen "'may have judged her through the lens of a stereotype,' allegedly telling Youngblood that her own conduct probably invited the harassment." *Id.* at *7. According to the complaint, Curnen also cited Youngblood's continued reference to "student sexual harassment" as part of the basis for a negative review, declined to refer Youngblood to the peer assistance program available to other teachers, and made it difficult to set up a meeting with him. Curnen also withdrew his support

for Youngblood's PRPIL application a week after Youngblood made complaints about sexual harassment, including one meeting where Curnen declined to label the student misconduct as "sexual harassment." Additionally, Curnen disciplined Youngblood on the same day she filed a complaint against him at the Equity Office. *Id.*

Based on all of that evidence, the Court ruled that "'a jury could, but need not, infer that a pattern of retaliatory conduct [began] soon after' Youngblood first engaged in protected activity, 'and only culminate[d] later in actual adverse action.'" *Id.* at *8, *quoting Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.*, 474 Mass. 382, 407 (2016). Referring to *Verdrager v. Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.,* the Court noted that a superior's criticisms that reflect "'stereotypical thinking' about women 'may lend support to the contention that the adverse employment action was made on an impermissible basis.'" *Id., quoting* 474 Mass. at 399-400. Here, for example, Curnen allegedly suggested to Youngblood that her identity as a woman should be "secondary" to her identity as a teacher. Although that comment could be subject to different interpretations, a jury could find that Curnen resented Youngblood's desire to punish John Doe or implement gender-based learning.

Because Youngblood's complaint set forth a *prima facie* case of retaliation, the defendants' motion to dismiss was denied.

## VI. MISCELLANEOUS JUDICIAL DECISIONS

### A. SEPARATION OF CHURCH AND STATE: *TRINITY LUTHERAN CHURCH OF COLUMBIA V. MISSOURI DEPARTMENT OF NATURAL RESOURCES*, UNITED STATES SUPREME COURT, 2017 WL 2722410 (JUNE 26, 2017)

**Introduction**

In a case where Chief Justice Roberts decided the consequence "is, all likelihood, a few extra scraped knees," the Supreme Court sharply split on a significant First Amendment

decision. Roberts was joined by Justice Kennedy, typically considered a moderate, Just Alito, frequently found in the conservative camp, and Justice Kagan, generally considered a moderate to liberal judge. Justice Thomas, widely viewed as one of the court's most conservative justice since the passing of Antonin Scalia, was joined by the newest Justice, Mr. Gorsuch, concurring opinions. Stephen Breyer, another member of the moderate to liberal wing of the court, filed a separate opinion concurring in the judgment and Justices Sotomayor and Ginsberg joined in a dissent which effectively criticized Roberts for cherry picking precedent.

All this arose out of a dispute about whether a pre-school operated by Trinity Lutheran Church was eligible to receive a state sponsored grant for a new playground surface.

**Factual Background**

In a well-intended program to reduce the surface of used and worn automobile tires, Missouri developed a competitive grant program allowing successful applicants to replace playground surfaces with rubberized surfaces made from recycled tires. Trinity Lutheran operated a pre-school and day care program for members of the church and other local students, some of whom were not members of the church or of any particular religion. According to the opinion of the court the mission of the pre-school daycare center "was to provide a safe, clean and attractive school facility in conjunction with an educational program structured to allow a child to grow spiritually, socially and cognitively. " Slip Op. at 3. According to the dissent, this antiseptic definition of the center's purpose effectively elided from the fully integrated religious aspect of the church's operation in a center.

According to the criteria in Missouri's grant program Trinity Lutheran should have been a successful grant applicant. The state, however, had a specific policy of refusing to extend grants to applicants owned or controlled by the church. This policy stemmed from provisions of

the Missouri constitution which prohibited direct or indirect aid to churches or religious organizations. As part of its application the center outlined benefits as including an upgrade to meet ADA requirements, the provision of a safe and long lasting surface, contributing to the improvement of Missouri's environment by repurposing recycled tires, and pointed out that the center was also a resource after school hours by children in the local community. As a result of the state policy Trinity Lutheran's childcare center "was categorically ineligible to receive the grant." The church filed suit in the federal district court alleging that the state policy violated the free exercise clause of the First Amendment.

In relevant parts the First Amendment states "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." Historically, the First Amendment has been interpreted as preserving an individual's right to practice his or her religion and as a prohibition from a state sponsored or supported establishment of religion. The free exercise clause protects individuals against unequal treatment based on their religious views and where individuals are targeted by law based on their religious status the laws are subject to the strictest scrutiny by the courts. Establishment clause jurisprudence has historically looked to scant as the direct funding of religious exercises and institutions by the state. Here, where the dissent wrote that even Trinity Lutheran that the playground facilities were part of its program to develop children spiritually the grant funding sought by the church "would impermissibly advance religion is [an] escapable [conclusion]" in violation of the establishment clause.

The district court dismissed Trinity Lutheran's complaint finding that the free exercise clause did not require Missouri to award the $20,000.00 grant to Trinity Lutheran. On appeal, the 8th Circuit affirmed noting that such an award could be made consistent with the establishment clause of the United States Constitution but the free exercise clause did not require

Missouri to disregard its own constitutional prohibitions against aid to religious institutions. The circuit court noted that a monetary grant to a religious organization was a "hallmark of an established religion" and determined that Missouri could deny Trinity Lutheran's application based on its status as a religious organization.

**Decision of the Court**

Justice Roberts avoided the Establishment Clause issue noting that the parties had effectively taken it off the table in their pleadings and briefs. He noted that the interaction of the free exercise clause with the establishment clause was not finely engineered. In fact, "there is play in the joints between what the establishment clause permits and what the free exercise clause compels." Because the free exercise clause does not allow an equal treatment based on religious observations, and laws which attempt to differentiate based on religious observations violate the exercise clause, Roberts wrote the Supreme Court "has repeatedly confirmed" that benefits generally available to some cannot be denied to others on account of their religious identity unless such a differentiation is justified "only by a state interest of the highest order." He cited, for example, *Everson v. Board of Education of Ewing*, 330 U.S. 1 (1947) in which the court concluded a New Jersey law reimbursing parents for transportation costs connected to attendance at private and parochial schools did not violate the establishment clause. More recently the court struck down, on free exercise grounds, the city ordinance which prohibited certain forms of animal slaughter practiced by a religious organization, concluding that the ordinance in question was not neutral or generally applicable. The Court wrote, "Nor may a law regulate or outlaw conduct because it is religiously motivated." *Trinity Lutheran*, slip op. at 9, citing Church of *Lukumi Babbalu Aye, Inc. v. Hialeah*, 508 U.S. 520 (1993). Roberts adopted a reasoning from a line of cases which prohibited the conditioning of the availability of benefits

upon a surrender of religious beliefs. Here, Roberts concluded Missouri's policy "expressly discriminates" against Trinity Lutheran, an otherwise eligible recipient solely because of the religious nature of organizations. Shifting the focus a bit, Roberts wrote that the discrimination at issue here "is not the denial of a grant, but rather the refusal to allow the church – solely because it is a church – to compete with secular organizations for a grant." This deprivation of an opportunity on equal footing was the turning point for Roberts.

Finally, Roberts addressed the question whether provisions of the state constitution or the federal constitution would control the disposition of the case. Missouri defended its policy by articulating an interest – achieving a greater separation between church and state than required under federal law – which Roberts and those that joined his opinion rejected. Deprivation of a public benefit in the form of a new playground surface solely due to the religious nature of the applicant "goes too far [and] violates the free exercise clause."

**Dissent**

Justice Sotomayor's dissent was 27 pages, almost twice as long as Justice Roberts' majority opinion. Justice Sotomayor began by pointing out that, even if the establishment clause was not at issue, in these types of cases the court should examine both prongs of the First Amendment, particularly as "the court today… for the first time, [determines] that the Constitution requires that the government provide public funds directly to a church." Roberts' majority focused on a ground level view of the problem, i.e. more or fewer skinned knees, whereas the dissent assessed the case from a higher altitude by framing the question as whether the government can provide funds directly to a church. In some ways, Sotomayor's dissent implied that Roberts had adopted an "ends justifies the means" appraisal. She reviewed 200 years of history across several states noting that while it took some time (Massachusetts was the

last state to prohibit direct aid to religious organizations in 1833) the states were almost universal in their rejection of a system in which religious organizations would be provided with state funds. Concluding that it was erroneous to disregard an establishment clause analysis, Sotomayor also challenged the majority on its free exercise clause assessment. She noted that the First Amendment issues at stake did not even apply to the states until the 1940's, when it was determined that the Bill of Rights was incorporated an applicable to the states through the Fourteenth Amendment.

**Comment**

Massachusetts has a constitutional provision which, broadly speaking, prohibits state funding of religious schools and institutions. The Massachusetts constitution ensures that citizens will have the right to freely exercise their religious beliefs. It also expressly prohibits a grant, appropriation or use of public money "for the purpose of founding, maintaining or aiding any … primary, secondary school… or religious undertaking which is not publicly owned and under the exclusive control [of] the commonwealth … and no such grant, appropriation or use… shall be made or authorized for the purpose of founding, maintaining or aiding any church, religious denomination, or society." There are several decisions construing Article 46 of the Massachusetts constitution to prohibit the provision of direct or indirect public assistance to private and religious schools. *See, e.g., Bloom v. School Committee of Springfield*, 376 Mass. 35 (1978), which contains an excellent history of the anti-aid amendment and other relevant provisions of the Massachusetts constitution. In *Bloom* the Supreme Judicial Court struck down a Massachusetts statute authorizing the loan of text books to private and religious schools. In a series of footnotes, the Supreme Judicial Court observed that the U.S. Supreme Court had in several instances already approved a provision of some public resources to private/religious

schools. *See Board of Education v. Allen*, 392 U.S. 236 (1968). Even when the Springfield case was decided, in 1978, the Supreme Judicial Court commented on the shaky precedent from the U.S. Supreme Court and noted there may be changes of interpretation on the wind.

