K-12 Public Education in the Kansas Courts: 1980-2009

K-12 PUBLIC EDUCATION IN THE KANSAS COURTS: 1980-2009

By

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ABSTRACT

This study provides a comprehensive overview and summary of the published federal and state court cases involving Kansas public schools from 1980-2009. The results of this dissertation may be used as a resource by scholars and public school administrators seeking knowledge of the types of cases typically heard in Kansas courts.

This study also compares the amount and type of education litigation in Kansas from 1980-2009 to that found in Kansas from the late 1800's through 1980. The purpose of this comparison is to determine whether the rate and type of litigation heard in Kansas state and federal courts has changed over the years.

This dissertation contains 173 briefs of Kansas public education cases reaching the Kansas court system from 1980-2009. Cases within the study were found through a search of the Westlaw database. When doing this search and selecting cases for inclusion, those cases that were repealed or amended and those that are unpublished opinions were not included in this dissertation. Therefore, this study does not include *all* cases heard in the Kansas Courts regarding public education. It only includes those that were reported and are considered good law.

Summaries of the cases within this study have been placed into categories based upon different types of education-related litigation. Each chapter is composed of cases within a specific category and is arranged in chronological order. A conclusion summarizes the findings and provides data tables.

Findings from this study show how the types of education litigation in Kansas have changed over the years. Challenges to the state funding formula, cases involving employee termination or nonrenewal, special education litigation, and negligence claims brought against school employees have all increased in Kansas.

These findings would indicate that Kansas public school administrators would be wise to familiarize themselves with state laws and statutes pertaining to due process and nonrenewal procedures for employees. An increase in the number of special education cases shows a need for heightened awareness of state and federal regulations regarding special education requirements. Concerning the increase in negligence cases, school districts may want to ensure that all personnel are well versed in the elements of negligence and are aware of the measures that can be taken to avoid that type of litigation.

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Finally, this work is dedicated to the memory of my father, Marion Lee Carter, Jr. He had faith that I would finish this work and earn my doctorate. I did it Dad, sure wish you were here to celebrate with me.

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Introduction

In 1981, Betty Martin Dillon published *A Kansas Handbook: Public Education in the Appeal Courts* for her dissertation at the University of Kansas. Her handbook contained a summary of court cases in Kansas public education that had been heard by the appellate courts from the 1800's through 1980. Dillon's book was organized into chapters based upon the different categories into which the cases fell, i.e. district and school organization, finance, church and state, employee relations, student rights, tort liability and civil rights.

A search for recent research on education law in the courts found studies addressing the volume of education-related litigation as well as which issues are heard most frequently in court. The search did not discover an historical study detailing the cases heard in a specific state's court system, as did Betty Martin Dillon's book. This dissertation *K-12 Public Education in the Kansas Courts: 1980-2009,* was written to fill in the gap in the literature available dealing with education litigation.

The purpose of this dissertation is to provide an updated version of Dillon's handbook that can be used as a resource for Kansas educators. It may be a useful tool for educators to examine the types of cases that have been most frequently heard in the Kansas state and federal court system since 1980, as well as allow them to read a brief of the case that provides details of the litigation. In addition to its use as a

reference tool for school administrators, this study could be used to supplement the texts used in school law courses in the state of Kansas.

This study contains 173 briefs of Kansas public education cases reaching the Kansas court system from 1980-2009. Cases within the study were found through a search of the Westlaw database. Westlaw is a major fee-based online legal research system. When doing this search and selecting cases for inclusion in this dissertation, litigation with a red flag or noted as a "table" case was not included. A red flag indicates the case has been amended, repealed, suspended, or held unconstitutional in whole or part. Thus, it is not considered good law. Table cases were not included because they are unpublished opinions. According to Kansas Supreme Court rule 7.04(f), "unpublished opinions are not precedential and are not favored for citation." At times, cases which have been red flagged or are unpublished may be mentioned to provide a deeper understanding of the history of the litigation discussed. Therefore, this study does not include *all* cases heard in the Kansas Courts regarding public education. It only includes those reported and considered published opinions.

Briefs of the cases included within this text have been placed into categories based upon different types of education-related litigation. Each chapter is composed of cases within a specific category and is arranged in chronological order. This dissertation utilized Imber and Thompson's typology discussed in their 1991 study *Developing a Typology of Litigation in Education and Determining the Frequency of Each Category.* Imber and Thompson's typology of education-related litigation was based upon previous research and groupings found in education-law textbooks. Their

preliminary typology was tested for "thoroughness and utility by examining more than 500 cases chosen randomly" from education-law textbooks and another 500 cases "chosen randomly from the Westlaw data base to see whether they fit within the typology" (Imber & Thompson, 1991, p. 228). The categories in their final typology encompass almost all litigation against schools and provide a higher degree of specificity than the typology used by Dillon.

Imber and Thompson's typology first separates all litigation into three categories based on potential complainants against schools: Category I (students), Category II (employees), and Category III (people outside the school environment). Each of these three categories is then divided into subcategories to allow for more specific data collection. Relative to students, cases were divided into the subcategories of negligence, control of behavior, school program, and equal opportunity issues. Litigation relating to employees was divided into subcategories of discrimination in hiring/promotion, termination and other disciplinary action, professional negotiations, and torts. Imber & Thompson divided the final category, suits by outsiders, into cases dealing with contract issues, fiscal issues, and the tort of negligence.

Using the categories listed above, this study has been divided into three sections: suits by students, suits by employees, and suits by outsiders. Imber and Thompson's subcategories were then used to form the chapters within those sections. If a case was found to fit within more than one subcategory, it was placed into the category with which it was most closely aligned. It was necessary to add a fourth

section titled miscellaneous suits, which contains one chapter for the few cases that did not fit within Imber & Thompson's classification. The chapter, titled "Miscellaneous," includes court cases dealing with school consolidation and school board matters. The cases within all twelve chapters have been arranged chronologically to allow the reader to follow the history of Kansas education law relative to each topic.

Each chapter begins with an introduction to the categories and a discussion of the relevant state statutes involved in some of the court decisions within that chapter. Every effort has been made to make the briefs within this dissertation as understandable to the reader as possible. A glossary has been added to provide definitions for common law terms to assist those unfamiliar with legal terminology.

At the end of this dissertation, a comparison of the number and topics of the cases found in Dillon's book to those appearing in this one has been included. It is provided to give some insight into historical trends and to provide a statistical view of the overall education litigation within in the state of Kansas.

Part I

Suits by Students

Chapter 1

Negligence

The twenty-two cases in this chapter deal with claims of negligence brought against school districts by students. Negligence can be defined as "the failure to exercise reasonable care resulting in harm to another person" (Imber & Van Geel, 2004, p. 502). In cases of negligence, a reasonable person in a similar position could have anticipated the harmful results. To have a valid cause of action for negligence, certain prerequisites must exist: (1) a duty to protect others; (2) a failure to exercise an appropriate standard of care; (3) a causal connection between the act and the injury, called proximate or legal cause; and (4) an actual injury, damage or loss must exist. In education, courts will often seek to determine if the educator should have foreseen the injury.

Many cases within this chapter deal with injuries occurring in a recreational setting. It would be wise for administrators and school districts to familiarize themselves with the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq*. This statute provides definitions as well as exceptions from liability that are applicable to Kansas public schools. In general, liability is the rule and immunity is the exception for governmental entities. However, one exception that is frequently found in Kansas education law cases dealing with negligence is K.S.A. 75-6104(o), the recreational use exception. It provides immunity for "any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open

area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury." In general, injuries that are the result of ordinary negligence and take place on any property used for recreational purposes have been exempt from negligence claims in Kansas.

The Restatement (Second) of Torts Section 324A provides for relief in cases of emotional distress. However, in the state of Kansas a plaintiff must establish that they have some sort of qualifying injury that was directly caused by the defendant's negligence. Typically, this must be a physical injury. Thus, in the cases within this chapter dealing with claims for relief on the grounds of emotional distress, the courts have required a showing of physical injury.

Claims of negligence for incidents occurring off campus have generally not been attributable to the school unless a duty of care has been established. In *Honeycutt v. City of Wichita*, 251 Kan.451, 836 P. 2d 1128 (1992) the courts found no duty to protect a student on the way home after leaving school grounds finding it would “create an intolerable burden" for schools to assume such a duty.

Paulsen v. Unified School District No. 368
717 P.2d 1051 (Kan. 1986)

James Paulsen was a high school student in an advanced woodworking class at Paola High School. On February 10, 1982, Paulsen was working on a project in class that required him to cut boards with an Oliver table saw. About twenty minutes before Paulsen used the saw, his teacher, Leroy Detwiler, removed the safety guard in

order to replace the saw's blade. Rather than replace the guard, Detwiler left it lying on the floor beside the table saw. Paulsen used the saw without a safety guard and after cutting several boards, he reached around to remove a scrap of wood and severely cut his hand on the blade. Detwiler came to his aid immediately and Paulsen was taken to the hospital where he eventually had surgery on his hand. Paulsen filed a personal injury action against his teacher and U.S.D. No. 368 in district court. He claimed his teacher failed instruct him properly on the safe use of the saw, failed to keep the saw in working order, and failed to properly supervise the classroom. Paulsen's claims against the District were that it had failed supervise an instructor properly and failed to provide a reasonably safe environment to students. The defendants moved for a directed verdict. The district court first determined that Detwiler owed Paulsen a duty to supervise him and that the District owed a duty to supervise Detwiler and to provide a reasonably safe environment for students. Paulsen took a beginning woodworking class the previous year and received instruction in the proper use of power tools at that time. The class spent four to six weeks on safety of all tools, including the Oliver table saw. Paulsen passed a safety test on use of the saw. During his advanced woodworking class, Paulsen was again instructed in the safety of power tools and again passed a safety test. While evidence showed that Detwiler had failed to enforce the safety rule that the table saw not be used without a guard, he had taught all of the students how to put the guard on and take it off. There was also some evidence that Detwiler did not always enforce safety requirements for using the table saw. After hearing all of the testimony, the district

court held that the defendants had not breached their duties and granted their motion for a directed verdict. The plaintiffs appealed this finding and the defendants cross-appealed, all of them claimed that the trial judge had made numerous errors during the trial.

The appellate court reviewed the record. One of the justices of the court was disqualified to participate in the decision and the remaining six judges were equally divided in their conclusions. Details regarding the appellate court's discussion were not provided. Kansas Constitution, Article 3, Section 2 provides that the agreement of four judges is necessary for a decision. In a case where there is an even split, the judgment of the trial court must stand. Therefore, the judgment of the district court was affirmed by an equally divided court.

Greider v. Shawnee Mission Unified School District No. 512, Johnson County
710 F. Supp 296 (D. Kan. 1989)

Alexander Greider was an eighth grade student in the fall of 1985. He was enrolled in an industrial arts class taught by Mark Isenberg and was injured in that class while using a table saw. Greider had been classified as behaviorally-disturbed and was therefore "handicapped" under the Education for All Handicapped Children Act of 1975. As he was considered handicapped, Greider was required to have an Individual Education Plan (IEP) developed by school representatives and his parents to meet his needs. One of his special education teachers determined that Greider should be placed in Isenberg's woodworking class, where he severely injured his hand

on the table saw. Greider brought suit through his father contending that the school district and Isenberg were negligent. He claimed that the defendants failed to take reasonable steps to protect his safety by: placing him in the class despite his disability, failing to properly notify Isenberg of his disability, failing to properly instruct him on safety procedures, and failing to provide proper guards and warnings on the table saw. The defendants made a motion for summary judgment arguing that all actions of which Greider complained were discretionary and were therefore entitled to immunity under the Kansas Tort Claims Act, K.S.A. 75-6101 *et seq.* (KTCA).

The KTCA is applicable to school districts and their employees. K.S.A. 75-6104 provides that "a governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from... (e) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty...whether or not the discretion is abused and regardless of the level of discretion involved." As no workable definition of "discretionary" is provided by the statute, the court turned to a line of court cases cited within *Dougan v. Rossville Drainage Dist.,* 243 Kan. 315, 757 P.2d 272 (1988) which dealt with discretionary exception to give them some guidance. In *Dougan,* the court held that in general, under KTCA, liability is the rule and immunity is the exception. The court also noted in *Dougan* that the discretionary function exception was available only when no mandatory duty or guidelines exist. The line of Kansas cases cited in *Dougan* relied on the presence or absence of a legal duty in deciding whether the discretionary exception should apply. In this case, the school board would only be

entitled to immunity if its actions were not governed by any "readily ascertainable standard," or if no legal duty to act in a certain manner existed. The court found here that the defendants were under a legal duty to supervise Greider in the woodworking class and to take reasonable steps to protect his safety. At the minimum, he should have been properly instructed on safety procedures and guards should have been placed on the table saw. Those are not "discretionary" matters. Therefore, the discretionary function exception did not apply to this case and the defendants were not entitled to immunity under the KTCA. The defendant's motion for summary judgment was denied.

Hackler v. Unified School District No. 500, Kansas City
777 P.2d 839 (Kan. 1989)

Stephen Hackler brought a personal injury action against USD 500 because he had been hit by a car when he tried to cross the street after getting off a school bus. On April 15, 1989, Stephen rode the school bus home, as he had all year, and got off at a bus stop on the south side of Leavenworth Road, which was across the street from his home. He did not cross the street immediately, but walked along the south side of the road for a while. After the bus had left the area, he attempted to cross Leavenworth Road about a block from his house and was hit by a car. Leavenworth Road was a busy street and there were school bus stops on both sides of the road. Before school had started, a letter was sent to all parents asking them to select the bus stop nearest their home and on their side of the street. The bus driver had been told

not to allow students to cross Leavenworth Road but stated that she was not aware of the fact that Stephen lived on the north side of the street. Stephen's father claimed that he had not seen the letter and did not know there was a bus stop on the north side, so he chose the south side bus stop. The Plaintiffs filed action claiming the District owed several duties to Stephen and their breach in duty was the cause of Stephen's accident. The trial court found that the school district did not owe any duty to the plaintiff that was breached. The plaintiffs appealed this decision.

The questions raised on appeal were: Did the school district breach any duty it owed to Stephen? If it had, was the District exempt under the discretionary function exemption of the Kansas Tort Claims Act (KTCA), K.S.A. 1988 Supp. 75-6104(e)? Moreover, were any acts or omissions of the school district the proximate cause of the plaintiff's injuries? The plaintiff relied on provisions of K.A.R. 36-13-31. This regulation outlines the duties of transportation supervisors and bus drivers, such as planning bus routes, supervising the loading and unloading of passengers, requiring students to cross the street in front of the school bus, and not moving the bus until all students needing to cross the street have done so. The court found that the school district did not owe the duty of selecting the bus for a student to ride. That decision was delegated to parents who would better know which stop was nearest to their homes. The court also found that although the regulations required bus drivers to supervise children crossing the street, that duty only applied to children who had to cross the street. As far as the bus driver was aware, none of the children she transported had to cross Leavenworth Road. The driver had no duty to direct children

to cross the road in front of the bus when as far as she knew none of them intended to do so. The court also found nothing in the regulations that required a school district to unload students on the side of the street on which they live. It was the courts' opinion that the school district had not ignored or violated any of the provisions of K.A.R. 36-13-31. As the district had not breached any duty owed to Stephen, the other two questions did not need to be addressed. The judgment of the trial court was affirmed.

Nichols v. Unified School District No. 400
785 P.2d 986 (Kan. 1990)

Jeffrey Nichols played football for Smoky Valley High School and was injured after a nighttime practice held on August 23, 1985. When practice ended, the head coach told the players to run to the locker room from the practice field. In between the practice field and the locker room was a waterway that provided drainage for a playground. As he was going to the locker room, Nichols stumbled as he ran through the waterway and then continued on to the locker room. After he showered, Nichols sat down and felt a sharp pain in his back. Nichols sued the school district alleging the football coach was negligent in requiring players to run to the locker room in darkness and negligent in failing to proper supervise the team. All parties agreed that the coach did not intentionally hurt Nichols. The district court granted summary judgment in favor of the school district based upon the discretionary function and recreational use exceptions to the Kansas Tort Claims Act (KTCA), K.S.A. 75-6104. Nichols appealed this decision. In an unpublished opinion, the

Court of Appeals, 777 P.2d 861, affirmed the decision of the district court. The court held that the recreational use exception provided immunity to the school district and to the football coach as an employee who acted within the scope of his employment. Nichols appealed to the Supreme Court of Kansas.

The KTCA is an act which makes governmental liability the rule and immunity the exception. However, K.S.A. 75-6104(n) provides for statutory exceptions to liability. It provides that an employee of a governmental agency acting within the scope of employment will not be liable for "damages resulting from any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless [the employee] is guilty of gross and wanton negligence proximately causing such injury." Nichols and *amicus curiae* Kansas Trial Lawyers Association argued that the recreational use exception did not apply to injuries that occurred during a supervised activity by a school district. The Supreme Court found this argument to be without merit due to the "plain language of the statute." The language of the statute clearly stated that immunity existed for any injury resulting from the *use* of property intended for recreational purposes. Next, *amicus curiae* argued that immunity was only available to the school district when the injury was a result of the condition of the public property. To support their argument, *amicus* relied on previous cases in which they claimed that immunity was granted because the injuries were the result of the condition of the premises. Here, Nichols claimed the injury was the result of negligent supervision, not of any defective condition of the field. The court disagreed,

pointing to *Boaldin v. University of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987) in which a student was injured when he hit a tree while sledding down a campus hill. The court stated, "Trees at the bottom of Daisy Hill are no more a defective condition of the premises than the grassy waterway at Smoky Valley High School" (p. 989). The injury in *Boaldin* resulted from the use of the premises, not the condition. The court further held that it would be too restrictive a reading of the recreational use exception statute if the injury had to be the result of the condition of the property in order for the governmental entity or employee to gain immunity. The language of the statute clearly states "use" of property. If the legislature had wanted to limit immunity to situations in which an injury was caused by the conditions on the property, it would have stated as much in the statute. The judgment of the district court was affirmed.

Kansas State Bank and Trust Company v. Specialized Transportation Services, Inc.
819 P.2d 587 (Kan. 1991)

This case is a tort action that arose out of the alleged sexual molestation of H.R. by her school bus driver. H.R., a six-year-old girl with Down's syndrome, entered Bryant Elementary School in September 1985 and was placed in the trainable mentally handicapped (TMH) classroom. H.R. was transported to and from school in a van operated by Specialized Transportation Services (S.T.S.) who had a contract with U.S.D. No. 259. H. Aron Davidson was H.R.'s van driver from the fall of 1985 until December 1986. H.R.'s mother reported that in November 1985 Davidson

became irate when she asked him to park five or ten feet forward so that she could see his van from her kitchen window. Mrs. R stated that Davidson became angry, yelled, and began to drive the van away before she could shut the door. Mrs. R called Jerry Burns, the Bryant principal to report the incident the following day. Burns initially told Mrs. R that he would see if he could switch Davidson to another route, he later told her that was not possible. The day after the van door incident, Davidson required H.R. to sit in the front passenger seat next to him. Mrs. R claimed that she began noticing a change in H.R.'s behavior following the door incident. Mrs. R's babysitter also reported problems with Davidson and asked that Mrs. R call the school. She again called Burns who said he would handle the problem. H.R.'s behavior continued to worsen throughout the spring; however when she attended summer school and was driven by a different driver, her behavior improved. In the fall of 1986, Davidson was once again H.R.'s van driver. In October, Mrs. R attended H.R.'s IEP meeting with H.R.'s teacher, Kim Brown. At that meeting, Brown reported that H.R. had been displaying some inappropriate behavior in school. On December 10, Mrs. R was told that H.R. had been uncontrollable on the bus. When Mrs. R talked to H.R. that evening about her behavior on the bus, H.R. reported that Davidson had touched her inappropriately in the genitals and buttocks. Mrs. R requested a meeting the following day with Burns, Brown, the school counselor, the school psychologist and someone from the bus company. She did not tell Burns the reason for the meeting. Paul Pritchard, the director of transportation, stated that Burns called him on the morning of December 11, 1986, to schedule the meeting and told him there was the

possibility that H.R. was being sexually molested by Davidson. Pritchard contacted the manager of S.T.S. and requested that Davidson be taken off the route until the matter was investigated. At the meeting, Burns stated that in hindsight he should have known something was wrong when Mrs. R had complained about Davidson and he had seen H.R. sitting on Davidson's lap. Brown discussed H.R.'s behavior problems and stated that she did not suspect abuse. H.R. had never shown any reluctance to get on the bus and Brown stated that she had no indication that Davidson would sexually molest one of the students. After the December 11 meeting, Burns reported the allegations to the Kansas Department of Social Rehabilitation Services. The investigators found that Davidson had not been arrested for any previous crime, nor had he been involved in any sort of sexual molestation. An examination by a pediatrician showed a number of signs that indicated H.R. had been sexually abused. Davidson denied all allegations against him. He said that he required H.R. to sit in the front with him because she was uncontrollable in the back. He admitted allowing the younger students to sit on his lap. Davidson reported that he had written up his concerns regarding H.R.'s behavior on the bus. He wrote discipline slips until the bus supervisor, William Benjamin, told him not to. Nelda Treadwell, the manager of the bus company, told Davidson to write up slips until something was done at the school. The school bus incident reports were a five-copy form that was to be distributed to the parent, principal, bus contractor, driver, and district transportation department. Mrs. R never received any discipline reports. Problems with Davidson had never been brought to the attention of Thurman Mitchell,

former supervisor of Student Transportation Services. If he had been aware of such problems, he stated that he would have requested a conference with the driver, parents, and school administration to try to resolve the issue.

The plaintiff , Kansas State Bank & Trust Company (Kansas State Bank) as conservator and next friend of H.R, filed suit against Davidson for intentional battery and against U.S.D. No. 259 and S.T.S. on theories of respondeat superior, negligent hiring, and negligent retention and supervision of Davidson. U.S.D. 259 and S.T.S. were granted summary judgment on respondeat superior and negligent hiring claims when the trial court determined that the intentional criminal act of Davidson was outside the scope of his employment and facts showed Davidson was competent and qualified for employment as a bus driver. Summary judgment was denied as to negligent retention and supervision of Davidson. The trial court also held that U.S.D. 259 was not immune from liability under the Kansas Tort Claims Act (KTCA) because the actions alleged by plaintiff to be wrongful were not discretionary functions. U.S.D. 259 and S.T.S. moved for a directed verdict after the plaintiff rested its case. They argued that they neither knew nor should have known that Davidson had a propensity to sexually molest children. U.S.D. 259 again argued that it should have been granted immunity under the discretionary function provision of the KTCA. The trial court denied the motion and sent the case to a jury to determine whether or not it was foreseeable that Davidson would commit a battery. The jury returned a verdict for $1,800,000. U.S.D. 259 and S.T.S. appealed the judgments and the case was transferred from the Court of Appeals to the Kansas Supreme Court.

