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2022 Year-in-Review

I. Introduction

The year 2022 was, in many ways, a landmark year for the American legal landscape. Many fundamental areas of the law were altered or adjusted by court decisions, requiring the practitioner’s understanding of what the law means to shift with the courts. The arena of education law was no exception. For instance, in 2022, the U.S. Supreme Court offered clarification on the legal doctrine tug-of-war for religion between the Free Exercise Clause and the Establishment Clause of the First Amendment. The *Carson v. Makin*¹ decision concluded that a state is not required to fund a religious school, but if public funding is extended to secular private schools, it must also be extended to religious private schools. In essence, the ruling expanded school choice for some students and school funding for nearly all students – regardless of religious principles applied to the learning environment. The University of Louisville team expanded on this discussion in a blog posting through the Journal of Law and Education. Similarly, the *Kennedy v. Bremerton School District*² also strengthened the Free Exercise Clause when it concluded that a high school football coach could kneel and offer quiet personal prayer, which others joined. Through that decision, the Supreme Court reconsidered the legal analysis of a lingering doctrinal framework, the Lemon test, to analyze whether government action maintained a secular purpose, had the principal or primary effect focusing on religious nature, and arose to excessive governmental entanglement. The three-prong test from Lemon would be

¹ 142 S. Ct. 1987 (2022).

² 142 S. Ct. 2407 (2022).



the analysis used to decide whether the government violated the Establishment Clause.³ The *Kennedy v. Bremerton School District* decision squarely placed the *Lemon* test into a sour-taste for any future consideration to determine if government action violates the Establishment Clause when it announced, “this Court long ago abandoned *Lemon* and its endorsement test offshoot.”⁴ Also, *Houston Community College System v. Wilson* revealed that a college’s board could censure one of its board members without violating his First Amendment rights of free speech.⁵

At the same time, the year 2022 revealed other cases that shaped education policy and practices in new ways. Case trends may be found in a new breed of contract disputes between students and universities due to COVID-19 and quarantine measures. Additionally, significant special education cases under the Individuals with Disabilities Education Act (IDEA) were decided, and even cases involving foundational legal protections such as qualified immunity and due process also trended in 2022. As noted, the Supreme Court further took up the argument about charter schools and debated what the required compliance with federal regulations should be for such schools. Finally, and perhaps most significantly, parental rights in the realm of public education were hotly debated, legislated, and litigated this past year.

This review of the past year’s significant cases and trends seeks to shed light on the current posture of the courts using a series of topical areas as a slightly deeper analysis to illuminate shifts, trends, and reinstatements of law and further endeavors to communicate the specific standards and requirements to bring a claim in each area. Driving this analysis and

³ *Lemon v. Kurtzman*, 403 U.S. 602 (1971)

⁴ 142 S. Ct. at 2427.

⁵ 142 S. Ct. 1253 (2022).



discussion, members of the Journal of Law and Education at the University of Louisville’s Louis D. Brandeis School of Law reviewed all the education law cases in 2022, and this team of writers constructed a year-in-review highlights, which incorporated interviews from education law scholars and lawyers.

II. Contract Disputes Arising under COVID-19 Safety Measures (Higher Education)

In 2020, the COVID-19 pandemic swept across the United States and the rest of the world, effecting nearly all aspects of daily life. The country’s response seeking to limit the spread of this infection had a significant impact on American schools and universities. En masse, in-person classes were transitioned to online learning to comply with quarantine restrictions or, even if not demanded by the government, schools opted for this choice to simply keep families safe. As a result of these changes, many university students across the U.S. brought actions against their respective universities for breach of contract. These student plaintiffs have alleged that universities who shifted to online learning are in breach of contract for failing to provide the agreed upon in-person learning.⁶ For students to successfully recover in an action for breach of contract, they must prove the existence of an express or implied in fact contract.⁷ However, before the court may determine whether a valid contract exists, it must consider whether immunity is applicable.⁸

⁶ Univ. of Ky. v. Regard, No. 2021-CA-0020-MR, 2022 WL 627194 (Ky. Ct. App. June 9, 2022); Dist. Bd. of Trs. of Miami Dade Coll. v. Verdini, 339 So.3d 413 (Fla. Dist. Ct. App. 2022).

⁷ *Id.*

⁸ *Id.*



The doctrine of immunity protects state-sponsored universities from certain types of liability. This doctrine, if applicable, can make it difficult for students to successfully state a claim. This issue was explicitly addressed in *University of Kentucky v. Regard*, where the court held that universities waive immunity when they execute a written express contract with students.⁹ This approach was also adopted in the Florida case of *District Board of Trustees of Miami Dade College v. Verdini* when the court stated that immunity prohibits suit in the absence of an express contract.¹⁰ Therefore, the only way for students to successfully bypass a university's immunity is to prove the existence of an express contract.

A. Express Contracts

Student plaintiffs have had difficulty proving that they entered an express contract with their universities, specifically that the university was obligated to provide in-person classes. This can be seen in *Hickey v. University of Pittsburgh*, which held that there must be a clear, written, and specific promise by the university to provide in-person classes before it can be held in breach of contract.¹¹ In *Hickey* and *Regard*, students provided compilations of documents such as admissions pamphlets, syllabi, websites, promotional materials, circulars, admission papers, and publications to prove the existence of an express written contract.¹² Despite their effort, the courts held that the plaintiffs in both cases failed to identify any specific language that promised to provide in person classes.¹³

⁹ *Regard*, 2022 WL 627194.

¹⁰ *Verdini*, 339 So.3d 413.

¹¹ *Croce v. St. Joseph's Coll. N.Y.*, 155 N.Y.S.3d 51 (Sup. Ct. N.Y. 2021); *Hickey v. Univ. of Pittsburgh*, 535 F. Supp. 3d 372 (W.D. Pa. 2021).

¹² *Regard*, 2022 WL 627194.

¹³ *Id.*; *Hickey*, 535 F. Supp. 3d 372.



However, in *Regard*, the court did hold that the “Financial Obligation Statement” that a student agrees to upon registration does impose a contractual obligation between the student and the university.¹⁴ Thus, when the Financial Obligation Statement is considered in conjunction with other registration documents, all necessary elements of an express contract can be deemed present. This weight given to the Financial Obligation Statement reversed the circuit court’s decision, remanding *Regard* for further proceedings to determine whether the university breached their express contract with the student Plaintiffs.

Though proving the existence of an express contract containing a specific promise to provide in-person classes has proven to be very difficult, it is not impossible. A major reason that students have been having difficulty finding the requisite express language guaranteeing in-person instruction is that, prior to 2020, universities did not consider the possibility of a pandemic shutting their doors, so they never had a reason to address such an issue. Going forward, universities have hopefully learned the importance of addressing these issues in writing. It is likely this phenomenon will trigger more detailed contracts between universities and their students in the future.