## B. OPEN MEETING LAW: *AMOS V. TOWN OF WESTFORD*, 34 MASS. L. RPTR. 10 (MASS. SUPER. 2016)

### Introduction

*Amos v. Town of Westford* involves a claim of four registered voters that members of the Westford Board of Selectmen and Planning Board violated the Open Meeting Law, G.L. c. 30A, §§ 18-25, in connection with their holding meetings about litigation and settlement with land owners in executive session. 34 Mass. L. Rptr. 10 (Mass. Super. 2016). The present matter was a ruling on the plaintiffs' motion for a preliminary injunction. The Court denied that motion, vacated a temporary restraining order ("TRO"), and denied the voters' request for minutes of the executive sessions at issue.

The background and procedural history of this matter is complex and largely irrelevant to the Open Meeting Law issue. In short, there was a dispute among Westford and the owner and lessee of land leased by a construction company (collectively, "construction company") that wanted to develop an asphalt manufacturing facility on industrial property in town. There were numerous proceedings with the town zoning board and other municipal bodies and ultimately, the parties proceeded to Land Court. *Id.* at *1-*4. After the Land Court ruled on a number of pre-trial motions, the town was concerned that it may not succeed at trial and agreed to designate one person to participate in mediation with the construction company.

In accordance with that plan, on June 20, 2016, one member of the Board of Selectmen, along with members of the Town Council, the Town's Director of Land Use Management, and counsel for the town attended mediation with the construction company on June 20, 2016.

Following that mediation, between June and the end of September 2016, the Planning Board met in executive session five times and the Board of Selectmen met in executive session four times to discuss the terms raised during mediation. *Id.* at *2. The Boards posted public notices for each of the meetings, which notices listed the time, date, and location of the meeting and also stated that the Boards would be entering into executive session "to '[r]eceive an update on litigation for [the *Newport Materials* litigation], as an open session may have a detrimental effect on the litigating position of the public body.'" *Id.* At each meeting, the Boards also began in open session, repeated the information in the notice, then voted to enter executive session for the reasons outlined in the notice.

At the end of September 2016, the Boards voted to approve the requested special permit, with a number of conditions. Shortly thereafter, abutters filed a motion to intervene and the next day, the town made a public statement relative to the settlement with the construction companies. The parties then sought approval of their settlement in Land Court, which Court approved the agreement, with some conditions. Among other things, the Land Court ordered the town to issue the special permit by November 14, 2016. The town did so. The same day, the plaintiffs sought and obtained a TRO enjoining the issuance of the special permit. The town granted the permit prior to receiving the TRO. *Id.* at *3.

The voters then sought a preliminary injunction, which was the subject of the present matter before the Superior Court. Because preliminary injunctions are an extraordinary remedy, they are only granted when moving parties make a clear showing that (1) they have a likelihood of success on the merits, (2) irreparable harm will result from a denial of the injunction, and (3) that the harm to the voters if the injunction did not issue would outweigh any harm the injunction would cause the non-moving party. *Id.* at *4. Here, because the voters sought to enjoin

government action, the Court also needed to consider whether the injunction would adversely affect the public.

Following that framework, the Court began by assessing the voters' likelihood of success on the merits of their Open Meeting Law claim. To do so, the Court first needed to determine which exception to the Open Meeting Law applied to the closed executive sessions. The voters argued that G.L. c. 30A, § 21(a)(9) applied. That provision allows public bodies to meet in executive session to meet or confer with a mediator. The Court rejected that argument, however, because only one member of the Board met with the mediator. Under the plain meaning of the statute, which requires a quorum to be present for a "meeting," a single Board member who did not have authority to bind the Board at mediation, did not constitute a meeting for purposes of the Open Meeting Law.

Instead, the Court agreed with the Westford defendants that § 21(a)(3) would apply. Under that exception, public bodies may meet in executive session to "'discuss strategy with respect to collective bargaining or litigation if an open meeting may have a detrimental effect on the bargaining or litigating position of the public body and the chair so declares.'" *Id., quoting* G.L. c. 30A, § 21(a)(3). The Court then concluded that the voters did not have a likelihood of success on the merits in proving the defendants violated that provision. As discussed above, the Boards posted notices of their meetings with the time, date, location, and nature of the meetings, as well as the Boards' anticipated executive sessions and the reasons therefor. Although the voters complained that the posting failed to notify voters that they were discussing entering into a mediated settlement, the Court concluded that level of detail is not required by the Open Meeting Law. *Id.* at *5-*6. Thus, even construing the provisions of the Open Meeting Law

broadly in favor of sharing information with the public, the voters did not show that they were likely to prevail on their claims.

Even if they had, however, the Court reasoned that they still would not have been entitled to an injunction because they could not show irreparable harm. Irreparable harm exists when money damages cannot adequately redress the harm. *Id.* at *6. Here, the harm the voters alleged was in the form of litigation costs associated with filing an action to review a zoning decision under G.L. c. 40A, § 17. Such harm could be remedied with monetary compensation. Further, the denial of an injunction would not adversely affect the public interest because citizens can challenge the settlement agreement pursuant to G.L. c. 40A, § 17. *Id.*

Accordingly, the Court denied the voters' motion for a preliminary injunction, vacated the TRO, and denied the voters' request that the Boards release the minutes of the executive session meetings held to discuss the land use matter. *Id.*

**Comment**

Even where governing bodies have adequately cited and posted the purposes of an executive session, open meeting law gadflies or purposeful opponents to certain public business can use litigation to stall public affairs. This result is not what the Legislature necessarily intended in enacting the Open Meeting Law amendments, but it must be accounted for. Imagine, for example, convening an executive session to discuss the collective bargaining implications of staff transfers resulting from a plan to re-district elementary schools. It is hard to predict whether the staff or parents would be the most vocal critics and potential litigants of Open Meeting Law claims.

# VII. STATUTORY AND REGULATORY UPDATES

## A. BOARD OF EDUCATION REVISIONS TO EDUCATOR EVALUATION REGULATIONS

### Introduction

On February 28, 2017, the Massachusetts Board of Education approved certain revisions to the regulations pertaining to educator evaluation, codified at 603 CMR 35.00. The amendments, scheduled to take effect upon publication by the Secretary of State on March 24, 2017, affect the evaluation system for all educators, including administrators, but this memorandum focuses primarily on the effect upon teacher evaluation. Among the most notable changes, the proposed revisions remove references to district-determined measures (DDMs) and individual impact ratings, replacing them with a new "student learning indicator" incorporated into Evaluation Standard II. A redlined copy of these amendments, as well as a Memorandum from the Commissioner dated March 10, 2017, can be found at the DESE website (www.doe.mass.edu). According to that Memorandum, school districts are not required to report student impact ratings for 2016-2017, but they are expected to incorporate the regulatory amendments into their evaluation systems by the beginning of the 2017-2018 school year. Under former and new regulations, the Department of Elementary and Secondary Education (DESE) retains the right to review all collectively bargained evaluation systems and amendments for consistency with the regulations.

The former regulations required the development of DDMs and separate individual impact ratings for teachers in the evaluation process. Efforts to fold those elements into contract evaluation provisions have netted limited success at the bargaining table. In light of these difficulties, beginning in the summer of 2016 the Department of Elementary and Secondary Education ("DESE") began circulating for review and comment potential adjustments to the

regulations. These early conversations resulted in DESE's development of proposed revisions to the regulations, which revisions DESE presented to the Board of Education this past fall. The Board, in turn, posted a notice soliciting public comment for the draft revisions. As noted, the Board of Education adopted the amended regulations at its February 28, 2017 meeting.

The amended regulations eliminate or revise several provisions in the regulations, the three most significant of which are addressed in this advisory. First, and most notable, the concept of utilizing DDMs and an individual impact rating are deleted from the new regulations. In their place, the Board added a new "student learning indicator" to "Standard II: Teaching All Students." See 603 CMR 35.03(c).

Second, the proposed regulations incorporate a measurement of whether an educator has demonstrated the "expected impact" on student learning gains. The determination of whether an educator has or has not met the "expected impact" is based on the evaluator's professional judgment applied to multiple measures of student learning, growth, and achievement, student learning gains and common assessments, and state-wide student growth measures. The "expected impact" also may include consideration of the teacher's student population and specific learning context. *See* 603 CMR 35.02 and 35.06(3)(e)(2).

Third, the amended regulations require a conversation between the evaluator and the educator when there is a discrepancy between the evaluator's ranking on the "Teaching All Students" standards and the evidence of the educator's impact on student learning, growth, and achievement.

Section II of this memo discusses the Board of Education's broad policy-making authority relative to adopting educator evaluation standards, including measures for student

learning, growth, and achievement. Section III discusses the collective bargaining implications of implementing further changes to the educator evaluation system.

**Board of Education Authority – Adoption of Standards and Indicators**

The Board of Education is charged with helping to create and monitor educational opportunities for students. The duties of the Board and DESE are statutorily defined to ensure that (1) every classroom provides conditions for students to fully engage in meaningful learning; (2) a consistent financial commitment and resources are made available to provide high quality public education; (3) a deliberate process for establishing and achieving educational performance goals of every child exists; and (4) there is "an effective mechanism for monitoring progress towards those goals and for holding educators accountable for their achievement." G.L. c. 69, §1. It is beyond dispute that the law charges the Board with creating an educator accountability system for student achievement. Indeed, it is hard to imagine a meaningful educator evaluation process that does not consider student outcomes.

