LCW Liebert Cassidy Whitmore

Private Education Matters

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

May 2019

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LCW NEWS

Private Education Matters is published monthly for the benefit of the clients of Liebert Cassidy Whitmore. The information in ***Private Education Matters*** should not be acted on without professional advice.

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STUDENTS

STUDENT DISCIPLINE

College Disciplinary Panel Denied Student a Fair Hearing by Failing to Follow Own Policies and Basing Decision on Statements of Non-Testifying Witnesses.

Jane Roe was a student at a private college ("College") located in Montecito. After receiving a report from Jane's mother that another student, John Doe, had raped Jane while at an off-campus party, the College's Associate Dean for Resident Life (Dean) began a preliminary investigation in accordance with the College's Sexual Assault Policy.

The Dean first met with Jane, who alleged that several weeks earlier she attended an off-campus house party. She asserted that after she and John left the party to take a walk, John raped her in the front yard of a neighboring house. The Dean then met with John. John admitted to attending the party, but denied being alone with Jane, denied having sex with her, and denied raping her. Jane and John identified eight witnesses and the Dean met with each one. The witnesses provided conflicting information on material points that corroborated neither Jane nor John's version of events.

The Dean determined the evidence warranted further proceedings, so he compiled all materials and evidence he discovered or developed during the preliminary investigation and provided copies to the College's Student Conduct Panel ("Panel"), which is comprised of the Dean and two other staff members, for hearing. The Dean also provided copies of the materials and evidence to Jane and John, but omitted some of his questions and some of the witnesses' answers.

During the adjudication proceedings, the Sexual Assault Policy extends certain rights to the alleged victim and the accused including the right to provide witnesses and information; the right to view each other's written statements; the right to view all materials discovered or developed by the investigator; and the right to be informed verbally of all material opposing information communicated by any witness.

The Panel first interviewed Jane and accepted her written statement. The Panel then interviewed John and provided him with Jane's written statement and an oral summary of her interview. Thereafter, the Panel interviewed

six witnesses, but refused to interview four additional witnesses that John had asked the Panel to interview. The Dean had interviewed those four witnesses during the preliminary investigation. The Panel asked some, but not all, questions Jane and John had suggested. A College staff member took detailed notes of each witness interview. The Panel provided Jane and John with oral summaries of the other witnesses' testimony, but not the detailed notes prepared by the College staff member.

The Panel found that a preponderance of the evidence showed that John committed sexual assault in violation of the Sexual Assault Policy based on Jane's account of the incident, which it deemed credible and consistent throughout the proceedings, and certain statements of non-testifying witnesses made during the preliminary investigation. The Panel found John not credible because they concluded his testimony was inconsistent and the testifying witnesses did not corroborate his version of events. The Panel suspended John for two years. John appealed, but the Vice President for Student Life denied John's appeal. John filed a petition with the court to review the Panel's decision.

The court held that the Panel denied John a fair hearing in three ways. First, the Panel deprived John of a fair hearing when it deemed certain portions of non-testifying witnesses' statements taken from the preliminary investigation as more credible than the testimony of the witnesses who testified in person at the hearing. Accordingly, the court held that a fair hearing requires each adjudicator to hear from critical witnesses – in person, by videoconference, or by some other method – before assessing credibility.

Second, the Panel deprived John of a fair hearing when it failed to abide by the College's Sexual Assault Policy. For example, the College failed to give John all of the Dean's questions and the witnesses' answers from the investigative report. Further, the Panel did not provide John the detailed notes that recorded the Panel's questions and the witnesses' responses from the meetings. This allowed the Panel to make credibility determinations based on broader information than was available to John. Thus, the court held that where the outcome of a sexual misconduct disciplinary proceeding turns on witness credibility, an adjudicatory body cannot base its credibility determinations on information in its possession that is not made available to the accused.

Third, the Panel deprived John of a fair hearing when it failed to provide him the opportunity to pose questions to the witnesses. While a student accused of sexual misconduct is not entitled to cross-examine the alleged victim or other witnesses directly, the accused student must be permitted to pose questions to the alleged victim and other witnesses, at least indirectly, if the college's decision hinges on witness credibility. Here, for example, the Panel relied on testimony obtained from non-testifying witnesses from the preliminary investigation, thereby denying John the right to propose questions for these witnesses. Therefore, the court held that a fair hearing requires the accused student's material participation in submitting proposals for the questioning of critical witnesses.

The court set aside the College's determination and the sanctions against John and directed the School to conduct further proceedings.

Doe v. Westmont College (2019) 34 Cal.App.5th 622.

NOTE:

This case reiterates the importance of having good procedures and following those procedures. Serious student discipline cases are very difficult and are often closely scrutinized by students and their families. It is important to ensure that the procedure itself works and that administrators are trained to follow the procedure carefully.

DISABILITY DISCRIMINATION

Magistrate Judge Finds Title III Public Accommodations Not Limited to Physical Structures.

The National Association of the Deaf, on behalf of its members and three individually named plaintiffs brought class action lawsuits under Section 504 of the Rehabilitation Act of 1973 ("Section 504") and Title III of the Americans with Disabilities Act of 1990 ("Title III") against Harvard University and the Massachusetts Institute of Technology ("MIT") alleging failure to provide equal access for deaf and hard of hearing individuals to the audio and audiovisual content the schools make available online to the general public.