B. Implied Contracts

Given the difficulty of proving the existence and breach of an express contract, students have contended that universities are in breach of a less overt contract which bound them to in-person instruction. If a valid express contract does not exist, students may bring an action for

¹⁴ *Regard*, 2022 WL 627194.



breach of an implied contract.¹⁵ This avenue has proven to be more successful as most of the arguments put forth otherwise have not been successful at singling out specific binding language required for an express contract claim. Rather than the “express” standard, the implied contract standard is essentially a reasonability test, allowing the court to view the documents in their entirety and discern the binding effect of those documents as a reasonable person in the position of the plaintiff would.¹⁶ To pass this reasonability test, a student must point to an identifiable implied contractual promise that the defendant failed to honor.¹⁷ To lift this burden, student plaintiffs have made use of three types of evidence: 1) a compilation of documents, 2) the disparity in pricing between online and in-person classes, and 3) the history and course of dealings between the university and the students.¹⁸

Hickey makes clear that merely satisfying one of the factors may not be enough. In this case, the plaintiffs provided admissions pamphlets, syllabi, websites, promotional materials, circulars, admission papers, and publications.¹⁹ Despite a showing of documents, the court found that this evidence did nothing more than provide a “generalized and non-specific impression of typical student life.”²⁰ In *Trustees of Indiana University v. Spiegel*, the plaintiffs provided a similar compilation of documents to support the existence of an implied contract, but also highlighted to the court how online courses were priced “‘substantially less than’ their on-campus degree programs.”²¹ The court held that they were successful in stating a claim for

¹⁵ King v. Baylor Univ., 46 F.4th 344 (5th Cir. 2022).

¹⁶ Shaffer v. George Wash. Univ., 27 F.4th 754 (D.C. Cir. 2022).

¹⁷ Gociman v. Loyola Univ. of Chi., 41 F.4th 873 (7th Cir. 2022).

¹⁸ *Id.*

¹⁹ *Hickey v. Univ. of Pittsburgh*, 535 F. Supp. 3d 372 (W.D. Pa. 2021).

²⁰ *Id.* at 380.

²¹ *Trs. of Ind. Univ. v. Spiegel*, 186 N.E.3d 1151, 1160 (Ind. Ct. App. 2022).



breach of implied contract given the compilation of documents and the showing of price disparity.²²

The same argument was proposed in *Shaffer v George Washington University*.²³ The students again argued the fact that online classes were priced substantially lower than the school's in-person counterparts.²⁴ The court also looked to the history, custom, and course of dealing along with the school's statements to determine that the university had plausibly created an implied promise of in-person classes.²⁵ The court thus held that a reasonable person would have assumed that the universities intended to bind themselves to providing in-person instruction in exchange for retaining the students' entire tuition for traditional on-campus degree programs.²⁶ Given the allowance of external evidence in the analysis of an implied contract, student plaintiffs have found this a much more surmountable claim in court.

The breach of contract claims following COVID-19 were not only unforeseeable but raised an interesting question: at what point is a university liable for that which is out of their control. On one hand, the online learning decision was not necessarily the fault of the universities, rather they were complying with the government requirements and recommendations. On the other hand, students spend thousands of dollars to gain not only a secondary education, but also to take part in the "college experience," which includes in-person classes. By transitioning classes to online learning and shutting down campuses, students were unable to access the many benefits that in-person learning, and campus life generally, provides.

²² *Id.* at 1161.

²³ *Shaffer v. George Wash. Univ.*, 27 F.4th 754 (D.C. Cir. 2022).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Shaffer*, 27 F.4th 754.



As for the future of these claims and litigants like them to come, Judge St. George stated it best, saying, “It appears that the outcome as to whether a breach of contract claim as to tuition and/or fees is dismissed is entirely dependent on the specific language used by the various colleges and universities in their catalogs, publications, mission statements, et cetera, as pled in the complaints.”²⁷ It is likely that these unforeseen situations will be used as a learning experience by universities in how they formulate future student contracts and agreements, as well as how they advertise their services as a university.

III. Special Education (K-12)

Students with disabilities are legally entitled to protection from discrimination under three critical federal laws.²⁸ The first law, Section 504 of the Rehabilitation Act (“Section 504”), protects individuals from discrimination based on their disabilities.²⁹ Second, the Individuals with Disabilities Education Act (“IDEA”), is the legal “entitlement of each eligible child with a disability to a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet the child’s unique needs and that prepare the child for further education, employment, and independent living.”³⁰ Third, as it pertains to education, the Americans with Disabilities Act (“ADA”) prohibits discrimination against people with disabilities and requires educational institutions to provide accommodations.³¹ Identifying the

²⁷ *Croce v. St. Joseph's Coll. N.Y.*, 155 N.Y.S.3d 51, 54 (Sup. Ct. N.Y. 2021).

²⁸ *Americans with Disabilities Act (ADA) and Educational Accommodation*, LAW OFFS. OF STIMMEL, STIMMEL & ROESER, <https://www.stimmel-law.com/en/articles/americans-disabilities-act-ada-and-educational-accommodation> (last visited Feb. 13, 2023).

²⁹ *Id.*

³⁰ *About IDEA*, U.S. DEP’T OF EDUC., <https://sites.ed.gov/idea/about-idea/#IDEA-Purpose> (last visited Feb. 13, 2023).

³¹ Law Offices of Stimmel, Stimmel & Roeser, *supra* note 24.



proper federal laws and applicable procedural elements is crucial for a successful plaintiff claim. A failure to identify the proper federal law may force plaintiffs to complete additional requirements before suing.

A case centered on IDEA claims involving a violation of FAPE requires all administrative remedies to be exhausted before a federal suit may be brought.³² The standard of FAPE is most often met through an Individualized Education Program (“IEP”) with reasonably calculated goals for the student to achieve appropriate instruction and educational achievements.³³ In *Fry v. Napoleon Community Schools*, the Supreme Court held that “exhaustion is not necessary when the gravamen of the plaintiff’s suit is something other than the denial of the IDEA’s core value.”³⁴ Exhaustion of administrative remedies for IDEA claims often involves a multi-step process before a plaintiff has proper standing before a federal court.³⁵ Administrative remedies frequently require parents of a student with disabilities to file a procedural complaint with the school district or relevant agency in request of a preliminary meeting to review the student’s IEP.³⁶ Following the hearing, mediation is frequently offered to settle the dispute.³⁷ If the parents of the disabled student are still unsatisfied with the

³² *Id.*

³³ *Student ADA Complaint was Subject to Exhaustion of Administrative Remedies Under IDEA*, LCW (Dec. 22, 2021), <https://www.lcwlegal.com/news/student-ada-complaint-was-subject-to-exhaustion-of-administrative-remedies-under-idea/>.