In furtherance of these broad goals, the Commissioner must assess the effectiveness and improvement of schools in every school district. G.L. c. 69, §1A. The statutory focus on improving learning opportunities for every student, increasing funding, and measuring student learning growth and achievement has resulted in additional statutory language that requires the Board of Education to publish information on student achievement and performance goals, and to establish qualifications for teachers. *See* G.L. c. 69, §1B. More narrowly, the Board must "establish guidelines for establishing a system of personnel evaluation, including teacher performance standards." *Id.* at paragraph 13. Toggling between assessing teacher performance and district performance, the legislature has determined that a school's improvement or failure to improve is "defined by student acquisition of the skills, competencies and knowledge" necessary

to satisfy the academic standards and educational goals adopted by the Board pursuant to G.L. c. 69, §1D. The determination of whether students have acquired skills, competency, and knowledge is left to the Commissioner, who is authorized to collect information from districts "for the purposes of evaluating individual public schools, school districts […. and] assessing the effectiveness of district evaluation systems and assuring effective teaching and administrative leadership." See G.L. c. 69, §1I, paragraphs 4 & 5.[18]

Given the statutory framework, the adoption of evaluation regulations is a permissible exercise of the Board's authority. The Board's recent modifications to the original regulations are also in furtherance of its purposes and authority. The Board can determine whether DDMs and individual impact ratings are appropriate devices to assess and measure teacher effectiveness or, as it has done, determine whether to replace those portions of the regulations with student learning indicators and an assessment of whether a teacher meets expectations.

The Board has chosen to modify the standards and indicators contained in 603 CMR 35.03 by adding a new subsection (f). The new regulations focus on Standard II: "Teaching All Students." The new subsection includes a new student learning indicator which assesses whether an educator "[c]onsistently demonstrates expected impact on student learning based on multiple measures of student learning, growth, and achievement." For teachers who are responsible for direct instruction, these measures must include student progress on common assessments and, where available, state-wide student growth measures. *Id.* Assessing an educator's "expected impact' depends on whether:

> […] the educator meets or exceeds anticipated student learning gains on multiple measures of student learning, growth, and

[18] The legislature has acknowledged that, while district results are matters of public interest and are to be reported in the aggregate, any information related to a specific teacher is considered to be "personnel information," exempt from disclosure under the public records statute pursuant to G.L. c. 4, §7, cl. 26(c).

> achievement. The evaluator shall use professional judgment to determine whether the educator is having expected impact on student learning, based on student learning gains on common assessments and, where available, statewide student growth measures. The evaluator's professional judgment may include, but is not limited to, consideration of the educator's student population and specific learning context. Anticipated student learning gains must be consistent across the district for common assessments and agreed upon by the educator and evaluator for other assessments. The Department shall establish anticipated student learning gains for statewide student growth measures in guidance.

*Id.*

The focus on whether an educator meets or fails to meet expectations relates to the development of self-directed growth plans in the evaluation cycle. Experienced educators[19] who are rated proficient or exemplary and whose impact on student learning *is at least* as expected, may adopt a self-directed educator plan for two years. For those experienced educators rated proficient or exemplary whose impact *is less than* expected, a self-directed plan of one year's duration will be implemented, and the evaluator shall discuss with the educator the educator's impact on student learning, growth, and achievement. For those experienced, proficient, or exemplary educators whose impact is less than expected, the self-directed growth plan will also examine goals, elements, and practices contributing to the less-than-expected impact.

**Collective Bargaining Implications – G.L. c. 71, § 38 and G.L. c. 150E**

On the local level, the principles of evaluation established by the Board must be applied by the Superintendent to all teachers, principals and administrators. *See* G.L. c. 71, §38. Additionally, a School Committee may require the utilization of supplemental performance standards if consistent with the Board of Education principles. *Id.* Local school district

[19] Experienced teachers rated "proficient" or "exemplary" and who have achieved at least the expected impact will be evaluated every two years.

autonomy is limited by the statutory scheme set out in §38, the rules established by G.L. c. 69, G.L. c. 150E, and the regulatory framework at 603 CMR 35.00, *et seq*., regarding evaluations.

Although the requirement that evaluations be conducted is not subject to collective bargaining, the procedures by which these evaluations are conducted is "subject to the collective bargaining provisions of chapter one hundred and fifty E." *See* G.L. c. 71, §38. Additionally, "all teacher performance standards" are determined through negotiations "for a reasonable period of time." *Id*. Before sitting down with the local Union to negotiate performance standards, the Committee is obligated to convene a public hearing and solicit comments on the standards. In this instance, we believe that means that the provisions of Standard #2 relative to "Teaching All Students" are subject to the public hearing requirements of §38. Thereafter, if the School Committee and Union are unable to reach agreement after a reasonable period of negotiations, "teacher performance standards shall be determined by binding interest arbitration."[20] *Id.*

Many districts completed the first round of teacher evaluation negotiations without resort to interest arbitration. There have been one or two cases in which arbitrators were called upon to draft evaluation language.[21] The provisions of G.L. c. 71 §38 establish the rules for negotiating the new evaluation language relative to student indicators and whether educators meet expected impact on students. The law expressly requires that "subsequent modifications of performance standards must be made pursuant to §38." Given the current climate, we do not anticipate arriving at a speedy resolution of the issues presented by the proposed regulations.

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[20] Most arbitrations in the public sector are "rights" arbitrations, in which the arbitrator determines the rights of the parties in relation to an existing but disputed contract clause. Interest arbitration, in contrast, requires that the arbitrator draft the contract language that will govern the parties' obligations and behavior. While the parties are free to propose evaluation standards authored from any state or national organizations, it would be rare to find an arbitrator experienced in the drafting of a teacher evaluation instruments and establishment of standards of performance for educators. Nevertheless, that is the process the legislature has created.

[21] Cases in Lawrence and Spencer-East Brookfield are on record.

The law requires negotiation, but a working definition of the requirement that the parties "undertake for a reasonable period of time to agree on teacher performance standards" is not readily ascertainable. The use of the word "reasonable" makes it clear that neither party may unilaterally pre-determine the duration of negotiations. It also implies an objective perspective on the amount of time spent on negotiations, the behavior of the parties, and the totality of the circumstances. *See, e.g., School Committee of Newton v. Labor Relations Commission*, 388 Mass. 557 (1983); *Plymouth and AFSCME Council 93*, 23 MLC 175 (1997). Given the required interest arbitration process, normal impasse procedures available in successor negotiations (proceeding to mediation and fact finding with a return to the bargaining table), and the impasse proceedings in midterm bargaining (negotiating in good faith to impasse with a managerial right to implement a proposal consistent with those on the bargaining table at the point of impasse) are probably inapplicable. However, we have little doubt that even if the provisions of §38 relative to interest arbitration are the exclusive means for resolving this dispute, school districts implementing changes to their evaluation systems will find themselves defending unfair labor charges at the Division of Labor Relations, a notoriously inhospitable forum for management.

As early as 1977 the Division of Labor Relations acknowledged that, while the requirement that evaluations be conducted is not subject to collective bargaining, the negotiation of evaluation procedures does not impinge "upon the non-delegable of the responsibilities of a school committee." *Town of Danvers and Local 2038*, 3 MLC 1570 (1977). Over time, the Division of Labor Relations has determined that new evaluation criteria are a mandatory subject of bargaining. *See Comm. of Mass. and SEIU Local 509*, 18 MLC 1161, 1165 (1991). Further, while changes to an evaluation process which "merely measure the same performance criteria which have been measured in the past" do not violate the law, *Town of Wayland and IBPO*, 5

MLC 38 (1979), in our view, the proposed DESE regulations relative to student learning indicators and the issue of whether teachers meet expectations relative to student learning would constitute "new criteria" within the meaning of the precedent. While it may be argued that §38's process of interest arbitration preempts G.L. c. 150E and renders the precedent inapplicable, the deference paid to a well-developed body of law under G.L. c. 150E could undermine the position.

**Impact on Existing Evaluation Agreements**

School districts came to agreements on an evaluation process following the adoption of the regulations and the model agreement in 2012-2013. As noted in the introduction to this memo, §38 requires submission to DESE of any amendments to the existing agreements. Further, assuming there has been a public hearing before the Committee meets with the Union to negotiate for a reasonable period of time on the potential regulatory changes, questions remain on the status and utility of the existing agreement in the absence of agreed upon amendments.

The regulations are clear. The 2013 regulations[22] state:

> All evaluation systems and changes to evaluation systems shall be subject to the Department's review to ensure the systems are consistent with the Board's Principles of Evaluation. *A district may continue to use its existing evaluation system until the district has fully implemented its new system.*

603 CMR 35.11(2).

As noted above, the Commissioner's expectation is that evaluation systems will be in alignment with the amended regulations as of the beginning of the 2017-2018 school year. In the absence of an agreement, the existing and proposed regulations require that the present

[22] Under the new regulations, this provision is slightly modified and located at 603 CMR 35.10(2).

agreement on evaluation continue and must be utilized. We do not read the regulatory use of the words "may continue" to provide an option to discontinue the existing practice. The mandatory provisions of the statute relative to the creation of an evaluation system in accordance with Board of Education principles do not provide an opt-out if there is a lack of agreement on a modified plan. While one might argue that the phrase "may continue" permits the cessation of the existing agreement or the portions of it repealed by the new regulations, such as the deletion of DDMs and the individual impact rating, we believe this aggressive interpretation sails too close to the wind.

