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Articles

Primary and Secondary Education

Joseph A. Ranney, *"Absolute Common Ground": The Four Eras of Assimilation in Wisconsin Education Law.* 1998 WIS. L. REV. 791-822 (1998). The first "great era of educational assimilation" occurred when universal education became the role of schools. The second era involved schools becoming "preservers of ethnic and religious culture." In the third era, parochial school supporters sought state aid. The fourth era, race assimilation, is ongoing.

Michael A. Vaccari, *Public Purpose and the Public Funding of Sectarian Educational Institutions: A More Rational Approach After* Rosenberger *and* Agostini. 82 MARQ. L. REV. 1-61 (1998). Academic competitiveness enhances public education. Yet, the Supreme Court's Establishment Clause rulings have limited religious involvement in education. The Supreme Court should adopt an analysis that encourages private school education without furthering religious interests.

Joseph P. Viteritti, *Blaine's Wake: School Choice, the First Amendment, and State Constitutional Law.* 21 HARV. J.L. & PUB. POL'Y 657-718 (1998). "[I]t is reasonable to expect that the [Supreme] Court would look favorably on government initiatives that provide aid for children to attend religious schools and would frown on choice programs that specifically exclude religious schools from participation." However, poor children will continue to be prevented from attending the school of their choice as the Court probably would not condone the idea of finding a parental right to send children to parochial school at public expense.

Mark R. Freitas, *Applying the Rehabilitation Act and the Americans with Disabilities Act to Student-Athletes.* 5 SPORTS L.J. 139-162 (1998). Congress prohibited government agencies from discriminating against disabled individuals

when it passed the Rehabilitation Act in 1973. In 1990 Congress enacted the Americans with Disabilities Act which enlarged protections for disabled individuals by including "both public entities and private entities operating a place of public accommodation" to the list of those who may not discriminate. Student-athletes are increasingly utilizing these Acts to prevent discrimination in school athletics.

Colleges and Universities

Laura F. Rothstein, *The Affirmative Action Debate in Legal Education and the Legal Profession: Lessons from Disability Discrimination Law.* 2 J. GENDER RACE & JUST. 1-32 (1998). "Under disability law, one is entitled to reasonable accommodations by the program only where the individual with the disability makes 'known' the disability." Similarly law school applicants should make known the qualities decision makers deem important in the admissions process such as hardship, unique perspectives, and exemplary services. Disclosure allows the decision maker to "avoid inappropriate overreliance on statistical measures to demonstrate merit and relative merit."

Deirdre McCloskey, *Happy Endings: Law, Gender, and the University.* 2 J. GENDER RACE & JUST. 77-85 (1998). "[I]f people in universities remember that they are ethical actors as much as they are prudent seekers of self-interest, theses places can be as good for sexual minorities as they are for other minorities."

Rob Remis, *Analysis of Civil and Criminal Penalties in Athlete Agent Statutes and Support for the Imposition of Civil and Criminal Liability upon Athletes.* 8 SETON HALL J. SPORT L. 1-74 (1998). The athlete and his agent are subject to disparate laws. Almost half of the states impose criminal or civil penalties upon an agent for violation of athlete-agent statutes. The athlete, however, is subject to criminal penalties in only five states and only eight states would impose civil liability.

Kevin O'Shea, *The First Amendment.* 24 J.C. & U.L. 131-160 (1997). "The judicial decisions of the past year affecting First Amendment rights in public higher education indicate a number of trends." Most often employers prevail when an educator, who has been aggrieved by employment decisions, raises First Amendment objections. However, the employers' victory is expensive and time consuming. Additionally, students "will raise more complaints regarding the classroom speech of their professors." Lastly, students will also raise First Amendment objections to what they perceive as encroachments on their free exercise of religion.

Christopher Johnsen, *Federal Immunity Law in Higher Education: A Review of 1996 and 1997 Judicial Decisions.* 24 J.C. & U.L. 161-186 (1997). "The Eleventh Amendment in general protects the states from suits without their express consent." The author concludes that "Eleventh Amendment immunity should continue to strengthen in the coming years. . ." Additionally, he finds that the power of Congress to abrogate immunity will continue to be scrutinized by the federal courts and that the Court will soon consider the issue of analyzing an official's intent.