³⁴ *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154, 158 (2017).

³⁵ Michael T. Raupp, *Supreme Court Clarifies Administrative Exhaustion Requirements Under IDEA*, HUSCH BLACKWELL (Feb. 24, 2017), <https://www.k-12legalinsights.com/2017/02/supreme-court-clarifies-administrative-exhaustion-requirements-idea/>.

³⁶ *Id.*

³⁷ *Id.*



remediations, a due process hearing occurs to determine whether a student received FAPE.³⁸

Parents may file suit in federal court only after all procedural steps have been completed.³⁹

In contrast to the IDEA procedural requirements, ADA and Section 504 violations do not require exhaustion of administrative remedies.⁴⁰ A federal suit may be brought without exploration of administrative remedies.⁴¹ Therefore, the central axis of a plaintiff's claim revolves around proper determination of which federal law(s) applies. Distinguishing the gravamens of IDEA from Title II of the ADA and Section 504 have proved to be complicated for courts and plaintiffs alike.⁴² Considering the complicated nature of making the distinction, the Supreme Court has established additional considerations:

One clue to whether the gravamen of a complaint against a school concerns the denial of a FAPE, or instead addresses disability-based discrimination, can come from asking a pair of hypothetical questions. First, 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? And second, could an *adult* at the school—say, an employee or visitor—have pressed essentially the same grievance? When the answer to those questions is yes, a complaint that does not expressly allege the denial of a FAPE is also unlikely to be truly about that subject; after all, in those other situations there is no FAPE obligation and yet the same basic suit could go forward. But when the answer 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.⁴³

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Section 504 & the Americans with Disabilities Act*, COUNCIL OF PARENT ATT'YS AND ADVOCS., <https://www.copaa.org/page/504ADA#:~:text=The%20ADA%20and%20Section%20504,require%20exhaustion%20of%20administrative%20remedies> (last visited Feb. 13, 2023).

⁴¹ *Id.*

⁴² *Fry v. Napoleon Cmty. Sch.*, 580 U.S. 154 (2017).

⁴³ *Id.* at 756.



Thus, courts must examine the plaintiff’s complaint closely, looking beyond purely stylistic or intellectual choices, to determine the central axis of the case to assess the requirement of administrative remedies exhaustion.⁴⁴ The doctrine of exhaustion was created by Congress in an effort to “promote an efficient justice system and autonomous administrative state.”⁴⁵

Practitioners tend to favor the doctrine of exhaustion for IDEA claims as it permits the administration and families of disabled students to reach a communal consensus without intervening with the judicial system.⁴⁶ Judicial intervention often involves high costs associated with representation, court fees, and stringent schedules of judicial proceedings.⁴⁷

Adoption of the doctrine of exhaustion has permitted parents to seek remedies through out-of-court proceedings with school administrations. For example, in *Powell v. School Board of Volusia County*, a plaintiff attempted to circumvent the exhaustion requirement by requesting monetary damages and claiming the exhaustion of administrative remedies would be futile and inadequate for the plaintiff’s remedies.⁴⁸ The Florida Middle District Court rejected the plaintiff claims as the case revolved around IDEA which requires an exhaustion of administrative remedies.⁴⁹ Similarly, in *Simmons v. Pritzker*, the plaintiffs claimed they should be exempt from

⁴⁴ *Id.*

⁴⁵ Peter A. Devlin, *Jurisdiction, Exhaustion of Administrative Remedies, and Constitutional Claims*, 93(5) N.Y.U. L. REV. 1234, 1234 (November 2018), <https://www.nyulawreview.org/issues/volume-93-number-5/jurisdiction-exhaustion-of-administrative-remedies-and-constitutional-claims/#:~:text=The%20doctrine%20of%20exhaustion%20of,system%20and%20autonomous%20administrative%20state>.

⁴⁶ Telephone Interview with Christopher D. Thomas, Esq. Ph.D., Assistant Prof. of Edu. Leadership and Policy, University of Fla., College of Education (Nov. 17, 2022); Telephone Interview with Nicole D. Snyder, Esq., Chair of Special Education Practice, McKenna Snyder LLC (Jan. 11, 2023).

⁴⁷ Thomas, *supra* note 46; Snyder, *supra* note 46.

⁴⁸ *Powell v. Sch. Bd. of Volusia Cty., Fla.*, No. 6:21-cv-1791-CEM-EJK, 2022 WL 17662226 (M.D. Fla. Nov. 9, 2022).

⁴⁹ *Id.* at 11.



the exhaustion requirement as the administrative process would be futile and inadequate because the administrative officer would not be able to order changes to provide a free and appropriate public education.⁵⁰ The Illinois Northern District Court rejected this argument as the plaintiffs failed to offer evidence to prove that the administrative officer would be incapable of providing appropriate orders.⁵¹

As evidenced by *Powell* and *Simmons*, the argument of overturning the exhaustion of administrative remedies requirement if futile outcomes are anticipated is an ongoing debate. The Supreme Court granted certiorari for the 2022-2023 term on whether all administrative remedies must be exhausted for IDEA claims even if the remedies would be futile.⁵² The Court's rendering could drastically influence the administrative requirements of IDEA claims.

The IDEA, ADA and Section 504 laws all aim to protect and prohibit discrimination towards students with physical or mental disabilities.⁵³ While the general purpose of the laws is similar, the procedural processes and outcomes vary greatly.⁵⁴ As evidenced by the drastic requirements of procedural elements by IDEA versus the more lenient procedural requirements of the ADA or Section 504, distinguishment between the federal laws is critical. Failure to correctly identify the applicable federal law could disqualify a plaintiff from filing suit until further administrative processes are complete.

⁵⁰ *Simmons v. Pritzker*, No. 22 CV 0123, 2022 WL 7100611 (N.D. Ill. Oct. 12, 2022).

⁵¹ *Id.*

⁵² *Perez v. Sturgis Pub. Sch.*, 3 F.4th 236 (6th Cir. 2021).

⁵³ *A Comparison of ADA, IDEA, and Section 504*, DISABILITY RTS. EDUC. & DEFENSE FUND, <https://dredf.org/legal-advocacy/laws/a-comparison-of-ada-idea-and-section-504/> (last visited Feb. 13, 2023).