**Conclusion**

As adopted by the Board, the new regulations will require a change in indicators of evaluation standards. We anticipate that the primary bargaining focus will be on whether an educator "demonstrates the expected impact" on student learning. School Committees should work closely with their local counsel to assess how these new regulations will affect their existing evaluation systems and school districts.

## B. UPDATES ON MARIJUANA LAW IN MASSACHUSETTS

**Summary**

Recreational marijuana use was legalized in the Commonwealth via a statewide ballot question on November 8, 2016, with legalization under state law effective as of December 15, 2016. Medical marijuana has been legal in Massachusetts under state law since 2012. Despite these significant changes in state law over the past several years, marijuana remains an illegal drug under federal law, which makes no distinction between recreational and medical use. While a school district's outright prohibition of recreational marijuana use on school grounds and at school activities will likely be treated in the same manner as long-established bans on tobacco

and alcohol use on campus, the discrepancy between state and federal law creates a conflict of laws issue for schools in the Commonwealth relative to staff or student use of medical marijuana on school grounds.

The state's medical marijuana statute itself does not require school districts to accommodate any on-campus use of medical marijuana. Further, allowing medical marijuana use on school grounds could potentially put schools' federal funding dollars at risk, as schools would not be in compliance with the federal law. Districts could potentially be subjected to discrimination claims and special education related claims under state law in the future, however, upon prohibiting medical marijuana use or administration by registered medical marijuana patient staff or students at school as prescribed. If faced with a medical marijuana accommodation request, school districts should balance the best interests of students with the associated risks and costs to the district, in the context of both state and federal law.

## Recreational Use

### Federal Law is Unchanged by Legalization at the State Level

The legalization of recreational marijuana in Massachusetts, the possession and use of which is restricted to those twenty-one (21) years of age or older,[23] is so recent that implementing regulations[24] have yet to be created. It is clear, however, that legalization at the state level does not supersede existing federal laws or repeal all state law prohibitions relative to the possession, sale and use of marijuana, particularly on or near school grounds. The federal Controlled

[23] Under the new G.L. c. 94G, Section 2(b), the law shall not be construed to allow a person under the age of twenty-one (21) to "possess, use, purchase, obtain, cultivate, process, manufacture, deliver or sell or otherwise transfer marijuana or marijuana accessories."

[24] Under and in accordance with the new G.L. c. 94G, Section 4, as well as in accordance with G.L. c. 30A, an appointed "Cannabis Control Commission" shall, in consultation with a "Cannabis Advisory Board," promulgate initial implementing regulations in accordance with the law's provisions no later than September 15, 2017

Substances Act, 21 U.S.C. § 801 *et seq.* ("Controlled Substances Act"), Drug-Free Workplace Act and Safe and Drug-Free Schools and Communities Act are not nullified or modified by the legalization of marijuana in Massachusetts. Marijuana is still a Schedule I illegal drug under the Controlled Substances Act, and schools must continue to comply with the Drug-Free Workplace Act and Safe and Drug-Free Schools and Communities Act as a condition of receiving federal funding.

Under the new G.L. Chapter 94G, Sections 2 (d) and (e), the law shall **not** be construed to:

(1) prevent the Commonwealth, a subdivision thereof or a local government agency from prohibiting or otherwise regulating the possession or consumption of marijuana or marijuana accessories within a building owned, leased or occupied by the commonwealth, a political subdivision of the commonwealth or an agency of the commonwealth;

(2) authorize the possession or consumption of marijuana or marijuana accessories on the grounds of or within a public or private school where children attend school preschool through grade 12;

(3) require an employer to permit or accommodate conduct otherwise allowed by the law (i.e. marijuana possession and consumption) in the workplace.

Section 13(c) of the new G.L. Chapter 94G prohibits the consumption of marijuana in public places and anywhere the smoking of tobacco is prohibited, along with regulating possession, in cars and otherwise.

**District Policies on Recreational Marijuana: Look to Alcohol/Tobacco Policies for Guidance**

Alcohol and tobacco have long been legal for "recreational" use by those who are of legal age. Nonetheless, state laws and district policies can and do prohibit the use of alcohol and tobacco on school grounds, even for those who are of age. The same will no doubt continue to be true for recreational marijuana. The climate in schools will likely be even more prohibitive

relative to recreational marijuana, as alcohol, unlike marijuana, is not an illegal substance under federal law. Massachusetts law has yet to address whether schools may prohibit employees from recreationally using marijuana at home outside of work hours, or may discipline or terminate an employee for doing so.

Issues that districts face relative to recreational marijuana will often not be as clear cut as those pertaining to alcohol. Testing procedures for marijuana are less easily implemented than the use of a breathalyzer, for example. Positive marijuana test results may be indicative of past use and not current use or current intoxication. Edibles and ointments will present additional challenges relating to underage consumption, possession and search and seizure issues.

## Medical Use

### State Medical Marijuana Statute and Regulations Do Not Require District Accommodation of Medical Marijuana Use on School Grounds

The state's medical marijuana statute does not require the accommodation of on-site medical marijuana use in a school or in *any* place of employment. Chapter 369 of the Acts of 2012, "An Act for the Humanitarian Medical Use of Marijuana," states, with the same language being codified in G.L. c. 94C, App. § 1-7: "[n]othing in this law requires any accommodation of any on-site medical use of marijuana in any place of employment, school bus or on school grounds, in any youth center, in any correctional facility, or of smoking medical marijuana in any public place." Aside from this provision, the state medical marijuana law and its implementing Massachusetts Department of Public Health ("DPH") regulations, 105 CMR 725, focus on patient registration and dispensary licensing/operations, being otherwise silent on employer/employee and school considerations. G.L. c. 94C, App. § 1-7 expressly states that nothing in the law "requires the violation of federal law," "purports to give immunity under federal law," or "poses an obstacle to federal enforcement of the law."

## Analysis of Whether District Accommodation/Allowance of Medical Marijuana Use is Otherwise Required by Law

### Staff Consumption of Medical Marijuana

On-site. Although the state medical marijuana statute and regulations do not require an employer or, even more specifically, a school to accommodate on-site medical use of marijuana, the law is unclear as to whether any other statute or regulation may require such accommodation for registered medical marijuana patient staff. The potential for wrongful termination claims, discrimination claims, including those brought under G.L. c. 151B, and privacy claims brought under G.L. c. 214, § 1B, relative to the intrusiveness of any drug testing, should be considered. A reasonable accommodation analysis may come into play under the federal American Disabilities Act, 42 U.S.C. 12101 *et seq.* ("ADA"), in the future as well. To our knowledge, the ADA does not currently require any accommodation for the use of medical marijuana. Courts have articulated that medical marijuana accommodation is not required under the ADA because marijuana is classified as an illegal drug under federal law.[25]

While the state medical marijuana statute and its regulations do not require districts to allow or accommodate staff possession or use of medical marijuana on school grounds, and federal law continues to condition federal funding on schools being drug-free, the possession, use and effects of medical marijuana may be analogized to the use, possession and effects of other prescription medications needed to treat medical conditions in the future. As such, districts should consider any medical accommodation requests on a case-by-case basis.

[25] "…medical marijuana use is not protected by the ADA. Even as to plaintiffs 'who face debilitating pain,' Congress 'has made clear ... that the ADA defines 'illegal drug use' by reference to federal, rather than state, law, and federal law does not authorize the plaintiffs' medical marijuana use.'" *The Kind and Compassionate v. City of Long Beach*, 2 Cal.App.5th 116, 127 (Cal. Ct. of Appeal 2016), *citing James v. City of Costa Mesa*, 700 F.3d 394, 397 (9th Cir. 2012).

Off-site. Massachusetts law has also yet to address whether a school may prohibit a registered medical marijuana patient employee from using properly obtained medical marijuana *prior* to coming to work, or discipline or terminate an employee for legally permissible use of medical marijuana off school grounds and outside of school hours. At least one relevant, though not entirely on point, case is currently pending.

In *Barbuto v. Advantage Sales Marketing*, 148 F.Supp.3d 145 (D. Mass. 2015), the United States District Court for the District of Massachusetts remanded a case involving the termination of a registered medical marijuana user[26] for a failed drug test to the state trial court, finding that the defendant employer had not met the burden of establishing that the amount in controversy exceeded the requisite $75,000.00 for removal to federal court. The Superior Court then granted the employer's motion to dismiss on all but one claim raised by the employee in *Barbuto v. Advantage Sales Marketing*, Suffolk Superior Court No. 1584CV02677. Direct appellate review has been allowed, and the case was transferred from the Appeals Court to the Supreme Judicial Court for review relative to the dismissed claims (SJC-12226, entered November 17, 2016).

According to docket records as of this writing, the SJC has yet to issue a decision in *Barbuto*. The case's status is currently reported as "argued, under advisement." Because the Superior Court's favorable ruling on the employer's motion to dismiss is not precedent setting, the SJC's decision will be an important one. While the plaintiff in *Barbuto* was an employee of a private, non-school employer, the case's outcome will likely prove to be significant for districts

[26] The Plaintiff, Cristina Barbuto, is a registered medical marijuana patient who used marijuana at home to treat a medical condition. Ms. Barbuto's private employer terminated her from her marketing position after she tested positive for marijuana use. Ms. Barbuto had disclosed to her employer that she was a medical marijuana user prior to taking the drug test.

relative to off-site, off-hours medical marijuana use, despite the substantial differences between a private workplace and a public school educating minor students.