Title III of the ADA prohibits disability-based discrimination in public accommodations provided by private entities, including private schools. Specifically, Title III prohibits discrimination against individuals based on disability in the "full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of any place of public accommodation by any person who owns ... or operates a place of public accommodation." For example, Title III and its implementing regulations require public accommodations to furnish appropriate auxiliary aids and services where necessary to ensure effective communication with individuals with disabilities.

Section 504 and its implementing regulations prohibit recipients of federal funding from, among other things, denying a qualified handicapped person the opportunity to participate in or benefit from any aid, benefit, or service; denying a qualified handicapped person equal access to any aid, benefit, or service; or providing a qualified handicapped person less effective aids, benefits, or services than those provided to others. For example, Section 504 and its various implementing regulations require a recipient of federal funding to take appropriate steps to ensure that persons with impaired hearing are able to access the aids, benefits, and services it provides.

Harvard and MIT each control, maintain, and administer websites on which the schools make available to the public, free of charge, educational and general interest content, including audio and audiovisual files. The schools each create some, but not all, of the content. Only a fraction of the content contains accurate, effective captioning for the deaf or hard of hearing.

The schools each filed motions for judgment on the pleadings, arguing that the websites were not themselves "places of public accommodation" under Title III because the websites were not physical structures. The schools further argued that the content on the websites was not an "aid, benefit, or service" of the schools under Section 504 because the schools merely furnish the websites, third parties post content to the websites, and the schools do not provide or control the content.

Since the facts and defendants' arguments in the Harvard and MIT cases were largely the same, United States Magistrate Judge Katherine A. Robertson issued a detailed order in the Harvard case, which she applied equally to the MIT case. In analyzing the schools' first argument, Judge Robertson explained that First Circuit precedent establishes that public accommodations are not limited to actual physical structures and may extend beyond physical places. Accordingly, the judge rejected the schools' argument that the websites could not constitute places of public accommodation.

Judge Robertson also rejected the schools' argument that the content on the websites was not an "aid, benefit, or service" of the schools under Section 504. The judge explained that while third parties may have created and posted some of the content on the schools' websites, the schools created and posted other content on the

websites. Accordingly, the schools must comply with Section 504 for that content. Further, Judge Robertson noted that the Section 504 implementing regulations prohibit a recipient of federal funding from discriminating in providing any aid, benefit, or service to a disabled individual directly or through contractual, licensing, or other arrangements. Therefore, the Title III and Section 504 components of the National Association of the Deaf's cases against Harvard and MIT will proceed to trial.

The complete orders of United States Magistrate Judge Katherine A. Robertson are available at: http://bit.ly/2JU7CDx

NOTE:

Judge Robertson's orders are only binding on Harvard and MIT. However, the judge's order is consistent with the legal obligations for private school and colleges under Title III to provide equal access to services to individuals with disabilities. Further, the Ninth Circuit Court of Appeals, which encompasses the state of California, held in January 2019 in Robles v. Domino's Pizza, LLC (2019) 913 F.3d 898, that a website and app that facilitated access to the goods and services of a place of public accommodation were covered by Title III of the ADA.

EMPLOYEES

WAGE AND HOUR

California's ABC Test for Independent Contractors Applies Retroactively.

In *Vazquez v. Jan-Pro Franchising International, Inc.*, the Ninth Circuit analyzed, among other things, whether the California Supreme Court's 2018 decision in *Dynamex Operations West, Inc. v. Superior Court*, which established the ABC Test for determining whether a worker is an independent contractor, applies retroactively. Under the ABC Test, a worker is not an independent contractor unless the hiring entity establishes (A) the worker is free from the control and direction of the hiring entity in connection with the performance of the work, under the contract terms and in fact; (B) the worker performs work that is outside the usual course of the hiring entity's business; and (C) the worker is customarily engaged in an independently established trade, occupation, or business.

The court analyzed California law related to retroactivity and the California Supreme Court's opinion in the *Dynamex* case to reach its conclusion that *Dynamex* applies retroactively. First, in California, there is a presumption that judicial decisions have retroactive effect, even those decisions that overrule precedent. Second, the California Supreme Court in *Dynamex* emphasized that its holding was a clarification rather than departure from established law, which further indicates an intended retroactive application. Finally, the court noted that there was no indication that California courts were likely to hold that *Dynamex* applied only prospectively. The California Supreme Court has denied requests to modify the *Dynamex* opinion to apply the ABC Test only prospectively and lower courts have already begun applying the ABC Test retroactively. The court remanded the case to the district court to decide the case using the *Dynamex* ABC Test.

Vazquez v. Jan-Pro Franchising International, Inc. (9th Cir. 2019) 923 F.3d 575.

NOTE:

In light of the decisions in Dynamex and Jan-Pro, schools should undergo an assessment of all workers currently classified as independent contractors and determine whether they can be properly classified as such under the ABC Test. Schools need to recognize that the legal presumptions continue to make it much more difficult to classify workers as independent contractors. Workers at schools who provide typical school services such as teaching likely do not qualify as independent contractors under the law. Read more about the ABC Test from Dynamex Operations W. v. Superior Court (2018) 4 Cal.5th 903, reh'g denied (June 20, 2018) at: http://bit.ly/2JTAYlJ

EEOC EMPLOYEE PAY DATA COLLECTION

EEO-1 Filers Must Submit Component 2 Pay Data to EEOC By September 30, 2019.