Robert D. Bickel, *Tort-Accident Cases: Traditional Tort Rules in the College or University Setting.* 24 J.C. & U.L. 187-212 (1997). Faculty and university or college staff continue to utilize negligent misrepresentation and intentional torts such as defamation and intentional infliction of emotional distress as causes of action against their schools. Students also rely on reasonable care based theories such as negligent supervision and instruction as causes of action. Additionally, students have sought to hold colleges and universities liable for the acts of the schools' employees or third parties under vicarious liability theories. Other areas of liability that have been utilized against colleges and universities include defective premises, duty to control others, medical malpractice and governmental immunity, workers' compensation, and construction contracts.

Darryll K. Jones, *Tax Exemption Issues Facing Academic Health Centers in the Managed Care Environment.* 24 J.C. & U.L. 261-323 (1997). "[The] article discusses and analyzes tax provisions applicable to operating strategies employed by academic health centers adapting to the managed care environment."

Robert W. Gall, *The University as an Industrial Plant: How a Workplace Theory of discriminatory Harassment Creates a "Hostile Environment" for Free Speech in America's Universities.* 60 LAW & CONTEMP. PROBS. 203-243 (1997). Hostile environment theory suggests that racist and sexist language can be so prevalent in the workplace that it "constitutes discriminatory harassment." Hostile work environment theory should not be woven into campus speech codes. Free speech deserves greater protection on campus than in the workplace.

Brian L. Porto, *Completing the Revolution: Title IX Catalyst for an Alternative Model of College Sports.* 8 SETON HALL J. SPORT L. 351-418 (1998). Title IX of the Education Amendments of 1972 has forced schools to end discrimination in athletics. As a result of the Act, some colleges and universities have disbanded some men's team to achieve equality. "Colleges can achieve gen-

der equity and maintain ample sports opportunities for men if they replace the commercial model of college sports with a participation model."

Rob Remis, *The Art of Being a Sports Agent in More Than One State: Analysis of Registration and Reporting Requirements and Development of a Model Strategy.* 8 SETON HALL J. SPORT L. 539-574 (1998). "[T]he athlete agent statutes of the twenty-seven states that regulate the sports agent profession are vaguely worded and vary considerably from state to state." An agent, who wishes to practice in several states, should familiarize himself or herself with the applicable statutory law.

Darryl C. Wilson, *Title IX's Collegiate Sports Application Raises Serious Questions Regarding the Role of the NCAA.* 31 J. MARSHALL L.REV. 1303-1319 (1998). Protection and preservation of "the amateur collegiate spirit" is the NCAA's primary purpose. "The NCAA must ask itself whether business concerns have caused it to lose sight of its purpose." The author uses Title IX, which prohibits sex discrimination, to illustrate the tension between business and the NCAA's primary purpose.

Melanie Ryan Byers, *Affirmative Action in Post-Secondary Education: When Race Matters.* 1997 DET. C.L. MICH. ST. U. L. REV. 955-992 (1997). "The purpose of this Comment is to analyze the constitutional success of minority-preferential admissions and financial aid programs in universities since their inception and to ascertain whether the heightened judicial scrutiny in this area of the law supports the viability of these programs."

Michael C. Dorf, *God and Man in the Yale Dormitories.* 84 Va. L. Rev. 843-869 (1998). The author uses four male students at Yale College, who desire to live off-campus for religious reasons, and Yale's unwillingness to accommodate them by making an exception to its housing policy, to exemplify the limits of legal and constitutional thought.

Debra M. Parrish, *The Federal Government and Scientific Misconduct Proceedings, Past, Present, and Future as Seen Through the* Thereza Imanishi-Kari *Case.* 24 J.C. & U.L. 581-618 (1998). "The . . . article discusses the development of federal policies and procedures for responding to scientific misconduct with reference to the recent *Thereza Imanishi-Kari* case." The case demonstrates the need for changing "the current federal scheme" for addressing scientific misconduct.

Barbara A. Lee, *Discrimination Against Students in Higher Education: A Review of the 1996 Judicial Decisions.* 24 J.C. & U.L. 619-636(1998). The article

reviews judicial decisions in 1996 on the issues of gender discrimination, sexual orientation, and racial discrimination.