In many states, including First Circuit states Maine and Rhode Island, state statutes and/or court decisions prohibit employers from discriminating against registered medical marijuana patients in hiring, while not requiring employers to allow employee use of medical marijuana in the workplace (AZ, CT, DE, IL, ME, MN, NV, NY, RI). Courts in some jurisdictions, such as Colorado,[27] have affirmed employer terminations of registered medical marijuana users for testing positive for marijuana, even if usage was off-site and off-hours, having no impact on the employee's work, because marijuana use of any kind remains illegal under the Controlled Substances Act. Arbitrators have come to the opposite conclusion in some cases. At least one state's medical marijuana statute, Arizona's,[28] incorporates protections against such termination, but includes an express exemption for employers who are recipients of federal funds, as schools are.

**Student Consumption of Medical Marijuana During School Day**

The state's medical marijuana law and regulations also do not impose any obligation upon districts to allow or accommodate a student's in-school medical marijuana use.

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[27] *See Curry v. Miller Coors, Inc.,* 2013 WL 4494307 (D. Colo. 2013); *Coats v. Dish Network, L.L.C.,* 350 P.3d 849 (Supreme Court of Colo. 2015) (Colorado federal and state courts both finding that registered medical marijuana patient employee's consumption of medical marijuana outside of workplace / working hours and not impacting work was not "lawful activity" under state statute prohibiting employees from being fired for engaging in lawful activity outside of work because medical marijuana is illegal under federal law, despite being legal under Colorado state law).

[28] "Unless a failure to do so would cause an employer to lose a monetary or licensing related benefit under federal law or regulations, an employer may not discriminate against a person in hiring, termination or imposing any term or condition of employment or otherwise penalize a person based upon either: 1. The person's status as a cardholder. 2. A registered qualifying patient's positive drug test for marijuana components or metabolites, unless the patient used, possessed or was impaired by marijuana on the premises of the place of employment or during the hours of employment." See Ariz. Rev. Stat. Ann. ¶36-2813(B), noting the exception applicable when an employer would lose monetary or licensing benefit under federal law or regulations.

Massachusetts has yet to otherwise address the issue via statute, regulation, administrative guidance or case law. To our knowledge, neither the Massachusetts Department of Elementary and Secondary Education ("DESE") nor the DPH has issued guidance.

While permitting student consumption of medical marijuana on school grounds could potentially cause schools to lose federal funding,[29] as touched upon above, a handful of medical marijuana permissive states have nonetheless enacted legislation allowing for or requiring the accommodation of student medical marijuana use on school grounds during the school day.[30] As

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[29] Guidance from the federal government may suggest that this risk is minimal, however. The Department of Justice issued memoranda in 2009 (Deputy Attorney General Ogden), 2011 (Deputy Attorney General Cole), and 2013 (Deputy Attorney General Cole), however, stating that, while marijuana remains illegal at the federal level, enforcement and prosecution efforts should be focused on the primary aims of federal prohibition, not on activities that have been "legalized" under state law, and particularly not on ill patients' use of medical marijuana in accordance with state law. The 2009 Ogden Memorandum is available at: https://www.justice.gov/opa/blog/memorandum-selected-united-state-attorneys-investigations-and-prosecutions-states; The 2011 Cole Memorandum is available at: https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf; The 2013 Cole Memorandum is available at https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf.

[30] **Washington State (April 14, 2015):**
An Act Relating To Establishing The Cannabis Patient Protection Act (Second Substitute Senate Bill 5052; Laws of 2015, Chapter 70); *See* amendments modifying, inserting new sections and repealing sections relative to R.C.W 66.08.012, 69.50, 69.51A, 43.70.320, 9.94A.518, 42.56, 82.04
- schools are permitted, yet not required to accommodate student medical marijuana use on-campus;
- "nothing in this chapter requires any accommodation of any on-site medical use of cannabis…in any school bus or on any school grounds, in any youth center… or smoking cannabis in any public place..." "However, a school may permit a minor who meets the requirements of section 20 of this act to consume marijuana on school grounds. Such use must be in accordance with school policy relating to medication use on school grounds."

**Maine (June 30, 2015):**
An Act to Provide Reasonable Accommodations for School Attendance for Children Certified for the Medical Use of Marijuana, (P.L. 2015, Chapter 369, H.P. 381-L.D. 557); See 20-A MRSA § 6306; 22 MSRA § 2426, sub-§§1 and 1-A
- it seems that a school is required to permit use on-campus and on a school bus as a reasonable accommodation for qualified medical marijuana patient student, via the statement that a registered medical marijuana patient student "may not be denied eligibility to attend school solely because the child requires medical marijuana in a nonsmokeable form as a reasonable accommodation necessary for the child to attend school;"
-marijuana must be administered in a "nonsmokeable form" only;
- a properly designated "primary caregiver" must administer.

**New Jersey (November 9, 2015):**
An Act Concerning Medical Marijuana, Supplementing Chapter 40 of Title 18A of the New Jersey Statutes and Chapter 6D of Title 30 of the Revised Statutes, and amending P.L. 2009, Chapter 307 and N.J.S.2C:35-18 (P.L. 2015, Chapter 158)

outlined in footnote no. 8, the majority, but not all, of the early adopter states taking a permissive legislative position on the issue of student consumption of medical marijuana on school grounds thus far seem to require:

> 1. that administration of the drug on school grounds be handled only by a parent, guardian or caregiver, subject to registration requirements; and
>
> 2. that consumption be permitted only in a nonsmokeable or nonsmokeable/noninhalable form.

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- schools shall create a policy authorizing use on-campus, on school bus, at school-sponsored events, by qualified students;
- calls for administration of marijuana by "parents, guardians, and primary caregivers" (subject to registration requirements);
-schools must identify locations on school grounds where marijuana may be administered;
- marijuana is prohibited in smoking form or via another form of inhalation on school grounds, on school bus or at school sponsored event.

**Colorado (June 6, 2016):**
An Act Concerning Requiring School Districts To Adopt A Policy Permitting The Use Of Medical Marijuana By Students Authorized To Use Medical Marijuana (H.B. 16-1373); See C.R.S. 22-1-119.3, 25-1.5-106
- student possession or self-administration on school grounds, on school bus, or at school-sponsored event is generally prohibited;
- a "primary caregiver" may administer on school grounds, on school bus, or at a school sponsored event; schools may adopt a policy determining who a primary caregiver may be;
- only a "nonsmokeable form" of marijuana is allowed on school grounds, in a manner that does not create "disruption to the educational environment" or cause "exposure to other students;"
- seems to prohibit storage on-campus – a caregiver must administer then remove any excess from school grounds post-dosing;
- states that nothing in the law requires school district staff to administer marijuana;
-states that the statutory paragraph allowing for primary caregiver to administer the marijuana on school grounds, on school bus or at school sponsored event "does not apply" if the school "loses federal funding as a result" of implementing that paragraph, or if the school "posts on its website in a conspicuous place a statement regarding its decision not to comply" with that paragraph.

**Delaware (September 7, 2016):**
An Act to Amend Title 16 of the Delaware Code Relating to Medical Marijuana Oil (Chapter 422, Formerly S.B. 181 As Amended By Senate Amendment No. 1); See § 4904A, Title 16, Delaware Code.
- only "marijuana based oils" to be permitted;
- schools are required to allow qualifying students to consume marijuana based oils for medical purposes on school grounds;
- authorizes only registered "designated caregivers to possess and administer" and students to use medical marijuana on school grounds and school buses;
- "[t]he designated caregiver shall not be a school nurse or other school employee hired or contracted by a school unless he or she is a parent or legal guardian of the minor qualifying patient, and said parent or legal guardian possesses no more than the number of dose(s) prescribed per day of medical marijuana oil which is kept at all times on their person.

State statutes vary regarding whether a school is (1) required (Maine, New Jersey, Delaware), (2) generally required but allowed to opt-out (a) if federal funding is at risk or (b) if a school chooses to affirmatively opt-out via a conspicuous website posting (Colorado), or (3) permitted but not at all required (Washington State), to accommodate/allow student medical marijuana use on school grounds. To our knowledge, none of these state statutes have been successfully challenged to date.

A blanket prohibition on any accommodation of a qualified, registered student's consumption of medical marijuana during the school day is certainly the most conservative and protective relative to federal funding and district logistical expenses. Such a restrictive stance could potentially subject the district to claims of violations of G.L. c. 71B and discrimination claims under state law in the future, however. It could also force a student out-of-district who might otherwise be able to remain in-district. This may result in a parent bringing a claim against the district before the Bureau of Special Education Appeals ("BSEA"),[31] and/or the district being forced to incur expensive out-of-district tuition fees, especially if a student's out-of-district placement ends up being residential. Claims brought against the district under the Individuals with Disabilities Education Act, 20 U.S.C. § 1400 et seq. ("IDEA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794 ("Section 504") or the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 et seq. ("ADA") would not likely be viable, however, as marijuana remains illegal under federal law.

[31] It is worth noting that the BSEA stated in its *In Re: Ashley D.* decision, 1 MSER 16 at p. 20, BSEA #93-1037 (H.O. Figueroa, 1995), that "ordering a school to administer an unapproved [unapproved by the F.D.A. in the United States] medication goes beyond the jurisdiction of the BSEA," and that the "[p]ower to issue such an order" would involve "a separate proceeding in a court with pertinent jurisdiction." The hearing officer concurred with the home school district that the proposed out-of-district placement was appropriate even without such an order relative to the home or out-of-district school. This case contemplated a student's use of Frisium to treat a seizure disorder, not medical marijuana use, but an analogy can be drawn relative to the BSEA's finding that it did not have proper jurisdiction to order a school to administer a drug not approved by the F.D.A. to a student.