U.S.D. 259 and S.T.S. appealed the denial of their motions for summary judgment and directed verdict on the issue of negligent retention and supervision of Davidson. They argued that no evidence had been presented which showed that either U.S.D. 259 or S.T.S. should have known that Davidson would sexually molest one of the students riding on his bus. There was no information that Davidson had mistreated his any of his student passengers, only that he had been rude towards parents and teachers. The plaintiffs asserted that there was sufficient evidence to establish foreseeability. They pointed out that H.R.'s teacher, Kim Brown had testified that she believed some of H.R.'s behavior problems were the result of exposure to sexual conduct and she had even questioned Mrs. R about this. Principal Burns had told Pritchard that there was a possibility Davidson had molested H.R. before Mrs. R had told Burns the purpose for their meeting. In light of these allegations, and after viewing all evidence in favor of the plaintiff, the Supreme Court held that the trial court had not erred when it denied the defendants motions for summary judgment on this issue because foreseeability of the risk of harm was a jury question. U.S.D. 259 next asserted that it should have been granted immunity under K.S.A. 75-6104(e), the "discretionary function" exception to the KTCA. This statute states in relevant part that a governmental entity will not be liable for damages that result from "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty." The determining factor in deciding whether a governmental employee is exercising "discretionary function" is the nature and quality of the discretion exercised. The more a judgment involves the

making of policy, the more it is of a nature and quality to be recognized as discretionary. A failure to follow mandatory guidelines would not be subject to immunity under the discretionary function exception to the KTCA. In this case, the U.S.D. 259 contract with S.T.S. addressed student discipline by bus drivers. It stated that a driver "shall make prompt written reports to the Principal or principal's designee of the names and manner of conduct of any pupils who are undisciplined..." The testimony indicated that this policy was not followed. Davidson had stated that he was told not to write so many reports. The procedures called for Mitchell to receive a copy of the disciplinary slip. Had he received five or six slips in a given time period he might have investigated and switched Davidson off the route if he could not handle a particular student. Another copy of the bus incident report was supposed to go to the parent. H.R. finally told her mother what was happening when her mother asked why she was not behaving on the bus. H.R. might have told her mother sooner if U.S.D. 259 had followed its bus incident reporting procedure and sent a copy of Davidson's incident reports involving H.R. to her mother. The court believed that the testimony indicated that if the reporting procedure had been followed, some type of remedial action might have been taken. The development of the bus incident report was a discretionary act that involved the formulation of a policy. However, U.S.D.259's employees were not making policy when they decided not to follow the required reporting procedure. Based on the facts in this case, the Supreme Court held that it was for a jury to decide whether U.S.D. 259 would have been alerted to the problem if the reports had been made and distributed as required.

For this reason, the court found that the trial court had been correct in ruling that U.S.D. 259 was not entitled to immunity under the discretionary function exception. The court also found that the amount awarded in damages was fair. The $500,000 limit on liability under K.S.A. 75-6105 of the KTCA was not applicable because U.S.D. 259 had entered into a contract of insurance that provided coverage in excess of that amount.

Honeycutt By and Through Phillips v. City of Wichita
836 P.2d 1128 (Kan. 1992)

Jeremy Honeycutt was a kindergarten student at Irving Elementary School. Jeremy was usually taken to school by his grandfather, who sometimes walked and sometimes drove. If his grandfather could not transport him, either his mother or a friend provided transportation. On March 5, 1987, Jeremy was walking home unsupervised. Railroad tracks ran on a diagonal between the school and Jeremy's home. As a train was passing by, Jeremy ran alongside of it and tried to touch the train. He fell under the wheels and lost parts of both legs. A negligence suit was filed on Jeremy's behalf against Union Pacific Railroad Corporation and Missouri Pacific Railroad Company (Railroads), the City of Wichita (City), and U.S.D. No. 259. Jeremy claimed that U.S.D. No. 259 owed him the following duties: (1) to retain him until an authorized adult took custody of him, (2) to retain him on school property through a "hold back" policy, and (3) to establish a safety patrol at the railroad crossing. He also claimed that the school district was not immune under the

Kansas Tort Claims Act (KTCA). The District Court granted the guardian's motion for partial summary judgment that the child could not be comparatively at fault. On appeal, the Supreme Court, 247 Kan. 250, 796 P.2d 549, reversed and remanded. On remand, the District Court granted summary judgment in favor of the school district. The trial court ruled that U.S.D. No. 259 did not owe a duty to supervise Jeremy off school property and after school hours. Jeremy appealed this decision. U.S.D. 259 argued that Jeremy's appeal should have been dismissed for lack of jurisdiction because the first notice was premature and the second notice of appeal was filed too late.

After reviewing the timeline of events, the court found that Jeremy's second notice of appeal was filed after the 30-day deadline and therefore the court did not have jurisdiction. However, although his first notice of appeal was premature, it was validated by the final judgment of the trial court which disposed of all claims and all parties. The court held that the premature notice of appeal in this case would not harm the school district because they would have known of "the intent to appeal prior to the final judgment and would be in the same position as if a notice of appeal had been filed after the final judgment" (p. 1136). Once the issue of the timeliness of the appeals was settled, the court turned to the argument that U.S.D. No. 259 owed Jeremy a duty of care. Jeremy relied on the Restatement (Second) of Torts Section 324A (1964) which provided that one who undertakes to provide services to another "which he should recognize as necessary to the protection of a third person, is subject to liability to the third person for physical harm resulting from his failure to exercise

reasonable care to protect his undertaking." The courts have established principles that must be met in order for Section 324A to be applied. The "threshold requirement" for the application of Section 324A is that the defendant did more than act, but "through affirmative action assumed an obligation or intended to render services for the benefits of another" (p. 1137). Furthermore, the person to whom the services are directed must accept such services. U.S.D. No. 259's Board of Education Policy No. P1360.01 stated that school personnel were "neither legally liable nor legally responsible" for students traveling to and from school if the students walked or furnished their own transportation. This is relevant because it shows that the school district had not affirmatively assumed a duty to protect Jeremy on his way to and from school. The District had no policy that prohibited kindergartners from walking home alone. Jeremy's guardians had never asked that the school retain him until one of them arrived to pick him up. While policy allowed the placement of a safety patrol at the railroad tracks by the school principal "as needed," it was not required. Jeremy could not prove that U.S.D. 259 had assumed a duty to him through its conduct or written policies. Jeremy's second reason for the claim that the school district owed a duty was that the "special relationship" between the District and Jeremy created such a duty. Jeremy argued that the school district policies that described safety procedures and mentioned safety patrols caused a special relationship between the school and the safety patrol which created a duty. The appellate court did not agree with this argument and cited the finding of the trial court which had held that the policy was not a "specific mandatory set of guidelines"

sufficient to give rise to a duty. The policy left it up to the administrator to determine when safety patrols are "needed." There was no mandatory language in the policy such as "shall" or "must." For these reasons, the decision of the district court was affirmed.

Boos v. The National Federation of State High School Associations
889 P.2d 797 (Kan. App. 1995)

In 1985, Philip Boos, his parents, the National Federation of State High School Associations (NFSHSA), the Kansas State High School Activities Association (KSHSAA), and USD 428 together with the insurance carrier, Fund Company Limited (the Company), entered into a settlement agreement in a suit which sought damages for negligence for injuries Boos suffered when he dove into the high school swimming pool. The settlement agreement provided stipulations for the payment of damages to Boos and his family. In 1993, Boos filed a motion that alleged the Company had failed to pay a portion of his medical expenses as required by the agreement. He claimed that all of the defendants were liable under the agreement because the Company was simply their agent for payment. Defendants claimed that the settlement agreement had released them from all liability in connection with the accident. The trial court found in favor of Boos. It determined that although the parties intended to compensate Boos and release the defendants from liability, it was the court's belief that "the intent of the parties was the Defendants were obligated and

responsible to see the payments were made to the Plaintiffs as set forth in the ...Settlement Agreement" (p. 801). The defendants appealed.

The central issue was whether the original settlement agreement bound the defendants to pay the plaintiff if the Company did not do so. The court turned to the language of the settlement agreement to make its decision. All parties agreed, and the court held, that the contract was not ambiguous. The failure of the contract to address whether the defendants would incur future liability did not make it ambiguous; it more likely meant that there was no such obligation. It was the plaintiff's burden to prove the contract required the defendants to bear the responsibility for the Company's failure to pay. The only duties placed on the defendants under the terms of the agreement were the payment of $3,811.57 and $1,000 in attorney's fees. Paragraph 3 of the contract imposed only on the Company the duty to perform all other payment obligations set forth in its subparagraphs. No provisions were made for the defendants to make payments under paragraph 3 if the Company failed to do so. Boos had agreed to the terms of the contract that clearly bound the Company to make payments, not the defendants. The appellate court found the trial court in error when it did not enforce the "clear and unambiguous wording" of the contract. The trial court's decision was reversed.

If the settlement agreement had stated that the defendants would be responsible for the insurance company's obligations, they would have been required to pay the damages. In the absence of such language, the defendants were not liable for the failure of the insurance company to cover medical expenses. The trial court

could not rewrite the terms of the settlement agreement to make the defendants responsible for the error of their insurer.

Lanning By and Through Lanning v. Anderson
921 P.2d 813 (Kan. App. 1996)

On May 12, 1993, Marcus Lanning was hit in the head by a discus while he was at track practice at Cherryvale Middle School. Marcus and other members of the relay team were walking toward the school, taking a sidewalk that went through the middle of the playground, when the discus was thrown from 80-90 feet away. As a result of the accident, Marcus suffered various cognitive defects and was told he could never participate in contact sports again. The practice was supervised by two track coaches, Jeff Anderson and Chuck Stockton. At the time of the accident, Stockton was working with the girls' relay team. Anderson had told the boys' relay team to run two laps and then go to the locker room. Anderson did not tell the boys to take any particular route and he did not see them walking down the middle sidewalk. Middle school track practice normally took place at the high school track, but Anderson decided to use the middle school playground because of muddy conditions at the high school track. Coaches had held discus practice at the middle school playground approximately 10 times previous to the date of the accident and there had been no incidents. Lanning brought a personal injury action against Coach Anderson and the Board of Education of Unified School District No. 447. After all evidence had been presented to the district court, the defense moved for a directed

verdict on the grounds that there was not sufficient evidence to go to jury on the question of gross and wanton negligence. The district court denied the motion and the case went before a jury. The jury found the defendants guilty of gross and wanton negligence and awarded Lanning $252,731.94 in damages. Anderson and the school district moved for a judgment notwithstanding the verdict, or in the alternative, for another trial. The district court judge denied the motion. Anderson and the school district appealed arguing that the district court had erred when it refused to grant a directed verdict and that there was not sufficient evidence to prove gross and wanton negligence.

In ruling on a motion for directed verdict, the court must resolve all facts and inferences drawn from the evidence in favor of the party against whom the ruling is sought and, where reasonable minds could reach a different conclusion based on the evidence, the motion must be denied and the issue submitted to a jury. It is only when reasonable persons could not reach a different conclusion from the same evidence that the issue can be decided as a question of law. Under the Kansas Tort Claims Act (KTCA), governmental liability is the rule and immunity is the exception as determined by *Nichols v. U.S.D. No. 400,* 246 Kan. 93, 785 P.2d 986 (1990). However, K.S.A. 1995 Supp. 75-6104 allows an exception for public property that is used or intended for recreation. This statute provides that governmental entities or employees acting within the scope of their employment "shall not be liable for damages resulting from (o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for

recreational purposes, unless the governmental entity or employee is guilty of gross and wanton negligence..." Court cases that had previously interpreted the recreational use exception defined gross and wanton negligence as knowledge of a dangerous condition and indifference or reckless disregard to the consequences. In the case at hand, there had been no prior accident or "close call" that might have give the coaches some sort of notice that a dangerous condition existed. The coaches indicated in their testimony that if they had realized the imminence of danger, they would have done things differently at practice. The coaches did not foresee that the boys would cut across the middle of the field nor did they foresee that the discus throwers would fail to see the group on the sidewalk in time to warn them. The team had practiced at the same field several times that same spring without any incident. Because of this, the appellate court found that there was "no evidence to support a finding that the coaches realized the imminence of danger or that the coaches had reason to believe that someone would be injured at track practice" (p. 820). It further held that the district court had erred when it allowed the gross and wanton negligence question to go to the jury. Lanning argued that the recreational use exception did not apply to school-sponsored, supervised activities. In *Nichols,* the Kansas Supreme Court held that K.S.A. 1995 Supp. 75-6104(o) applied when a student was injured after the football coach had told the athletes to run in darkness to the locker room through a grassy waterway. The *Nichols* court specifically rejected the argument that the KTCA did not apply to supervised activities. Thus, the appellate court concluded the same in this case. The court also found against Lanning's argument that the

middle school playground was not a public recreational area as contemplated by K.S.A. 1995 Supp. 75-6104(o) when it pointed out that the language of the statute specifically mentions the term "playground."

Kimes v. Unified School District No. 480, Seward County
934 F. Supp. 1275 (D. Kan. 1996)

Janet Kimes, the plaintiff, was a student in the welding program at Liberal Area Vocational Technical School. She brought action against the school district alleging negligence arising from a fall she took in the school's welding area. On October 30, 1992, Kimes fell while walking through the welding shop. As she fell, she grabbed onto a welder to catch her balance and a cylinder of pressurized gas detached from the welder and landed on Kimes. She suffered head and facial injuries. Kimes accident occurred at the end of the class while students were cleaning up. Kimes had not been working in the welding shop that afternoon and she had no reason for walking through the shop. Neither Kimes nor any witness to the accident knew what caused her to fall. A few witnesses noticed water and some welding beads on the floor in the area where Kimes fell. Another mentioned seeing the power cord from the welder on the floor. Kimes alleged that the defendant school district had failed to maintain the floor of the shop in a safe manner, that they had failed to maintain the welder and its attached gas cylinder in accordance with the manufacturer's recommendations, and that they failed to provide adequate supervision of the welding students. The school district moved for summary judgment.

To recover for negligence, a plaintiff must establish that the defendant owed a duty to the plaintiff, that the defendant breached that duty, and that a causal connection existed between the breach and the plaintiff's injury. The court first addressed whether the defendant had failed to maintain the floor of the welding shop in a reasonably safe condition. The court found that the items mentioned by witnesses did not "constitute concealed dangers of which the defendant had a duty to warn the plaintiff" (p. 1279). Welding beads and a power cord were considered to be normal components of a welding shop. Kimes admitted that students were taught to weld and use equipment in a safe manner and students in the welding class were in the process of cleaning the area when she walked through. Thus, the court concluded that Kimes had failed to establish the defendant had breached any duty regarding the floor or the work area. The water that had accumulated on the walkway could have constituted a dangerous condition of which the defendant had a duty to warn if the defendant had knowledge of the condition, or the condition had been there for such a length of time that the defendant should have known about it. One witness mentioned that it had started to snow and that the walkway was wet from people coming in from outside. However, Kimes could offer no evidence as to how long the walkway had been wet or that the defendant knew it was wet. In *Carter v. Food Ctr., Inc.*, 207 Kan. 332, 485 P.2d 306 (1971), the court held that "where the plaintiff fails to show that an allegedly dangerous substance had been on the floor for any length of time prior to her fall, or that the defendant had knowledge of its presence, the plaintiff cannot recover for negligence" *Carter*, 485 P.2d at 310. Next, the court turned towards the

claim that the welder had not been maintained in accordance with the manufacturer's recommendations. The school district admitted that it had the responsibility to maintain the school's welder. While Kimes alleged several ways she believed the welding assembly was unsafe, she did not provide the court with anything showing what the relevant industry standards were for such equipment. She referred the court to excerpts from the operating manual that accompanied the welder, but offered no evidence showing that the gas cylinder had been in an unsafe position at the time of her accident. The court found that "in the absence of any proof that the welder and gas cylinder were in a dangerous condition at the time Ms. Kimes fell, no reasonable jury could find the defendant failed to exercise ordinary care to keep its premises in a reasonably safe condition" (p. 1281). Finally, the court addressed Kimes' claims of negligent supervision. The claims of negligent supervision due to the condition of the floor and the welder failed because of the court's decision above. Kimes' claim that the defendant failed to enforce clothing and eyewear safety requirements was related to the claim that the defendant had promoted an unsupervised and unsafe activity, that being a Halloween party. The facts of the case established that there had been no organized party on the day of the accident. However, students had been allowed to wear Halloween costumes to school that day. Kimes stated that she was wearing boots as a part of her costume. She also maintained that she had worn the same boots to school on previous occasions. The court noted that if the boots represented Kimes' "ordinary footwear, than she cannot claim that the defendant's authorization of Halloween costumes caused her to dress in an unsafe manner" (p. 1281). Mr. Hamey,

the instructor, testified that he had told Kimes that she should not work in the shop area while dressed in her "biker" costume of boots and sunglasses. Kimes had previously admitted that she had not been working in the welding area and she offered no explanation for her presence in the shop that day. The court could find nothing to support that Kimes' injuries were the result of the failure of the school district to enforce clothing and safety eyewear requirements. Accordingly, the court granted the school district's motion for summary judgment.

Beshears By and Through Reiman v. Unified School District No. 305
930 P.2d 1376 (Kan. 1997)

Brent Beshears, by and through his mother Babette Reiman, claimed that negligence on the part of the school district caused his paralyzing neck injury which resulted from a fight with Salina South classmate, Michael Jester. Beshears originally sued Jester and Jester's parents but after discovering Jester had an extensive discipline record and had made statements to school officials before the fight, the school district was added to the suit. Beshears alleged negligent supervision on the part of USD 305. Two days before the fight, Jester had told a counselor and assistant principal that Beshears and another student had been yelling at him. He reported that he did not think it would get serious but that he wanted the school to know it had been going on so that if the boys started something the school would know that it was not his fault. Jester was on a discipline plan for disruptive classroom behavior and knew he would receive a long-term suspension from school if he had any further problems.

Jester did not say that he was going to fight Beshears, nor did he ever return to the counselor or assistant principal to report further problems. The fight between Beshears and Jester took place after track practice on a county road. Jester's disciplinary records indicated that he had various problems in school dealing with such things as off-task behavior, throwing spitballs, and not staying in his seat. These incidents resulted in him being placed on probation. As long as Jester stayed out of trouble and made satisfactory academic progress, he would be allowed to stay in school. If not, he could be suspended for the remainder of the semester. Jester was sent to the office once during his probationary period but because his teachers reported he had been showing improvement, he was not suspended. The district court concluded that "neither the law nor the uncontroverted facts of this case" gave rise to create a duty whereby the school district should be expected to anticipate or prevent the injuries suffered by Beshears or create a duty by reason of the 'special relationship doctrine' (p. 1381). No legal duty was owed to the plaintiffs because the district had no knowledge of the prearranged fight and thus had no way to intervene to prevent it from occurring. While Jester's disciplinary file showed him to be a disruptive student, there was no evidence from which to conclude that he had "vicious tendencies towards other students in general, and the plaintiff Brent Beshears in particular" (p. 1381). The Saline District Court granted summary judgment in favor of the district and authorized interlocutory appeal. The plaintiffs appealed the decision.

The Restatement (Second) of Torts § 315 provides: "There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection." Beshears argued that this special relationship doctrine should impose a duty on USD 305. The appellate court did not agree stating in part, "we have found a duty owing under section 315(a) only in situations in which the party owing the duty did have the ability or right to control the third person causing the harm. The school district acknowledges that a special relationship and duty to supervise students exists during the school day. They hold that this special relationship does not exist off campus. USD 305 had neither the ability nor the right to control Jesters or Beshears under the facts here" (p. 1382). The court also discussed the nature of the duty owed by school officials to students in three cases: *Honeycutt v. City of Wichita*, 251 Kan.451, 836 P. 2d 1128 (1992); *Hackler v. U.S.D. No. 500,* 245 Kan. 295, 777 P. 2d 839 (1989); and *Sly v. Board of Education,* 213 Kan. 415, 516 P. 2d 895 (1973). In *Honeycutt,* the court rejected the notion that the special relationship between a school district and a student created a duty to protect the student on the way home after leaving school grounds. To do so would "create an intolerable burden for the school" *Honeycutt*, 251 Kan. at 469. The court in *Sly* held that "deliberate and malicious assaults by students should not be required to be anticipated by school personnel in the absence of notice of prior misconduct..." 213 Kan. at 425. *Sly*

controls this case. USD 305 could not have foreseen the off-campus, after hours fight between Beshears and Jester. Beshears claimed this duty of care was owed to him by the fact that the school failed to follow its own policies by not suspending Jester when he broke his probation. The court disagreed. The school districts efforts to keep Jester in school rather than expel him should not result in liability. This liability, according to the court would work against the public benefit of educating all students. USD 305's expulsion policies, according to the court, gave the school "the authority to expel students, but they do not mandate suspension or expulsion. School officials retain discretion" (p. 1384). None of the circumstances for imposing a duty were present in this case. The district court decision was affirmed.

Allowing Jester to remain in school did not increase the risk of harm to Beshears who voluntarily participated in the fight. Jester's disciplinary problems did not present any risk of danger to other students. With no knowledge of the prearranged fight, there was no way it could have been prevented by school officials.

Jackson ex rel. Essien v. Unified School District No. 259
995 P.2d 844 (Kan. 2000)

Larry Jackson participated in a required physical education class at Hamilton Middle School. During class, a student asked the teacher if they could use a springboard to jump into the air so that they could dunk a basketball. When Jackson attempted this, he fell to the floor and broke his right forearm in two places. Jackson, through his mother Virgie Essien, filed suit against the school district alleging that

negligent conduct caused his injuries. The defendant moved for summary judgment under the recreational use provision of the Kansas Tort Claims Act (KTCA) K.S.A. 75-6101 *et seq.* and claimed that the KTCA provided qualified immunity. The district court granted the school district's motion. Jackson appealed. The Court of Appeals affirmed the decision of the district court in *Jackson v. U.S.D. 259,* 26 Kan.App.2d 111, 979 P.2d 151 (1999). The plaintiff requested review by the Kansas Supreme Court and that requested was granted.

In order for a governmental entity to avoid liability under the KTCA, it must prove that it falls within one of the exceptions found in K.S.A. 75-6104. K.S.A. 75-6104(e) provides immunity for "any claim for injuries resulting from the use of public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity or employee is guilty of gross and wanton negligence." In this case, the plaintiffs did not allege that the defendant was guilty of gross or wanton negligence. The plaintiffs argued that the gym was not "public property" because access to the gym was limited. The court determined that "limited access to governmental property does not mean that the property is not public" and held that the school gymnasium was indeed public property. (p. 847) The plaintiffs next asserted that the legislation intended for "open area" to be limited to outdoor areas. The court reviewed previous appellate court cases that provided immunity from injuries occurring on a football practice field, a school playground, and a sledding area. After this review, the court held that "it defies common sense" to hold that K.S.A. 75-6104(o) provides immunity from injuries which occurred in all of

these other locations but not on a basketball court just because it is not outdoors. Thus, the Supreme Court found that the school gymnasium qualified as an "open area." The plaintiff's argument that because there had been no previous cases which applied K.S.A. 75-6104(o) to the inside of a school gym was without merit because "there must always be a first case" (p. 849) Next, the court turned to the issue of whether the gymnasium was a property used for "recreational purposes." Because the injury occurred during class, the plaintiffs argued that the gym was not "property intended or permitted to be used...for recreational purposes." In order for a location to fall within K.S.A. 75-6104(o), the location must be "permitted or intended" for such use, the injury did not have to be the result of "recreation." The Supreme Court reviewed the history of the recreational use exception and could find no committee notes that specified locations that would fall under this exception. The court also discussed court cases from Illinois, which had a statute similar to that of Kansas. In *Ozuk v. River Grove Board of Education*, 281 Ill.App.3d 239, 217 Ill.Dec.18, 666 N.E.2d 687 (1996), a student fell in physical education class and was injured. The Illinois Appellate Court found that the school gymnasium would fall under the immunity statute if it was "encouraged, intended, or permitted to be used for recess, extracurricular events, or other recreational, noncompulsory activities..." *Ozuk*, 281 Ill.App.3d at 243. The Illinois court further remanded the case to the district court to determine the permitted use of the gymnasium. The Kansas Supreme Court adopted the holding of the Illinois court and remanded this case to the district court to

determine whether the Hamilton Middle School gymnasium was intended or permitted to be used for recreational purposes.