Since 1966, all private employers with 100 or more employees have been required to file an EEO-1 report, which is an annual government survey that employers use to provide a count of their employees by job category and then by ethnicity, race, and gender. In 2016, the Equal Employment Opportunity Commission (EEOC) revised the EEO-1 report to collect data on each employee's W-2 earnings and hours worked in 12 pay bands (i.e., 12 specified salary brackets) (Component 2 pay data) beginning with the 2017 reporting cycle. In August 2017, the federal Office of Management and Budget (OMB), a component of the Executive Branch, decided to initiate a review of stay for the Component 2 pay data. Thereafter, the National Women's Law Center filed a suit against the OMB for its extended review of stay for Component 2 pay data.

In March 2019, Judge Tanya S. Chutkan, a federal D.C. judge, ordered that Component 2 pay data be included in the EEO-1 report. Thereafter, the OMB said the EEOC could collect Component 2 pay data by September 30, 2019. In April 2019, Judge Chutkan ordered the EEOC to collect Component 2 pay data for 2018 by September 30, 2019. Judge Chutkan then gave the EEOC the option to collect Component 2 pay data for 2017 or 2019. The EEOC subsequently elected to collect Component 2 pay data for 2017. The due date for 2017 Component 2 pay data is the same as the due date for 2018 Component 2 pay data, September 30, 2019. The EEOC was required to notify EEO-1 filers by April 29, 2019 of the Sept. 30, 2019 deadline for the collection of 2018 Component 2 pay data.

However, Employers must still submit Component 1 data in the EEO-1 survey to the EEOC by May 31, 2019. The EEO-1 Survey is available at: https://www.eeoc.gov/employers/eeo1survey/index.cfm.

EEOC DISCRIMINATION AND RETALIATION CHARGES

EEOC Discrimination Charges Fell to 12-Year Low in FY 2018.

In fiscal year 2018, which ended on September 30, 2018, the Equal Employment Opportunity Commission (EEOC) received 76,418 discrimination and retaliation charges, which marks the fewest number of charges received by the EEOC since 2006. More than half of the charges the EEOC received in 2018 were for retaliation, while discrimination based on sex, race, or disability comprised the most frequently filed types of discrimination charges. Discrimination based on religion, salary, and genetic information comprised the least common types of discrimination charges filed. The numbers for each type of charge declined in fiscal year 2018 except for charges brought under the Equal Pay Act (EPA) and the Genetic Information Nondiscrimination Act of 2008 (GINA), which saw a modest increase.

While EEOC trends indicate discrimination and retaliation charges are declining, it remains crucial to maintain fair, consistent, and legally compliant employment practices in order to prevent and defend against discrimination and retaliation charges.

For more information visit: https://www.eeoc.gov//eeoc/statistics/enforcement/charges.cfm

ARBITRATION AGREEMENTS

Employee Who Continued Working After Notification of Arbitration Agreement Was Bound By Terms.

During a staff meeting, Sohnen Enterprises' Chief Operating Officer (COO) informed all employees in attendance, including employee Erika Diaz, that the company was adopting a dispute resolution policy requiring arbitration of all claims. The COO stated that continued employment by an employee who refused to sign the agreement constituted acceptance of the dispute resolution agreement. About two weeks after the staff meeting, Diaz informed the COO that she did not wish to sign the arbitration agreement. The COO reminded Diaz that continuing her employment with Sohnen constituted acceptance of the arbitration agreement. Several days later, Diaz and her attorney delivered a letter to Sohnen stating Diaz refused to accept the arbitration agreement, but intended to continue her employment with the company. On that same day, Diaz served Sohnen with a complaint alleging workplace discrimination. Sohnen filed a motion to compel arbitration of Diaz's claim, which Diaz opposed.

A party petitioning the court to compel arbitration must first prove the parties formed a binding agreement to arbitrate. If the petitioning party makes this showing, the party opposing arbitration may nevertheless avoid arbitration if she can show that the agreement is unconscionable, and therefore unenforceable. Determining whether an agreement is unconscionable requires an analysis of the existence of oppression, surprise, unequal bargaining power, or overly harsh or one-sided results.

Under California law, when an employee continues his or her employment after notification that an agreement to arbitrate is a condition of continued employment, that employee has impliedly consented to the arbitration agreement. In applying this principle to the facts before them, the court found that Diaz was bound by the terms of the arbitration agreement because she continued to work for Sohnen after she received notice of the agreement. The court further noted that the at-will employment relationship between Sohnen and Diaz allowed Sohnen to make such unilateral changes to the terms of Diaz's employment as long as it provided her with notice of the change and the alteration did not violate a statute or breach an implied or expressed contractual agreement.

Accordingly, Sohnen established that it had a binding agreement to arbitrate with Diaz. Further, Diaz failed to present any evidence of circumstances demonstrating unconscionability.

Diaz v. Sohnen Enterprises (2019) 34 Cal.App.5th 126.

Agreement to Terminate All Contractual Obligations Did Not Terminate Arbitration Provision.

In December 2015, Oxford Preparatory Academy (Oxford) and Edlighten Learning Solutions (Edlighten) entered into three agreements: (1) an Affiliation Agreement; (2) a Personnel Service Agreement; and (3) a Management Services Agreement. The Management Services Agreement contained an arbitration provision requiring the parties to arbitrate any controversy or claim arising out of the agreement or any breach of the agreement.