Requiring that a student's parent/guardian/caregiver pick the student up at school, dose off campus, then return to the student to school would be similarly protective of federal funding, but might also lead to discrimination claims under state law and/or a parent bringing claims against the district before the BSEA, alleging G.L. c. 71B violations. Such a requirement might result in the district being forced to provide or fund a student's daily transportation home (or to an alternate caregiver dosing location) and then back to school again mid-day in order to accommodate off-campus dosing, which could also trigger costly expenses for the district.

On-campus dosing allowances would best accommodate the student's medical condition / disability and prescribed treatment protocol, while permitting the student to remain in school, minimizing disruption to learning time and eliminating the need for student transportation and the related costs. It would also put the district in a position of violating federal law.

The district would technically be violating federal law simply by having a policy permitting marijuana on school grounds in any capacity, even if it required a properly registered parent/caregiver to bring the drug to campus, administer it, and leave with any excess, thereby eliminating district involvement with possession, storage or administering of the drug. Nonetheless, this procedure has been adopted by the majority of the jurisdictions that have enacted legislation permitting student consumption of medical marijuana on-campus. This parent/caregiver, on-campus procedure would allow for treatment on campus without removing the student from school for part of the day due to his or her illness/disability, and without putting increased responsibility/potential liability on district staff / school nurses relative to the storage/possession/dosing of medical marijuana on school grounds.

Issues and expense will no doubt be raised, however, if a registered parent/caregiver is unable and/or unwilling to travel to school to administer the drug to the student during the

school/work day. A school will also have less knowledge of and control over proper dosing, and less awareness of the extent of influence on the student in a parent dosing scenario, however, which could in some cases potentially increase student safety risks.

If medical marijuana were to be considered as any other prescription drug, storage and dosing on school grounds would be required to be in compliance with 105 CMR 210.000 et seq., the DPH regulations setting forth state requirements regarding a school nurse's supervision/delegation/medication administration plan relative to a school administering any drug to a student. This methodology would place the greatest onus upon the school district, which at that point would be in possession of, storing and administering the drug via its staff-likely in the form of the school nurse. While districts may have the greatest control and oversight with such a policy, and be in compliance with state DPH regulations, they would also be in clear violation of federal law and at a heightened risk of losing federal funding. Staff issues, including but not limited to G.L. c. 150E or contractual claims, may also arise if a school nurse refuses to store and/or administer the drug in an attempt to comply with federal law.

**Conclusion**

As stated herein, neither the state's recreational nor medical marijuana laws, in and of themselves, require districts to permit or accommodate staff or student marijuana use on school grounds. Marijuana remains an illegal drug under federal law, even when used for medical purposes. Whether the accommodation of staff or student medical marijuana use on school grounds may otherwise be required by law remains to be seen. Massachusetts law is also unsettled as to staff use of marijuana off of school grounds and outside of school hours, particularly in the case of medical marijuana. Because this area of the law is new and rapidly changing, it is necessary to monitor the evolution of marijuana law in Massachusetts and

throughout the country, particularly as it intersects with employment law, school law and federal funding requirements.

## C. UPDATES TO THE PUBLIC RECORDS LAW

### Introduction

The Commonwealth's amended public records law[32] went into effect on January 1, 2017. Guidance from the Secretary of State's Office was updated in January, following that Office's issuance of amended public records regulations on December 16, 2016, effective January 1, 2017. The amendments most often favor requestors. As such, public entities are subject to increased compliance requirements and a more limited ability to assess fees as a pre-condition to producing responsive documents.

The law distinguishes between a "municipality"[33] versus an "agency"[34] that is subject to a public records request. This advisory primarily focuses on the law's treatment of municipalities. This distinction is significant, as requirements, deadlines and allowable fees can differ for municipalities versus agencies under the public records law. The requirements, deadlines and

[32] "An Act to Improve Public Records," signed into law by Governor Charlie Baker as Chapter 121 of the Acts of 2016 on June 3, 2016, has amended state public records law G.L. c. 66, along with the G.L. c. 4, § 7(26) definition of "public records," discussed infra, effective January 1, 2017. Amended regulations were issued by the Secretary of State's office on December 16, 2016, in the form of an updated 950 CMR 32.00 et seq.

[33] 950 CMR 32.02 defines the term "Municipality" as "Cities and towns, local housing, redevelopment or similar authorities. A consortium, consolidation or combination of entities within a single political subdivision of the commonwealth or among multiple political subdivisions of the commonwealth shall be deemed a municipality."

[34] 950 CMR 32.02 defines the term "Agency" as "Any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth that is identified in G.L. c. 66, § 6A and c. 4, § 7, clause Twenty-sixth and makes or receives "public records", as defined in 950 CMR 32.02. Agency includes any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in G.L. c. 32, § 1.

allowable fees discussed herein are those that are applicable to municipalities under the amended public records law and its regulations.

**Unchanged Provisions**

As was the case under the state's former public records law, the amended law presumes that any requested record is a public record subject to disclosure. The burden remains on public entities to prove, by a preponderance of the evidence, that a requested record, or a portion of it, is exempt from disclosure. What constitutes a public record[35] subject to disclosure and what constitutes an exempt record[36] remains the same under the amended G.L. c. 4, § 7(26), other than

[35] G.L. c. 4, § 7(26) continues to define "public records" as "all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32," unless such materials or data fall within the exemptions itemized in G.L. c. 4, § 7(26)(a)-(u) (no subsection (26)(k) exists).

[36] G.L. c. 4, § 7(26)(a)-(u) exemptions include "materials or data

(a) specifically or by necessary implication exempted from disclosure by statute;

(b) related solely to internal personnel rules and practices of the government unit, provided however, that such records shall be withheld only to the extent that proper performance of necessary governmental functions requires such withholding;

(c) personnel and medical files or information; also any other materials or data relating to a specifically named individual, the disclosure of which may constitute an unwarranted invasion of personal privacy;

(d) inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency; but this subclause shall not apply to reasonably completed factual studies or reports on which the development of such policy positions has been or may be based;

(e) notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit;

(f) investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials the disclosure of which materials would probably so prejudice the possibility of effective law enforcement that such disclosure would not be in the public interest;

(g) trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality; but this subclause shall not apply to information submitted as required by law or as a condition of receiving a governmental contract or other benefit;

(h) proposals and bids to enter into any contract or agreement until the time for the opening of bids in the case of proposals or bids to be opened publicly, and until the time for the receipt of bids or proposals has expired in all other cases; and inter-agency or intra-agency communications made in connection with an evaluation process for reviewing bids or proposals, prior to a decision to enter into negotiations with or to award a contract to, a particular person;

(i) appraisals of real property acquired or to be acquired until (1) a final agreement is entered into; or (2) any litigation relative to such appraisal has been terminated; or (3) the time within which to commence such litigation has expired;

(j) the names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms issued pursuant to chapter one hundred and forty or any firearms identification cards issued pursuant to said chapter one hundred and forty and the names and addresses on sales or transfers of any firearms, rifles, shotguns, or machine guns or ammunition therefor, as defined in said chapter one hundred and forty and the names and addresses on said licenses or cards;

<[ There is no subclause (k).]>

(*l*) questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment instrument; provided, however, that such materials are intended to be used for another test, examination or assessment instrument;

(m) contracts for hospital or related health care services between (i) any hospital, clinic or other health care facility operated by a unit of state, county or municipal government and (ii) a health maintenance organization arrangement approved under chapter one hundred and seventy-six *I*, a nonprofit hospital service corporation or medical service corporation organized pursuant to chapter one hundred and seventy-six A and chapter one hundred and seventy-six B, respectively, a health insurance corporation licensed under chapter one hundred and seventy-five or any legal entity that is self-insured and provides health care benefits to its employees.

(n) records, including, but not limited to, blueprints, plans, policies, procedures and schematic drawings, which relate to internal layout and structural elements, security measures, emergency preparedness, threat or vulnerability assessments, or any other records relating to the security or safety of persons or buildings, structures, facilities, utilities, transportation, **cyber security** or other infrastructure located within the commonwealth, the disclosure of which, in the reasonable judgment of the record custodian, subject to review by the supervisor of public records under **subsection (c)** of section 10 of chapter 66, is likely to jeopardize public safety **or cyber security**.

(o) the home address, **personal email address** and home telephone number of an employee of the judicial branch, an unelected employee of the general court, an agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of a political subdivision thereof or of an authority established by the general court to serve a public purpose, in the custody of a government agency which maintains records identifying persons as falling within those categories; provided that the information may be disclosed to an employee organization under chapter 150E, a nonprofit organization for retired public employees under chapter 180, or a criminal justice agency as defined in section 167 of chapter 6.

(p) the name, home address, **personal email address** and home telephone number of a family member of a commonwealth employee, contained in a record in the custody of a government agency which maintains records identifying persons as falling within the categories listed in subclause (o).

(q) Adoption contact information and indices therefore of the adoption contact registry established by section 31 of chapter 46.

(r) Information and records acquired under chapter 18C by the office of the child advocate.

(s) trade secrets or confidential, competitively-sensitive or other proprietary information provided in the course of activities conducted by a governmental body as an energy supplier under a license granted by the department of public utilities pursuant to section 1F of chapter 164, in the course of activities conducted as a municipal aggregator under section 134 of said chapter 164 or in the course of activities conducted by a cooperative consisting of governmental entities organized pursuant to section 136 of said chapter 164, when such governmental body, municipal aggregator or cooperative determines that such disclosure will adversely affect its ability to conduct

the additions of "cyber security" related records under § 7(26)(n) and "personal email address" of specified judicial, state and agency employees and their family members under § 7 (26)(o) and (p). *See* footnote no. 5.