Wright v. Unified School District No. 379
14 P.3d 437 (Kan. App. 2000)

Travis Wright was a student at Clay Center Community High School in February of 1996. Wright participated on the wrestling team during this time under the direction of Keith George, the wrestling coach. Benny Wallace, a former student and wrestler at Clay Center, was asked by George to come to practice and wrestle Wright because there was no one on the team with Wright's skill and size. One afternoon at practice, Wallace placed a move on Wright that caused a serious injury to Wright's knee. When the accident occurred, George and his assistant coach were wrestling with other students. Wright filed suit against U.S.D. 379, George, and Wallace, claiming that the proximate cause of his injury was the negligence of the defendants to allow Wallace to wrestle against him. The defendants moved for summary judgment, claiming they were immune from liability under K.S.A. 75-6104(0), the recreational use exception of the Kansas Tort Claims Act (KTCA). The trial court denied the defendants' motion for immunity under the recreational use exception holding that K.S.A. 75-6104(o) was only applicable to outdoor areas. Instead, the trial court granted the defendants' motion for summary judgment based on the discretionary function exception of the act. Wright appealed the trial court's

decision. The defendants cross-appealed from the judgment of the trial court denying their summary judgment motion on different grounds.

At issue for the appellate court was: (1) Whether the defendants were immune from liability under the recreational exception of K.S.A. 75-6104(o); and (2) if they were, whether the trial court erred in denying the defendants' motion for summary judgment on those grounds. K.S.A. 75-6104(o) provides in relevant part that a governmental entity or employee will not be liable for damages that result from "any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or employee is guilty of gross and wanton negligence." Wright's injury occurred in the wrestling room, which was in the southeast corner of the gym, next to the weight room. The wrestling room, weight room and gymnasium were all connected and considered to be part of the school's physical education facility. The wresting and weight rooms had been used by the public for weightlifting, aerobics and wrestling activities. The school district's general policy was that if an organized school activity was not using the areas, they were open to the public. The Kansas Supreme Court in *v. U.S.D. 259,* 268 Kan. 319, 995 P.2d 844 (2000), addressed the issue of whether an area, such as the wrestling room could be considered a "park, playground or open area" within the meaning of K.S.A. 75-6104(o). In *Jackson*, the court held that the indoor high school gymnasium was an open area. *Jackson* specifically rejected the argument that K.S.A. 75-6104(o) was limited to outdoor areas and further emphasized that the injury need not be the

result of participating in recreation as long as the injury occurred on public property "intended or permitted to be used…for recreational purposes." *Jackson,* 268 Kan. at 326. In the case at hand, the wrestling room had been used by the public for recreational purposes. In addition, being a member of and practicing with the wrestling team was a noncompulsory activity that would be considered a recreational activity. Accordingly, the appellate court held that the defendants were immune under the recreational use exception of the KTCA as the wrestling room was considered an "open area" under the Act. The decision of the trial court was affirmed in part and reversed in part.

Jackson ex rel. Essien v. Unified School District No. 259
31 P.3d 989 (Kan. App. 2001)

This is Larry Jackson's second appeal. In his first appeal, *Jackson v. U.S.D. 259,* 268 Kan. 319, 995 P.2d 844 (2000) (*Jackson I*), the Kansas Supreme Court remanded the case for a factual determination. Jackson, who injured his arm in a physical education class, sued the school district for negligence. The trial court granted the District's motion for summary judgment based on the recreational use exception to the Kansas Tort Claims Act (KTCA). Jackson appealed. The Supreme Court held that a gymnasium fell within the recreational use exception and then remanded the case for a determination of whether the school gymnasium was intended or permitted to be used for recreational purposes. On remand, the school district filed a motion for summary judgment. Jackson filed a motion for partial summary judgment and argued that K.S.A. 75-6104(o) as it was interpreted in

Jackson I violated his equal protection and due process rights. The Attorney General intervened to argue the constitutionality of K.S.A. 7506104(o). The trial court granted the District's motion for summary judgment and denied Jackson's motion. Jackson appealed this decision.

Section 1 of the Fourteenth Amendment provides in part that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law..." Before determining that a statute is unconstitutional, the statute "must clearly appear to violate the constitution." *State ex rel. Tomasic v. Unified Gov. of WyandotteCo./Kansas City*, 264 Kan. 293, 300, 955 P.2d 1136 (1998). All parties in this case agreed to apply the rational basis standard to analyze the statute. This type of analysis requires a finding of a valid State interest and a reasonable relationship between the legislation and that interest. In *Jackson I*, the court stated, "The purpose of K.S.A. 75-6104(o) is to provide immunity to a governmental entity when it might normally be liable for damages which are the result of ordinary negligence." 268 Kan. at 331. This immunity would allow governmental entities to build recreational facilities for public use without fear of the high cost of litigation that could occur in cases of simple negligence. The public benefits from having recreational facilities for their use, often times at no cost. This creates a valid State interest in the legislation as well as a rational connection between the legislation and the State interest. For these reasons, the appellate court held that K.S.A. 75-6104(e) was constitutional. Jackson argued that the KCTA took away his

right to seek recovery for simple negligence. The court agreed that the recreational use exception was a change from the general rule of liability found in K.S.A. 75-6103. It noted, however, that "governmental immunity was a part of the common law at the time the Kansas Constitution was adopted" and this immunity applied to school districts (p. 993). Jackson failed to establish that there was ever a remedy for simple negligence in cases similar to this. Finally, Jackson argued that the trial court should not have granted the school district's motion for summary judgment and erred in its determination that the recreational use of the gymnasium was beyond incidental. K.S.A. 75-6104(o) requires that the location be "intended or permitted to be used for recreational purposes." It also requires that the minimum amount of recreational use must be more than incidental. In the school district's motion for summary judgment, facts were presented to show that the middle school gymnasium was used by the public for many events and by many different groups. These facts made it clear that the gymnasium was used for recreational purposes well beyond incidental use. The court held that the school gymnasium qualified for the recreational use exception and affirmed the decision of the district court.

Glaser v. Emporia Unified School District No. 253
21 P.3d 573 (Kan. 2001)

Todd Glaser was a 12-year-old seventh-grade student when he was injured after being hit by a car on a public street adjacent to school property. Todd had been on school property before classes started and was unsupervised by USD 253 employees. Prior to the accident, a teacher, Douglas Epp, saw Todd and another

student running in an area next to the public street. Glaser alleged that Epp took no action and continued walking towards the school. Epp claimed he cautioned the boys from playing around the cars near the street. After the accident, Glaser brought a personal injury action against the driver, school district, and Epp. He settled the claims against the driver, and the district made a motion for summary judgment from the district court. The district court granted summary judgment on the grounds that, under the circumstances, neither Epp nor the school district had a duty to supervise Glaser. The court noted that the school district did not "exercise supervision before school until a student was in the building" (p. 574). Glaser appealed this decision. The case was transferred from the Court of Appeals to the Supreme Court of Kansas.

The issue for the court to decide on appeal was whether the school district assumed a duty to protect the safety of students gathered on school grounds before classes started. The legal basis for Glaser's argument was the Restatement (Second) of Torts Section 324A (1964) and its interpretation in various Kansas court cases which involved liability to third persons for negligent performance. This provided in part that, one who undertakes to render services to another which are necessary for the protection of a third person, is subject to liability to the third person for physical harm that results from a failure to exercise reasonable care if "(a) his failure to exercise reasonable care increases the risk of harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." In *v. City of Wichita*, 251 Kan. 451, 836 P.2d 1128 (1992), the court engaged in discussion of

the Restatement (Second) of Torts Section 324 A (1964) and established a threshold requirement. This requirement states, "the defendant undertook, gratuitously or for consideration, to render services to another. In order to meet this requirement, the evidence must show the defendant did more than act, but *through affirmative action* assumed an obligation or intended to render services for the benefit of another." *Honeycutt* 251 Kan. at 464. The court cited other Kansas court cases as well as cases from several states leading to the determination that no duty had been owed to Glaser. In this case, as in *Honeycutt*, the injury occurred off school property at a time when the student was not in school custody. The court held that the school district had never undertaken to "render services calculated to protect or supervise Todd, either by affirmative acts or promise to act..." (p. 581). Therefore, the decision of the district court was affirmed.

Barrett ex rel. Barrett v. Unified School District No. 259
32 P.3d 1156 (Kan. 2001)

Frances Barrett, mother of Alex Barrett, brought suit against USD 259 and a football coach at her son's high school claiming negligence and gross negligence resulted in her son's death from heat stroke during football practice at the school. Barrett filed a motion for partial summary judgment alleging that the defendants were not entitled to rely on K.S.A. 75-6104(o), the recreational use exception to the Kansas Torts Claims Act (KTCA), because its application to cases where the injury is caused by a coach's negligence and not by a condition of the property violated equal

protection under the United States Constitution. She also claimed that the defendants were not entitled to immunity under the discretionary function section of K.S.A. 75-6104(e) because the coach had a duty of care to the students. The defendants countered with their own motion for summary judgment. The trial court found in favor of Ms. Barrett, ruling that the recreational use exception did not apply to cases involving coaching negligence as it violated equal protection by creating a distinction between similarly situated students based solely on the location of the injury without a rational basis. In making its judgment, the trial court stated in part:

> "It is the application of the recreational use exception to the immunity statute to the same classes of people under different life situations that creates 'unequal treatment' of constitutional magnitude. For example, the child injured while participating in a mandatory physical education class faces proof of gross or wanton negligence if the injury occurred in the gym because the school and teacher are entitled to qualified immunity under those circumstances. When the same child is injured in the same way under the charge of the same teacher, but that day the teacher conducted the class in the classroom, the student need only show ordinary negligence…The same classes of people are discriminated against solely based on the location of the tort, a distinction with no sensible difference. Such a rule creates a double standard without a reasonable basis, a constitutional anomaly." (p. 1163)

The trial court also concluded that the discretionary function under the KTCA was not applicable as the school owed a duty of care to its students and had issued

safety policies and guidelines which reinforced this duty of care. The trial court denied the defendants' motion for summary judgment. The defendants asked the trial court to certify its rulings for interlocutory appeal pursuant to K.S.A. 60-2102(b). They argued that the trial court erred in finding the recreational use exception, as applied in this case, violated the Equal Protection Clauses of both the Kansas and United States Constitutions. The defendants contended that such a ruling was not supported by case law and that a rational basis did exist for treating similarly situated persons differently under the law. The State of Kansas intervened and asked the trial court to certify the case for interlocutory appeal. The trial court sustained both motions.

Interlocutory appeal is called for when a question of law must be answered by an appellate court before a trial may proceed. In this case, the trial court had found K.S.A. 75-6104(o) improperly distinguished between similarly situated students based on the location of the tort. Thus, it called into question the constitutionality of a state statute. Before a statute can be stricken down, it must clearly violate the constitution. The appellate court had to determine if the lower court correctly applied the law in striking down the statute. Under 75-6104 (o) "A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from: any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury." The language of

the statute only requires that the property be intended or permitted to be used for recreational purposes, not that the injury occurred as a result of recreational activity. Citing previous cases, the appellate court found that the recreational use exception applied to this case. They next turned to the question of whether this violated equal protection by creating a distinction between students based solely on location of the injury. The appellate court found that the trial court did not "fully take into account the legitimate purpose of the legislation and whether the statute is rationally related to that purpose" (p. 1164). The purpose of K.S.A. 75-6104(o) is to encourage governmental agencies to build recreational facilities for the public benefit without fear of litigation for simple negligence. The appellate court also found that the examples given in the trial court's opinion failed to show that that legislation distinguishes between similarly situated persons without a rational basis. The court went on to say that, "…distinguishing between a student injured in the gym and one who is injured in the classroom is rationally related to the purpose of the statute" (p. 1164). The school district does not need as much incentive to build a classroom as it does to build recreational facilities such as a football field. The recreational facility is different from the classroom in its value to the public and in the potential for injury in its use. Without a limited grant of immunity for negligence, a school district may decide not to provide these facilities. That this immunity is extended to coaches simply furthers the purpose of the statute. The legislature "determined that such an extension of immunity is necessary to encourage the development of such facilities" (p.1165). The court acknowledged that the classification of injuries, which may

occur to a student on a football field being different from those occurring to the same student in the classroom, is not perfect. However, " '[W]here rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect.' " citing *Kimel v. Florida Board of Regents,* 145 L.Ed.2d 522 (2000). The appellate court concluded that K.S.A. 75-6104(o) "is rationally related to a legitimate government objective, and the trial court erred in its finding that it violated the Equal Protection Clause" (p. 1166). The court found K.S.A. 75-6104(o) to be constitutional and applicable in this case. The appellate court did not address the discretionary function exception found in K.S.A. 75-6104(e) because the discretionary function exception under the KTCA would only provide a defense against ordinary negligence. The defendants are exempt from ordinary negligence based on K.S.A. 75-6104(o). Therefore, the appellate court found it unnecessary to address the applicability of K.S.A.75-6104(e). The only remaining questions involved a determination of whether the defendants' actions amounted to gross or wanton negligence. Thus, the case was reversed and remanded for further proceedings.

In this case, the court showed that a rational basis exists for distinguishing between injuries occurring on public recreational facilities and those that do not, even if the same persons are involved. This distinction must exist in order to advance the legitimate goal of encouraging the development of recreational facilities that are available for public use. Under K.S.A. 75-6104(o), the defendants could not be found

liable for ordinary negligence. However, the plaintiff could still proceed with her claim of gross and wanton negligence if she so chose.

Dunn v. Unified School District No. 367
40 P.3d 315 (Kan. App. 2002)

On December 15, 1995, plaintiffs Michael Dunn and Terry Ballou, seniors at Osawatomie High School, broke a plate glass door while returning to class and were severely injured. Ballou's hand slipped when he reached for the crossbar and struck the glass door. The boys filed separate claims of negligence against USD 367 pursuant to the Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 *et seq.* Those claims were joined for discovery and trial. USD 367 made a motion for summary judgment and argued that it was immune pursuant to K.S.A. 75-6104(m) and that the claim was barred by the statute of repose. The district court denied this motion. Following further discovery, the school district renewed its motion for summary judgment which was granted in part and denied in part. The district court granted the motion with respect to the governmental immunity found in K.S.A. 75-6104(m) and dismissed any claims of negligence for failure to replace the plate glass with safety glass. However, the court denied the motion with respect to the statute of repose argument. The case was tried on the plaintiffs' allegations of breaches of duties other than failure to replace the plate glass. The jury found each plaintiff to be 10% at fault and USD 397 to be 90% at fault. Each plaintiff was awarded over $100,000 in damages. USD 397 moved for a new judgment as a matter of law or a new trial.

They argued that (1) the statute of repose barred plaintiffs' claims; (2) defendant's liability was barred by K.S.A.75-6104(m); and (3) a private person would not be liable under the facts of this case. The motion was denied and USD 397 appealed.

The statute of repose provides in part that "in no event shall an action be commenced more than 10 years beyond the time of the act giving rise to the cause of action." K.S.A. 60-513(b). USD 397 argued that the act giving rise to the cause of action was the installation of the plate glass door which occurred in the late 1960's. The court determined that the date of the designing of the plate glass doors was immaterial to a statue of repose because the designing and planning of a door with plate glass is not actionable pursuant to K.S.A. 75-6104(m). K.S.A. 75-6104(m) states in part that a governmental entity "shall not be liable for damages resulting from: (m) the plan or design for the construction of or an improvement to public property, either in its original construction or any improvement thereto, if the plan or design is approved by the governing body" and if the plan was prepared with the generally recognized standards in existence at the time the plan was prepared. In this case, any acts which gave rise to the plaintiffs' cause of action occurred well within the statute of repose. Plaintiffs alleged multiple duties and breaches of those duties as being the cause of their injury. The question the court addressed was whether a governmental entity can be liable for damages caused in part by a breach of duty from which they are immune pursuant to K.S.A. 75-6104(m) and in part by breaches of duty for which they are not immune. In making their determination, the court looked at the recreational use exception found in K.S.A. 75-6104(o) which specifically states

that a governmental entity is not liable for damages resulting from "*any* claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes…" The court held that "the design exception does not exempt governmental entities from "any claims" resulting from the use of a building designed or planned with prior approval…" (p. 324). The court did not believe that the legislature intended to preclude claims for injuries caused in part by the plan or design and in part by other tortious acts. Thus, the court found that a "governmental entity is not immune from liability caused by negligence independent of design, where that independent negligence is a concurring, proximate cause of injury" (p. 325). The court next turned to the argument made by USD 367 that a private person would not be liable under the facts of this case. The KTCA governs tort claims brought against a school district and it states in part that unless there is a statutory exception to liability, a governmental entity is liable for damages caused by negligence if a private person would be liable under the laws of the state. The court found *Glynos v. Jagoda*, 249 Kan. 473, 819 P.2d 1202 (1991) to control in this case. In *Glynos*, the plaintiff was injured when he went through a plate glass window at a private apartment complex. The Supreme Court held in *Glynos* that the duty of cared owed the plaintiff by the apartment complex "transcends the building code issue. Conformity with the building code is not an absolute defense to a claim based on ordinary negligence" *Glynos,* 249 Kan. at 485. Compliance to building codes may be evidence of due care but it does not preclude a finding of negligence where a reasonable person would have taken additional precautions under

the same circumstances. *Glynos* held a private person liable for injuries resulting from a broken plate glass door because it was proven that the defendant breached a duty of care to maintain the common area of the apartment complex. Finally, the court addressed the issue of what duty of care was owed to an 18-year-old student and a 17 ½-year-old student. The court found that regardless of their ages, the school district owed the students the duty to properly supervise students and take reasonable steps to protect their safety. Thus, the argument that the district owed no duty of care to properly supervise the plaintiffs and protect their safety was rejected. The decision of the district court was affirmed.

Kurtz v. Unified School District No. 308
197 F. Supp. 2d 1317 (D. Kan. 2002)

Merry Kurtz, mother of David Lee Gann, brought tort action against the school district for negligent retention and supervision of a speech and language para-professional. In 1998-99, David was a 12-year-old 5th grade student at Faris Elementary school where he received special education services for a learning disability. Pamela Hart, a speech pathologist for the school district, and Sandra Zolman, a para-professional who worked with Hart, became acquainted with David during that school year. At the end of the 1998-99 school year, Zolman introduced David to her 11-year-old son Austin and the boys became friends. David would often play with Austin and would sometimes spend the night at his house. Kurtz and Zolman also became better acquainted during this time. When school started in

August 1999, David enrolled in the 6th grade at Lincoln grade school. Hart and Zolman continued to work together at both Faris and Morgan schools. One evening in early October 1999, Zolman went to Hart's house and told her of an incident in which David had made contact with her in a "sexual and inappropriate manner." After discussing the matter with Hart, Zolman agreed that she would not have any more contact with David and that she would speak to Kurtz about the incident. Hart called Kathleen Hall, a school psychologist, and told her that Zolman had come to her house and made allegations against David. The next morning, Hart met with the school district Director of Special Education, Dr. Connie Clark, about the situation. Hall and Clark agreed that David was confused about his relationship with Zolman and that Zolman should not see David again. Hart was the only employee of the school district that spoke to Zolman about the situation. Zolman claimed that she called Kurtz about what had happened, but Kurtz denied that she had done so. None of the officials at David's new school had any information informing them that Zolman had agreed not to have contact with David. After the incident, Kurtz gave written permission to the principal and a teacher at Lincoln School for Zolman to pick David up after school while Kurtz underwent a surgical procedure. David stayed with Zolman while Kurtz recovered from surgery and during this time he and Zolman began a sexual relationship. No sexual conduct occurred on school property or during school hours. Zolman was arrested in May 2000 and charged with rape and aggravated criminal sodomy. She pled no contest and was serving a jail sentence at

the time of this court action. Kurtz brought action against the school district and the district made a motion for summary judgment.

Kurtz alleged that the defendant school district was negligent in the retention and supervision of Sandra Zolman. In order for a plaintiff to succeed in such a claim they must show "some causal relationship between the dangerous propensity or quality of the employee, of which the employer has or should have knowledge, and the injuries suffered by the third person; the employer must, by virtue of knowledge of his employee's particular quality or propensity, have reason to believe that an undue risk of harm exists to others as a result of the continued employment of that employee" (p. 1320). In this case, the court found that Kurtz had not established any basis for imposing liability on the school district for Zolman's acts. The information that Zolman confided to Hart, which was subsequently relayed to other district officials, did not indicate that Zolman was a risk, rather it concerned David's inappropriate advances and his confusion about the relationship. District officials only knew that David was having some troubles and that the problem would be solved by Zolman refusing to have further contact with him. Zolman had agreed that she should not see David after the incident, and thereafter lied to Hart that she was complying with that agreement. According to the court, the school district had "no reason to know of Zolman's propensities, it had no reason to expect more from her than a simple agreement that the best course of action, in view of David's advances, was to cut off contact" (p. 1321). Zolman had informed Hart that she had discussed the matter with Kurtz, and district officials had no reason to believe she had not done

so. Officials at David's new school had no reason to suspect Zolman because they had no knowledge of the events that occurred at Faris. In light of the evidence presented, the court found that "nothing from Zolman's past or her conduct with David about which the defendant knew or should have known gave any indication that Zolman was a risk to her students" (p. 1321). The defendant's motion for summary judgment was granted.

* Kurtz appealed in an unpublished opinion, *Kurtz v. Unified School District No. 308,* 65 Fed.Appx. 257, 2003 WL 21224095, (C.A. 10 (Kan.)), 177 Ed. Law Rep. 930 (2003). The Court of Appeals affirmed the district court's decision.

Doe v. Unified School District
255 F. Supp. 2d 1239 (D. Kan. 2003)

Plaintiff, Jane Doe, brought this suit on behalf of her 16-year old daughter who had been sexually abused by her stepfather. Barbara began attending the school district when she was in the second grade. Her stepfather began sexually abusing her during her third grade year. When she was in the fourth grade, Barbara told three classmates about the abuse. On April 30, 1996, the classmates met with the school counselor and told her that Barbara Doe had told them her stepfather had raped her. The school counselor failed to report these allegations to the State Department of Social and Rehabilitation Services (SRS) or to any other agency. She did not talk to Barbara about the sexual abuse, nor did she report it to her mother. The counselor did inform the principal about her meeting with Barbara's classmates. The principal did

not notify SRS or do any further investigation. Although the Elementary School did not have a written policy dealing with reporting sexual abuse, the district's policy was to follow Kansas reporting statutes. The counselor knew that state law obligated her to report suspected sexual abuse. When she had been hired, the counselor had not obtained her state certification as a counselor. She was enrolled in the Counseling Masters program at a nearby university and the district obtained a waiver of the certification requirements from the Kansas State Board of Education. In April of 2001, Barbara told her mother of the sexual abuse and in August 2001, Ms. Doe filed a notice of a claim with the school district. The school board reviewed the claim in executive session. Although matters discussed in executive session are supposed to be kept confidential, one of Barbara's classmates overheard a board member tell his wife about the allegations in Ms. Doe's claim. This classmate was one of the three who had originally reported the alleged abuse. Ms. Doe then filed her action with the court. She contended that the defendants negligently failed to report or investigate the allegations of sexual abuse, that the school district and principal negligently supervised and retained the school counselor, and that the defendants invaded Barbara's right to privacy when the board member told his spouse about the allegations. Defendants filed a motion for summary judgment.