In May 2016, the parties entered into a Termination Agreement, which terminated all three agreements and all of the parties' rights and obligations under the agreements except for certain payment obligations for services rendered effective June 17, 2016, the termination date. The Termination Agreement also included an integration clause, which stated, "[t]here are no agreements, understandings, commitments, representations or warranties with respect to the subject matter hereof except as expressly set forth in this Agreement. This Agreement

supersedes all prior oral or written negotiations, understandings and agreements with respect to the subject matter hereof."

In March 2017, Oxford filed a complaint against Edlighten for breach of the Management Services Agreement, breach of the Personnel Services Agreement, and breach of fiduciary duty, among other things, based on events that occurred before June 17, 2016. Edlighten filed a petition to compel arbitration of Oxford's claims, arguing the arbitration provision in the Management Services Agreement survived the Termination Agreement. Oxford opposed the petition, arguing the Termination Agreement extinguished any duty to arbitrate.

The Court of Appeal analyzed whether the arbitration provision in the Management Services Agreement survived after the parties executed the Termination Agreement. The Court found the Termination Agreement did not extinguish the arbitration provision with respect to Oxford's claims, which accrued before termination. The Termination Agreement did not expressly or impliedly reflect the parties' desire to forego arbitration of claims accruing before termination.

The Court explained that the Termination Agreement did not waive, extinguish, excuse, or release any right or obligation of the parties that accrued before June 17, 2016 and, instead merely divided the rights and obligations of the parties on a temporal basis, with one set existing before June 17, 2016 and one set existing afterward. The Court further explained that the integration clause in the Termination Agreement also did not extinguish the arbitration provision in the Management Services Agreement because while the integration clause superseded previous agreements on the "subject matter" of the Termination Agreement, the "subject matter" of the Termination Agreement was the parties' mutual consent to cease performance under the three agreements.

The Court concluded that because Oxford's complaint alleged breaches of contractual obligations that arose before the termination date, the dispute must be resolved in a manner consistent with the parties' agreement to arbitrate disputes having their source in pre-termination performance or nonperformance. Accordingly, the arbitration provision survived the Termination Agreement.

Oxford Preparatory Academy v. Edlighten Learning Solutions (2019) 34 Cal.App.5th 605.

Note:

If parties to an agreement want to extinguish a contractual agreement to arbitrate through a Termination Agreement, the Termination Agreement should expressly state that the contractual agreement to arbitrate is extinguished.

Arbitration Agreements Must Explicitly Call for Class Arbitration.

Lamps Plus, Inc., a company that sells light fixtures and related products, requires employees to sign an arbitration agreement upon hire. In 2016, a hacker impersonating a Lamps Plus official tricked a Lamps Plus employee into providing the tax information of approximately 1,300 company employees. After the disclosed tax information of Lamps Plus employee Frank Varela was used to file a fraudulent tax return, he brought state and federal claims on behalf of himself and the class of employees whose tax information had been compromised. Lamps Plus sought to compel arbitration pursuant to the Federal Arbitration Act (FAA), which requires courts to enforce covered arbitration agreements according to their terms, with the District Court.

Instead of authorizing arbitration on an individual basis, the District Court authorized class wide arbitration. Lamps Plus argued that the court made an error when it compelled class wide arbitration and sought arbitration on an individual basis with the Ninth Circuit Court

of Appeals. The Ninth Circuit affirmed the District Court's decision compelling class wide arbitration and held that the agreement was ambiguous as to class wide arbitration under California law. In California, an agreement is ambiguous when it is capable of two or more constructions, both of which are reasonable.

The U.S. Supreme Court, deferring to the Ninth Circuit's interpretation of California law and its conclusion that the agreement was ambiguous as to class arbitration, examined whether the FAA bars class arbitration when an agreement is ambiguous about the availability of class wide arbitration.

The U.S. Supreme Court previously held that a court cannot compel arbitration on a class wide basis when an agreement is "silent" on the availability of such arbitration. This is because, under the FAA, a party may not be compelled to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so. Arbitration is strictly a matter of consent. Consent is essential, because arbitrators wield only the authority they are given.

The U.S. Supreme Court expanded this holding to arbitration agreements that are ambiguous as to class arbitration for the very same reasons. The Court also explained that class arbitration fundamentally changes the nature of the "traditionally individualized arbitration" envisioned by the FAA. Class arbitration lacks the benefits of individual arbitration, including lower costs, greater efficiency and speed, and the ability to choose expert adjudicators to resolve specialized disputes. Class arbitration also introduces new risks and costs to the arbitration process. Class arbitration further raises serious due process concerns by adjudicating the rights of absent members of the plaintiff class, with only limited judicial review. Accordingly, the Court held that courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a class wide basis.

Lamps Plus, Inc. v. Varela (2019) 139 S.Ct. 1407.

LABOR RELATIONS

Employees' Profanity-Infused Restroom Conversation Not Protected Activity.

While in a public restroom at a Quicken facility that was open to both employees and customers, Quicken employee Michael Woods complained to employee Austin Laff, using language pervaded with expletives, about a Quicken client referred to Woods who Woods felt was wasting his time. Laff responded that he understood Woods' frustration. A supervisor, Jorge Mendez, overhead the conversation and saw Laff exit a stall. After leaving the restroom, Mendez forwarded an email to all employees at the facility reminding them of proper employee conduct in public areas and directing them to refrain from swearing in the restroom about clients and "stating clients are wasting your (*swear word*) [sic] time."