⁵⁴ *Id.*



IV. Charters Schools and Federal Regulatory Compliance

As previously established, education law in 2022 faced many novel questions, ranging from the constitutionality of laws targeting “divisive concepts” to what may be the end of affirmative action in college admissions.⁵⁵ The answer to many of these questions remains to be seen. In contrast, courts in 2022 made clear their willingness to require more stringent compliance with federal regulations for charter, and even some private, schools. These decisions have been based on two fundamental analyses: 1) whether a school is considered a “state actor” and 2) whether a school receives federal funds.

Charter schools in the United States trace their origin to a concept first theorized in the 1970s by Ray Budde.⁵⁶ However, it was not until 1991 that Minnesota became the first state to pass a law allowing charter schools to exist and receive state funding.⁵⁷ Generally, charter schools are tuition-free public schools that are independently run.⁵⁸ Due to their unique structure, charter schools are free from the “red tape” that often envelopes traditional public schools, thus allowing schools and teachers more room to “innovate.”⁵⁹

⁵⁵ Eesha Pendharker, *Georgia Educators Plan to Sue Over the State’s ‘Divisive Concepts’ Law*, EDUC. WEEK (Nov. 11, 2022), <https://www.edweek.org/policy-politics/georgia-educators-plan-to-sue-over-the-states-divisive-concepts-law/2022/11>; Mark Walsh, *4 Things to Know About the Affirmative Action Showdown Before the Supreme Court*, EDUC. WEEK (Oct. 28, 2022), <https://www.edweek.org/policy-politics/4-things-to-know-about-the-affirmative-action-showdown-before-the-supreme-court/2022/10>.

⁵⁶ Ted Kolderie, *Ray Budde and the Origins of the ‘Charter Concept*, EDUC. EVOLVING (June 2005), <https://www.educationevolving.org/pdf/Ray-Budde-Origins-Of-Chartering.pdf>.

⁵⁷ Lynn Olson, *Nation’s First ‘Charter’ School Clears a Key Hurdle*, EDUC. WEEK (Nov. 27, 1991), <https://www.edweek.org/policy-politics/nations-first-charter-school-clears-a-key-hurdle/1991/11>.

⁵⁸ Arianna Prothero, *What Are Charter Schools?* EDUC. WEEK (Aug. 9, 2018), <https://www.edweek.org/policy-politics/what-are-charter-schools/2018/08>.

⁵⁹ *Id.*



Charter schools can be operated by public or private entities, non-profits, for profit corporations, or independent school districts.⁶⁰ The operator, whomever it may be, is bound to a “charter,” or contract, which outlines the school’s policies, education goals, etc., and is overseen by the state or local school district which not only authorizes the school but also has the ability to close the school if it fails to meet the terms of the contract.⁶¹ Since the early 1990s, charter schools have flourished with 45 states now permitting charter schools and over 3.5 million students attending a charter school each year.⁶²

By design, a charter school is a public school, though the extent that they are truly “public” is debated.⁶³ A question long left unanswered regarding charter schools is their status as “state actors.”⁶⁴ This summer, in a sharply divided opinion, the Fourth Circuit Court of Appeals provided an answer to this debate in *Peltier v. Charter Day School, Inc*, holding that a charter school in North Carolina *is* a state actor and thus subject to applicable federal anti-discrimination laws.⁶⁵

A second and more novel question regarding required compliance with federal law in primary education came to light via the COVID-19 pandemic and Congress’ response to it. The CARES Act, an economic stimulus package for public and private entities, allowed private

⁶⁰ *Id.*

⁶¹ Prothero, *supra* note 51.

⁶² *Measuring Up to the Model: A Ranking of State Public Charter School Laws, 2022*, NAT’L ALL. FOR PUB. CHARTER SCHS. (Jan. 25, 2022), <https://www.publiccharters.org/our-work/publications/measuring-model-ranking-state-public-charter-school-laws-2022>.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ Ed Whelan, *En Banc Fourth Circuit Sharply Divides on Whether Charter School Is State Actor*, NAT’L REV. (June 15, 2022), <https://www.nationalreview.com/bench-memos/en-banc-fourth-circuit-sharply-divides-on-whether-charter-school-is-state-actor/>.



schools to receive federal funds to offset costs associated with the COVID-19 pandemic through the receipt and use of Paycheck Protections Program (PPP) loans.⁶⁶ PPP loans were aimed towards supporting small and medium businesses during the COVID-19 pandemic and allowed recipients to receive low interest government loans to apply towards payroll, rent, mortgage, and worker protection expenses.⁶⁷ The court, in *Karanik et al. v. Cape Fear Academy, Inc.*, a case of first impression, determined that a private school’s acceptance of a PPP loan requires that school to follow Title IX until the loan is repaid or forgiven.⁶⁸ Taken together, these cases exhibit a current trend of courts heightening the required compliance with federal regulations and laws for private or quasi-private organizations.

In *Peltier v. Charter Day School, Inc.*, at issue was Charter Day School’s (“CDS”), dress code.⁶⁹ CDS required kindergarten through eighth grade girls to wear a skirt, a skort, or a jumper to promote chivalry, gentle treatment, and to encourage men take care of and honor women as “fragile vessels.”⁷⁰ Males at this school were free to choose to wear pants or shorts.⁷¹ Three parents, on behalf of their daughters, challenged this requirement on two claims: an Equal Protection Clause violation and a violation of Title IX.⁷² Regarding the plaintiff’s equal protection claim, the Fourth Circuit held that, because North Carolina has delegated a traditional

⁶⁶ Tina Sciocchetti, Jennifer Jovcevski, Tara Daub, Neal McNamara, Julie Seymour, *Private School Subject to Title IX for PPP Loan*, NIXON PEABODY (Jun. 23, 2022), <https://www.nixonpeabody.com/insights/alerts/2022/06/23/private-school-subject-to-title-ix-for-ppp-loan>.

⁶⁷ *First Draw PPP Loan*, U.S. SMALL BUS. ASS’N, <https://www.sba.gov/funding-programs/loans/covid-19-relief-options/paycheck-protection-program/first-draw-ppp-loan> (last visited Feb. 13, 2023).

⁶⁸ *Karanik v. Cape Fear Acad., Inc.*, No. 7:21-CV-169-D, 2022 WL 2195293 (E.D.N.C. June 17, 2022).

⁶⁹ *Peltier v. Charter Day Sch., Inc.*, 37 F.4th 104, 112 (4th Cir. 2022)

⁷⁰ *Id.*

⁷¹ *Id.* at 113.