Ms. Doe's general negligence claims were founded on three theories. First, that the school district and its employees had a common law duty to report and/or investigate the allegations. Second, that the school counselor had a duty to report the alleged abuse. Lastly, Ms. Doe believed that the defendants assumed a duty to report

and/or investigate based upon their acts and conduct toward Barbara. The first two claims were founded on the belief that the defendants had a duty under Kansas common law to report and/or investigate allegations of sexual abuse when it was reported by someone other than the victim. The court elected to certify those two questions to the Kansas Supreme Court. The answer from the Kansas Supreme Court would be needed to determine Ms. Doe's first two theories. Thus, the court denied the defendants' motion for summary judgment on the negligence claims founded on the theory that the school and/or its employees owed Barbara a common law duty. The court did address the negligence claims that the defendants assumed a duty to protect Barbara Doe. The Restatement (Second) of Torts Section 324 A states in part that "one who undertakes...to render services to another which he should recognize as necessary for the protection of a third person, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care...if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) he has undertaken to perform a duty owed by the other to the third person, or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking." To succeed in her claims, Ms. Doe needed to show that the defendants undertook a duty to protect Barbara from her stepfather, that they negligently failed to perform this undertaking, and that such negligence either increased the risk of harm or caused Barbara to suffer harm because of her reliance on their undertaking. Ms. Doe argued that because the counselor had educated students about sexual abuse and instructed them to report abuse to friends or the school counselor; she had assumed a duty to

report. The court disagreed. It held that the defendants had not taken an affirmative act sufficient enough to create a legal duty. When the counselor instructed students about sexual abuse, she had not agreed to take any affirmative act to protect Barbara Doe. Even if the district had assumed a duty to report the allegations, they could not be held liable because their failure to report did not increase the risk of harm. Barbara Doe's stepfather created the risk of harm, not the defendants. Thus, the court granted summary judgment to the defendants on negligence claims founded on a legal duty to protect. Next, the court turned to the claim of negligent hiring and retention. To succeed on this claim, it must be shown that the "employer had a reason to believe that an undue risk of harm to others would exist as a result of the employment of the alleged tortfeasor" (p. 1248). Although the counselor had not yet completed her counseling certification when hired, she did have a Bachelor's degree in education and almost fourteen years of experience in the field. The State Board permitted the district to hire her when they waived the certification requirements and she was actively pursuing her Masters in counseling. The court could find no reason that the school district and principal would believe that the school counselor presented an undue risk of harm. Summary judgment was granted in favor of the defendants. Finally, the court addressed the allegations that the defendants had violated Barbara's right to privacy. The court turned to *Dotson v. McLaughlin,* 216 Kan. 201, 531 P. 2d 1 (1975) in which the Kansas Supreme Court recognized the tort of invasion of privacy by adopting the provisions of the Restatement (Second) of Torts Section 652A. The Restatement provides in part that the right to privacy is invaded by an

unreasonable intrusion upon the seclusion of another, the appropriation of the other's name or likeness, the unreasonable publicity given to the other's private life, or the publicity that unreasonably places the other in a false light before the public. Ms. Doe contended that when the board member shared information with his wife it constituted "unreasonable publicity given to [Barbara Doe's] private life" (p. 1249). The defendants admitted that the school board member shared this information with his spouse and that one of Barbara's classmates overheard the conversation. They contended that this disclosure did not sufficiently publicize the facts enough to create liability under Section 652A. Ms. Doe could not produce any evidence showing the information was disclosed beyond the school board member, his spouse, and the former classmate who had already known about the alleged abuse. As such, the court granted summary judgment in favor of the defendants on this claim.

The court denied the defendants motion for summary judgment subject to refiling after the Kansas Supreme Court responded to the certified questions.

Simply educating students on matters of public health and safety does not mean that a school assumes a legal duty. Whether or not the school has a legal duty to report abuse when it is reported by someone other than the victim was a question for the Kansas Supreme Court to answer.

Doe v. Unified School District
255 F. Supp. 2d 1251 (D. Kan. 2003)

Jane Doe, mother of Barbara Doe, had sued the school district alleging negligence in their handling of sexual abuse allegations against Barbara's stepfather. (See *Doe v. Unified School District*, 255 F. Supp. 2d 1239 (2003). On the defendants' motion for summary judgment, the District Court held that questions regarding the defendants' common law duties would be certified to the state Supreme Court. Ms. Doe had alleged that the defendants negligently failed to report information concerning the suspected abuse of Barbara Doe after it had been reported to the school counselor by three classmates. She contended that the defendants had a duty independent of those under K.S.A. 38-1522 to report the information to the proper authorities. Kansas courts had not addressed what duty, if any, a school district, principal, or school counselor owed a student after receiving information from a third party that a parent is sexually abusing the student. As the answer to that question would be determinative of the pending action, the district court certified the following questions to the Kansas Supreme Court:

> (1) Whether Kansas common law imposes a duty upon a school district and/or its employees, to report to the appropriate authorities allegations that a parent is sexually abusing a child or to investigate further the validity of such allegations when someone other than the student informs the school and/or its employees that the student has been abused?

(2) Whether Kansas common law imposes a duty upon school counselors, based on their professional status, to report to the appropriate authorities allegations that a parent is sexually abusing a child or to investigate further the validity of such allegations when someone other than the student informs the counselor that the student has been abused? (p. 2)

K.S.A. Section 38- 1522 provides that when teachers, school administrators or other employees of a district have "reason to suspect that a child has been injured as a result of physical, mental or emotional abuse or neglect or sexual abuse, the person shall report the matter promptly...to SRS." The Kansas Supreme Court has held that this statute does not "create a private right of action for those aggrieved by a violation of this duty" (p. 1253). The court did not address whether such a duty existed at common law. Ms. Doe asserted that a duty existed under common law because of the special relationship between the school and its students. Existing court decisions regarding a school districts duty to protect its students could permit two different outcomes: first, that a school district and its employees owe no duty to protect students from third-parties once they leave school grounds, as was found in *Honeycutt v. City of Wichita,* 251 Kan. 451, 836 P. 2d 1128 (1992); or, second, that the school's special relationship with students extends beyond geographic boundaries when it knows or reasonably should know that a third-party poses a risk to the safety of that student, as could be inferred from language in *Beshears v. Unified School District No. 305,* 261 Kan. 555, 930 P. 2d 1376 (1997). No Kansas court had addressed what duty a school counselor owed, based on their professional status, to a

student when a report of abuse is made by a third party. The district court believed that the answers to these questions involved "substantial public policy choices" (p. 1254). It was therefore ordered that the two questions of law be certified to the Kansas Supreme Court.

Gilliam v. USD No. 244 School District
397 F. Supp. 2d 1282 (D. Kan. 2005)

Plaintiff, Rebecca Gilliam, filed a lawsuit alleging she had been harassed by her teacher, Joel Vannocker, while she was a high school student. During her junior year, Gilliam complained to another teacher that Vannocker was staring at her, inappropriately putting his arm around her, and improperly touching her by leaning over her desk. The teacher reported this complaint to the high school principal, Jim Kuhn. No disciplinary action was taken against Vannocker. During Gilliam's senior year, Vannocker's actions continued. He made comments to her that she was "beautiful" and "more mature than other students" (p. 1285). Gilliam claimed Vannocker paid more attention to her than to the other students, extended privileges to her and gave her chocolate candy. In February of 2004, an ad addressed to Gilliam was placed in the school newspaper from a "Secret Admirer." The ad stated, "you make my heart sing." Later, when Gilliam was making copies in the office for another teacher, Vannocker approached her from behind, leaned against her and whispered in her ear, "you know, you do make my heart sing" (p. 1285). On February 24, 2004, Vannocker asked Gilliam to come to his classroom after school.

When she arrived, he handed her three typewritten poems and a note. The note said that the poems were "inspired by" Gilliam and were not intended to frighten her. After school, Gilliam read the poems and claimed that she felt nauseous. Soon after, she began to suffer mental, emotional, and physical injuries, including nausea, vomiting, and insomnia. Gilliam told her father about the poems and the other unwelcome actions. Her father notified school officials and Gilliam filed a police report and protective order request against Vannocker. Gilliam has since been diagnosed with medical and psychological disorders arising from the harassment. Based on her allegations, Gilliam asserted five claims: (1) violation of Title IX against the school district; (2) violation of Section 1983 against Vannocker, Kuhn, and the school superintendent, Dale Rawson; (3) negligent infliction of emotional distress against all of the defendants; (4) negligent hiring, supervision and retention against the school district and against Kuhn and Rawson; and (5) violation of the Kansas Tort Claims Act (KTCA) against the school district. The matter went before the court on the defendants' motion to dismiss for failure to state a claim upon which relief could be granted.

The court began by addressing Gilliam's Section 1983 substantive due process claims against Vannocker, Kuhn, and Rawson. In order to determine if the defendants, as government officials, were entitled to qualified immunity the court had to conduct a two-part analysis. First, the court had to determine if the facts, as provided by Gilliam, set forth a constitutional violation. Second, if Gilliam alleged a constitutional violation, the court had to determine whether the violation was clearly

established at the time of the defendant's conduct. The Due Process Clause provides that the government cannot "deprive any person of life, liberty or property, without due process of law." The standard for judging a substantive due process claim is whether the action would "shock the conscience of federal judges" (p. 1287). The action must be more than just an ordinary tort; it must demonstrate a magnitude of potential or actual harm that would be considered shocking. In this case, the court did not believe Gilliam had alleged conduct that met this "shock the conscience" standard. There was no allegation of sexual molestation or assault. Vannocker was accused of inappropriately putting his arm around Gilliam, touching her by leaning over her desk, and pressing his torso into her back one time while she was making copies. While the court deemed this as unacceptable conduct, it did not rise to the level necessary to violate Gilliam's constitutional right to bodily integrity. Accordingly, Vannocker was entitled to qualified immunity and Gilliam's Section 1983 claim against him was dismissed. For similar reasons, Gilliam's Section 1983 individual claims against Kuhn and Rawson were also dismissed on the grounds of qualified immunity. Cases in which administrators have been held liable for a teacher's sexual harassment of a student have been limited to instances that involved the teacher's sexual molestation or assault of a student. That type of harassment did not occur in this case. Rawson and Kuhn also sought dismissal of Gilliam's official capacity Section 1983 claims against them on the grounds that the claims were redundant. The court held that while the claims might be subject to dismissal for some other reason, they were not considered redundant and so that part of the defendants' motion to dismiss was denied.

The court next addressed the defendants motion to dismiss Gilliam's state law claims on the grounds that under K.S.A. 75-6104(i) if a defendant is entitled to qualified immunity on a Section 1983 claim, they are also entitled to qualified immunity on related state claims. K.S.A. 75-6104(i) provides in part that a governmental entity or employee will "not be liable for damages resulting from…any claim which is limited or barred by any other law or which is for injuries…against an officer, employee or agent where the individual is immune from suit or damages." The defendants in this case were seeking immunity from Gilliam's state law claims for negligent infliction of emotional distress, negligent hiring, negligent supervision, and negligent retention. Under the provision of K.S.A. 75-6104(i), they would be entitled to immunity if the state law claims were barred by some other law or if the defendants are immune from damages on these claims. A state law claim is considered to be separate and distinct from a Section 1983 constitutional claim. Simply being immune from the Section 1983 claim did not mean the defendants would also be immune from the common state law claims. For that reason, the court denied the defendants' on these claims. Finally, the court addressed Vannocker's motion to dismiss Gilliam's claim of negligent emotional distress against him. Under Kansas law, the only way a plaintiff can recover on a claim for emotional distress is if the defendant's negligence results in physical injury to the plaintiff. Gilliam claimed she suffered from "extreme mental, emotional and physical injuries in the form of nausea, insomnia, nightmares, vomiting, difficulty eating, crying, fatigue…" (p. 1292). The court determined that these generalized physical symptoms failed to satisfy the physical injury rule. Vomiting

could fall under this rule, but Gilliam provided no factual allegations showing she vomited with or shortly after any incidents of harassment by Vannocker. Thus, the court granted Vannocker's motion to dismiss. Motions to dismiss were thereby granted in part and denied in part.

C.T. v. Liberal School District
562 F. Supp. 2d 1324 (D. Kan. 2008)

This is actually three consolidated cases from three different plaintiff students – C.T., G.B., and J.B. – who alleged that they had been sexually abused and harassed by Johnny Aubrey, a volunteer weight training coach in Liberal, Kansas. Aubrey ran a weight training program out of his home in which many students participated over the course of several years. The plaintiffs accused Aubrey of things such as having them take nude baths at his house, giving body massages that included some inappropriate touching, having them conduct weigh-ins at the school in the nude, and engaging in conversations about sex. The plaintiffs also claimed that Mr. Aubrey operated his program in conjunction with the Liberal School District's athletic programs, and so they asserted that the school district and several district employees were liable for Aubrey's actions. The district maintained that Aubrey was not an employee of the school and his weight-training program was not a school program. They also contended that they had no knowledge of any problems with Mr. Aubrey's program until the spring of 2003, after G.B. reported the matter to the police. The district took measures to distance itself from Aubrey at that time. The plaintiffs,

however, sought to impose liability on the district defendants because Aubrey had close friendships with many of the district's coaches and the athletic director; they had given him his own key to the school; and, he had access to athletes reserved only for the school district's coaches such as being allowed to assist with practices. The plaintiffs believed that Aubrey was a resource to the sports program at Liberal High School who helped athletes get physically prepared for sports at the school. Parents and students perceived that the athletes who participated in Aubrey's program were given special consideration in high school sports. Aubrey was so enmeshed with the athletic program that at least one parent believed him to be a "Rule 10" coach who is not a certified teacher but is hired by the school district to coach student athletes. The plaintiffs filed claims against the school district defendants under Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 *et seq.*, constitutional claims under 42 U.S.C. Section 1983, and state law claims which sought to impose vicarious liability for Aubrey's actions, negligent supervision of Aubrey, and negligent failure to supervise children. The matter went before the court on the school district defendants' motions for summary judgment.

The court first clarified that in resolving the motions for summary judgment, the court did not express any opinion about whether Johnny Aubrey's alleged actions were wrongful. Mr. Aubrey, who appeared pro se in the action, did not move for summary judgment on the plaintiffs' claims against him. The only summary judgment motions at issue were those filed by the school district defendants. As to the state claims, the school district did not seek summary judgment based on whether

Aubrey's conduct was not actionable. The districts' motions were directed only to the extent to which it could be held liable for Aubrey's conduct.

In this case, the plaintiffs asserted four different types of Title IX violations: (1) deliberate indifference to harassment by Mr. Aubrey, (2) deliberate indifference to harassment by other students, (3) two students complained about retaliation for complaining about Aubrey's sexual harassment and abuse, and (4) failing to implement adequate policies and training to protect them from harassment. Title IX provides in part that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. Section 1681(a). The court turned to *Gebser v. Lago Vista Independent School District,* 524 U.S. 274, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998) to make its determination on whether the district was deliberately indifferent in regards to Aubrey's actions. In *Gebser,* the Supreme Court held that a plaintiff could not recover damages under Title IX for sexual harassment of a student by a teacher unless an official of the school who "at minimum has authority to institute corrective measures had notice of, and was deliberately indifferent to, the teacher's misconduct." *Id.* at 277. In this case, the plaintiffs showed that the wrestling coach knew that Mr. Aubrey talked to kids in his program about sex education-type topics. However, they could not show that he had any knowledge beyond his assumption that it was nothing more than Aubrey talking to the boys about not getting girls pregnant. In terms of the nude weigh-ins at school, school officials were aware that they took

place but there was no testimony to support that there was any inappropriate behavior involved with the weigh-ins. In fact, it was not uncommon for nude weigh-ins to take place when wrestlers were trying to make weight during wrestling season. The record did not show that any school official with authority had any knowledge that Aubrey's behavior was inappropriate. It was not until G.B. notified police in the spring of 2003 that the school district had any indication that Mr. Aubrey was inappropriate with students. After the report to the police was made, Aubrey stopped his weight lifting program and had no further inappropriate contact with the plaintiffs. For these reasons, the court granted the school districts motion for summary judgment on claims it was deliberately indifferent to Mr. Aubrey's actions. As to the issue of deliberate indifference to harassment by other students, the court turned to *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) and found that public schools receiving federal funds can be held liable under Title IX for student-on-student sexual harassment. However, this is only the case when it can be shown that the school acted "with deliberate indifference to known acts of harassment" and only when the harassment was "so severe, pervasive and objectively offensive" that is prevented the victim from having access to educational opportunities or benefit. Plaintiffs C.T. and J.B. only had one incident of harassing behavior toward them and neither one of them reported the incidences. Neither could show that they had been deprived of any educational benefit as a result of the harassment. Summary judgment was granted to the school district defendants on the peer harassment claims of C.T. and J.B. When looking at G.B.'s peer harassment

claims, the court found more severe allegations. G.B. had been assaulted in the hallway at school and given a black eye. The football coach was aware of this, but he did not report it to the school administration. G.B. received two death threats, and was called "horrible names" every day he went to school for the remainder of the spring of 2003. G.B.'s parents reported that they had notified the school of these problems, but there was no evidence that other students had been disciplined for the harassment. G. B. transferred to a school in Oklahoma the following school year. The court determined that the school districts lack of response to harassment that was so severe that it barred G.B. from completing his education at Liberal High School amounted to deliberate indifference. The school districts motion for summary judgment was denied on this claim. Next, the court addressed J.B. and G.B.'s claims that the district had retaliated against them as a result of their complaints regarding Mr. Aubrey's sexual harassment and abuse. J.B. presented examples of what he considered were unwarranted disciplinary action that had been taken against him. In reviewing the record, the court found that J.B. had not made a meaningful attempt to develop the record in a way that would establish a connection between his allegations against Mr. Aubrey and the discipline he received for his misconduct. Based on the record, the court held that the disciplinary actions J.B. received were a result of "his own misbehavior" (p. 1337). As G.B. did not present any evidence to support his retaliation claim, the court found in favor of the school district defendants. The final Title IX claim alleged that the district acted with deliberate indifference by "establishing policies, procedures, and practices that caused or promoted an

environment or program in which sexual abuse" of students had occurred "or acted with deliberate indifference to provide training and guidance that was necessary for the implementation of school athletic programs" (p. 1337). The plaintiffs based this claim on *Simpson v. University of Colorado Boulder*, 500 F. 3d 1170, 1178 (10th Circ. 2007). The deliberate-indifference-to-obvious-need-for-training standard adopted in *Simpson* for Title IX claims is confined to circumstances in which a recipient of federal funds sanctions a specific program that, without proper control, would encourage sexual harassment and abuse such that the need for training is obvious. At Colorado, the program at issue was one for football recruiting which involved showing recruits "a good time" by pairing them with female "Ambassadors" who would show them around campus. Female students filed claims because they had been sexually assaulted by recruits and players as a result of this program. The court did not believe that the facts of the case at hand fell within the framework of the Tenth Circuit's holding in *Simpson*. The weight-training program did not bear the element of encouragement of misconduct by the school district to the extent that the Colorado football-recruiting program did in *Simpson*. The operation of a weight-training program by a school volunteer did not create a risk of abuse that would have been obvious to school officials. In the absence of actual notice of a substantial risk of abuse, the school district cannot be held liable. The court held that the failure to implement sexual harassment policies was not sufficient for a Title IX claim because this failure did not imply that the school district had actual notice of any sexual harassment or showed deliberate indifference. The school district's motion for

summary judgment on these claims was granted. Next, the court turned to the plaintiffs claims that they were deprived of their constitutional rights to substantive due process and equal protection under U.S.C. Section 1983 when they were sexually abused and/or harassed by Mr. Aubrey who was acting "under color of law." Four different tests exist to determine whether conduct will be considered action "under color of law" by private parties, such as Aubrey. *See Lugar v. Edmonson Oil Co.*, 457 U.S. 922, 939, 102 S.Ct. 2744, 73 L.Ed.2d 482 (1982) and *Gallagher v. Neil Young Freedom Concert,* 49 F.3d 1442, 1453-56 (10th Cir. 1995) (discussing the nexus test, the symbiotic relationship test, the joint test, and the public function test). Private conduct that is not attributable to the state under these tests is not actionable under Section 1983. The plaintiffs did not discuss any of the tests under which the court would evaluate whether Aubrey's conduct would constitute state action. They based their Section 1983 claim on the nude weigh-ins at school and the school district's policies and inadequate training concerning sexual harassment. A Section 1983 claim must be based on a constitutional violation by a person acting under color of state law. Because they did not address whether the nude weigh-ins involved an abuse of Mr. Aubrey's position while acting under color of state law, the plaintiffs raised no triable issue of fact as to whether these weigh-ins would constitute state action. Summary judgment was granted in favor of the school district on plaintiffs' Section 1983 claims. Finally the court addressed the plaintiffs' state law claims against the school district defendants in which they sought to impose liability against them for Mr. Aubrey's conduct either through the doctrine of respondeat superior and

ratification, or indirectly by alleging that the defendants had a duty to supervise Aubrey to prevent the misconduct. The school district claimed it could not be liable for Mr. Aubrey's actions because he was not an "employee" of the school district. The Kansas Tort Claims Act (KTCA) provides that a governmental entity is liable for "damages caused by the negligent or wrongful act or omission of any of its employees while acting within the scope of their employment…" K.S.A. Section 75-6103(a). The KTCA broadly defines the term employee to include "persons acting on behalf of or in service of a governmental entity in any official capacity, whether with or without compensation." *Id.* Section 75-6102(d). Mr. Aubrey's position would fit into this broad definition. Thus, the court held the fact that Aubrey was not a paid employee of the district did not entitle the school district to summary judgment. The school district also argued that it could not be held liable for Aubrey's misconduct because his actions did not occur in the scope of his "employment." Under Kansas law, an employer is held liable for injuries caused by an employee acting within the scope of his employment. An employee is considered to be acting within the scope of his employment when he is performing services for which he has been employed, or when the employee is doing anything reasonably incidental to that employment. The court found that at least some of Aubrey's alleged misconduct was reasonably incidental to his volunteer work as a trainer of student athletes. Although the school maintained that Aubrey's program was a private one run by him, the evidence showed that he had so ingratiated himself with district coaches and the athletic director that they came to rely on him to train their athletes. Aubrey had access to property and

was allowed to participate in the school's athletic program in ways in which the rest of the public was not. For these reasons, the school district's motion for summary judgment on this issue was denied. Next, the court looked at the plaintiffs' ratification claims. Ratification is the adoption or confirmation by an employer of an act performed on his behalf by an employee when that act had originally been performed without authority. Once the employer discovers the employee's unauthorized act, the employer must repudiate the act or the court will presume the employer ratified the act. In this case, the school district took actions to distance themselves from Mr. Aubrey and his weight lifting program when the allegations became known in the spring of 2003. As there was nothing to show that the school district defendants took any actions that could be viewed as having condoned or accepted Mr. Aubrey's allegedly inappropriate behavior, the court granted the defendants' motion for summary judgment on the plaintiffs' ratification claims. The defendants' motion for summary judgment on the claims that it had negligently supervised, retained, and hired Mr. Aubrey was denied. As previously discussed, the court could not say that Aubrey was not "retained" or "hired" as a volunteer for the district. The summary judgment motion on claims for negligent failure to supervise children was granted because the plaintiffs did not respond to the defendants' arguments on this issue.

The only claims against the school district defendants that survived summary judgment were G.B.'s Title IX claim of student-on-student harassment, and all of the plaintiffs' state law respondeat superior and negligent supervision, retention, and

hiring claims. The court also ordered that the plaintiff's motion to consolidate the remaining cases for trial be granted.

Ware ex. rel. Ware v. ANW Special Educational Cooperative No. 603
180 P.3d 610 (Kan. App. 2008)

On October 8, 2002, Daniel Ware, who was 4 years old at the time, fell asleep while riding the bus to school. The bus was operated for the purposes of transporting children to and from ANW's preschool. The driver was not aware that Daniel was sleeping and parked the bus in the school district parking lot. When Daniel woke up, he left the bus and began walking. A relative saw Daniel walking, picked him up and took him to his mother at around 1:00 in the afternoon. Between the October bus incident and March of 2003, Daniel expressed apprehensions about going to school. When ANW suggested that Daniel get on the bus and ride it again, Daniel stated he would only ride if his grandmother's foster daughter rode with him and if his grandmother followed in her own car. In March 2003, Daniel became upset and vomited at school when he was told that he would be going on a field trip the next day by bus. In June of 2003, Dr. Doug Wright, Daniel's therapist, diagnosed Daniel with Post Traumatic Stress Disorder (PTSD). Daniel's parents brought suit against ANW alleging negligent infliction of emotional distress. ANW moved for summary judgment arguing that Daniel did not suffer a compensable physical injury following the incident on the bus. The trial court granted ANW's motion holding that under *Hoard v. Shawnee Mission Medical Center*, 233 Kan. 267, 662 P.2d 1214 (1983),

Daniel had suffered no immediate physical injury following the bus incident and his symptoms were not compensable physical injuries for the purposes of negligent infliction of emotional distress. Daniel's parents appealed, contending that Daniel's PTSD met the physical injury requirement in personal injury cases.