Robert S. Whitman, *Affirmative Action on Campus: The Legal and Practical Challenges.* 24 J.C. & U.L. 637-670 (1998). The author examines recent developments in affirmative action including the areas of "Title VII of the Civil Rights Act of 1964 and the federal constitution," educational institutions, racial diversity as a justification for race based decision making, and strict scrutiny review survival.

Barry R. Ewy, *Drug Dispensing in Athletic Department of Colleges and Universities: A New Proposal.* 7 SETON HALL J. SPORT L. 371-390 (1997). Access to prescription drugs is important to student-athletes and their coaches. "However, the importance of proper health care outweighs the importance of access." The author suggests the NCAA adopt a uniform system designed to control the dispensing and storing of prescription drugs.

Diane Heckman, *Scoreboard: A Concise Chronological Twenty-Five Year History of Title IX Involving Interscholastic and Intercollegiate Athletics.* 7 SETON HALL J. SPORT L. 391-422 (1997). Congress enacted Title IX of the Education Amendments 25 years ago. Title IX prohibits discrimination on the basis of sex. The author examines Title IX's impact on the student-athlete and athletic employment as well as procedural, jurisdictional, and threshold issues in Title IX litigation.

Janice L. Austin, Patricia A. Cain, Anton Mack, J. Kelly Strader, and James Vaseleck, *Results From a Survey: Gay, Lesbian, and Bisexual Students' Attitudes About Law School.* 48 J. LEGAL EDUC. 157-175 (1998). In 1997, the Law School Admission Council's and Lesbian Issues Work Group surveyed gay and lesbian students and organizations at 194 law schools. "[The] article summarizes survey results and provides conclusions and recommendations in three broad subject areas: the admissions process, the climate for law students, and issues relating to student organizations."

Peter J. Sahlas and Carl Chastenay, *Russian Legal Education: Post-Communist Stagnation or Revival?* 48 J. LEGAL EDUC. 194-215 (1998). The article examines the Russian system of legal education after the fall of communism and attempts to fill the "void" of information on the subject.

Susan Johanne Adams, *Leveling the Floor: Classroom Accommodations for Law Students with Disabilities.* 48 J. LEGAL EDUC. 273-296 (1998). "[The] article examines the provisions of disability accommodation in the classroom

setting . . ." The author concludes that "law schools must be sensitive to special needs and committed to leveling the playing field."

General

Scoot R. Rosner, *Must Kobe Come Out and Play? An Analysis of the Legality of Preventing High School Athletes and College Underclassmen from Entering Professional Sports Drafts.* 8 SETON HALL J. SPORT L. 539-574 (1998). "[The] article . . . look[s] at the reasons behind the increased early entry of high school graduates and college underclassmen into pro sports drafts, and offer[s] and analyze[s] potential solutions to this problem according to the antitrust and labor laws of the United States."

S.E. Phillips, *Assessment Accommodations.* 1997 DET. C.L. MICH. ST. U. L. REV. 917-933 (1997). Striking a balance between attempts to create validity in standardized testing and the rights of the disabled has proven problematic. The Law School Admissions Test has evolved into a battleground for determining what constitutes reasonable accommodation.

Notes and Commentary

Primary and Secondary Education

Why Title IX does not preclude Section 1983 Claims. 65 U. CHI. L. REV. 1465-1486 (1998). Section 1983 provides the victim of sexual harassment by a teacher a cause of action based on constitution and federal laws violations. Title IX also provides the victim with a cause of action. Title IX does not preclude Section 1983 claims.

School Finance, Bilingual Education, and Free Speech. 2 J. GENDER RACE & JUST. 111-125 (1998). According to cyclical theory, gains made in one generation are neutralized or lost in the next. The areas of school finance, bilingual education and free speech have all undergone this cycle.

Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence. 26 HOFSTRA L. REV. 953-1001 (1998). Economically disadvantaged children "have a fundamental right to receive the same educational opportunities as other children under the Equal Protection Clause of the Fourteenth Amendment." The Supreme Court's prior decisions holding that education is not a fundamental right should be reversed.