The email prompted Quicken management to inquire into Mendez's reason for sending the email, which Mendez explained was triggered by a conversation he overhead in the restroom in which Laff was participating. Quicken management decided to meet with Laff and ask him about his involvement with the conversation in the restroom. Partly because of past accusations of misconduct made against Laff, Quicken management further decided that if Laff admitted his involvement, he would receive a written final warning, but if he denied his participation and was apparently untruthful, Quicken would terminate him. During the meeting, Laff stated he had "no clue" about the earlier incident in the restroom, so Quicken management gave Laff separation documents. Upon receipt of the documents, Laff admitted his involvement. However, Quicken moved forward with Laff's termination.

The NLRB (National Labor Relations Board) analyzed whether the conversation Laff and Woods had in the restroom was concerted activity and whether Laff was unlawfully terminated for participating in that conversation. Section 7 of the

National Labor Relations Act (NLRA) protects the right of employees to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. Accordingly, the Board noted, in order for an employee to receive Section 7 protection, the activity must be (1) concerted and (2) engaged in for the purpose of mutual aid or protection. Whether an activity is "concerted" depends on the link between the employee's actions and those of his coworkers. Whether an activity is, "for the purpose of mutual aid or protection" depends on whether the employee or employees are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees."

The Board determined that Laff's conversation with Woods did not constitute concerted activity for several reasons. First, in their brief exchange, Woods complained the client was wasting his time and no evidence existed to indicate that Woods complained to Laff to induce mutual protest related to the incident. Second, Laff's response that he understood Woods's frustration did not indicate Laff contemplated group action to address the problem. Instead, it appeared to the Board, the conversation amounted to mere personal griping. The Board further determined that even if the conversation did amount to concerted activity, it was not for mutual aid or protection. There was no evidence the conversation between Laff and Woods involved the goal of improving their working conditions or those of fellow employees. Accordingly, the Board held that Laff did not engage in protected activity and, thus, his termination was not unlawful.

Quicken Loans, Inc. & Austin Laff (Apr. 10, 2019) 367 NLRB No. 112.

NOTE:

The NLRA grants private sector workers the right to organize and be represented by labor unions and gives significant protections to employees whether or not they work in a unionized environment. Employee complaints about work or the workplace may or may not be legitimate and may or may not be protected under the NLRA. It is important to carefully analyze employee complaints to determine whether or not they might be protected before deciding how to proceed. This includes "complaints" that may contain profanity, be shared on social media and which may be deemed to be untruthful by your school or college.

BUSINESS AND FACILITIES

THIRD PARTY TRANSPORTATION VENDORS

Transportation: Checklist of Issues for Contracts with Third Party Transportation Vendors.

Many schools contract directly with vendors to provide transportation services to students, whether that transportation is to and from school, or for school sponsored field trips and activities. Below is a checklist that covers the various issues and laws that schools need to be aware of when contracting with vendors to transport students. California statutes include specific requirements related to school buses and school pupil activity buses (SPABs). The points below do not represent an exhaustive list of all requirements. Depending on the mode of transportation, additional requirements may apply.

- **Scheduling Details.** Include timing and scheduling details in the agreement. Contracts may include consequential or liquidated damages for no shows or late arrivals.
- **Screening.** California law requires fingerprinting and tuberculosis risk assessments for drivers. The vendor contract should include provisions stating that drivers will be fingerprinted and pass tuberculosis risk assessments before providing services.
- **Safety.** How and where will the company drop off the children? What happens if the car breaks down or gets into an accident?

The contract should address these protocols. The contract should also state that the vendor is responsible for ensuring students are dropped off in a safe manner. Finally, transportation providers for students are generally required to implement, maintain, and review annually a transportation safety plan. (See Education Code section 39831.3.)

- **Seatbelts.** Vehicles should include seatbelts for passengers. California law requires three-point seatbelts on (1) school buses manufactured on and after July 1, 2005 that carry more than 16 passengers and (2) all other school buses manufactured on and after July 1, 2004. (See California Vehicle Code section 27316.)
- **Insurance Coverage.** Consult with your school's insurance broker to identify the nature and extent of coverage required for the specific scope of services, and ensure that the vendor obtains this coverage. Required coverage includes Workers Compensation insurance, General Commercial Liability and Property Damage Insurance, and Commercial Automobile Liability Insurance. The vendor should provide the school proof that it has obtained all required coverage.
- **Student Accommodations.** Address how the company will accommodate a student with a disability, such as specialized equipment.
- **Compliance with Laws.** Include language stating that the vendor will comply with all laws and regulations related to transportation of students, including the operation of its vehicles, and training, licensing, and certification requirements. The laws in this area are detailed, and vary depending on the type of vehicle that is being operated by the vendor.
- **Indemnification.** The transportation company should defend, indemnify, and hold harmless the school from any and all liability associated with the transportation services.
- **Student Instruction.** The school will also need to ensure that all K-12 students transported in a school bus or SPAB receive instruction in emergency procedures and passenger safety, as required by Education Code section 39831.5.

DATA DESTRUCTION

The U.S. Department of Education Issues Revised Best Practices for Data Destruction.