To succeed on a claim for negligent infliction of emotional distress, a plaintiff must first establish that he has a qualifying injury under Kansas law. Second, *Hoard* held that the qualifying injury must (1) directly result from the emotional distress allegedly caused by the defendant's negligence and (2) appear within a short span of time after the emotional disturbance. The purpose of the physical injury requirement is to prevent plaintiffs from recovering for emotional distress that is feigned. Emotional distress is considered by the courts to be a common experience of life and therefore damages are limited to cases involving severe emotional distress, which is evidenced by actual physical injury. In the case at hand, the court concluded that Daniel's symptoms of nightmares, anxiety, nervousness, trembling, weight gain and sleep difficulties did not qualify as physical injury. The key symptom emphasized by the plaintiffs occurred in March when Daniel vomited after being told he would be going on a bus field trip. This was five months after Daniel had been left sleeping on the bus. The court held that even if Daniel could establish his vomiting as a physical injury, it occurred to remote in time from the initial incident, thus failing the requirement of *Hoard.* Accordingly, the court found that Daniel had not suffered a compensable physical injury for purposes of negligent infliction of emotional distress under Kansas law. Daniel next urged the court to expand its physical injury

definition to include PTSD. Daniel presented cases from other states to support this argument, but the appellate court noted that Kansas courts have consistently held that generalized symptoms of emotional distress, such as those associated with PTSD, are insufficient to state a cause of action for negligent infliction of emotional distress. The rule that some sort of physical injury or physical manifestation is required in order to recover for such claims is consistent with the rule set forth in the Restatement (Second) of Torts Section 436A. Section 436A of the Restatement provides in part that "if the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance." The appellate court acknowledged that the physical manifestation requirement has been criticized by some courts and abandoned by others. However, a number of states, including Kansas, still require some type of objective evidence of a plaintiff's emotional injury. The decision of the trial court was affirmed.

Chapter 2

Control of Behavior

The eleven cases within this chapter were brought by students filing claims against school districts for the control of their behavior or for punishment of transgressions. Schools are tasked with providing a safe and orderly school environment. In order to do so, officials must establish rules for conduct and enforce consequences for misbehavior. However, school rules cannot be so broad or vague as to allow arbitrary interpretation and application. School rules and regulations are general deemed sufficient by the courts so long as they provide students with adequate information on what is expected of them and are stated in such a way that a person with common intelligence could understand them. When establishing rules and enforcing discipline, schools must take care "not to suppress or punish behavior when there is no legitimate reason to do so" (Imber & Van Geel, 2004, p. 158).

When dealing with claims of due process violations, Kansas courts often cite the holding in *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975). School administrators faced with the decision to suspend or expel a student must be aware of the due process rights that should be afforded a student. K.S.A. 72-8902 provides guidelines for the state of Kansas in determining student rights in cases of short versus long-term suspensions and expulsions. This statute also outlines the type of notification that must be provided to parents.

In determining whether a search has violated a student's Fourth Amendment rights schools must meet the requirement of "reasonableness" established by *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). *T.L.O.* limits searches at schools to situations in which school officials have reasonable grounds to conduct the search based on the belief that the search will turn up evidence that a student has violated a school rule or the law. The scope of the search must also be reasonable in nature and not too intrusive considering the age and sex of the student and the nature of the infraction.

Recently, cases of student-on-student harassment have shown up in Kansas courts. Students in these cases have claimed violations of Title IX and state law. These claims were based on allegations that school officials were deliberately indifferent to harassment or negligently failed to supervise students under their control. In general, the courts have held that damages under Title IX are not available for simple acts of teasing and name-calling. Incidents of alleged harassment must be so severe and pervasive that the victim was denied equal access to education. Schools must show that they have responded to harassment in a manner that was clearly not unreasonable. It would be advisable for districts to have harassment policies in place that clearly outline unacceptable behavior and resulting consequences. School officials should also document cases of reported harassment and their response to those reports.

Boster v. Philpot
645 F. Supp. 798 (D. Kan. 1986)

This case involves two separate incidents. In the first incident, several high school students and two non-students admitted their guilt in the vandalism of a grade school. The high school principal, Michael Philpot, talked to the students and they were suspended from school for three days. Notice of the disciplinary action was mailed to their parents the same day they received the suspension. The parents came to the school the next day and demanded a hearing, which was refused. The two non-students were banned from all high school activities for the rest of the school year. In a separate incident later that year, two students who had been reprimanded for their unsportsmanlike conduct at a sub-state basketball game were banned from attending the next sub-state game. The students and their parents brought action against the high school principal, superintendant, and board members of USD 312 alleging that their due process rights had been violated. The plaintiffs also claimed that the defendants had violated the Kansas Open Meeting Act, K.S.A. 75-4317 *et seq.*, which deprived them of their liberty interest in participating in public school board meetings. The defendants made motion to dismiss or for summary judgment.

The court sought to determine four issues: (1) whether the students who were suspended for vandalism were denied due process; (2) whether the students who were banned from basketball games had been denied a property interest; (3) whether the parents were denied due process; and (4) whether the alleged violation by the school board of the Kansas Open Meeting Act deprived the parents of a liberty interest. In

looking at the first issue, the court turned to *Goss v. Lopez*, 419 U.S. 565, 95 S. Ct. 729, 42 L.Ed.2d 725 (1975) in which the Supreme Court analyzed the rights of students in the context of a suspensions of less than ten school days. The Court in *Goss* determined that students facing a short-term suspension must be given some kind of notice and be afforded some kind of hearing. The hearing could be "informal" and held immediately after the notice of suspension. No rights to counsel or to call witnesses were mandated. K.S.A. 72-8902 complies with *Goss* and provides in part that "no suspension for a short term [not exceeding 5 days] shall be imposed upon a pupil without giving the pupil the notice of the charges and affording the pupil a hearing thereon." The Kansas statute goes on to require that during the informal hearing the student must be present, be informed of all charges, and be given the right to make statements in his/her defense. In this case, after admitting their involvement in the vandalism, the students were called into the principal's office and notified of the 3-day suspension. The suspension was in accordance with the board's policy and was found in the student handbook. Because they admitted their guilt, there was no reason for them to present their side of the story. The court determined that the students had received all process due to them under the circumstances of the case and as such, the disciplinary decision to suspend them was not reviewable in federal court. The second issue involved the two nonstudents who were involved in the vandalism and the two students who were reprimanded for unsportsmanlike conduct. These students claimed that their due process rights were violated because they were not given a hearing prior to the imposition of the disciplinary action which

banned them from attending future games. In order to show a violation of due process rights, the plaintiffs had to show that attending an interscholastic athletic game is a constitutionally protected right. The court noted that there were abundant cases holding that a "student has no constitutionally protected right in *participating* in extracurricular activities" (p. 805). If there is no constitutional right to participate in activities, the court concluded that there clearly was no protected right to be a mere spectator at an event. These claims were dismissed for failure to state a claim under Section 1983. Next, the court turned toward the contentions from the parents of the students who were either suspended or barred from attending basketball games. The parents claimed that the discipline imposed on their children was done so without sufficient notice to them and that they were not afforded the right to file a grievance. As such, they stated that the "defendants interfered with their parental rights in violation of their right to due process of the law" (p. 806). K.S.A. 72-8902 provides for parents to receive notification when their child has been suspended from school. Under this law, the school must provide written notice of any short-term suspension and the reasons for the suspension to the parents or guardians within 24 hours after the suspension has been imposed. The parents in this case received such notice. However, the parents claimed they had a right to challenge the discipline that was imposed and because they were not allowed to do so, their parental rights were interfered with. The court cited numerous cases holding that the right to a free public education belongs to students, not parents. Therefore, when a student is suspended, it is the student who is entitled to due process not the parent. In this case, the parents

had no standing to assert that their due process rights were violated and so their claims under Section 1983 were dismissed. Finally, the court addressed the allegation that violations of the Kansas Open Meeting Act infringed upon their liberty interests in participating in the political process in violation of their right to due process. The court determined that the Kansas Open Meeting Act did not confer constitutional rights. In fact, the Act provides its own enforcement mechanism, K.S.A. 75-4320(a) which stipulates the payment of a penalty if a violation of the Act occurs. Because the Kansas Open Meeting Act confers no constitutional right, the federal district court determined it had no jurisdiction to determine whether or not the school district had complied with the Act. The defendants were granted summary judgment on all claims against them.

The court in its summary emphasized their view that this case should never have been brought before them. The students had done wrong and admitted so. Public schools have the right to impose discipline upon students without first seeking permission from parents as long as the due process rights of the student are upheld.

Griffith v. Teran
794 F. Supp. 1054 (D. Kan. 1992)

Sally Griffith was a senior at Wichita North High School and attended the 1991 graduation ceremony where an invocation and benediction were given by another student. The invocation made references to "Heavenly Father," "Great Spirit," and "Lord." The benediction that year made similar references and ended

with "Amen." Griffith found the invocation and benediction to be offensive and inappropriate and filed in court for a temporary restraining order and preliminary injunction on the grounds that the high school invocation and benediction violated the Establishment Clause of the First Amendment. The action was filed on May 27, 1992 and was an attempt at preventing the invocation and benediction at the May 29, 1992 graduation ceremony. The defendant was the principal of the high school, Ralph Teran. Teran testified that an invocation and benediction took place every year and they were delivered by students. Students were selected without regard to religious preferences or beliefs. Teran further explained that the purpose of the invocation and benediction is to give a "solemn sense" to the graduation ceremony and to promote understanding between people with different backgrounds. Attendance at the graduation exercise was not mandatory and was not a condition to receiving a diploma.

Since 1971, challenges to the Establishment Clause have been subjected to the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). The three prongs of the *Lemon* test impose three restrictions on governmental action: "(1) it must have a secular purpose; (2) its principal or primary effect must be one that neither advances nor inhibits religion; and (3) it must not foster an excessive entanglement with religion." *Id.* at 612-613. In most instances of cases brought to court regarding the Establishment Clause the issues occurred in the classroom. The court here found it significant that this case dealt with a graduation ceremony. The court noted that, "a graduation ceremony-unlike the classroom-does not attempt to

educate" (p. 1057). However, since the alleged violation occurred at a school-sponsored activity the court put the situation to the three-part *Lemon* test. The first prong of the test requires that the action have a secular purpose. The court here found that the benediction and invocation for the graduation exercises at North High School were both nonsectarian and nonproselytizing in content. They served the purpose of "solemnizing the occasion" (p.1059). In addressing the second prong of the *Lemon* test, the court found that the invocation and benediction would not have the effect of promoting or advancing religion. In the context of a graduation ceremony, the court found that "the nonsectarian references to the deity serve to endorse neither a particular religion nor religion in general" (p. 1059). Finally, the court turned to the third-prong of excessive entanglement. The court could find no evidence of any excessive entanglement. The policy of the school principal simply allowed students to compose and present the benediction and invocation. The contents of each were subject only to a review by the principal for sectarianism or proselytizing. Accordingly, the court found that the invocation and benediction did not violate the Establishment Clause and Griffith's motion was denied.

James By and Through James v. Unified School District No. 512, Johnson County
899 F. Supp. 530 (D. Kan. 1995)

James was a sophomore at Shawnee Mission Northwest High School in the spring of 1995. On April 28, 1995, Mark Hotzel, a police officer and school resource officer, and Harlan Hess, the associate vice principal, confronted James about a rumor

that he had a gun on school property and requested to search his car. James was allowed to call his father, but not an attorney. Prior to the arrival of James' father, Hotzel and Hess searched his car and found a gun. Hotzel arrested James and then informed him of his *Miranda* rights. Hess informed James and his father that James would be suspended for five days. School district policy prohibited possession of a gun on school property and required school administration to suspend and to recommend expulsion of any student in possession of a gun. USD 512 notified James and his parents by letter dated April 28, 1995, that a hearing would be conducted on May 1, 1995, to determine if James' suspension should be modified to a long-term suspension or expulsion. The letter was postmarked May 1, 1995, and James received it on May 2, 1995. James and his father were both present at the May 1 hearing. At that hearing, it was recommended that James be expelled from school for the remainder of the 1994-95 school year and the first semester of the 1995-96 school year. James appealed to the Board of Education which conduced a hearing on May 19, 1995. At the hearing, the school board affirmed the expulsion decision. On August 29, 1995, James filed suit in federal court requesting injunctive relief and monetary damages under 42 U.S.C. Section 1983 for alleged violations of his Fourth, Fifth, and Fourteenth Amendment rights. James asked that he be allowed to take his spring semester exams and that he be permitted to return to school in the fall of the 1995-96 school year.

In order to prevail on a motion for a temporary restraining order the plaintiff must show that he will suffer irreparable harm unless injunction issues, that threatened injury to the plaintiff outweighs whatever damage the proposed injunction may cause the defendant, that injunction would not be adverse to the public interest, and that there is a substantial likelihood that the plaintiff will prevail on the merits of the case. The court chose to first examine whether there was a substantial likelihood that James would prevail on the merits. James contended that his substantive due process rights were violated because the expulsion hearing was the result of an improper search and seizure by police officers of his vehicle. At issue was whether the findings of an illegal search and seizure were required to be excluded from an expulsion hearing. The court noted that even if James' Fourth and Fifth Amendment rights had been violated by the search, case law "does not prohibit using the fruits of that violation in school disciplinary hearings" (p. 533). The Supreme Court in *United States v. Janis*, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976) found that "the exclusionary rule does not prohibit the use of illegal evidence in a civil proceeding by a sovereign which was not involved in violating the Constitution in obtaining the evidence" *Id.* at 447. In this case, school officials had no part in the search and seizure of the gun found in James' car. Courts will only review and revise school suspensions on substantive due process claims if there was "no rational relationship between the punishment and the offense." *Brewer v. Austin Indep. Sch. Dist.*, 799 F.2d 260,264 (5th Cir.1985). In this case, school officials had a rational reason for suspending James: to keep weapons out of the school. The court held that James had

"failed to show a substantial likelihood that he would succeed on the merits of his substantive due process claim" (p. 535). In deciding James procedural due process claim, the court turned to *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Although *Goss* did not specifically address due process rights in the case of an expulsion, it did address rights for suspensions of ten days or less. In cases such as that, a student must be given oral or written notice of the charges and evidence against him and a chance to present his side of the story. *Goss* noted that longer suspensions or expulsions "may require more formal procedures." *Id.* at 584. Other court cases dealing with longer-term suspensions or expulsions required advance notice of the charges and a fair opportunity to be heard by an impartial decision-maker. While James may not have received advanced written notice of the May 1, 1995 trial, he received some sort of notice because he and his father attended the hearing. Both James and his father were given the opportunity to speak and James did not allege that the decision-maker was biased. At the May 19, 1995 hearing before the Board, James was represented by a lawyer and allowed to present evidence on his behalf. The court found that the defendant school district had afforded James "all the process he is due under the Fourteenth Amendment" (p. 536). James failed to show a substantial likelihood he would succeed on the merits of his procedural due process claim. Because James failed to establish an essential element in his request for injunctive relief, his motion for a temporary restraining order was denied.

Singleton v. Board of Education USD 500
894 F. Supp. 386 (D. Kan. 1995)

Darrell Singleton was a student at Central Middle School. On October 2, 1992, he was called out of gym class to meet with assistant principal Bernice Cottrell. An adult woman, Vivian Williams, met Singleton outside of the office area and accused him of stealing $150 from the front seat of her car. Jim Antos, another assistant principal, noticed the argument and took Singleton into his office to speak to the principal, Thomas Barry. Cottrell escorted Williams into her office and discussed the situation. Cottrell then informed Antos that Williams was upset and accused Singleton of stealing money from her car. She also reported that Singleton's mother sold drugs. Antos returned to Barry's office where he and Barry questioned Singleton about the money. They also searched Singleton while in the office. The versions of the search conflicted, however all agree that Singleton was not strip-searched. After he was searched, Antos and Barry took Singleton to his locker and searched his coat, books, and papers. They found no money or drugs in either search. Before this incident, Barry had discouraged students and staff from bringing large sums of money to school. Board policies were in place at the time of the incident regarding the search and seizure of students or their property. Singleton filed action under 42 U.S.C. Section 1983 alleging his constitutional rights had been violated when he was subjected to an illegal search. Claims were brought against Barry, Antos, Cottrell, and the school board.

New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), clearly established the law regarding constitutionality of searches at school. In *T.L.O.*, the Supreme Court held that the Fourth Amendment applies to searches made in public schools. Nevertheless, a student's expectation of privacy must be balanced against the school's need to maintain order. The test to determine the validity of a search is the "reasonableness, under all circumstances, of the search" *T.L.O.* 105 S.Ct. at 742. A two-fold test is used to determine the "reasonable under all circumstances" requirement. In order to be constitutionally valid, a search must be justified at the beginning, and the scope of the search must be reasonably related to the circumstances that necessitated a search. Based on the facts of this case, the court found that the search of Singleton was justified at its inception. The potential infractions included the possession of a large sum of money and the possibility that the money had been stolen. The court also found that the search was reasonable in its scope considering Singleton's age, gender, and the nature of the suspected infraction. He was searched in the privacy of Barry's office with only two male administrators present. Singleton was never required to remove his underwear, and he was not touched inappropriately. Previous court decisions from other states found similar student searches to be reasonable. Singleton also argued that the search of his locker was unreasonable. The defendants presented a copy of the school policy that clearly stated a student was not in possession of his locker; it was the property of the school. When the chance arose that Singleton could have had something stolen in his possession, the school had legally sufficient grounds to search his locker.

Accordingly, the court found that Singleton's constitutional rights had not been violated when school administrators searched him and his locker. The defendant's motion for summary judgment was granted and the case was closed.

Spencer v. Unified School District No. 501
935 P.2d 242 (Kan. App. 1977)

Jason Spencer, a student at Topeka High School, was suspended from school for possession of a pellet gun in the school parking lot. In February 1995, Jason was eating lunch with two other students in his car when one of the other students removed a pellet pistol that looked like a real handgun from under Jason's front seat. During the lunch break and again after school the other student pointed the gun at friends who laughed, knowing the gun was a joke. A parent saw the gun and reported Jason's license plate number to school security. An investigation ensued and Jason was suspended for the remainder of the school year. His suspension listed two causes: a code 40 violation of "unruly conduct that disrupts school" and a code 60 violation of "other matters covered by K.S.A. 72-8901 *et seq.*" (p. 244). Jason appealed his extended suspension to the board of education. After a hearing, the Board affirmed the suspension. Jason appealed to the district court, which upheld the Board's decision. Jason appealed.

The first argument addressed by the court was whether the Board had acted beyond the scope of its authority. Jason claimed the principal had "acquitted" him of the code 40 violation, which meant the issue should have been beyond the scope of

the Board's review. Jason interpreted the principal's finding that Jason possessed a look-alike handgun to mean he had only committed a code 60 violation because the principal did not specifically state that he had engaged in unruly conduct that disrupted school. The court did not agree with Jason's logic. It held that a code 60 violation, which was based on K.S.A. 72-8901, included "conduct which substantially disrupts…the operation of any public school…" And so, although the principal did not specifically state which code Jason had violated, because a code 40 violation fell within a code 60 violation, he did not acquit Jason of any offense. Therefore, the court found that the Board had not acted beyond its authority of the scope of its review. Jason next argued that K.S.A. 72-8901(b) was unconstitutionally vague because the language of the statute did not specify what kind of conduct was prohibited. The court first noted that a statute must be presumed constitutional and in order to be struck down it had to "clearly violate" the constitution. The U.S. Supreme Court addressed the issue of vague school regulations in *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). In *Bethel*, a student challenged a school regulation prohibiting conduct which materially and substantially interferes with the educational process. The *Bethel* court held that "Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions." *Id.* 478 U.S. at 686. Based on the broad standards set out in *Bethel*, the school in the present case did not need a regulation specifically prohibiting the possession of a

look-alike handgun. Accordingly, the court found that K.S.A. 72-890 was not unconstitutionally vague. Jason's final argument on appeal was that the Board's findings were not supported by the evidence. Jason argued that there was no substantial evidence showing his conduct caused an actual disruption in the operation of the school. The court found that this argument presented the closest issue of the case. The evidence of an actual disruption to the school was minimal. One parent saw the gun and contacted school security. There was no evidence that any student ever thought the gun was a real threat. Jason further argued that the school's investigative efforts could not be considered as a disruption to the operation of the school. The court believed this point to be "well taken." Students do not have control over whether school officials decide to conduct an investigation. The school, according to the court, should not be "able to deem a student's actions disruptive simply because the school chose to investigate" (p. 245). If they did so, a student's actions could be deemed disruptive even if the student had done no wrong, simply based upon the time and energy it took to investigate allegations against him. However, the court found a flaw in Jason's final argument in regards to the sufficiency of the evidence against him. The Board had not simply found that Jason had engaged in conduct that disrupted school; it also found that Jason's conduct had impinged upon or invaded the rights of others. The school principal testified regarding the importance of a safe school environment and pointed out that Jason's misconduct had "chipped away at that safe environment by creating a sense of fear that guns might be present on school grounds" (p.245). The principal further testified

that parents and students had the right to feel safe at school and Jason's behavior had impinged on those rights. Based on the principal's testimony, the court found the substantial competent evidence needed to support the school board's finding. The judgment of the district court was affirmed.

West v. Derby Unified School District No. 260
206 F.3d 1358 (10th Cir. 2000)

In 1995, in response to several incidents of racial tension between black and white students at Derby High School, the school district adopted a racial harassment and intimidation policy. Several verbal confrontations had occurred between students wearing shirts with an image of the Confederate flag and those wearing an "X" in support of Malcolm X. Racial graffiti appeared on campus bathrooms, walls, and sidewalks. At least one physical fight occurred and there were reports of racial incidents on school buses and at football games. In response to the tension, the school district organized a 350-member task force made up of parents, teachers and other community members to make a proposal on how the district should deal with the issues. This task force recommended the adoption of a policy on racial harassment. As a result, the school district adopted a "Racial Harassment and Intimidation" policy which stated in part that employees and students would not "wear or have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred" (p. 1361). The policy gave specific examples of items such as the Confederate flag and symbols

denoting the Ku Klux Klan, Black Power and Neo-Nazi groups. Any violation of the policy would result in disciplinary action. For students, the first offense would result in a three-day out-of-school suspension. At the beginning of each school year, students were required to review a handbook covering all of the district's policies, including the racial harassment policy. After reviewing the handbook, students signed an acknowledgement form stating they had reviewed and understood the policy handbook.