Lessons Learned: An Evaluation of the Past and Future of Education Finance and Administrative Reform in Canada, Great Britain, and the United States. 31 GEO. WASH. J. INT'L L. & ECON. 271-295 (1997-1998). Most U.S. educational systems are a monopoly. Some states as well as Canada and Great Britain have chosen a more flexible approach. Education reformers in the U.S. should heed the lessons learned from their experiences. One such lesson is that "the charter school concept fosters innovation while allowing local governments to continue their traditional role in shaping the future of education."

The Department of Education Clarifies Its Position Concerning Peer Sexual Harassment: But will Federal Courts Take Notice? 47 CATH. U. L. REV. 1363-1409 (1998). Title IX, which proscribes sex discrimination in educational activities that receive federal funding, is also being used to fight sexual harassment in schools. The Office of Civil Rights has established a test to determine whether a school should be liable for peer sexual harassment. Under this test, a school district can be liable if it "knew or should have known" harassment took place and it failed to take action. Courts should follow OCR's test.

"Make Your Own Kind of Music": Queer Student Groups and the First Amendment. 86CAL. L. REV. 1131-1168 (1998). The Supreme Court's current ruling regarding restrictions on student speech "lacks an underlying rationale and leads to inconsistent outcomes." The Court should "adopt a mission-based test that examines the relationship between the regulation on speech and the educational purpose underlying the activity."

An Alternative Approach to the Fourth Amendment in Public Schools: Balancing Students' Rights with School Safety. 1998 BYU L. REV. 1207-1240 (1998). The Supreme Court has ruled that evidence obtained in violation of a criminal defendant's Fourth Amendment right to be free from "unreasonable searches and seizures" must be excluded from trial. The Court, however, has not ruled on whether exclusion of evidence obtained in violation of the Fourth Amendment is the appropriate remedy in a school disciplinary proceeding. The author suggests an alternative method to the exclusionary rule.

Charter Schools, Equal Protection Litigation, and the New School Reform Movement. 73 N.Y.U. L. REV. 1290-1328 (1998). Charter schools are public institutions, however they are given more freedom with regard to "student recruitment, curriculum, budget and staffing." Charter schools face likely federal and state equal protection claims. Legislative changes should be enacted to insulate charter schools from the risks and costs of litigation.

When Going to School Becomes an Act of Courage: Students Need Protection from Violence. 36 BRANDEIS J. FAM. L. 627-648 (1997-1998). "When students are injured at school as a result of the school's failure to implement security measures, schools should be liable for such failure."

Limiting Liability Through Education: Do School Districts Have a Responsibility to Teach Students About Peer Sexual Harassment? 6 AM. U. J. GENDER & L. 165-197 (1997). Educating students about peer sexual harassment is an effective tool school districts can employ to reduce their liability exposure.

Economics and the Individuals with Disabilities Education Act: The Influence of Funding Formulas on the Identification and Placement of Disabled Students. 31 IND. L. REV. 1167-1187 (1998). "[The] Note . . . examine[s] how special education is funded, focusing in particular on how various funding mechanisms may improperly affect the classification of disabled children and the educational programs implemented on their behalf."

Centennial Panel: Two Decades of Intermediate Scrutiny: Evaluating Equal Protection for Women. 6 AM. U. L. GENDER & L. 1-64 (1997). A panel discusses the Supreme Courts use of intermediate scrutiny for classifications based on gender and its development over the past twenty years.

Cases Noted

Constitutional Law-Equal Protection-School District Policy that Restricts Participation in Extracurricular Activities to Public School Students does not Violate a Private School Student's Equal Protection Rights- Kaptein v. Conrad School District, *931 P.2d 1311 (Mont. 1997)* (middle-tier scrutiny applies to restrictions on extracurricular activities). 8 SETON HALL J. SPORT L. 327-350 (1998).

Please Senator, I Want Some More: The General Assembly Gets an "F" from the DeRolph *Court* (Ohio Supreme Court rules school funding system is unconstitutional). 45 CLEV. ST. L. REV. 773-787 (1997).

Centralized Wisdom? DeRolph v. State *and the Rise of Judicial Paternalism* (Ohio Supreme Court decision establishes dangerous precedent). 45 CLEV. ST. L. REV. 753-771 (1997).

The Supreme Court's Shifting Tolerance for Public Aid to Parochial Schools and the Implications for Educational Choice: Agostini v. Felton, *117 S. Ct.*

1997 (1997) (public assistance of parochial schools). 21 HARV. J.L. & PUB. POL'Y 861-879 (1998).