⁷² *Id.* at 112.



state function, primary education, to private actors (charter schools like CDS), the State could not then leave its citizens without a way to vindicate their constitutional rights.⁷³ The court also held that CDS violated Title IX with their dress code requirements. From a reading of Title IX’s text, dress codes are not included as explicit, enumerated prohibitions of discrimination covered by the law, but dress codes are also not listed among its many discriminatory exceptions such as “father-son” and “mother-daughter” events.⁷⁴ The court chose to broadly interpret the statute to encompass many areas of discrimination not expressly stated, while narrowing its exceptions to those included.⁷⁵

To hold a private entity as a “state actor,” a court must find a “sufficiently close nexus” between the defendant’s challenged action and the state itself.⁷⁶ This nexus can be found in several ways, but the Fourth Circuit focused on one in particular: delegation of duties a state is constitutionally required to provide.⁷⁷ North Carolina’s Constitution mandates that the state provide “... a general and uniform system of free public schools.”⁷⁸ Statutes which authorize charter schools in North Carolina say “a charter school... shall be a public school... [and] all charter schools shall be accountable to the State Board...”⁷⁹ Another state law says that charter school employees are state employees, regardless of the nature of their direct employer.⁸⁰ Thus,

⁷³ *Id.* at 118, quoting *West v. Atkins*, 487 U.S. 42 (1988).

⁷⁴ *Peltier*, 37 F.4th at 128.

⁷⁵ *Id.*

⁷⁶ *Id.* at 115.

⁷⁷ *Id.* at 118.

⁷⁸ *Id.*

⁷⁹ *Id.* at 117, quoting N.C. Gen. Stat. § 115C-218.15(a).

⁸⁰ *Id.*, citing N.C. Gen. Stat. § 115C-218.90(a)(4).



the court concluded that North Carolina has delegated some of its responsibility to provide public education to charter schools like CDS.⁸¹

When state actors are challenged on sex-based classifications, the actor must show that the challenged justification serves important government objectives and that the “discriminatory means employed are substantially related to the achievement of those objectives.”⁸² If they fail to do so, the challenged action could be deemed to violate the Equal Protection Clause of the Fourteenth Amendment, or statutes such as Title IX, just as CDS was found to have violated both in *Peltier*.⁸³ This case is notable because it is the first time, according to the ACLU, that a federal appeals court has stated that charter schools receiving federal funding are subject to the same compliance requirements as traditional public schools.⁸⁴ *Peltier* has already been cited in challenges to similar claims across the country, the first also coming from North Carolina.

In *Karanik v. Charter Day Schools*, a district court determined that a private school’s receipt of federal funds during the COVID-19 pandemic required it to comply with Title IX.⁸⁵ On April 30, 2020, Cape Fear Academy (CFA) applied for a PPP loan in the amount of \$1,253,949.⁸⁶ In their application, CFA promised to “comply in all material respects with all laws, rules, regulations and requirements of any Governmental Authority...”⁸⁷ On May 4, 2020, the loan was dispersed in full by First Carolina Bank.⁸⁸ During the 2020 – 2021 school year

⁸¹ *Id.*

⁸² *Id.* at 124.

⁸³ *Peltier*, 37 F.4th at 125.

⁸⁴ McKenna Oxenden, *Court Sides with Girls Who Sued Over School’s Skirt Requirement*, N.Y. TIMES (June 17, 2022), <https://www.nytimes.com/2022/06/17/us/nc-school-dress-code-skirts-lawsuit.html>.

⁸⁵ *Karanik v. Cape Fear Acad., Inc.*, No. 7:21-CV-169-D, 2022 WL 2195293 (E.D.N.C. June 17, 2022).

⁸⁶ *Id.* at 4.

⁸⁷ *Id.*

⁸⁸ *Id.*



Elizabeth Karanik, Charlotte Karanik, and Natalie Pressley attended CFA as high school students.⁸⁹

Throughout the 2020 – 2021 school year, Natalie Pressley alleged that in several of her courses, she was subject to harassment from male peers at CFA. Attempts to rectify this with school staff were unsuccessful. In the spring of 2021 Elizabeth, among other students, reported “sexual harassment and unwelcome conduct” from the same male students at CFA.⁹⁰ Further contact with school staff proved futile. In May of 2021, the male students accused of sexual harassment were chosen as graduation speakers to which Natalie and Elizabeth protested. On June 4, 2021, CFA terminated Charlotte’s enrollment contract for the upcoming school year, citing conduct of Elizabeth (her older sister), and in December of 2021, the three plaintiffs brought their claims against CFA for sex discrimination and retaliation in violation of Title IX, among other charges.⁹¹

“Title IX prohibits discrimination, exclusion from participation in, and denial of the benefits of any education program or activity that receives ‘federal financial assistance.’”⁹² Federal financial assistance includes “[a] grant or *loan* of Federal financial assistance... [and] any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity...”⁹³ Since PPP loans are, in fact, *loans*, a word the court notes the CARES Act uses about 75 times in describing PPP loans, these loans are

⁸⁹ *Id.* at 1.

⁹⁰ *Id.* at 2.

⁹¹ *Id.* at 4.

⁹² *Id.* at 6.

⁹³ *Id.*



“federal financial assistance” subject to Title IX.⁹⁴ Thus, a private school who accepted a PPP loan would be required to follow Title IX protections for as long as the loan balance was outstanding.

Whether it be through a finding of a school as a state actor or through a receipt of federal funds, *Peltier* and *Karanik*, share a common theme: required compliance with federal law. Both cases will likely have a ripple effect throughout the education law community. Charter schools, at least those in the Fourth Circuit, will now need to examine their rules closer, particularly those that may be challenged on equal protection grounds. For PPP loans, it is estimated that at least six *billion* dollars was dispersed to charter and private schools through the CARES Act in 2020.⁹⁵ While *Karanik* is the first case challenging a private school on a Title IX claim due to its receipt of this federal money, it likely will not be the last. For challenges that follow, *Karanik* sends a clear message and sets a clear precedent: if you accept federal money, you must comply with federal law.

V. Due Process

The United States Constitution’s Fifth Amendment proclaims that “no person shall be deprived of life, liberty, or property, without due process of law,” and the Fourteenth Amendment uses the same words in applying due process to the states.⁹⁶ What constitutes a property interest under the Due Process Clause has extended from solely actual property to include what is considered “new property,” which can include a wide range of interests from

⁹⁴ *Id.* at 7.

⁹⁵ Andrew Ujifusa, *Private and Charter Schools Got \$6 Billion in Paycheck Protection Program Aid, Study Says*, EDUC. WEEK (Sept. 1, 2022), <https://www.edweek.org/education/private-and-charter-schools-got-6-billion-in-paycheck-protection-program-aid-study-says/2020/09>.