During the 1997-98 school year, a seventh grade student, T.W., became involved in several disciplinary incidents. At one point, he received a three-day suspension for calling another student "blackie." When he returned from his suspension, T.W. had a conference with the assistant principal, Brad Keirns, who reviewed the harassment and intimidation policy with T.W. On April 14, 1998, during math class, T.W. drew a Confederate flag on a piece of paper. A student showed the drawing to the teacher who turned it over to Keirns. When questioned, T.W. admitted drawing the flag and provided a written statement about what happened. The assistant principal, following district policy, suspended T.W. for three days. T.W.'s father filed suit for injunctive relief against the school district under 42 U.S.C. Section 1983. In the suit, T.W.'s father alleged that the school district's policy (1) violated his son's First Amendment free speech right, (2) was unconstitutionally vague, (3) violated his son's Fourteenth Amendment right to procedural due process, and (4) violated his son's Fourteenth Amendment right to equal protection. The district court held that T.W. had received appropriate due process because the

assistant principal had informed T.W. of the charge against him and gave T.W. a chance to present his side of the story. The district court also found that the school district' policy did not violate equal protection because there was a legitimate educational purpose for not allowing students to possess a Confederate flag. The district court further held that the policy did not violate the First Amendment because school officials had sufficient evidence from which they could reasonably conclude that possession of a Confederate flag would likely lead to a material and substantial disruption of the school. T.W. appealed this decision.

On appeal, T.W. did not seriously argue that he failed to receive due process; rather he argued that he did not receive a "meaningful" hearing because the assistant principal never found out whether T.W. intended to harass or intimidate anyone by drawing the Confederate flag. The appellate court rejected any notion that the Constitution requires a finding of an intent to harass before the school district could enforce its harassment policy. The assistant principal suspended T.W. for "knowingly and intentionally" violating the district's policy. The appellate court found this decision to be supported by the evidence presented and held that T.W. had received all of the due process required under the Fourteenth Amendment. Next, the court addressed T.W.'s claim that the school had violated his rights under the Equal Protection Clause in that the school district selectively excluded his possession of the Confederate flag while other allowing other students to possess the flag in history or library books. The court first noted that public school students are not considered a suspect class under the Equal Protection Clause. Accordingly, the school district

could prohibit students from possessing the Confederate flag on school grounds, outside of school-approved materials, as long as the policy was rationally related to a legitimate government interest. In this case, the school district had a legitimate interest in preventing potentially disruptive student conduct from interfering with the educational process. Thus, the appellate court concluded that the harassment and intimidation policy did not violate T.W.'s right to equal protection under the Fourteenth Amendment. The court next held that the school district did not violate T.W.'s First Amendment right to free speech when it suspended him from school after he drew the Confederate flag. The display of the flag could be considered a form of political speech, and school officials cannot ban such speech simply because they fear there might be a disturbance. However, the weight of evidence in this case showed that, based on recent past events, the school district had good reason to believe that a student's display of a Confederate flag could cause a disruption. The history of racial tension in the school district made administrators' and parents' concerns about future disruptions from the possession of a Confederate flag at school reasonable. T.W.'s First Amendment free speech challenge failed with the appellate court. Finally, the court addressed T.W.'s challenge that the harassment policy was unconstitutionally vague and overbroad. In order for a court to address a challenge that a law is overbroad, it must be shown that the law could have "a chilling effect on the free speech rights of parties not before the court" (p.1367). The court held that T.W.'s challenge failed because there was no realistic danger that the district's policy would significantly compromise First Amendment protections of other students. The court

further held that the policy was not unconstitutionally vague. The policy might have been void for vagueness if a reasonable student of ordinary intelligence who read the policy might not understand its meaning. That was not the case here. The policy clearly prohibited any student from possessing a Confederate flag and outlined the consequence for such action. T.W. had reviewed the policy on more than one occasion and was well aware that drawing a Confederate flag was against school policy. The decision of the district court was affirmed.

C.R.K. v. U.S.D. 260
176 F. Supp. 2d 1145 (D. Kan. 2001)

In December 1995, the plaintiff, C.R.K., a student at Derby High School alleged that her boyfriend, Adrian Martin, raped her in August 1995 prior to the start of the school year. Adrian was also a student at Derby High. The alleged rape occurred during the summer but the plaintiff did not report the incident. Plaintiff and Martin broke up some time in October. In early December the plaintiff told a friend about the alleged rape who then insisted that the plaintiff tell her mother, which she did. Plaintiff and her mother contacted the Derby police and reported the incident. Plaintiff's parents met with Dr. Jim Sowers, the high school principal, in January 1996, and informed him of the alleged rape. They wanted an assurance from the school that Martin would not have any contact with their daughter and that supervision would be present at all cheerleading practices, as both Martin and the plaintiff were on the squad. Dr. Sowers informed the cheerleading sponsor who made

sure that because the plaintiff was on the junior varsity team and Martin was on the varsity, no practices were scheduled that included both of them. Because the incident had been reported to the police and had occurred outside the school's jurisdiction, Dr. Sowers did not impose any disciplinary action upon Adrian Martin. The plaintiff alleged that after she reported the incident, the defendants allowed Martin and his friends to harass her during school hours and at extra-curricular activities. The plaintiff gave examples of the harassment that occurred between January and the spring of 1996. Some of the incidents included: a group of girls who would follow her around and talk about her, one girl who pretended to kick her, and another girl who threatened to harm her. When these incidents occurred, the plaintiff would tell her mother who would call either Dr. Sowers or another staff member to report the situations. In each case, the school investigated the allegations made by the plaintiff, conferenced with the students involved if necessary, and in one case assigned a girl who had threatened the plaintiff to an in-school suspension. At the end of the school year, the plaintiff's mother wrote a letter to Dr. Sowers in which she expressed her frustration with the harassing behavior of other students, the police department who she referred to as "jerks," and the fact that she believed Adrian Martin should be kicked out of school. She also asserted that Martin should not be allowed to participate in extracurricular activities because of a clause in the school district's Standard Code of Conduct for Athletic/Activity Participation, which said that any student who "admits to, or is found guilty of any violation local, state, or federal law would be ineligible." In June 1996, a hearing concerning the complaint

against Adrian Martin was held. Adrian admitted to, and was found guilty of, the commission of a battery under K.S.A. 21-3412(b), a class B person misdemeanor. The judge placed Martin on one year of probation, a condition of which was a No Contact Order between him and the plaintiff. The court did not restrict any of Martin's extracurricular activities, leaving that to school rules and regulations. Sometime that summer, Alana Pharis, the Derby High School Athletic Director, determined that Adrian Martin was not eligible to participate in extracurricular activities because of his involvement in the juvenile court proceedings. In July 1996, Martin's parents wrote a letter to Dr. Sowers in which they asked for a clarification of the policy as it applied to Martin's circumstances. They asked Sowers to consider the fact that Martin was an honor student who had been involved in many school activities and had no prior disciplinary problems. Before making his decision, Dr. Sowers contacted one of the prosecutors in Martin's juvenile court case and asked if the No Contact provision would prevent him from participating in school activities. The attorney stated that he thought it "was best to keep juveniles in extracurricular activities" and he did not believe it would violate the No Contact order if Martin were allowed to play football. Sowers also received a letter from Martin's probation officer indicating that he had been doing well and expressing the opinion that it would have a "negative effect" if Martin were excluded from extracurricular activities. As he was inclined to reverse the athletic director's ruling, Sowers met with the Board to get some direction. They discussed the fact that Martin had been convicted of misdemeanor battery, not rape. There was also discussion about the new Standards of

Conduct for Athletics/Activity Participation, which had been approved the previous spring and stated that students were ineligible when "found guilty of any felonious law" (p. 1152). (This rule change had been suggested in 1994 and was put into place in 1996) As a result of these meetings, Sowers sent a letter to the parents of Adrian Martin notifying them that Adrian would be placed on extended probation and allowed to participate in extracurricular activities. Martin would not be eligible for yell leading, as that would place him in contact with the plaintiff who was on the cheerleading squad. Starting in the fall of 1996, plaintiff reported various forms of alleged harassment. Plaintiff's mother also complained that students were harassing her as well as the plaintiff. In each case, a school official would investigate the allegations and if they were verified, disciplinary action would occur. The school accommodated the No Contact order by ensuring that the cheerleaders had their own transportation to the games, rather than riding with the football team, of which Martin was a member. The cheerleading sponsor changed the plaintiff's location in the cheer formation when the plaintiff made that request. In October 1996, the plaintiff's mother called to report that a student had called the plaintiff "fat" during class. She said this violated Adrian Martin's No Contact order because the student was one of his friends. The situation was investigated but the accused student denied saying anything derogatory and the classroom teacher had seen no evidence of the incident. In January 1997, plaintiff's attorney served a notice and letter upon the defendant school district and Dr. Sowers alleging they had "intentionally discriminated against plaintiff on account of sex in violation of Title IX" (p. 1160). Plaintiff alleged that

the harassment continued through spring 1997. She pointed to incidents in which Martin would sit behind her at basketball games when she was cheering and times when his mother would follow her into the restroom. The plaintiff did not report these incidents to school officials; instead, she would tell her mother who would then call the school. Plaintiff also complained that she had wanted to join some school clubs but did not do so because Martin was in those clubs. She did not inform school officials of her desire to participate in these clubs. The plaintiff claimed that this harassment violated her rights under Title IX of the Education Amendments of 1972, 20 U.S.C. Section 1681 *et seq*. The matter went before the court on both parties' cross-motions for summary judgment.

Title IX provides in part that "no person in the United Stated shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. Section 1681(a). In *Davis v. Monroe County Bd. Of Education*, 526 U.S. 629, 119 S. Ct. 1661, 143 L.Ed.2d 839 (1999), the Supreme Court held that a school district that receives Title IX funds can be held liable for damages if the school is "deliberately indifferent" to acts of student-to-student sexual harassment. *Davis* did not imply the a school must expel students who engage in sexual harassment, nor did in state that liability hinged upon whether the school was successful in its attempts to stop peer harassment. Rather, school officials would be considered "deliberately indifferent" only when the response to reported harassment is "clearly unreasonable in light of the known circumstances." Unlike *Davis*, the

school district in this case took numerous steps in an effort to address the complaints made by the plaintiff and her mother. They did not ignore the reports but made attempts to investigate and address the problems. The plaintiff argued that allowing Martin to participate in extracurricular activities was evidence of deliberate indifference because it forced the plaintiff to have contact with Martin and "sent a message" to other students that sexual harassment was tolerated at the school. The court found several reasons why the defendants' actions did not rise to the *Davis* standard of deliberate indifference. First, in regards to the change in the eligibility rule, it was clear that by 1994 – before any incident involving Martin – the school had received recommendations from the athletic director that the policy be interpreted to allow school officials some discretion in determining whether a particular conviction should make a student ineligible. Second, the offense to which Martin pleaded guilty was battery and this offense contained no element of sexual contact. It was not unreasonable of the school to accept the findings of the court and treat the offense as consisting only of battery. Third, although the plaintiff points out that some students had been suspended or expelled in the past for committing battery, none of these cases occurred outside the jurisdiction of the school at a time when school was not in session. Fourth, Dr. Sowers relied on the recommendation of the district attorney and the probation officer who were involved in Adrian Martin's case. Both of these officials recommended that Martin be allowed to participate in school activities. It was clearly not unreasonable for Dr. Sowers to rely on their judgment as they were informed about the facts of Martin's case and they were charged with seeing that the

court's no-contact order was enforced. Finally, the fact that Dr. Sowers did not allow Martin to participate in yell leading was further evidence that he did not ignore the potential for contact between Martin and the plaintiff. While the court conceded that the school's response was not ideal in all instances, this was not a case, as was *Davis*, of a school making "no effort whatsoever either to investigate or put an end to harassment" (p. 1167). The court determined that the plaintiff failed to establish that the school responded in a manner that was clearly unreasonable. The defendants' motion for summary judgment was granted. The plaintiff's motion for partial summary judgment was denied. The clerk was directed to enter a judgment of dismissal on the merits in the favor of the defendants.

Nicol v. Auburn-Washburn USD 437
231 F. Supp. 2d 1092 (D. Kan. 2002)

Andrea Nicol was a student at Washburn-Rural High School who filed suit against a school security officer after an altercation took place at school. On the morning of September 30, 1998, Jerald Targett, the school security officer, was called to the office to assist with two students who were having behavioral issues. When he arrived, Targett encountered two female students, one of whom was the plaintiff Nicol. The girls had been suspended from school and had left the office to go to their classes to pick up homework assignments. Targett followed the girls. They became belligerent, used obscene language and told Targett to stop following them. Targett told the girls to leave the school grounds but they continued entering classrooms and

causing a disturbance. Targett followed them into a classroom and put his hands on Nicol in an attempt to get her to leave. According to Nicol, Targett grabbed her arm and placed his forearm across her throat cutting off her airway. Targett then swung her off the floor and dragged her into the hallway. He pushed her face and head into a wall, which resulted in bruises. According to Nicol, Targett then slammed her into a water fountain. She clung to the fountain to keep Targett from dragging her away. When Targett pulled her away from the fountain, he did so with enough force to pull the fountain off the wall. The police arrived, handcuffed Nicol and took her to Shawnee County juvenile where she was released to her parents. Nicol's parents took her to the hospital for treatment of her injuries. On October 5, 1998, the school board held an administrative suspension hearing and suspended Nicol for the remainder of the semester. On August 2, 1999, Nicol's parents appeared in front of the school board and requested an investigation into the actions of Targett against Nicol. In a letter dated September 13, 1999, Howard Schuler, superintendent, and Steven Angel, school board president, indicated that the school board would not take any action against any employee of the District for doing their job. Nicol filed suit against the school district, several employees of Washburn Rural, and one member of the school board. The defendants were named in both their individual and official capacities as agents of USD 437. Plaintiff Nicol filed her suit under Title IX of the Education Amendments Act of 1972, 20 U.S.C. Section 1681 *et seq*., claiming the defendants created a "hostile environment" that included harassment and physical abuse and discriminated against Nicol on the basis of her gender. She also filed suit under 42

U.S.C. Section 1983, claiming the defendants violated her rights under the Fourth Amendment to be free from unreasonable seizure and violated her rights under the Fourteenth Amendment to receive both procedural and substantial due process. Nicol filed under 42 U.S.C. Section 1985(3), in which she alleged the defendants engaged in a conspiracy to deprive her of her "class-based civil rights." In addition, she filed several related state law statutory and common law claims against the defendants, these included claims under Kan. Stat. Ann. Section 60-513 "against the use of excessive force by officers," claims under Kan. Stat. Ann. Section 21-3608 for child endangerment, and common law claims of intentional infliction of emotional distress, assault, and battery. The defendants made a motion to dismiss.

Courts will only dismiss a case for failure to state a claim when it appears beyond a doubt that the plaintiff can prove no set of facts in support of their theory that would entitle them to relief. All facts are accepted as true and all reasonable inferences from those facts are viewed in favor of the plaintiff. The defendants first argued that they were immune from liability for the civil rights violations claimed by Nicol by reason of qualified immunity. They asserted that the individually named defendants were government officials who performed acts "within the course of their duties" and that they acted in good faith and "not in ignorance or disregard of settled indisputable principles of law" (p. 1097). Qualified immunity protects state officials from liability when they act within the scope of their employment and their conduct has not violated any clearly established statutory or constitutional rights of which a reasonable person would have known. When a defendant raises the defense of

qualified immunity in the context of a motion to dismiss, the court conducts a two-part test. First, the court must determine if the plaintiff has asserted a violation of a constitutional or federal statutory right. Next, the court must examine whether the right that was violated was "sufficiently clear that a reasonable official would understand that what he is doing violates that right" (p. 1098). The court used this two-step test to analyze the qualified immunity defense in all of the plaintiff's claims.

In addressing the Fourth Amendment claim, the court sought to determine whether seizure was reasonable under all the circumstances. In a public school context, the court must take into account what is appropriate treatment for children in public schools as well as consider the school's "custodial and tutelary responsibility for children" (p. 1099). The defendants claimed that Targett's actions did not violate the Fourth Amendment because they were directed at getting Nicol to leave the school, to prevent her from continuing her disruption of classrooms and running through the school to evade Targett. While the court agreed the school had an interest in ensuring that students cooperate in non-disruptive manner, it found that Targett's actions went beyond what would be considered reasonable under the circumstances. In considering the facts alleged by Nicol, the court found that she had stated a violation of her Section 1983 Fourth Amendment rights which met the first prong of the test. Having found she stated a Fourth Amendment claim, the court next determined that a reasonable officer in Targett's position should have known that the use of excessive force in response to a student's non-compliant actions would violate well-known constitutional principles. As the plaintiff was able to meet both prongs,

the court denied the defendants motion to dismiss the Fourth Amendment claim. Nicol had two Fourteenth Amendment claims for the court to address, those being procedural and substantial due process. In her procedural due process claim, Nicol alleged that the due process that had been provided was biased in favor of the school. As she could not substantiate this claim with facts, the court dismissed it and granted the defendants' motion on this basis. In her substantive due process claim, Nicol alleged that the "attack" by Targett was "punishment" for her behavior the day of the incident. The Tenth Circuit set out that in school discipline cases, the substantive due process inquiry is "whether the force applied caused injury so severe, was so disproportionate to the need presented, and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience" (p. 1102). When the court considered the facts presented in this case, it determined that the altercation, which was of such force that the plaintiff suffered injuries and school property was damaged, might rise to the "shock the conscience" standard. Thus, the court found Nicol had stated a substantial due process claim. The court also found that the Fourteenth Amendment's substantive due process protections had long been established in public schools and Targett should have known that the amount of force he used would violate these well-known constitutional principles. The defendants' motion on the substantive due process claim was denied.

The court next turned to the Title IX, 20 U.S.C. Section 1681(a) claims that the defendants created a "hostile environment" that included harassment and physical

abuse and discriminated against Nicol because of her gender. To state a claim under Title IX, a plaintiff must show that the school district (1) had knowledge of, and (2) was deliberately indifferent to (3) harassment that was so severe, pervasive and objectively offensive that it (4) deprived the victim of access to the educational benefits of opportunities provided by the school. In considering Nicol's complaint, the court found that she had made a generalized accusation that the school district "fostered a hostile educational environment that discriminated against the Plaintiff...on the basis of her gender" (p. 1104). However, there were no factual allegations to support this statement. There was nothing to tie Targett's actions to Nicol's gender, nor were there allegations that the districts' decision not to discipline Targett had anything to do with her gender. Accordingly, the court found that Nicol had failed to establish a case for this claim and granted the defendants motion for dismissal on the accusation of a hostile environment on the basis of sex under Title IX. The court also dismissed Nicol's conspiracy claim under 42 U.S.C. Section 1985(3) because she failed to claim that the actions taken by the defendants stemmed from some class-based, discriminatory motive. Because Nicol failed to respond to the defendants' arguments on the alleged state statutory violations of excessive force by officers under K.S.A. 60-513 and child endangerment under K.S.A. 21-3608, the court dismissed these two claims. Finally, the court addressed the defendants' assertion that they were entitled to qualified immunity from the state law claims pursuant to the discretionary function of the Kansas Tort Claims Act (KTCA). K.S.A. 75-6104(e) protects governmental entities and employees acting within the scope of

their duties for damages that result from "any claim based upon the exercise or performance or the failure to perform a discretionary function or duty on the part of the governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved." The court pointed out that this exception only provides a defense against ordinary negligence. It does not apply to allegations of willful or wanton acts by governmental employees. The court found that in this case, the defendants were not entitled to immunity under the exception found in the KTCA. The claims made by Nicol involved intentional torts and alleged willful and malicious conduct by the defendants. Accordingly, the defendants' motion was granted in part and denied in part.

Smith v. Barber
316 F. Supp. 2d 992 (D. Kan. 2004)

This lengthy case involved five student plaintiffs who were arrested for plotting an armed attack on their high school. Much of the case dealt with the claims brought against law enforcement officers and the county attorney. This brief will only discuss those claims brought against school district officials.

On Friday, December 17, 1999, Labette County High School (LCHS) officials learned of an alleged plot to stage an armed attack on the school by students Smith, Traxson, Spencer, McReynolds, Vail (plaintiffs) and non-parties Heiskell and Van Buren. The plan had allegedly been planned the evening of December 16 at Smith's home and was to take place on December 20, 1999. At school on December 17,

Heiskell and McReynolds talked about the plan in front of Van Buren. Van Buren was allegedly recruited to participate in the attack by sitting on a building outside LCHS and shooting people as they came out of the school. Over their lunch hour that day, Heiskell and Van Buren informed Stacy Smith, a teacher at LCHS, about the plan to attack the school. When Smith further questioned the students, Heiskell described the plans and warned her that she was a target along with other teachers and a student. Van Buren told Smith that McReynolds had asked him to sit on the roof and shoot people as they came outside. Van Buren became visibly upset and began crying. Stacy Smith immediately reported the conversation to Greg Cartwright, school principal. Cartwright interviewed Heiskell in the presence of Smith and Van Buren. Heiskell repeated the story he had told Smith and added that he and the other plaintiffs had been drinking and doing drugs during while making their plans. Heiskell told Cartwright that they had drawn a map of the school and planned to start their attack at the end of the school where the art room was located. McReynolds had said he could get police uniforms for them to wear because his father was a reserve deputy for the sheriff's office. Heiskell also reported that they had discussed a hit list of specific individuals they would shoot. Heiskell had not believed the five students were serious until Van Buren was approached about sitting on top of a building to shoot people as they came out. After the interview, Cartwright called the Safe School Hotline to report the alleged threat. Ken Swender, an assistant principal, called Undersheriff C.W. Davis at the sheriff's office to report the alleged plot. Sheriff William Blundell, detective Scott Higgins, and Davis all drove to LCHS to

investigate. When he arrived, Blundell informed police chief James Barber that the sheriff's office would handle the investigation. Cartwright informed Blundell, Higgins, and Davis of the plan as told to him by Heiskell. Cartwright then called Superintendent Dennis Wilson to tell him about the situation at LCHS. Once Wilson arrived at the school, Blundell and Higgins interviewed Heiskell in the presence of his parents and Wilson. Throughout the interview, Heiskell was upset and crying. After the interview, Blundell and Higgins met with county attorney Robert Forer in his office and informed him of their conversation with Heiskell. The discussed the need to interview Van Buren and to contact the Kansas Bureau of Investigations (KBI) to help with the investigation. Cartwright was called to the sheriff's office to provide details about his conversation with Heiskell and information regarding where the boys lived. Cartwright informed Higgins at that time that he had received a report from a teacher's aide stating that Van Buren had warned her not to come to school on Monday. Later that evening, Higgins called Heiskell to conduct a second interview by telephone and the KBI interviewed Van Buren. Based on information from the interviews, Higgins completed an application for search warrants. The search warrants were executed early in the morning hours of December 18, 1999. McReynolds, Smith, Traxson, Spencer, and Vail were all arrested at their homes. Multiple guns, ammunition and reserve sheriff's deputy uniforms were confiscated in the searches. The boys were all interrogated on December 18, 1999. Each discussed the plans for attacking the school and Traxson and Smith acknowledged having access to weapons. All five said that the conversation was meant to be a joke. On

December 19, Forer filed juvenile complaints in Labette County District Court charging each of the boys with eight counts of conspiracy to commit first-degree murder. That same day, Higgins interviewed Heiskell for a third time at LCHS. Heiskell reiterated his story and said he believed the plot to be serious. On December 21, 1999, a detention hearing was held and the court ordered that the five students remain in custody. On January 29, 2000, the five were transferred from the Juvenile Detention Center to the Labette County Jail. Between February 8 and February 14, 2000, the five boys were released on $25,000 bond and house arrest. As a condition of their release, none could have any contact with LCHS. On February 6, 2000, Heiskell told Forer that parts of his previous statements to law enforcement were not true. Specifically, no map had been drawn, there were no guns or uniforms present during the discussions, and the guns were in the gun cabinet. Forer was not sure whether Heiskell's initial statements or his revised statements were true. Forer concluded that there was not sufficient evidence to prosecute the five boys, so he dismissed the charges of conspiracy to commit murder on April 14, 2000. After Forer dropped the charges, the prohibition against the boys contacting the school was also released. Cartwright concluded it was in the best interest of the students and LCHS to suspend the five for the remainder of the school year. On April 17, 2000, Cartwright sent a notice to the students advising them that they would be placed on short-term suspension through April 28. He also sent notice of his intention to suspend them for the rest of the school year and advising them of their right to contest that recommendation during hearings scheduled for April 27 and 28. The notifications

included copies of the Student Suspension and Expulsion law, K.S.A. 72-8901 *et seq.* and U.S.D. 506 Board regulations relating to due process hearings for students. Superintendent Wilson presided over the hearings for all of the students. All of the boys denied any wrongdoing, however, all except Vail agreed to the proposed suspension. Vail did not agree to the suspension and Wilson advised him of his right to appeal the decision of the hearing officer to the school board. Wilson accepted the suspension recommendation for each of the boys and mailed copies of his determination to each of them the following week. None of the students filed an intent to appeal with the school district. The five students sued the city and its police chief, county attorney, sheriff, detective, and undersheriff, school district, district superintendent, and the high school principal under Section 1983 alleging violations of Fourth Amendment relating to searches and arrests, malicious prosecution, and violations of the Eighth Amendment. Their specific claims against the school district and officials were for deprivation of procedural and substantive due process rights. The defendants made a motion for summary judgment.