In March 2019, the U.S. Department of Education's Privacy Technical Assistance Center revised its recommended best practices for data destruction under the Family Educational Rights and Privacy Act (FERPA). FERPA applies to educational agencies and institutions that receive funding under any program administered by the Department of Education. Accordingly, FERPA does not apply to private schools unless the private school receives such federal funding. Nevertheless, the guidance provides valuable information and resources on data destruction that private schools may use to guide their own best practices. For example, the guide provides practical information on destroying electronically stored information, which can be particularly challenging, such as appropriate data deletion methods to ensure data cannot be recovered.

For more information visit: http://bit.ly/2WhYGhY

LITIGATION

Nonprofit Director Maintained Standing After Her Removal from the Board.

Margaret Summers served on the board of directors for Wildlife Waystation, a nonprofit animal sanctuary located in Los Angeles. Summers filed an action against Wildlife Waystation and fellow director, Martine Colette, alleging numerous acts of self-dealing and breaches of fiduciary duty and seeking to

remove Colette as a director. Thereafter, Colette and the other Waystation directors voted to remove Summers from the board of directors. Waystation then argued that the court should dismiss Summers' action because, while she had standing to bring the action when she first filed it, she lost her standing when the board of directors later removed her.

Collectively, California Corporations Code sections 5142, 5223, and 5233 give a director of a nonprofit corporation standing to bring an action to, among other things, enjoin, correct, or obtain damages for or to otherwise remedy a breach of a charitable trust; remove another director for fraudulent or dishonest acts, gross abuse of authority, or breach of contract; and remedy impermissible self-dealing by another director. While the parties agreed that Summers had standing at the time she filed the action because she was a director of Wildlife Waystation, the parties disagreed over whether Summers lost her standing when the board of directors removed her.

To reach its decision, the court, noting that no other California case had addressed the issue before and the plain language of the statutes was unclear, analyzed legislative intent, public policy considerations, statutory purpose, and decisions on the same issue from other jurisdictions. Ultimately, the court held that Summers had standing under sections 5142, 5223, and 5233 at the time she instituted her action, and her subsequent removal as director did not deprive her of standing to maintain the action. The court declined to read into the statutes a requirement that a director must remain a director throughout the litigation in the absence of contrary legislative direction. Doing so would frustrate the purpose of these statutes to ensure that the individual in the best position to learn about breaches of trust in public benefit corporations and charitable trusts is able to bring the relevant facts to a court's attention.

Summers v. Colette (2019) 246 Cal.Rptr.3d 116.

LCW BEST PRACTICES TIMELINE

Each month, LCW will present a monthly timeline of best practices for private and independent schools. The timeline runs from the fall semester through the end of summer break. LCW encourages schools to use the timeline as a guideline throughout the school year.

MAY

- ☐ Complete hiring of new employees for next school year.
- ☐ Complete hiring for any summer programs.
- ☐ If service agreements expire at the end of the school year, review service agreements to determine whether to change service providers (e.g. janitorial services if applicable).
  - Employees of a contracted entity are required to be fingerprinted pursuant to Education Code sections 33192, if they provide the following services:
    - School and classroom janitorial.
    - Schoolsite administrative.
    - Schoolsite grounds and landscape maintenance.
    - Pupil transportation.
    - Schoolsite food-related.
  - A private school contracting with an entity for construction, reconstruction, rehabilitation, or repair of a school facilities where the employees of the entity will have contact, other than limited contact, with pupils, must ensure one of the following:
    - That there is a physical barrier at the worksite to limit contact with pupils.
    - That there is continual supervision and monitoring of all employees of that entity, which may include either:

- surveillance of employees of the entity by School personnel; or
- supervision by an employee of the entity who the Department of Justice has ascertained has not been convicted of a violent or serious felony (which may be done by fingerprinting pursuant to Education Code section 33192). (See Education Code section 33193).

If conducting end of school year fundraising:

□ Raffles:
- Qualified tax-exempt organizations, including nonprofit educational organizations, may conduct raffles under Penal Code section 320.5.
- In order to comply with Penal Code section 320.5. raffles must meet all of the following requirements
  - Each ticket must be sold with a detachable coupon or stub, and both the ticket and its associated coupon must be marked with a unique and matching identifier.
  - Winners of the prizes must be determined by draw from among the coupons or stubs. The draw must be conducted in California under the supervision of a natural person who is 18 years of age or older
  - At least 90 percent of the gross receipts generated from the sale of raffle tickets for any given draw must be used by to benefit the school or provide support for beneficial or charitable purposes.

□ Auctions:
- The school must charge sales or use tax on merchandise or goods donated by a donor who paid sales or use tax at time of purchase.
  - Donations of gift cards, gift certificates, services, or cash donations are not subject to sales tax since there is not an exchange of merchandise or goods.
  - Items withdrawn from a seller's inventory and donated directly to nonprofit schools located in California are not subject to use tax.
    - Ex: If a business donates items that it sells directly to the school for the auction, the school does not have to charge sales or use taxes. However, if a parent goes out and purchases items to donate to an auction (unless those items are gift certificates, gift cards, or services), the school will need to charge sales or use taxes on those items.

JUNE

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

MID-JUNE THROUGH END OF JULY

□ Update Employee and Student/Parent Handbooks

□ The handbooks should be reviewed at the end of the school year to ensure that the policies are legally compliant, and consistent with the employee agreements, and the tuition agreements that were executed. The School should also add any policies that it would like to implement.