The Sixth Circuit sets up age restrictions as insurmountable hurdles for learning-disabled high school student-athletes (students with learning disabilities and athletic participation). 5 SPORTS L.J. 109-137 (1998).

Colleges and Universities

The Fourth Amendment and Dormitory Searches — A New Truce. 65 U. CHI. L. REV. 1403-1433 (1998). Dormitory searches by college and university officials are on the rise. The searches should be divided into three categories and each category given a seperate Fourth Amendment standard. These categories are: "(1) a traditional law enforcement search if performed by state or local police would require both a warrant and probable cause; (2) an inspection for health or safety by university officials, even one that results in discovery of incriminating evidence in plain view, would not require a warrant or probable cause; and (3) a search by university officials, with or without the aid of campus police, for evidence of drugs or contraband would require probable cause but not a search warrant."

Choppy Waters are Forecast for Academic Free Speech. 26 FLA. ST. U. L. REV. 187-217 (1998). Academic Freedom, which gives professors the right to censor free speech, has recently been threatened by Supreme Court decisions. "The public employee doctrine needs to be reexamined so that it encompasses protection for academic freedom . . ."

May a Public University Restrict Faculty Expression on its Internet World Wide Web Sites? Academic Freedom and University Facility Use Restrictions. 24 J.C. & U.L. 325-348 (1997). "[The] article addresses the tension between academic freedom of the faculty member and the university, and proposes that, in some circumstances, the content-based restriction of faculty expression on a public universities Web Server is permissible and will not [violate] the First Amendment academic freedom rights of university faculty members."

Teaching or Learning: Are Teaching Assistants Students or Employees? 24 J.C. & U.L. 349-375 (1997). Teaching assistants are seeking to be classified as employees. Such a classification would allow the teaching assistants to unionize and bargain collectively. Universities and colleges continue to oppose the employee designation in an attempt to control costs.

The Confidentiality of NCAA Investigation Files: A Policy of Protection. 8 SETON HALL J. SPORT L. 629-662 (1998). NCAA Administrative Bylaws prevent the disclosure of investigation files while the California Public Records Act mandates disclosure of all "information concerning the people's business." "[The] comment . . . discuss[es] whether the NCAA, and by extension, its investigation files, should be subject to state open records statutes which would mandate public disclosure of those files."

Blinking at Reality: The Implications of Justice Clarence Thomas's Influential Approach to Race and Education. 78 B.U. L. REV. 575-619 (19988). Clarence Thomas is the only black member of the Supreme Court. As a result of this position Justice Thomas is "one of most powerful minority voices in the country." "[The] Note argues that if other political, legal, and economic leaders follow Thomas's lead, the purpose behind the Fourteenth Amendment will be subverted, and black school children will be left to attend deteriorating and unequal schools for at least another generation."

Cases Noted

Civil Rights, Learning Disability, and Academic Standards (The Americans with Disabilities Act and post-secondary education at Boston University).
2 J. GENDER RACE & JUST. 33-58 (1998).

Strict in Theory, but not Fatal in Fact: Hunter v. Regents of the University of California *and the Case for Educational Research as a New Compelling State Interest* (educational research as a compelling interest).
83 MINN. L. REV. 183-217 (1998).

A Critique of Instrumental Rationality: Judicial Reasoning About the "Cold Numbers" in Hopwood v. Texas (functional approach and education affirmative action).
16 LAW & INEQ. 359-427 (1998).

Reflections on the VMI *Decision* (balancing strict scrutiny with remedial gender based classifications).
6 AM. U. J. GENDER & L. 35-42 (1997).

Unfairly Applying the Fair Use Doctrine: Princeton University Press v. Michigan Document Services,
99 F.3d 1381 (6th Cir. 1996) (protecting against strict enforcement of the copyright law).
66 U. CIN. L. REV. 959-1018 (1998).

Book Reviews

Creating a Safe Campus: BA Guide for College and University Administrators,
24 J.C. & U.L. 695-698 (1998).

Free Speech in the College Community,
24 J.C. & U.L. 699-708 (1998).

Editor's Note: The material reported in this section is that reported in the ***Current Index to Legal Periodicals*** during the months of October, November, and December of 1998.