In addressing the claims against Wilson and Cartwright, the court cited several previous court decisions dealing with suspension and the rights of students. *Wood v. Strickland,* 420 U.S. 308, 95 S.Ct. 992, 43 L.Ed.2d 214 (1975) held that "it is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Id.* 420 U.S. at 308. The *Wood* court also went on to point out that public school students retain substantive and procedural due process rights while at school. In *Goss v. Lopez,* 419

U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975), the Supreme Court established the basic procedural due process rights for students. At the minimum, students facing a suspension must be given some sort of hearing. In the case of suspensions of 10 days or less, a student must be given oral or written notice of the charges against, an explanation of the evidence, and a chance to present his side of the story. If the suspension is for a longer period of time, or in the case of an expulsion, "more formal procedures" may be required. The five students in the present case first asserted that they were deprived of their due process rights when the school district failed to provide them with an education while they were confined in jail. Basically, they alleged that this failure amounted to a "de facto" suspension without notice or a hearing. The court determined that the students failed to support their assertion with any controlling authority. Although they quoted several sections of Kansas statutes and cited case law dealing with public school discipline and suspension, they could offer no explanation for how this supported their claim. The court dismissed the claim for lack of evidence of any requirement that school officials must provide a confined student with educational materials or else risk violating the student's due process rights. Next, the students claimed there were several errors in their suspension from school that resulted in due process violations. They contended they should have been informed that Heiskell had been a witness against them and been allowed to cross-examine him. In *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237 (10th Cir.2001), it was made clear that there was "no constitutional guarantee to cross-examine witnesses during a school suspension hearing" (p. 1033). The

suspensions in this case were based on the conversation about attacking the high school, which resulted in a substantial disruption of the school, not Heiskell's testimony. The court also found that the notices sent to the students from the school district sufficiently notified them of the charges against them and satisfied the requirements set out in *Goss.* The student plaintiffs also argued that their suspensions were not proper because they were based on the belief that the boys were guilty, even after Heiskell admitted he had not been truthful in all of his statements and the charges had been dismissed. The court believed this argument missed the mark. The boys had been suspended because of the impact their admitted conversation about attacking LCHS had on the school, not because of the criminal charges filed or Heiskell's statements. Finally, the court addressed the substantive due process claims of the five students. To prevail on this claim, a student must show that he suffered substantial prejudice as a result of inadequate procedures. Because four of the students had been present at the hearing, with an attorney and their parents present, and agreed to the suspensions, they could not now claim that their suspension was the result of inadequate procedures. Vail, who did not have an attorney present and did not agree with the suspension, was allowed to present his case and was provided with proper notice of the appeal process, thus preserving his due process rights. Accordingly, the court granted Wilson and Cartwright's motion for summary judgment with respect to the students' claims for deprivation of their procedural and substantive due process rights. Finally, the court addressed the claims against U.S.D. 506. The district could only have been held liable for unconstitutional acts that were

the result of a policy or custom of the school district or from the acts of officials with policy-making authority. Since the court had determined that Cartwright and Wilson had not deprived the students of any rights, the claims against the school district were also dismissed. Summary judgment was granted with respect to the school district and its employees and the case as a whole was dismissed.

Theno v. Tonganoxie Unified School District No. 464
377 F. Supp. 2d 952 (D. Kan. 2005)

This case was brought by Dylan Theno as the result of student-on-student harassment that took place when he attended junior and senior high school in Tonganoxie. The harassment of Theno began when he was in the seventh grade during the 1999-2000 school year. In October of 1999, K.L. and C.C. called Theno a faggot and K.L. tried to trip him. Theno pushed K.L. and the teacher took the students to the office. The vice principal talked to all of them and warned that they would get an in-school suspension if the behavior continued. In November of 1999, at a school basketball game S.S. threw rocks at Theno, called him a fag and made other rude comments about him. Theno punched S.S. and received a three-day suspension. S.S. received an in-school suspension for the name-calling. Theno talked to Steve Woolf, the building principal, about the incident. On several occasions after Christmas, Theno was harassed by students in the lunchroom who called him fag and accused him of masturbating. One student, G.P., made rude gestures of a sexual nature towards Theno. Two other boys, M.M. and D.C. made fun

of Theno regarding a rumor that he had been caught masturbating in the bathroom. They told him that G.P. had started the rumor. Other students began teasing Theno and asking if he was going to "make a trip to the bathroom" (p. 955). Theno left the lunchroom and went to see the vice principal. He told her what happened and she went to talk with the other kids. Woolf brought Theno into his office and asked about what happened. The vice principal returned and told them that she had warned the students that if they used the terms fag or gay again they would be suspended. Theno's mother learned of the incident in the lunchroom and came to the school to meet with the administrators. She disagreed with the boys only receiving a warning. Later, Mrs. Theno spoke with the superintendent, Richard Erikson, and asked that he review the manner in which the principal (Woolf) and vice principal (Strong) had handed the situation. Erikson reported back to Mrs. Theno in a few days and said that he believed the school's administrators had handled the situation in accordance with the student handbook. Theno's father met with G.P. and his father at which time G.P. apologized. G.P. later told students that he had made up the rumor about Theno's masturbating. Theno had no further problems with G.P., C.C., or K.L. Shortly after this situation, an eighth grader, D.W., called Theno the jack-off kid. Later that school year, Theno had problems with A.E. in the lunchroom calling him the jack-off. Theno did not report this to staff members. On February 17, 2000, Theno was counseled and moved to a different lunch table for calling other students faggots after they made fun of his hair. On February 24, 2000, A.E. was disciplined and given a three-day lunch detention and a warning that the next incident of harassment would

result in more severe consequences. Numerous other incidents of harassment occurred throughout the remainder of Theno's seventh grade year involving different students. During Theno's eighth grade year, the 2000-01 school year, Theno had problems with D.W. again. D.W. would call him names, such as faggot and queer and once drew rude pictures that represented Theno in the condensation on the school bus window after basketball practice. Theno reported this to Woolf who told D.W. that if he continued making fun of Theno he would be kicked off the basketball team. D.W. stopped the harassment until after basketball season was over, then he continued making random rude comments. Mr. Theno went to the school in January of 2001 to speak to Woolf about D.W. He also went the school several other times that year to discuss the continuing harassment. The next major problem occurred during Theno's ninth grade year in gym class. Someone (Theno suspected D.W.) had written on the locker room chalkboard that Theno was a fag and that he masturbated. Theno erased it the first time, but when it was written a second time he reported it to Woolf. Woolf said he would handle it. Nothing was written the next day, but someone wrote something the following day. When Theno returned to Woolf, he apologized, said he had been busy and had forgotten to check. Woolf talked to D.W. and to Matt Bond, the gym teacher. Nothing further was written on the board and Theno had no further problems with D.W. Woolf also interviewed A.E. and asked if he had called Theno names or heard others calling him names. A.E. denied any knowledge of anything. Mr. Theno again spoke with Woolf. He also met with Erickson in early February of 2002 to discuss the numerous incidents of name-calling.

After meeting with Mr. Theno, Erickson talked to Woolf and reviewed all of the incidents based on the information Mr. Theno had given him and discussed Woolf's handling of the harassment. Theno did not report any further incidents during the remainder of his ninth grade year. Theno moved up to the high school for the 2002-03 school year. Woolf did not talk to anyone at the high school before Theno arrived to alert them of the harassment that Theno had experienced or the complaints raised by his parents. Theno first experienced harassment at the high school in February of 2003 in a strength training class. T.H. started making fun of Theno by saying that he had been caught masturbating in the bathroom. This happened on several occasions. Theno had similar problems with N.S. and M.W. in strength training class. Theno did not report any of this to his teacher, Matt Bond, and he let it go on for about a week before telling his father. Mr. Theno went to the school and met with the high school assistant principal, Brent Smith, to notify him of the problems in strength training class as well as in another class with A.E. Mr. Theno told Smith that his son had had similar problems in the seventh grade. Smith investigated the complaints by first talking to Theno and then with the boys accused of making comments. Smith talked to the boys about the seriousness of sexual harassment and the consequences that would ensue if the harassment continued. Smith also informed Bond of the comments so that he would be more aware of the situation. Theno had no further problems with M.W., N.S., or T.H. In March of 2003, Mr. Theno called school board member, Richard Dean, and outlined the problems that his son had been having. On March 12, Theno and his parents met with Dean at which time Mr. Theno gave Dean

a copy of sixteen pages of notes from Mrs. Theno regarding all of the harassment their son had been dealing with. Dean later shared the concerns with the other board of education members and notified school administrators. After Smith received the log of incidents, he and the principal, Michael Bogart, decided to take a more proactive stand and talk to the boys mentioned in the incident log. Smith brought in all of the boys mentioned in the log and spoke with them about the seriousness of their past actions. Most of the students Smith talked to were aware of prior problems, but nothing recent. All assured Smith that they would not be a part of any further issues. There were no further problems during Theno's tenth grade year. During the summer before Theno's eleventh grade year, Mr. Theno provided Smith with information that included the names of student who had harassed his son in the past. Mr. Theno also contacted the school counselor and told her about the harassment. Bogart and Smith met with some of Theno's teachers for the 2003-04 school year, informed them of the previous harassment and advised that they be alert to any inappropriate comments. Only a few days after school started, D.O. made fun of Theno at the lunch table, calling him fag and referring to the rumor about masturbating in the bathroom. Theno ignored D.O. and did not report anything. On September 8, 2003, as Theno was entering the school building, D.O. stepped forward into Theno's face and said, "Faggot, faggot, faggot" (p. 960). Theno punched D.O. in the face and a fight ensued. Both boys were suspended for three days. Theno had no further problems with D.O. in school. On October 13, 2003, Mr. Theno met in executive session with the school board to complain about the harassment and request

that the administrators be terminated. On November 16, 2008, while in strength training class doing lunges with weights, C.L. called Theno a queer. The teacher overheard the comment and made C.L. do pushups. Bogart learned of the incident during a conference the next day with Mrs. Theno. He met with C.L. and C.L.'s mother, gave C.L. a detention and required him to write a letter of apology to Theno. On November 18, 2003, Bogart made an all school announcement that banned the use of the terms "gay" or "fag." That night Theno begged his mother not to send him back to school. On November 19, 2003, Mrs. Theno called Bogart and took her son out of school. Theno subsequently earned his GED. Theno brought this court action alleging that the school district and various school officials violated Title IX and state law by being deliberately indifferent to the harassment and for negligent failure to supervise students under their control. The defendants sought summary judgment claiming because the sexual harassment was not gender related, was not sufficiently severe and pervasive, and the school district responded reasonably and without deliberate indifference, it did not merit a Title IX claim.

In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999), the Supreme Court held that public schools, as recipients of federal funds, can be liable under Title IX for student-on-student harassment when it can be shown that "the funding recipient acts with deliberate indifference to known acts of harassment" and "only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit" *Id.* At 633, 119 S.Ct. 1661. The *Davis* court dealt with a case

of male-on-female harassment. In *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), the Supreme Court held that same-sex harassment arising from a hostile work environment fell under Title VII. Based on these Supreme Court decisions, the court here held that "same-sex student-on-student harassment is actionable under Title IX to the same extent that same-sex harassment is actionable under Title VII" (p. 962). *Oncale* provided three evidentiary methods by which a same-sex plaintiff can show the harassment was based on sex. Theno was not able to meet any of the three methods, but the court determined that the three methods were meant to be "instructive, not exhaustive" (p. 963). Gender stereotyping is another method of proving same-sex harassment under Title VII. The court here determined that a "rational trier of fact" could infer that Theno had been harassed because he failed to meet his peers' stereotyped expectations for his gender because the primary objective of the harassers appeared to be an attack on Theno's masculinity. The name-calling alone "probably would not be sufficient to withstand summary judgment" (p. 965). The bulk of the harassment could be traced back to the rumor started when Theno was in the seventh grade that he had been caught masturbating in the bathroom. In the court's opinion, all of the harassment relating to the masturbation rumor reflected the harasser's beliefs that Theno did not conform to male stereotypes by *not* engaging in that kind of behavior at school, i.e., that he did not act as a man should act. Therefore, Theno could raise a genuine issue of material fact that he had been harassed based on his gender.

Under Title IX, a plaintiff can show that the school district was deliberately indifferent to discrimination "only where the district's response to the harassment…is clearly unreasonable in light of the known circumstances" *Davis* 526 U.S. at 648, 119 S.Ct. 1661. Courts have held that this does not mean administrators must take any particular type of disciplinary action. *Davis* held that victims do not have a right to seek a particular punishment and courts should not "second guess school administrators' disciplinary decisions" *Id.* at 648, 119 S.Ct. 1661. In the case at hand the discipline handed out by the school district, which was mostly warnings, was largely effective in stopping the harassment with respect to each individual harasser. Each time the school warned a harasser, that particular harasser stopped bothering Theno. However, when looking at the evidence in a light most favorable to the plaintiff, as the court must do in determining summary judgment, the school's response to the harassment might be considered ineffective by a rational trier of fact. Theno had been subjected to years of harassment. The school rarely took any disciplinary measures above warning the harassers. The court recognized the fact that the school "was not legally obligated" to stop the harassment, but found that a jury could conclude that at some point in the four years Theno was harassed the school district's standard disciplinary response to the known harassment became unreasonable. In *Vance v. Spencer County Public School District*, 231 F.3d 253 (6th Cir. 2000), the plaintiff suffered harassment by her peers for a number of years. The school district in *Vance* largely "talked to" the harassers, much like the Tonganoxie administrators did with Theno's harassers. The Sixth Circuit recognized that a school

was not required to expel or suspend every student accused of misconduct, but found that "where a school district has actual knowledge that its efforts to remediate are ineffective, and it continues to use those same methods to no avail, such district has failed to act reasonably in light of the known circumstances" *Id.* at 261. Although in Theno's case, the school did eventually become more proactive in speaking with teachers and students and increased its efforts to prevent the harassment, the court held that it was a question for the jury to decide if these efforts were "too little, too late." Next, the court addressed whether the harassment was severe and pervasive enough to deprive Theno of access to educational opportunities. Previous courts have held that damages are not available for simple acts of teasing and name-calling, even where comments target differences in gender. As described previously, Theno was teased by his peers for four years. He was routinely called names based on a rumor started in the seventh grade. As a result of the harassment, Theno suffered from stomach problems and depression so severe that medication was required. He sought counseling and was diagnosed with post-traumatic stress disorder, anxiety disorder, and avoidant personality. Theno eventually withdrew from school. Although some of the isolated incidents could be characterized as mere insults, teasing, and name-calling, collectively they reflected a pattern of harassment that the court found to be severe and pervasive. Therefore, the defendants' motion for summary judgment was denied on Theno's Title IX claim.

With respect to Theno's claim of negligent supervision, the court determined that Kansas courts would not recognize a negligent supervision claim under the facts

of this case. Under Kansas law, public schools have no duty to supervise students in such a manner as to prevent emotional harm to other students. All of the cases brought to Kansas courts dealing with negligent supervision have involved physical, bodily harm to a student. Accordingly, the defendants' motion for summary judgment was granted on the negligent supervision claim.

On July 27, 2005, the defendants' brought a motion to reconsider or alter this judgment. The court held that the adequacy of the school's response to known acts of harassment was an issue that had to be resolved by a jury. Thus, the motion was denied.

Theno v. Tonganoxie Unified School District No. 464
394 F. Supp. 2d 1299 (D. Kan. 2005)

In the previous *Theno* case, Dylan Theno sued the Tonganoxie School District on allegations that his Title IX rights had been violated in connection with the district's alleged deliberate indifference to four years of harassment by other students. The case went to a jury and a $250,000 verdict against the district was returned. Following this verdict, the school district filed a renewed motion for judgment as a matter of law. The school district argued that the evidence presented at the trial was insufficient to prove (1) that Theno was harassed based on his gender, (2) that Theno suffered harassment of which the school district had knowledge that was so severe, pervasive, and objectively offensive that it deprived him of educational opportunities, and (3) that the school district acted with deliberate indifference.

In order to win judgment as a matter of law, the court must find "no legally sufficient evidentiary basis with respect to claim or defense under the controlling law" (p. 1301). Courts must affirm the jury verdict if the record, viewed in the light most favorable to the nonmoving party, contains evidence upon which a jury could have properly returned a verdict for the nonmoving party. The court reviewed the transcript from the *Theno* trial and the record. After review, the court first found that whether Theno was harassed by pupils based on his failure to conform to stereotypical gender expectations was a question for the jury. In spite of the district's claim that there was no evidence that the harassment was based on the harassers perceptions that Theno was effeminate or homosexual, the court found there was sufficient evidence to support the jury's decision. The student harassers did not pick on Theno using terms such as "geek" or "weirdo," they resorted to crude gestures, teasing, and name calling that all had sexual innuendos and undertones meant to "debase" his masculinity. The court also held that the determination of whether the harassment was so severe that it deprived Theno of educational benefits or opportunities was a question for the jury. The harassment had occurred over several years, with the same sexually derogatory themes. Theno suffered from physical side effects and eventually left school. This was sufficient evidence to support the jury's verdict. Finally, the court determined that whether the school district acted with deliberate indifference was also a question for a jury. Enough evidence was presented showing that the district's response to the harassment was not reasonable in

light of the severity and ongoing nature of the harassment to support the jury's decision. Because the evidence presented was sufficient for the jury to return a verdict in Theno's favor, the court denied the school district's motion for judgment as a matter of law.

Chapter 3

School Program

The four cases in this chapter deal with the administration of programs of study or other school activities. In Kansas, these have been limited to challenges brought by students to participation in extracurricular activities and one case dealing with the removal of objectionable books from a school library.

In Kansas, the courts do not find a constitutionally protected property interest in participating in extracurricular activities. However, students may not be banned from participation based on their membership in a protected class.

Regarding the decision to ban books, schools should follow the guidelines established by *Board of Education v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982). Books may not be banned simply because school officials disagree with the topics or ideas presented by the author. School districts should establish procedures for the steps to take when making a decision to ban a book and then follow those procedures.

Haverkamp v. Unified School District No. 380
689 F. Supp. 1055 (D. Kan. 1986)

Deandra Haverkamp had been the Head Cheerleader at Centralia High School. In October 1985, she asked for permission to go to Nashville, Tennessee to record an album. The principal, Mr. Zumbahlen, and Superintendent, Mr. Kraushaar, granted

her request. The pep club sponsors, Ms. Dibble and Ms. Sleeper, removed Haverkamp from the cheerleading squad. Kraushaar and Zumbahlen were told of her removal from the squad but did not take any action on her behalf. Haverkamp alleged that in January 1986, Dibble subjected her to corporal punishment without just cause that resulted in Haverkamp ending her public education early. Haverkamp claimed that her removal from the cheerleading squad violated her right to procedural due process because she was not given any notice or hearing. She claimed that she had a property interest in her position as Head Cheerleader and that her trip to Nashville was a protected activity under the First Amendment of the United States Constitution and the defendant's actions against her violated her first amendment rights. Haverkamp also claimed liberty and property interests in the right to continue her high school education without interruption until May 1986 and a liberty interest that was violated by Dibble's conduct in corporal punishment against her. The matter went before the court on the defendants' motion to dismiss.

In considering a motion to dismiss, the court must take the factual allegations of the complaint as true and all reasonable inferences must be indulged in favor of the plaintiff. The complaint may not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of her claim. The court first considered the property interest in Haverkamp's position as Head Cheerleader. The defendants argued that no protected property interest existed in the right to participate in extracurricular activities. Although Kansas courts had not addressed this issue, many other states had. The majority of cases examined by the court rejected the

existence of a federally protected right in participation in interscholastic extracurricular activities. While a few cases held otherwise, the court here found that Haverkamp's position as Head Cheerleader did not rise to the level of a constitutionally protected property interest. Next, the court considered the equal protection and first amendment claims. There did not need to be a property or liberty interest in her position as Head Cheerleader for Haverkamp to claim a first amendment retaliation claim. However, the court found that the facts presented by the plaintiff did not "rise to the level of a constitutional violation" (p. 1058). There was no indication that Haverkamp's speech or associations led to her being removed from the cheerleading squad. There was also no evidence of retaliation by school officials because she went to Nashville to record an album. Everything the defendants had done fell within the discretionary authority available to school officials. Thus, the court could not find that the defendant's actions had violated the first amendment rights of the plaintiff. The court next turned towards Haverkamp's claim that she had been deprived of property interest by the defendants' actions preventing her from continuing her high school education until May 1986 and that her liberty interests had been violated because the discipline imposed upon her had caused damage to her reputation. The court cited *Goss v. Lopez*, 419 U.S. 565, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975) and noted that a student's "legitimate entitlement to public education may not be taken away without adherence to minimal due process procedures" (p. 1059). *Goss* dealt with students who had been suspended from school for misconduct. In this case, there was no allegation that Haverkamp had been

suspended or expelled because she traveled to Nashville while school was in session. Haverkamp alleged that because of the defendant's actions she "was forced to graduate early" because of an "oppressive environment." She was in no way deprived of her right to a public education by her decision to graduate early. The court also found no support for the claims of a liberty interest, as there were no allegations of the defendants publicizing Haverkamp's removal from the cheerleading squad, nor was there any indication of damage to her reputation. The last claim for the court to address was whether Haverkamp had been deprived of a liberty interest by being subjected to corporal punishment from Dibble. Corporal punishment only violates a child's substantive due process rights when it is arbitrary, capricious, or wholly unrelated to the legitimate state goal of maintaining an atmosphere conducive to learning. *Woodward v. Los Fresnos Independent School Dist.,* 732 F.2d 1243 (5th Cir. 1984). When the court reviewed Haverkamp's complaint, they found it to be "devoid of any facts pertaining to this claim" (p. 1060). The complaint simply stated that Dibble's conduct against the plaintiff had deprived her of her liberty interests under the Fourteenth Amendment. While the court acknowledged that in ruling on a motion to dismiss it had to take factual allegations as true in the plaintiff's favor, the plaintiff had pled no facts in support of a claim. The court held that it was "not required to speculate on what facts may exist which could entitle plaintiff to relief" (p. 1060). The defendants' motion to dismiss was granted.