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

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

AUGUST

Conduct staff trainings, which may include:

- AB 1825 Sexual Harassment Training, which a school with more than 50 employees must provide to supervisors and managers every two years.
- Mandated Reporter Training
  - Prior to commencing employment all mandated reporters must sign a statement to the effect that they have knowledge of the provisions of the Mandated Reporter Law and will comply with those provisions. (California Penal Code section 11166.5.)
- Risk Management Training such as Injury, Illness Prevention, CPR.
- Distribute Parent/Student Handbooks and collect signed acknowledgement of receipt forms, signed photo release forms, signed student technology use policy forms, and updated emergency contact forms.

CONSORTIUM CALL OF THE MONTH

Members of Liebert Cassidy Whitmore's consortiums are able to speak directly to an LCW attorney free of charge to answer direct questions not requiring in-depth research, document review, written opinions or ongoing legal matters. Consortium calls run the full gamut of topics, from leaves of absence to employment applications, student concerns to disability accommodations, construction and facilities issues and more. Each month, we will feature a Consortium Call of the Month in our newsletter, describing an interesting call and how the issue was resolved. All identifiable details will be changed or omitted.

ISSUE: A school administrator explained to an LCW attorney that the school is quite concerned about the recent increase in cases of the measles and the pockets of measles outbreaks occurring throughout the country. To protect the students, families, and employees in the school community, the school would like to stop granting permanent medical exemptions and instead require students to provide a signed, written statement from a licensed physician annually. The school administrator asked whether this is legally permissible.

RESPONSE: The LCW attorney explained that current California law requires a school to grant a permanent medical exemption to a child if the school receives (1) a signed, written statement; (2) from a licensed physician (Medical Doctor (MD) or Doctor of Osteopathic Medicine (DO)); (3) which states the physical condition or medical circumstances of the child are such that the required immunization(s) is not considered safe on a permanent basis; and (4) which vaccines are being exempted. Accordingly, so long as the child meets the preceding criteria, the school must grant a permanent medical exemption to the child. Should a school refuse admission to a child who submits a valid written statement, the child's parents could allege discrimination based on medical condition.
The new immunization regulations that go into effect on July 1, 2019, impose stricter requirements on medical exemptions, but still require schools to grant permanent medical exemptions if the applicable criteria is met.

STUDENT IMMUNIZATIONS

New Pre-Kindergarten and School Immunization Requirements Effective July 1, 2019

On July 1, 2019, new regulations go into effect regarding immunization requirements for students enrolled in California schools for the 2019-2020 school year. Under the new regulations, if a child's enrollment at a school on or after July 1, 2019 is considered an "admission," the child must meet the new immunization requirements at the time of admission. The regulations define "admission" as the child's first attendance in a school or pre-kindergarten facility or re-entry after withdrawing from a previous enrollment. This definition encompasses transfer students. Similarly, if a child is advancing to 7th grade, the child must meet the new 7th grade immunization requirements in effect at the time of entry into 7th grade.

New Requirements for Unconditional Admission

Unconditional admission is admission based upon a school's documented receipt of all required immunizations for the child's age or grade except for those immunizations exempted pursuant to a permanent medical exemption.

Beginning July 1, 2019, the requirements for unconditional admission for Pre-Kindergarten are as follows:

AGE WHEN ADMITTED	TOTAL NUMBER OF DOSES REQUIRED OF EACH IMMUNIZATION
2 through 3 months	1 Polio 1 DTaP 1 Hep B 1 Hib
4 through 5 months	2 Polio 2 DTaP 2 Hep B 2 Hib
6 through 14 months	2 Polio 3 DTaP 2 Hep B 2 Hib
15 through 17 months	3 Polio 3 DTaP 2 Hep B 1 Varicella *On or after the 1st birthday:* 1 Hib4 1 MMR
18 months through 5 years	3 Polio 4 DTaP 3 Hep B 1 Varicella *On or after the 1st birthday:* 1 Hib4 1 MMR

Beginning July 1, 2019, the requirements for unconditional admission for Kindergarten through 12th grade are as follows:

GRADE	NUMBER OF DOSES REQUIRED OF EACH IMMUNIZATION
K-12 Admission	4 Polio 5 DTaP 3 Hep B 2 MMR 2 Varicella
(7^{th} – 12^{th})	1 Tdap
7^{th} Grade Advancement	2 Varicella 1 Tdap

New Requirements for Conditional Admission

Conditional admission is provisional admission for a child who has received some, but not all, required immunizations and is not due for any vaccine dose at the time of admission.