Personnel and medical records remain exempt from disclosure under G.L. c. 4, § 7(26)(c). A second class of records that relate to a specifically named individual, the disclosure of which would publicize "intimate details" of a "highly personal" nature, or the disclosure of which may constitute an "unwanted invasion of personal privacy," are also exempt under § 7(26)(c). See footnote no. 5. Employee records must be produced as public records in response to a request seeking information regularly kept in a staff directory, a payroll database or similar, such as employee names, job classifications, salary information, absences, etc.[37]

**Significant Provisions of New Law Affecting Municipalities**

**Mandatory Records Access Officers**

The amended public records law and its regulations require each municipality and state agency to appoint and publicly identify at least one designated "Records Access Officer" ("RAO"), who shall be responsible for compliance with state public records laws. Public records requests should be directed to RAOs, who are charged with cataloging all requests, responding to

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business in relation to other entities making, selling or distributing electric power and energy; provided, however, that this subclause shall not exempt a public entity from disclosure required of a private entity so licensed.

(t) statements filed under section 20C of chapter 32.

(u) trade secrets or other proprietary information of the University of Massachusetts, including trade secrets or proprietary information provided to the University by research sponsors or private concerns."

[37] This is particularly true when a request is directed at an entire category of employees rather than targeting an individual. *See Wakefield Teachers Ass'n v. School Committee of Wakefield*, 431 Mass. 792, 799-803 (2000*); citing Brogan v. School Comm. of Westport*, 401 Mass. 306 (1987); *Pottle v. School Comm. of Braintree*, 395 Mass. 861 (1985); *Globe Newspaper Co. v. Boston Ret. Bd*., 388 Mass. 427 (1983); *Connolly v. Bromery*, 15 Mass.App.Ct. 661 (1983); *Hastings & Sons Publ. Co. v. City Treasurer of Lynn*, 374 Mass. 812 (1978). Student records are governed at the state level by relevant sections of G.L. c. 71 and 603 CMR 23.00 et seq., and by FERPA (20 U.S.C. sec. 1232g) and its regulations (34 CFR Part 99).

all requests and producing requested public records in accordance with G.L. c. 66 and 950 CMR 32.00 et seq. The RAO for a municipality shall be the municipal clerk. We are of the opinion that each school district should also appoint its own RAO, generally the Superintendent of Schools. As discussed below in more detail relative to the amended law's new posting and website requirements, each RAO must be clearly identified in a conspicuous posting at a public entity's offices as well as on its website.

**Response Timeframe and Other Requirements**

Initial Request and Response. An RAO must furnish requested records no later than ten (10) business days[38] from the date of a request "reasonably describing" a "public record" within the "possession, custody or control" of the public entity along with payment of a "reasonable fee" assessed within the law's parameters. If unable or unwilling to furnish the records within ten (10) business days, the RAO must send a written response to the requestor within ten (10) business days from the initial receipt of the request confirming receipt, identifying the relevant records and providing a reasonable timeframe for producing the records and/or the reason(s) for withholding any records. The provided timeframe shall not exceed twenty-five (25) business days following the request to a municipality, unless voluntarily agreed to by the requestor.

RAO May Request Modifications / Notice of Fees. If needed, the RAO's response should suggest a reasonable modification of scope and/or offer to assist the requestor in reasonably modifying the scope of the request. The RAO must provide a good faith estimate of fees (discussed infra) and a notification of the requestor's right to appeal, as well as documenting the nature, date of request and date of response for each public record request, along with a record of the time, costs/fees, petitions, appeals and adjudications relating to each request.

[38] Timeframes were calculated in calendar days, rather than business days, under the former public records law.

Unduly Burdensome, Harassing Requests / Referral to Supervisor of Public Records. If a public entity is unduly burdened by the number of requests made by the same requestor or the magnitude or difficulty of a request, the RAO may seek an extension of time for compliance from the Supervisor of Public Records within 20 (twenty) business days of receipt of the initial request or within ten (10) business days of a receipt of a determination made by the Supervisor of Public Records that the requested record does constitute a public record. The Supervisor of Public Records may, upon consideration of specified factors, grant a single extension of no more than thirty (30) business days to a municipality. The Supervisor of Public Records may grant a longer extension or relieve the RAO from the obligation to respond if a request is "part of a series of contemporaneous requests that are frivolous or designed to intimidate or harass," and "not intended for the broad dissemination of information to the public about actual or alleged government activity."

**Reasonable Fees that May be Charged to Requestors**

Allowable Copy / Print Charges Reduced. An RAO may assess a reasonable fee, not to exceed the actual cost of reproduction, for the production of a public record not "freely obtainable for public inspection." Costs for standard black and white paper copies or printouts are limited to a maximum of five (5) cents per single or double sided page.[39] If an RAO does not respond within the required ten (10) business days, no fees may apply. No additional charges are permitted for redaction or segregation except as may be required or allowed by law (see discussion of allowable segregation fees below), or approved by the Supervisor of Public Records. An RAO may waive or reduce fees upon a showing that disclosure is in the public

[39] Prior to the amended law taking effect on January 1, 2017, the limit was twenty (20) cents per page for standard copies and fifty (50) cents per page for computer printouts.

interest and is not primarily in the commercial interest of the requestor, or upon a showing that the requestor lacks the financial ability to pay the full reasonable fee. An RAO may refuse to provide requested records if the same requestor has not paid for previously produced records.

Allowable Search and Segregation Fees Reduced. Municipalities required to spend more than two (2) hours of search/segregation/redaction/compilation/reproduction time in responding to a request may charge fees for that time, to be calculated at the hourly rate of the lowest paid employee who has the skill to perform the work, not to exceed a maximum rate of twenty-five ($25.00) dollars per hour. A municipality having a population in excess of twenty thousand (20,000) people may not charge for the first two (2) hours spent on such work. Regulations and guidance issued by the Secretary of State's Office in December and January expressly state that municipalities with populations of 20,000 people or fewer will be permitted to charge for the first 2 hours of employee time.[40] If the Supervisor of Public Records finds a request to be for a commercial purpose, or that a municipality's fee estimate is a good faith representation of the actual cost of compliance, upon the Supervisor's approval a municipality may charge an increased hourly rate.

**Posting/Website and Electronic Records Requirements**

Each public entity must post conspicuously at its offices and on its website, if any, the name, title, business address, business telephone number and business email address of its RAO. Any entity that maintains a website must post guidelines for accessing public records on its website. These guidelines must be periodically updated and must include a list of categories of public records maintained by the entity.

[40] *See* 950 CMR 32.07(2)(m)2 and Secretary of State Guidance available at: https://www.sec.state.ma.us/pre/prenotice.htm and https://www.sec.state.ma.us/pre/prepdf/guide.pdf, p. 4.

An RAO must provide public records to a requestor electronically unless a record is not available in electronic form or the requester "does not have the ability to receive or access" a requested record in a "usable electronic form." Further, an RAO must, "to the extent feasible," provide a public record in the requestor's "preferred format," or, in the absence of a preferred format, in a "searchable, machine readable format." Providing "reasonable assistance" in locating a requested record on a public website shall be considered furnishing the record. Whenever feasible, public entities must provide commonly available public records online.

Except as may otherwise be provided by law, all public records must be maintained in the custody of a Custodian of Records. A Custodian may enter into a contract for the storage of records, including but not limited to an electronic system or database, only if the contract does not prevent or unduly restrict the Custodian or a RAO from providing or storing records in accordance with the law. Records in storage are considered to remain within the Custodian's possession for the purposes of the law.

**Enforcement**

If a requestor believes that a public entity has refused or failed to comply with the law, the requestor may petition the Supervisor of Public Records for a determination. If the entity refuses or fails to comply with an order issued by the Supervisor of Public Records, the Supervisor can seek enforcement via the Attorney General, who may file an enforcement action in the county where the entity is located. Alternatively, a requestor, or the Attorney General for enforcement of the law, may initiate a civil action for enforcement in the county where the entity is located.

**Presumptive Award of Fees and Costs for Refusal to Produce Record**

An award of fees and costs, including reasonable attorney fees, is presumptive unless (1) the Supervisor of Public Records finds that the public entity did not violate the law, (2) the entity

reasonably relied on a published decision of the appellate court or Attorney General based on similar facts, (3) the requestor had the intention to harass or intimidate or (4) the request was not in the public interest or was made for a commercial purpose unrelated to dissemination of information to the public. A court must issue written findings if fees and costs are not awarded.

Upon awarding attorney fees, a court must order waiver of any fee charged by the entity. Punitive damages between one thousand ($1,000.00) and five thousand ($5,000.00) dollars, to be deposited in the Public Records Assistance Fund, are permitted only if a court finds that the entity did not act in good faith.

**Conclusion**

The most significant changes stemming from the amended public records law and its regulations generally benefit the requestor, not the public entity. Requestors are generally entitled to timely access to public records at a reduced cost, and have greater access to records in an electronic format. Entities are burdened with increased compliance provisions, particularly relative to electronic records, mandated RAOs and record keeping/posting/website requirements. Awards of costs and attorney fees, with additional punitive damages if warranted, are available to requestors. All public entities should review and become familiar with the full text of the amended G.L. c. 66, G.L. c. 4, § 7(26) and 950 CMR 32.00 et seq.