⁹⁶ U.S. CONST. amend. V, XIV § 1.



welfare to a professor’s tenure.⁹⁷ “To have a property interest ... a person clearly must have more than an abstract need or desire for it... He must, instead, have a legitimate claim of entitlement to it.”⁹⁸ The current trend of due process in higher education is for courts to allow institutes of higher education to have wide latitude in their decision making with the only real due process constraint being a requirement to substantially follow their own established rules.

The major factor in determining if an action violates due process is if the action is arbitrary or capricious. As stated by the U.S. Supreme Court, the arbitrary and capricious standard requires “reasoned decision-making,” and that “actions be set aside if they are arbitrary or capricious.”⁹⁹ The Court went a step further, declaring that “[u]nder this narrow standard of review, ... a court is not to substitute its judgment for that of the agency... but instead to assess only whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment.”¹⁰⁰

In *Teacher v. California Western School of Law*, the plaintiff/student was expelled from law school after a disciplinary hearing in which he was not able to cross-examine any of the witnesses.¹⁰¹ The school’s “disciplinary procedures expressly provides, [t]he student or the student's spokesperson shall have the right to cross-examine witnesses.”¹⁰² The student won his claim as the court held that the law school violated the student’s due process by not following its stated policies and procedures.

⁹⁷ Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 577 (1972).

⁹⁸ *Id.*

⁹⁹ Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1905 (2020) (internal quotations omitted).

¹⁰⁰ *Id.*

¹⁰¹ *Tchr. v. Cal. W. Sch. of Law*, 292 Cal.Rptr.3d 343 (Cal. Ct. App. 2022).

¹⁰² *Id.* (Internal quotations omitted).



While the previous case exhibits the standard which requires institutions of higher education to follow their stated policies and procedures, *Farooqui v. Columbia University* is an example of the wide latitude given to university decisions and further exhibits the importance that the university follow its own rules.¹⁰³ In this case, a student brought forth a claim that the university deprived them of a property right after being removed from a Ph.D. program. Unlike in *Teacher*, the court here held that the university's “decision to dismiss petitioner from the Ph.D. program was not arbitrary and capricious,” which are the factors necessary mount a successful due process challenge, “nor did they fail to substantially adhere to their own rules and regulations in reaching their determination.”¹⁰⁴

Although universities are technically required to adhere to their policies and procedures, the current trends seem to suggest that they merely need to substantially comply with these policies. *Alexander M. v. Cleary*, a due process case stemming from an alleged violation of student conduct, demonstrates the idea of a minimum acceptable standard.¹⁰⁵ The court said, “once having adopted rules or guidelines establishing the procedures to be followed in relation to suspension or expulsion of a student, colleges or universities — both public and private — must *substantially comply* with those rules and guidelines,” and “[s]ubstantial evidence is a minimal standard [that] ... demands only that a given inference is reasonable and plausible, not necessarily the most probable.”¹⁰⁶

¹⁰³ *Farooqui v. Columbia Univ.*, 158 N.Y.S.3d 9 (N.Y. App. Div. 2021).

¹⁰⁴ *Id.*

¹⁰⁵ *Alexander M. v. Cleary*, 168 N.Y.S.3d 162 (N.Y. App. Div. 2022).

¹⁰⁶ *Id.* at 164-167 (emphasis added).



Once this “substantial” standard is met, courts are unlikely to change the outcome of a university’s decision, as evidenced by the court stating, “[i]n reviewing UAlbany’s disciplinary determination, made after a hearing ...we are limited to assessing whether the determination is supported by substantial evidence.”¹⁰⁷ Even if there is equal evidence that the student did not violate student conduct, the court held that “[w]here substantial evidence exists to support a decision being reviewed by the courts, the determination must be sustained, irrespective of whether a similar quantum of evidence is available to support other varying conclusions.”¹⁰⁸

In *Guo v. Southern University A&M College Baton Rouge*, the court held that a public university did not violate the U.S. Constitution by ending a professor’s tenure without due process.¹⁰⁹ The professor was fired under an emergency declaration made by the university (financial distress), and the professor was given a chance to appeal. Although tenure is widely held to be an applicable property right for due process, the university complied with its own rules and regulations to ensure the professor received adequate due process in light of the declared emergency. This case is significant due to the ability to remove the property right of tenure under an emergency declaration. As schools have been placed under extra financial pressure due to COVID-19, there is a chance that others with similar policies will remove tenure by declaring an emergency.

These cases provide a clear standard for the lawful removal of property interests: universities will be held not to be in violation of due process if they substantially comply with

¹⁰⁷ *Id.* at 164.

¹⁰⁸ *Id.* at 164-167 (emphasis added).

¹⁰⁹ *Guo v. S. Univ. A&M Coll. Baton Rouge*, 342 So.3d 70 (La. Ct. App. 2022).



their own rules and avoid the appearance of making arbitrary/capricious decisions. If universities, at minimum, follow their own policies and procedures, courts are likely to uphold the decisions made by those universities.

VI. Qualified Immunity

Another doctrine which fell under court review this past year was qualified immunity. Qualified immunity often protects state officials unless their conduct substantially departs from accepted principles. These accepted principles include violations of constitutional or statutory rights that are clearly established at the time of the violation.¹¹⁰ While qualified immunity is often associated with law enforcement officers, this doctrine is also applicable to officials within public colleges and universities.¹¹¹

While the doctrine of qualified immunity has adjusted with time, the doctrine currently functions as a balancing test between two competing interests: the public interest in holding public officials accountable and the interest of preventing distractions from hindering the performance of duties.¹¹² In other words, qualified immunity “protects the performance of discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”¹¹³ Within a qualified immunity analysis, there are two prongs: (1) a violation of a statutory or constitutional right, and (2) whether a clearly established law supports the claim.¹¹⁴

¹¹⁰ See *Doe v. Aberdeen Sch. Dist.*, 42 F.4th 883, 890-892 (8th Cir. 2022).

¹¹¹ Samantha Harris, *Have a Little (Good) Faith: Towards a Better Balance in the Qualified Immunity Doctrine*, 93(3) TEMP. L. REV. 511, 512 (2021).

¹¹² *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009).

¹¹³ *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹¹⁴ *Messerschmidt v. Millender*, 565 U.S. 535, 536 (2012).



The relevant case law from the past year has exhibited two trends. First, courts are not consistently defining what a clearly established law is. Second, the courts have exhibited a reluctance to perform the available analysis.