Beginning July 1, 2019, the new requirements for conditional admission for Pre-Kindergarten are as follows:

DOSE	EARLIEST DOSE MAY BE GIVEN	EXCLUDE IF NOT GIVEN BY
Polio #2	4 weeks after 1st dose	8 weeks after 1st dose
Polio #3	4 weeks after 2nd dose	12 months after 2nd dose
DTaP #2, #3	4 weeks after previous dose	8 weeks after previous dose
DTaP #4	6 months after 3rd dose	12 months after 3rd dose
Hib #2	4 weeks after 1st dose	8 weeks after 1st dose
Hep B #2	4 weeks after 1st dose	8 weeks after 1st dose
Hep B #3	8 weeks after 2nd dose	12 months after 2nd dose and at least 4 months after 1st dose

Beginning July 1, 2019, the new requirements for conditional admission for Kindergarten through 12th grade are as follows:

DOSE	EARLIEST DOSE MAY BE GIVEN	EXCLUDE IF NOT GIVEN BY
Polio #2	4 weeks after 1st dose	8 weeks after 1st dose
Polio #3	4 weeks after 2nd dose	12 months after 2nd dose
Polio #4	6 months after 3rd dose	12 months after 3rd dose
DTaP #2	4 weeks after 1st dose	8 weeks after 1st dose
DTaP #3	4 weeks after 2nd dose	8 weeks after 2nd dose
DTaP #4	6 months after 3rd dose	12 months after 3rd dose
DTaP #5	6 months after 4th dose	12 months after 4th dose
Hep B #2	4 weeks after 1st dose	8 weeks after 1st dose
Hep B #3	8 weeks after 2nd dose	12 months after 2nd dose and at least 4 months after 1st dose
MMR #2	4 weeks after 1st dose	4 months after 1st dose
Varicella #2	*Age less than 13 years:* 3 months after 1st dose	4 months after 1st dose
	Age 13 years and older: 4 weeks after 1st dose	8 weeks after 1st dose

A child's continued attendance after conditional admission is contingent upon the school's receipt of the remaining immunizations required for unconditional admission.

New Requirements for Permanent Medical Exemptions

For unconditional admissions on or after July 1, 2019, the requirements for a permanent medical exemption have become stricter. To grant a permanent medical exemption to a required immunization, a school must receive from the child's parent or guardian a signed, written statement from a licensed physician (Medical Doctor (MD) or Doctor of Osteopathic Medicine (DO)) and the child must have obtained all other required immunizations. The signed, written statement from the licensed physician must state:

(1) The specific nature of the physical condition or medical circumstance for which the licensed physician does not recommend immunization;

(2) That the physical condition or medical circumstance is permanent; and

(3) Each specific required immunization from which the pupil is permanently exempt.

If the school obtains a signed, written statement that meets these requirements, the school must grant the child a permanent medical exemption.
New Requirements for Temporary Medical Exemptions

For conditional admissions on or after July 1, 2019, the requirements for a temporary medical exemption have also become stricter. To grant a temporary medical exemption to a required immunization, a school must receive from the child's parent or guardian a signed, written statement from a licensed physician (Medical Doctor (MD) or Doctor of Osteopathic Medicine (DO)) and the child must have obtained all other required immunizations. The signed, written statement from the licensed physician must state:

(1) The specific nature of the physical condition or medical circumstance for which the licensed physician does not recommend immunization;

(2) The probable duration of the physical condition or medical circumstance;

(3) Each specific required immunization from which the pupil is exempt; and

(4) The date that the medical exemption expires for each respective immunization.

If the school obtains a signed, written statement that meets these requirements, the school must grant the child a temporary medical exemption. However, the temporary medical exemption must have an expiration date of no more than 12 calendar months from the date of the licensed physician's written statement. To continue admission after the temporary medical exemption expires, the child must thereafter meet all immunization requirements.

What About Existing Medical Exemptions?

Existing medical exemptions remain valid until the earliest of:

(1) The time the child's enrollment is next considered to be an "admission," at which time the school will need to confirm whether the previously filed medical exemption meets the newer requirements; or

(2) The expiration date specified on a temporary medical exemption; or

(3) The time the child advances to 7th grade (for a medical exemption from varicella vaccine or Tdap).

The new regulations are available at http://eziz.org/assets/docs/IMM-1080.pdf

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MANAGEMENT TRAINING WORKSHOPS

Firm Activities

Customized Training

June 11 **"Preventing Harassment, Discrimination and Retaliation in the Private and Independent School Environment"**

Chandler School | Pasadena | Julie L. Strom

June 19 **"Governance"**

The Academy in Berkeley | Berkeley | Linda K. Adler

NEW TO THE FIRM

Donald Le is an Associate in Liebert Cassidy Whitmore's Los Angeles office where he assists clients in matters pertaining to labor & employment law as well as business, construction and facilities. He represents the interests of both public and private sector clients in transaction and litigation matters. He has experience representing and advising owners, contractors, design professionals, and large sub-contractors on a wide variety of construction matters and projects throughout the state. He can be reached at 310.981.2020 or dle@lcwlegal.com.

ON THE MOVE!

Our SAN DIEGO Office is relocating! As of June 1, we'll be located at:
401 West "A" Street, Suite 1675
San Diego, CA 92101
619.481.5900

LCW Webinar

FIVE THINGS CALIFORNIA PRIVATE SCHOOLS NEED TO KNOW ABOUT: VACCINATIONS IN LIGHT OF MEASLES OUTBREAK

Thursday, June 6, 2019 | 8:30 AM - 9:00 AM
From cruise ships to school and college campuses, the threat of measles is grabbing our attention. This quick 30-minute webinar provides California Independent Schools with guidance on vaccination requirements and what schools can, and should, do to keep their campuses safe and epidemic-free.

Who Should Attend?
Heads of School, Business Officers, Registrars, and other Administrators

Workshop Fee:
Consortium Members: $50, Non-Members: $70

PRESENTED BY JULIE L. STROM

REGISTER TODAY:
WWW.LCWLEGAL.COM/EVENTS-AND-TRAINING

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

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