## D. REAUTHORIZATION OF AND REVISIONS TO MCKINNEY-VENTO HOMELESS ASSISTANCE ACT

Reauthorized by the Every Student Succeeds Act
Most Changes Effective as of October 1, 2016

**Introduction**

Subtitle VII-B of the McKinney-Vento Homeless Assistance Act, 42 U.S.C. 11431 et seq., is the primary federal law governing the education of children and youth who are

experiencing homelessness.[41] In December of 2015, Title IX, Part A of the Every Student Succeeds Act reauthorized the McKinney-Vento Act.

As the 2017-2018 school year approaches, it is important to take note of the changes having the most significant impact on students and districts, outlined herein. As in McKinney-Vento's prior iteration, homeless students are entitled to equal access to the same free, appropriate public education, including a public preschool education, provided to students who are not experiencing homelessness. As of December 10, 2016 in most states,[42] including Massachusetts, students "awaiting foster care" are no longer included in McKinney-Vento's definition of homelessness. Students awaiting foster care are now covered by the Title 1, Part A foster care provisions of the Every Student Succeeds Act, which went into effect on December 10, 2016 and are summarized below.

**Amendments to McKinney-Vento**

The reauthorized McKinney-Vento Act has been amended to increase requirements relative to the identification and servicing of homeless children and youth, which in turn increases the obligations not only of the Massachusetts Department of Elementary and Secondary Education ("DESE") and its Homeless Education State Coordinator, but for districts

[41] The term "homeless children and youths" is defined by McKinney-Vento as "individuals who lack a fixed, regular and adequate nighttime residence" and includes "children and youths who are sharing the housing of other persons due to loss of housing, economic hardship, or a similar reason; are living in motels, hotels, trailer parks, or camping grounds due to the lack of alternative adequate accommodations; are living in emergency or transitional shelters; or are abandoned in hospitals; . . . who have a primary nighttime residence that is a public or private place not designed for or ordinarily used as a regular sleeping accommodation for human beings . . . ; . . . who are living in cars, parks, public spaces, abandoned buildings, substandard housing, bus or train stations, or similar settings; and . . . migratory children . . . who qualify as homeless because [they] are living in circumstances described [above]."

[42] The removal of children or youth "awaiting foster care placement" from the McKinney-Vento Act's definition of homelessness went into effect on December 10, 2016 in every state except Arkansas, Delaware and Nevada. The definitional change will go into effect in those three states on December 10, 2017.

and their local educational agency liaisons for homeless children and youth as well, as described herein.

**District as the Local Educational Agency ("LEA")**

The amended Mc-Kinney-Vento Act has ramped up school districts' obligations relative to homeless children and youth, increasing requirements to coordinate with the Homeless Education State Coordinator and to engage in outreach, identification and data reporting in addition to servicing already identified homeless students enrolled in district schools. Districts are now required to:

- Make efforts to engage out-of-school homeless students.
- Design coordination with services agencies, other districts and state and local housing agencies to ensure homeless children and youth are promptly identified, and that school staff conduct outreach activities aimed at identifying homeless children and youth.
- Coordinate the provision of special education services and medical accommodations with the provisions of programs for disabled students served by the district and other involved local education agencies.
- Immediately enroll a homeless student even if the student is unable to produce records typically required for enrollment, such as immunization and other records, or if the student has missed application or enrollment deadlines during any period of homelessness.
- Allow a homeless student to enroll immediately in the school in which he or she is seeking enrollment, pending final resolution of any dispute over placement, including disposition of all available appeals.

- Presume that keeping a student in his or her "school of origin"[43] is in the student's best interest, except when continued placement in the school of origin is contrary to the request of the student's parent or guardian or the request of the unaccompanied student.
- Consider "student-centered factors" related to the student's best interest, "including factors related to the impact of mobility on achievement, education, health, and safety of homeless children and youth," giving priority to the request of the student's parent or guardian or the request of the unaccompanied student.
- Provide the student's parent or guardian, or the unaccompanied student, with an easily understandable, written explanation of the reasons for its determination that attending the school of origin is not in the student's best interest, including information about the right to appeal, if the district comes to that conclusion after conducting a best interest determination via consideration of the presumption standard and the student-centered factors standard.
- Provide transportation, if requested by a parent, through the conclusion of the academic year in which a student becomes permanently housed.
- Grant partial or full credit to homeless students for school work completed in a previous district.
- Ensure that homeless students receive the same college and career counseling as non-homeless students.
- Treat information about a homeless student's living situation as a student education record, with such information not being deemed or treated as directory information.
- Adopt policies and practices to ensure participation of a designated, appropriate staff person, serving as a Local Educational Agency Liaison for Homeless Children and Youths ("LEA liaison"), in professional development activities and other technical assistance activities, as determined appropriate by DESE's Homeless Education State Coordinator.

[43] A "school of origin" is the school a student attended when permanently housed, or the school in which the student was last enrolled. The amended McKinney-Vento Act extends the school of origin designation to preschools, as well as to the "receiving school," meaning when a student completes the highest grade level in a feeder school, his or her school of origin includes the receiving school at the next grade level.

- Inform homeless children and youths, as well as their parents and guardians, of the duties of LEA liaisons, in addition to informing school personnel, service providers and advocates about LEA liaison duties.

**Local Educational Agency Liaisons for Homeless Children and Youths ("LEA liaisons")**

Increased district obligations under the amended McKinney-Vento Act require LEA liaisons to fulfill a broader and more comprehensive role than was required of district staff prior to October of 2016, with responsibilities reaching far beyond the servicing of identified enrolled students. Today, LEA liaisons' mandatory duties also include:

- Ensuring that an easily understandable public notice of the educational rights of homeless children and youths is disseminated in locations frequented by them and their parents or guardians, such as schools, shelters, public libraries, and soup kitchens.
- Collaborating with community advisors and the providing of referrals to the parents/guardians of homeless children and youth and to unaccompanied homeless youth, including but not limited to referrals to health care services, dental services, mental health and substance abuse services, and housing services.
- Ensuring that unaccompanied youths are enrolled in school, have opportunities to meet the same state-established academic standards as other students, are informed of their status as "independent students," and are aware that they are entitled to the LEA liaison's assistance in receiving verification of independent student status for FAFSA purposes.
- Having obtained the requisite training, finding without Department of Housing and Urban Development action that a child or youth eligible for and participating in a local education agency program, or his or her immediate family member, who meets eligibility requirements, is eligible for a such a program or service.
- Collecting and providing comprehensive data on homeless children and youth to DESE's Homeless Education State Coordinator.

**New Provisions Affecting Students in or Awaiting Foster Care**

Under Title I, Part A of the Every Student Succeeds Act, the definition of "foster care" includes all children for which the Department of Children and Families is responsible for out-of-home, 24-hour substitute care. This includes but is not limited to those students placed or awaiting placement in: foster homes, kinship placements, group homes, STARR programs and Transitional Care Units. As noted above, as of October 10, 2016 students awaiting placement in foster care are no longer designated as "homeless" under the amended McKinney-Vento Act.

Foster care provisions of the Every Student Succeeds Act cover all children accessing public education while in or awaiting foster care, through graduation, and bear many similarities to McKinney-Vento provisions:

- A student in foster care has the right to remain enrolled in his or her "school of origin" for the duration of his or her time in foster care, or until he or she completes the highest grade level in that school.
- A student in foster care has the right to immediately enroll, with or without documentation, in the district where the student is placed in foster care, if it is not in his or her best interests to remain enrolled in the school of origin.
- Districts must collaborate with the Department of Children and Families to ensure that the transportation of students in foster care to and from school is arranged, provided and funded.
- Districts should designate the local Point of Contact ("POC") as expeditiously as possible, even if the Department of Children and Families has yet to provide written notification of a corresponding POC.

**Conclusion**

The Every Students Succeeds Act's reauthorization of an amended McKinney-Vento Act, along with its Title I, Part A provisions impacting students in or awaiting placement in foster care, impose greater requirements on districts and afford greater protections for students who are

among the most vulnerable in school populations. Please become familiar with the new provisions, contacting local counsel with any questions or specific concerns. Additional information is available from the United States Department of Education at: https://www2.ed.gov/policy/elsec/leg/essa/160240ehcyguidance072716.pdf.

## E. OCR INSTRUCTIONS TO THE FIELD INVOLVING COMPLAINTS

The United States Department of Education's Office of Civil Rights ("OCR") recently issued two new guidances to its field officers instructing them on how to handle complaints. The first is entitled "OCR Instructions to the Field re Scope of Complaints" and the second is entitled "OCR Instructions to the Field re Complaints Involving Transgender Students." These two documents have not been made available on the Department of Education's website but are available on non-government websites.[44]

Note that although the federal government's treatment of complaints by transgender students may be in flux, the law remains unchanged in Massachusetts. In Massachusetts, the law is clear that schools may not discriminate against students based on gender identity. The Massachusetts Department of Elementary and Secondary Education has published a helpful guidance for school districts regarding the implementation of the Massachusetts law prohibiting discrimination on the basis of gender identity. That guidance can be located at: http://www.doe.mass.edu/sfs/lgbtq/GenderIdentity.html. We urge Superintendents to consult that guidance and local counsel when questions arising regarding the treatment of transgender students.

[44] The first document concerning the scope of complaints can be located at: https://assets.documentcloud.org/documents/3863019/doc07424201706091118 24.pdf. The second document concerning complaints involving transgender students can be located at: https://assets.documentcloud.org/documents/3866816/OCR-Instructions-to-the-Field-Re-Transgender.pdf.