For example, in *Cunningham v. Blackwell*, the Sixth Circuit struggled to clearly define what a clearly established law is. In *Cunningham*, two University of Kentucky professors sued, alleging the university violated their rights to due process under the Fourteenth Amendment and retaliated against them in violation of their free speech rights under the First Amendment.¹¹⁵ The court held that, because the administrators did not violate clearly established law, they were entitled to qualified immunity.¹¹⁶ In their analysis of the clearly established law prong, the Sixth Circuit states that “the clearly established inquiry does not turn on what happened in the case; it turns on the existing law in the area.”¹¹⁷ In certain rare circumstances, a right could be clearly established even in the absence of any case law.¹¹⁸

The First Amendment claim in *Cunningham* centered on whether the First Amendment allows an employer to require an employee to sign their name to a statement they believe is false as part of their job duties.¹¹⁹ This is important to address because the Sixth Circuit had not yet taken a stand, and there happens to be a circuit split on this issue, which under the court's jurisprudence required the court to determine that the law is unsettled.¹²⁰ As stated above, even when there is no case law, a right can be recognized as clearly established. Here, when presented

¹¹⁵ *Cunningham v. Blackwell*, 41 F.4th 530, 533-34 (6th Cir. 2022).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 536, quoting *Leary v. Livingston Cnty.*, 528 F.3d 438, 441-42 (6th Cir. 2008).

¹¹⁸ Joseph C. Cook & John L. Sobieski, *Civil Rights Actions* § 2A.01 (2022).

¹¹⁹ *Messerschmidt*, 565 U.S. at 543.

¹²⁰ *Cagle v. Gilley*, 957 F.2d 1347, 1349 (6th Cir. 1992).



with an opportunity to analyze a case of first impression, the court seems unwilling to perform the analysis available.

However, it is important to note that no Supreme Court decision provides a definitive discussion of the relevant authority in ascertaining whether a constitutional right is clearly established.¹²¹ While some courts, such as the Sixth Circuit, have held that the facts of the case are not important, other courts have held that when “abstract or general statements of legal principle untethered to analogous or near-analogous facts are not sufficient to establish a right ‘clearly’ in a given context; the inquiry must focus on whether a right is clearly established as to the specific facts of the case.”¹²² This seems to give the Sixth Circuit a framework to perform an analysis of the clearly established prong in the qualified immunity determination in a case of first impression.

Another case that turned on the clearly established prong was *Thompson v. Ragland*, out of the Tenth Circuit. In this case, the court held that a university official could not impose discipline on a student for their speech without good reason.¹²³ Additionally, the Tenth Circuit, in their analysis under the clearly established law prong, stated that conduct that has not previously been held unlawful can still be held as conduct that violates a clearly established law.¹²⁴ The court illustrated this by reasoning that, as long as a great deal of the law is settled, the fact that a given case may turn on the unsettled section of law may be irrelevant.¹²⁵

¹²¹ *Id.*

¹²² *Vincent v. City of Sulphur*, 805 F.3d 543, 547 (5th Cir. 2015).

¹²³ *Thompson v. Ragland*, 23 F.4th 1252, 1260 (10th Cir. 2022).

¹²⁴ *Id.*

¹²⁵ *Id.*



What makes *Thompson* important is that it draws on the reasoning from another qualified immunity case out of the Tenth Circuit this year. In *Sturdivant v. Fine*, the Tenth Circuit provides a clear example of how conduct violates a clearly established law even though such conduct has never been held unlawful.¹²⁶ The court illustrated this by stating, “Even without a precedent involving similar facts, the Equal Protection Clause obviously prohibited an acting head coach from orchestrating a boycott based on a team member's race.”¹²⁷

Moreover, this new growth in the Tenth Circuit regarding the established law prong can be seen in *Irizarry v. Yehia*, where the court overturned a district court’s ruling that the law was not clearly established in Tenth Circuit.¹²⁸ Directly on point in *Irizarry*, the court demonstrated this growth by recognizing that there was no binding authority but instead finding persuasive authority from six other circuits sufficient to fulfill the clearly established prong due to the weight of such authority.¹²⁹

The Tenth Circuit cases and the Sixth Circuit case, while implying similar rationales, show that there are some inconsistencies on how broadly to look at the clearly established prong. The Tenth Circuit exemplifies the more expansive way to look at the clearly established law determination, while the Sixth Circuit recognizes this in a way but limits it to rare circumstances. Additionally, there is frustration that when plaintiffs bring these qualified immunity cases

¹²⁶ *Sturdivant v. Fine*, 22 F.4th 930, 938-39 (10th Cir. 2022) (distinguishable from *Thompson* because it is a primary education case).

¹²⁷ *Id.* at 939.

¹²⁸ *Irizarry v. Yehia*, 38 F.4th 1282, 1298 (10th Cir. 2022).

¹²⁹ *Id.* at 1293-94.



involving is a question of clearly established law, courts refuse to engage in constitutional analysis.¹³⁰

Some believe that qualified immunity in its current form creates a barrier for individuals seeking to recover from institutions violating their constitutional rights. While there are many uncertainties in the case law surrounding qualified immunity, it is clear that this year has shown inconsistencies in finding what is “clearly established” and a reluctance to perform the available analysis.

VII. Parental Rights in Public Education

This year also brought a marked statutory and jurisprudential broadening of the degree to which parents are entitled to control their child’s public education. While the concerns surrounding a parent’s rights regarding the education of their children are not new, the current iteration and politization of the term “parental rights” presents a challenge in determining which rights are judicially enforceable and which asserted rights directly limit the breadth of education available to public school students.¹³¹

There are a few cases that are consistently cited when the issue of parental rights arises.¹³² These cases outline the ways in which the Fourteenth Amendment provides protection of a parent’s right to direct the upbringing of their child in many ways, including various aspects of their education.

¹³⁰ *Id.* at 528-529.

¹³¹ Telephone Interview with Charles J. Russo, Dir., Ph.D. Program in Educ. Leadership, University of Dayton (Nov. 10, 2022).

¹³² *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Troxel v. Granville*, 530 U.S. 57 (2000); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).



Language surrounding “parental rights” has expanded from narrow constitutional rights pertaining mostly to a right of care, custody, and ability to choose where to educate your child, to a much more expansive understanding of parental rights. This year, various plaintiffs argued that parents have a fundamental right to have absolute control over most aspects of their child’s public education, including the specific topics taught through the entire curriculum.¹³³ State legislatures introduced 84 separate bills in 2022 seeking to expand parental rights, and three states passed a “Parents’ Bill of Rights” this year.¹³⁴ These legislative acts, in conjunction with this year’s Supreme Court decisions, indicate a trend toward exponentially widening the scope of parental right protections.

In many ways, the idea of fundamental parental rights to control a child’s education seems to be innocuous. Unfortunately, this year has shown quite the opposite. These laws have almost exclusively targeted the removal of educational material, books, or classroom instruction that touches on topics like racism, gender, sexuality, LGBTQ+ families, and sexual health. For example, the Florida Parental Rights in Education Act is so targeted toward the exclusion of LGBTQ+ topics that it has been labeled, by opponents, as the “Don’t Say Gay Law.”¹³⁵

A. Parental Rights as “Fundamental”

The plurality opinion in *Troxel* states that parents have a “fundamental right to rear children” and “to make decisions regarding the care, custody, and control of their children.”¹³⁶

¹³³ Ga. Code Ann. § 20-2-786 (West); Ariz. Rev. Stat. Ann. § 1-602; Fla. Stat. Ann. § 1014.03 (West); La. Stat. Ann. § 17:406.9 (West).

¹³⁴ *Id.*

¹³⁵ Fla. Stat. Ann. § 1001.42 (West).

¹³⁶ *Troxel v. Granville*, 530 U.S. 57 (2000) (“*Troxel* is a decision... has nothing to do with a parent’s right to dictate the actions or inactions of a public school system.” *John & Jane Parents 1_v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256, n.6 (D. Md. Aug. 18, 2022).).



Statutes and court rulings identify a parent’s right to “control the upbringing and education of their children” as constitutionally “fundamental.” What the Court did not do was require the application of the strict scrutiny standard to any alleged infringement of a parent’s right to “control” their child’s education—as was suggested in Justice Thomas’s concurring opinion.¹³⁷

An overview of the state statutes and federal cases in 2022 indicate that there may be momentum to take the extra step that Justice Thomas suggested should have been taken in *Troxel*.¹³⁸

B. Circuit Splits on “Fundamental” Nature of Parental Rights

Where state legislation defining parental rights does not provide a state remedy for a violation, parents continue to bring their claims in federal court. With no clear-cut guidance on the scope of parental rights, there is no consensus among circuits that determines the degree to which a parent’s right to control their child’s education is “fundamental.”¹³⁹

In October, a Maryland federal court held that parents hold a fundamental constitutional right to “control when and how information about transgender topics is presented by a public school to their first-grade children.”¹⁴⁰ Conversely, a Pennsylvania federal district court held, that a “parent’s right to make decisions regarding the care, custody, and control of their children, is a ‘fundamental liberty interest’” that is certainly not absolute.¹⁴¹ The Pennsylvania court cited the Second, Third, Fourth, & Ninth federal Circuit Courts of Appeals as support for their

¹³⁷ *Id.* at 80 (Thomas, J., concurring)

¹³⁸ Ga. Code Ann. § 20-2-786 (West); Ariz. Rev. Stat. Ann. § 1-602; Fla. Stat. Ann. § 1014.03 (West); La. Stat. Ann. § 17:406.9 (West); *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256, at *7 (D. Md. Aug. 18, 2022); *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *29 (W.D. Pa. Oct. 27, 2022).

¹³⁹ *Tatel*, 2022 WL 15523185 at *1.

¹⁴⁰ *Id.*

¹⁴¹ *Montgomery Cnty. Bd. of Educ.*, 2022 WL 3544256 at *7.



ultimate conclusion that a parent’s right to control every aspect of their child’s education is not constitutionally fundamental.¹⁴²

C. Parental Rights in the States

All four of the states that enacted a “Bill of Rights” for parents have included a standard that mirrors the constitutional standard of strict scrutiny to determine if a school or state action is violative of the rights enumerated in their respective statutes.¹⁴³ For example, the Georgia statute reads—“No state or local government entity, governing body, or any officer, employee, or agent thereof may infringe on the fundamental right of a parent to direct the upbringing and education of his or her minor child without demonstrating that such action is reasonable and necessary to achieve a compelling state interest and that such action is narrowly tailored and is not otherwise served by less restrictive means.”¹⁴⁴ The other statutes use nearly identical language that effectively circumvents the hesitance of federal courts to apply the standard in constitutional challenges. Arizona’s statute reserves these rights “exclusively” to the parents, seemingly, making the right sound nearly absolute.¹⁴⁵ Despite that language, Arizona also utilizes the same standard to determine whether a parental right can be violated.¹⁴⁶

D. Dobbs and Parental Rights

This year’s decision in *Dobbs* may also have some effect on the determination of whether any infringement of the right of a parent to direct the education of their child is a violation under

¹⁴² *Id.* at 22-35.

¹⁴³ Ga. Code Ann. § 20-2-786 (West); Ariz. Rev. Stat. Ann. § 1-602; Fla. Stat. Ann. § 1014.03 (West); La. Stat. Ann. § 17:406.9 (West) (Louisiana “Bill of Rights” statute was enacted in 2014).

¹⁴⁴ Ga. Code Ann. § 20-2-786 (West).

¹⁴⁵ Ariz. Rev. Stat. Ann. § 1-602.

¹⁴⁶ *Id.*



the Fourteenth Amendment’s Substantive Due Process Clause.¹⁴⁷ On this question, the two above federal district courts came to opposite conclusions, demonstrating the unpredictability of the application of this standard. The Maryland court, in appreciation of the fact that there are no precise boundaries to parental rights, analyzed the asserted right of the parent narrowly to determine whether it can be described as “fundamental” under the Fourteenth Amendment.¹⁴⁸ The court ultimately decided only on that narrow right described by the plaintiffs. In contrast, the Pennsylvania court determined broadly that the right of a parent to control the upbringing and education of their children is fundamental.¹⁴⁹ As applied, the court determined that the right of parents to “control the upbringing and education is... deeply rooted in the nation’s history and tradition and implicit in the concept of ordered liberty,” and thus is fundamental under the Fourteenth Amendment.

As with many of the other hot issues in education law this past year, the battle over the fundamental nature of parents’ rights regarding the education of their children in public schools will continue to be fought in the state and federal legislature, as well as in the courts. While the current trend appears to favor the side of parents, it will be interesting to watch as the battle continues among the varying political and social interests involved.

VIII. Conclusion

The year of 2022 proved to be a year of immense legal significance throughout the entire realm of law, including in the arena of education law. As many “foundations” of American law

¹⁴⁷ *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

¹⁴⁸ *John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ.*, No. 8:20-3552-PWG, 2022 WL 3544256, at *14-22 (D. Md. Aug. 18, 2022).

¹⁴⁹ *Tatel v. Mt. Lebanon Sch. Dist.*, No. CV 22-837, 2022 WL 15523185, at *34 (W.D. Pa. Oct. 27, 2022).



have been shaken over the past several months, it comes as no shock that education law has also seen trends in the courts that deviate from recent years and will have substantial impacts on the education community. The legal world will continue to evolve as the still hotly contested issues become resolved, and our attention will remain focused on the issues outlined in this piece throughout 2023.