Stone By and Through Stone v. Kansas State High School Activities Association, Inc.
761 P.2d 1255 (Kan. App. 1988)

During the 1986-87 school year, Lance Stone was a junior at Tonganoxie High School (THS). In the spring semester of 1987, Stone only passed four of his classes. The Kansas State High School Activities Association (KSHSAA) Rule 13 requires that a student pass at least five subjects in a current semester in order to be eligible in the next semester. Rule 14 prevents a student from making up the work after the semester has ended in order to regain eligibility. On June 8, 1987, Lee Smith, the principal of THS certified to KSHSAA that Stone was ineligible for the fall semester of 1987. While Smith was on vacation in July, Stone's parents made arrangements with the superintendent of the school district, Stephen McClure, for Stone to receive 45 hours of tutoring from his English teacher so that he could raise his failing grade. McClure did not know about Rule 14 when he approved the arrangement. When Smith returned from vacation, McClure learned that Rule 14 would prevent Stone from regaining his eligibility. McClure also discovered that under standards set by the Kansas Board of Education, 60 hours of tutoring would be required for one unit of credit. Stone completed the remaining 15 hours of tutoring during the fall semester. The school duly noted on his transcript that he had completed English III by arrangement on 10/7/87. On September 22, 1987, Stone, his parents and their attorney appeared before the KSHSAA's executive board and requested that Stone's eligibility be restored. Their request was denied. The following day, Stone, his parents, their attorney and Superintendent McClure

appeared before the KSHSAA board of directors. McClure asked the board to amend Rule 14 so that students who made up work could regain their eligibility. The board did not act on the request. On October 8, 1987, Stone and his parents filed action in district court seeking a declaratory judgment that Rule 14 violated Stone's constitutional rights. They also sought a permanent injunction to enjoin KSHSAA from declaring Stone ineligible for the fall semester. The following day Stone requested and obtained a temporary restraining order prohibiting KSHSAA and the school district from "preventing in any way, Lance Stone from participating in any interscholastic or interschool activity during Fall Semester of 1987" (p. 1257). At a hearing on October 22, 1987, the trial court found that although Rule 13 was desirable, not allowing a student to make up the work and regain eligibility was "unreasonable and arbitrary" and prevented a student the right to participate. Stone alleged at the trial that a Eudora High School student who had moved in from Iowa was allowed to participate after making up some failed courses before transferring from Iowa to Kansas. Iowa, unlike Kansas, permits make-up work and this student would have been eligible if he had remained in Iowa. He became eligible in Kansas under a rule that allows a transfer student from another state to be eligible in Kansas if they would have been eligible had they remained in the state from which they transferred. The trial court found this to be unequal treatment of students. The court granted the preliminary injunction holding that the "no make-up" rule was unreasonable and denied Stone the due process and equal protection guaranteed by the United States Constitution. KSHSAA appealed the decision. Stone claimed that the appeal should

be dismissed as moot because the fall 1987 semester had ended by the time the case came before the Court of Appeals. The court declined to dismiss the case because of its importance to students and school systems around the state and because similar actions could be filed in the future.

KSHSAA is a voluntary association of Kansas high schools that oversees interscholastic activities. Its existence is authorized by K.S.A. 72-130 *et seq*. KSHSAA has enacted a set of fifty-one rules and regulations that are binding on member schools and on students of member schools who participate in interscholastic activities. Although not a true government body, when KSHSAA acts, it acts as a government body because of the substantial control it has over Kansas public schools. For that reason, the appellate court held that KSHSAA's rules were subject to the same constitutional scrutiny applied to rules adopted by the legislature or school districts. KSHSAA provided several reasons for its no make-up rule. First, the rule encourages students to do well academically. Second, it treats all students the same because many schools do not offer summer school and not every parent can afford tutoring. A different rule, according to KSHSAA, would be unfair to those students who would not have the opportunity to make up their work. It would also be unfair to those students participating in spring sports because they would not have as long a period of time between semesters to get their work made up. KSHSAA did not believe the rule was overly harsh because most high school students can enroll in six or seven classes and only have to pass five to be eligible for the following semester. While the trial court had disagreed with KSHSAA's reasoning, the appellate court

held that it was "not the role of the trial court to substitute its own judgment for that of KSHSAA" (p. 1259). The appellate court further held that if "reasonable people" could differ on the rationale behind the no make-up rule, a court could not hold the rule to be invalid under a rational basis standard. Therefore, the appellate court found that the no make-up rule had a rational basis and its application to Stone did not violate any due process rights. The court next addressed whether the no make-up rule denied Stone the equal protection of the laws because the Iowa transfer student had been deemed eligible under the out-of-state transfer rule even though he had made up the work from classes he had failed. The court pointed out "different classes of people may be treated differently under the equal protection clause of the United States Constitution" (p. 1260). If the unequal treatment is directed towards a person falling within a suspect category, such as race or gender, the government must show a compelling state interest for the differential treatment. However, if the classification is on any other basis, equal protection only requires that the classification have a reasonable or rational basis. KSHSAA determined that it would be unfair to deny eligibility to students moving into Kansas if they would have been eligible had they stayed in their former state. Students from other states have different eligibility rules and plan their course of study according to those rules. When students move in to Kansas they have no knowledge of KSHSAA's rules, and to hold them to Kansas requirements would not be fair. The appellate court found this distinction between Kansas students and students from out of state to have a rational basis. Because of this, and the fact that the distinction was not based on any suspect category, the

appellate court found that Stone had not been denied the equal protection of the law. The court further held that the district court had abused its discretion by issuing a temporary injunction to which Stone, as a matter of law, was not entitled. Enforcement of the no make-up rule had not denied Stone of due process or equal protection rights. The decision of the trial court was reversed.

Case v. Unified School District No. 233, Johnson County
908 F. Supp. 864 (Kan. 1995)

This case involves former and current students and their parents who challenged the decision of the Board of Education and its superintendent to remove a book titled *Annie on My Mind* from the school libraries. The plaintiffs' claim was brought pursuant to 42 U.S.C. Section 1983 and alleged that the defendants had violated their rights under the First and Fourteenth Amendments of the United States Constitution and Section 11 of the Bill of Rights to the Kansas Constitution. In early August of 1993, the Gay and Lesbian Alliance Against Defamation/Kansas City (GLAAD/KC) and Project 21 offered to donate two books with gay or lesbian story lines to the District as part of their promotion of gay and lesbian issues in the Kansas City metropolitan area. The books were *Annie on My Mind* and *All American Boys*. This project received media coverage and school district representatives received a number of phone calls from the public regarding the book donations. In October, a representative from Project 21 delivered copies of these books to each of the three Olathe High Schools. It was discovered by one of the high school media specialists

that prior to the donation there were copies of *Annie on My Mind* on the shelves of four Olathe junior high and high schools. Dr. Banikowski, the school district's Assistant Superintendent for Curriculum and Instruction, requested that the media specialists review both donated books and then advise her of their opinions regarding the suitability of each book for inclusion in the District's library collections. All of the media specialists agreed that because *Annie on My Mind* had literary merit and had received very favorable reviews, it was appropriate for the high school libraries. They did not believe *All American Boys* was appropriate for inclusion in the school libraries. In early November, Dr. Wimmer, the superintendent, informed the Board that the literary review committee, in keeping with the District's book review procedures, had recommended acceptance of *Annie on My Mind.* He stated that he had not received any formal complaints from parents and gave a copy of the book to two board members so they could read it. Dr. Wimmer determined that the district needed to clarify procedures for book donations and told the board he had scheduled a meeting with media specialists to create guidelines for this process. In December, Dr. Wimmer met with media specialists and gave them a copy of the new book donation guidelines that he had created on his own. He had decided prior to this meeting that the District would refuse to accept the donated books and would remove existing copies of *Annie on My Mind* from all libraries. Dr. Wimmer had not had any meetings with media specialists before making this decision. He told them that the district needed to take this action because of community concerns and because he did not believe the Board would support acceptance of the book. The literary merit and

educational suitability of the book were not discussed, nor was there discussion about possible alternatives to removing the book, such as placement on a restricted shelf. In early January, a group of students asked to speak at a school board meeting to express their views regarding the removal of *Annie on My Mind* from the District's libraries. Presentations were made at the next board meeting both for and against the removal of the book. Following these presentations, the Board met in executive session to consult with counsel and hear Dr. Wimmer's position regarding the issue. The Board then returned to open session and voted 4-2 in favor of a motion to support Dr. Wimmer's decision to remove *Annie on My Mind* from the school district's libraries. A group of students and parents then took their complaints to the district court and a trial was held in September of 1995.

The court first addressed the school district's policies and procedures for library materials. The Olathe School District had an adopted "Media Selection Policy" which set forth the District's selection criteria for library resources. The policy incorporated the American Library Association's School Bill of Rights which states in part that it is the "responsibility of the school library media center to provide materials that support the curriculum; encourage students' growth in knowledge and development of literary, cultural, and aesthetic appreciation and ethical standards…thereby enabling students to develop an intellectual integrity in forming judgment." The media policy also set out a 13-step procedure to address concerns about library materials. The court found that the "District failed to follow its adopted procedures for the reconsideration of library materials" (p. 872). The court also held

that the school district had ignored the American Library Association's School Bill of Rights which places importance on having diverse ideas available in the library for students. After the media specialists had determined that *Annie on My Mind* was suitable, Dr. Wimmer overrode their decision and created his own "book donation guidelines." In doing this, he ignored both the media specialist's recommendations and the school district's established criteria for reevaluation of library materials. When they voted to support Dr. Wimmer's decision, the Board did not follow policy requiring that challenged materials be evaluated according to the District's established criteria. The Board also had no discussion regarding the literary or educational merit of the book. Thus, the Board ignored its own guidelines for the reconsideration of library materials. The next issue the court addressed was that of standing. The defendants argued that plaintiffs lacked standing to challenge the removal of *Annie on My Mind*. The court pointed out the three elements involved in constitutional standing requirements: First, the plaintiff must have suffered an injury in fact – an invasion of a legally protected interest. Second, there must be a causal connection between the injury and the conduct. Third, it must be likely that the injury will be redressed by a favorable decision. In using these criteria, the court determined that the former students and their parents lacked standing because they could not check out materials from Olathe school libraries and therefore their injuries would not be redressed if the books were returned to those libraries. Parents of current students were also found to lack standing because "the constitutional right to challenge the removal of a book from a school library appears to be held by the student who is

denied access to the book" (p. 873). The only remaining plaintiffs with standing were current Olathe School District students and one parent who was also a teacher in the district. Having resolved the issue of standing, the court turned to the claim that the plaintiffs' rights had been violated under the First and Fourteenth Amendments. In *Board of Education v. Pico,* 457 U.S. 853, 102 S.Ct. 2799, 73 L.Ed.2d 435 (1982), the Supreme Court concluded that there were limits on the discretion of school officials to remove library books from junior high and high school libraries. In a plurality opinion, the *Pico* court held that local school boards could not "remove books from school library shelves simply because they dislike the ideas contained in those books." *Id.* at 872. The plurality indicated that removal might be permissible if the book contained "pervasive vulgarity" or if it was "educational unsuitable." The court here concluded that it should follow the *Pico* decision because it was the only Supreme Court decision dealing with the removal of books from a public school library. In determining the motivation of the school board members for their removal decision, the court found that the trial testimony showed that they disagreed with the ideas presented in the book. By removing the book, the board members intended to deny access to those ideas. There was no evidence that suggested a lack of educational suitability was behind the Board's decision. The fact that the Board and superintendent disregarded established policies and did not consider less restrictive alternatives to completely removing the book were cited as evidence of improper motivation for the removal of *Annie on My Mind* from the Olathe public school libraries. The court concluded that this was a violation of the plaintiffs' constitutional

rights under the First Amendment of the United States Constitution and under the Constitution of the State of Kansas, Bill of Rights, Section 11. Finally, the court turned to the plaintiffs' due process claim under the Fourteenth Amendment. The court found that although the district did not follow its own procedures for removal of a book from the library, this failure did not constitute a due process violation. By providing the plaintiffs an opportunity to express their views at a school board meeting, the Board had satisfied the minimum federal constitutional requirements. The plaintiffs' request for injunctive and declaratory relief was granted and the court ordered the defendants to return the copies of *Annie on My Mind* to the libraries in the Olathe School District.

The court will look to the rationale used when a school district decides to remove a book from its library. The district must be able to show that the removal was due to the educational suitability of the book and not to their disapproval of the ideas and opinions presented. It would be wise for a school district to have a policy in place that outlines the steps that must be followed to address concerns about library materials. It would be wiser still to follow that procedure once it has been established.

Adams By and Through Adams v. Baker
919 F. Supp. 1496 (D. Kan. 1996)

The plaintiff, Tiffany Adams, a fifteen-year-old female student, filed for a preliminary injunction against the defendant school district alleging that her right to equal protection had been violated when the school district refused to allow her to try

out for the high school wrestling team because of her gender. Plaintiff sought injunctive relief and monetary damages against the school district alleging Title IX and equal protection rights had been violated. Defendant school district's superintendent, Bob Neel, testified that he made the determination to prohibit the Plaintiff from trying out for the wrestling team due to several factors: parents' moral objections, the possibility of sexual harassment lawsuits; the plaintiff's safety; that state law and Title IX do not require coed wrestling; and disruption of the school setting.

Parties seeking preliminary injunction must establish substantial likelihood that it will prevail on merits; that it will suffer irreparable injury unless injunction issues; that threatened injury to moving party outweighs whatever damage proposed injunction will cause opposing party; and that injunction would not be adverse to public interest. Title IX of the Education Amendments of 1972 (Title IX) is a federal law prohibiting discrimination based on sex in all programs and activities receiving federal funds. 34 C.F.R. Section 106.41 deals specifically with athletics. Under section 106.41(b), "where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try out for the team offered unless the sport involved is a contact sport. In this case, the plaintiff was unlikely to succeed on her Title IX claim as Title IX did not require school districts to allow

female students to participate in contact sports, and wrestling is defined as a contact sport.

The plaintiff's claim of deprivation of equal protection brought under 42 U.S.C. Section 1983 was based on the fact that the defendants sought to deny her the opportunity to participate in wrestling on the basis of gender. Gender based discrimination is permissible only where the discrimination is "substantially related" to the achievement of "important governmental objectives." *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 723, 102 S.Ct. 3331, 3336, 73 L.Ed.2d 1090 (1982). The defendants' reasons for their decision were safety, fear of sexual harassment litigation, potential disruption of the school setting, student and parent objections based on moral beliefs, and a variety of inconveniences, such as availability of locker room facilities. The court concluded that the rationales of parent objections and inconveniences did not constitute "important governmental objectives" in this case. School districts are not subject to every parental complaint, nor is it the duty of schools to shield students from every situation they may find objectionable or embarrassing due to their own prejudices. While the court agrees that student safety is an important governmental objective, there is no evidence to support the claim that the plaintiff's safety is at a greater risk simply because of her gender. Preventing sexual harassment is also a government objective; however, there is no reason to suspect that girls would be likely to mistake the contact that is inherent in the sport of wrestling for sexual harassment. The court also found that the defendants' actions were not substantially related to the goal of avoiding school disruptions. The plaintiff

wrestled at her junior high the year previous and there were no such disruptions. These findings show that the plaintiff is likely to succeed on the merits of her Section 1983 claim based on equal protection. A deprivation of a constitutional right is in and of itself irreparable harm, so the plaintiff would succeed in that portion of her injunctive relief motion. The only hardship the defendants alleged relate to accommodating a female wrestler's need for a place to change and possible differences in coaching techniques. These problems had been overcome the previous year and could likely be solved again. Therefore, it was found that a preliminary injunction imposing minimal hardships to the defendants would be outweighed by the irreparable injury that the plaintiff would suffer if not allowed to participate. Finally, the court found that the public interest would best be served by enjoining the defendants from infringing on the plaintiff's right to equal protection. The court granted the motion for preliminary injunctive relief and the defendants were enjoined from denying the plaintiff the opportunity to participate in wrestling based on gender.

Courts must consider all factors when determining whether preliminary injunction should be issued. In this case, Adams was able to establish that she would prevail on merits, as prohibiting her from wrestling based solely on gender does not impose upon important governmental objectives. To deny preliminary injunction would have caused irreparable injury in the denial of constitutional rights as well as causing a loss of practice time and competitive opportunities. It was highly unlikely that the defendant would suffer any damage because of the injunction and the public

interest favors granting an injunction as the public as a whole has an interest in protecting constitutional rights.

Chapter 4

Equal Opportunity Issues

Ten of the thirteen published cases in this chapter deal with the rights of students with disabilities. The Individuals with Disabilities Education Act (IDEA), along with related state laws and other federal and state regulations provide the legal framework for educating students with disabilities. A "basic mandate of IDEA is that all children with disabilities must receive a free, appropriate public education (FAPE)" (Imber & Van Geel, 2004, p. 262). Courts will often rely on the decision in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 189-90, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982) to determine if a school district has met its requirement to provide a FAPE to a student.

The bulk of special education cases in Kansas are made up of challenges to the Individualized Education Program (IEP) of a student. According to *Rowley,* an IEP must provide some educational benefit in order to be supported by the courts. School districts must make placement decisions based on the input of the IEP team with parental involvement. At an IEP meeting, parents must be provided with their rights, which include the procedures to follow in order to challenge an IEP.

When challenging an IEP, The Education of the Handicapped Act, 20 U.S.C. Section 1415 mandates that parents are first provided with an impartial hearing to air their grievances. If the results of the hearing are not to the satisfaction of the parent or school district, then an appeal can be made to the state department of education. If either party does not agree with the decision of the state department, then an appeal

may be taken to either state or federal courts. So long as administrative relief is available and pursuit of such relief is not futile, these administrative remedies must be taken before a case will be heard by the courts.

Kansas courts, in keeping with *Rowley*, have held that FAPE does not require the school maximize the potential of handicapped children by giving them the exact same opportunities provided to other children. So long as it can be shown that a child is receiving *some* educational benefit, the courts will support the IEP. In challenging an IEP, the burden of proof rests with the party opposing the IEP. The opposing party must show why the educational setting established by the IEP team is not appropriate. Parents do not have the right to compel a school district to provide a specific program or methodology and courts have consistently left those decisions up to schools. School districts need only show they are providing an appropriate education for a child, it need not be the one preferred by parents.

Bailey v. Unified School District No. 345
664 P. 2d. 1379 (Kan. 1983)

Kenneth and Barbara Bailey, parents of a visually handicapped child disputed the decision by U.S.D. 345 to place their child at the Kansas State School for the Visually Handicapped (KSSVH). The school district believed this to be the child's appropriate placement. The parents wanted their son to continue his education in the local public school system. The Baileys were provided a due process hearing in which both parties presented their evidence. The hearing examiner upheld the school

district's decision to place the child at KSSVH. This decision was appealed to the State Board of Education, who, upon reviewing the 700-page transcript, upheld the decision of the hearing examiner. The Baileys appealed the State Board's decision to the district court. No additional evidence was presented to the district court and the district court upheld the decision of the State Board of Education finding the decision to be "supported adequately and fully" by the record. The Baileys appealed to the Supreme Court of Kansas.

Two issues were presented to the Court. The first dealt with the accusation that the district court erred in excluding additional evidence and the second related to whether the district court was incorrect in finding there was substantial evidence to support the Board's decision. The exclusion issue dealt with a situation in which the attorney for the Baileys filed a motion four days after oral arguments had been heard requesting they be allowed to submit additional evidence. They cited 20 U.S.C. Section 1415(e)(2) of the Education for All Handicapped Children Act of 1975 which provides "…the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party…" The district court denied this motion because "…no additional evidence was presented in the appeal before the State Board and no additional evidence was presented to this Court prior to the submission of this cause for decision. This Court's review is on the record, and further, the motion comes too late…" (p. 1381). The Supreme Court agreed with the district court's decision pointing out that "even on appeal we have no information as to the nature of such 'additional evidence' " (p. 1382). The Court interpreted the

"additional evidence" provision as applying to evidence offered at the time of the district court hearing. In deciding the issue of whether or not there was substantial evidence to support the district court's decision, the Supreme Court turned to the educational records that led to the determination by the school district that residential placement in the KSSVH was an appropriate educational program for the child. The records showed that the defendant school district had worked with the Bailey's for over ten years. During that time, the district had provided counseling services for the family, as well as special education services. The child was mainstreamed during junior high and provided with a one-on-one teacher to provide assistance during classes. The district worked closely with KSSVH, as well as the State Rehabilitation Center for the Blind, to provide the best program for his needs, which included emotional as well as visual disabilities. The school district consulted with various outside experts, considered numerous options, and finally determined that enrollment in a regular high school would not be an appropriate education for the child. After looking at these records, the Supreme Court concluded that the district court was correct in its decision of the State Board of Education was supported by substantial competent evidence. Judgment of the district court was affirmed.

The provision of 20 U.S.C. Section 1415(e)(2) which permits the presentation of additional evidence does not require the court to admit evidence which is offered following the actual court hearing.

Kansas Commission on Civil Rights v. Topeka Unified School District No. 501
755 P.2d 539 (Kan. 1988)

Prior to September 1985, five black students filed requests to transfer their elementary school enrollment from Linn Elementary to Avondale East Elementary. The school district denied their requests because they were requesting to transfer to a school having a higher minority race percentage than their home attendance area school. U.S.D. 501 based this decision on Board Policy No. 8025, Section V.C., which stated in relevant part that applications for transfer would only be approved for a minority race student requesting a transfer to a school which had a "lower minority race percentage than his/her home attendance area school." On September 5, 1985, five complaints were filed with the Kansas Commission on Civil Rights (KCCR) which alleged that U.S.D. 501 had denied the complainants their request for transfer on the basis of their race and in violation of the Kansas Act Against Discrimination, K.S.A. 44-1009(c)(3), which prohibited discrimination "in places of public accommodation." The KCCR served five subpoenas upon the school district and Mr. Gerry Miller, the Custodian of Student Records. U.S.D. 501 notified the KCCR that it would not comply with the subpoenas because the KCCR did not have jurisdiction under the Act to investigate the complaints. The KCCR filed an order to enforce the subpoenas with the district court. After a briefing and oral arguments by both parties, the district court denied enforcement of the subpoenas. The district court had based its decision on *Kansas Commission on Civil Rights v. Howard,* 218 Kan. 248, 544 P.2d 791 (1975) which was the KCCR's first attempt to expand its authority since a

1972 amendment to the Act. The *Howard* majority determined that the KCCR's jurisdiction was "clearly confined to the areas of public accommodation, housing, and employment" (p. 542). The district court further held that public schools and public school policies were not matters of "public accommodation" and were not within the scope of the KCCR's authority. The KCCR appealed this decision.

K.S.A. 44-1004 of the Kansas Act Against Discrimination bestowed specific powers on the KCCR. The Act provided in part that the commission would have the "functions, powers, and duties to receive, initiate, investigate, and pass upon complaints alleging discrimination in employment, public accommodations, and housing because of race, religion, color..." The Act was amended in 1972 but the specific powers granted to the KCCR were not changed. The KCCR requested that the court expand the powers and duties of the KCCR by determining that the definition of "unlawful discriminatory practice" found in K.S.A. 44-1009(c)(3) was "a legislative grant of additional jurisdiction" (p. 542). The court did not expand the KCCR's powers. Rather, it found that the Act was clear in defining the role of the KCCR. The court determined that its role was to decide if a public school was considered a place of "public accommodation." Section (h) of K.S.A. 44-1002 defines public accommodations and provides a list of 21 facilities given as examples of a public accommodation. All 21 were places of business offering "goods, services, facilities, and accommodations to the public" (p. 543). Public schools were not listed. The court determined that public schools were not places of public accommodation as provided by the Act. The court further added that "if the legislature had intended the

public schools to be included within the concept of 'public accommodations,' they would have specifically so stated" (p. 543). Schools could be considered a place of public accommodation when sponsoring an activity open to the general public, such as a basketball game. If the school then denied entrance to the game on the basis of race it would be within the authority of the KCCR to investigate allegations of wrongful discrimination. In this case, the alleged discrimination centered on a board policy which determined access to a specific school; a situation not within the scope of public accommodation. The decision of the district court was affirmed with the Kansas Supreme Court noting that "whether the scope of the Act should be broadened to cover the complaints of public school students who were denied the right to transfer to a school outside their attendance area is a matter for the legislature, not the courts" (p. 544).

Hayes Through Hayes v. Unified School District No. 377
877 F.2d 809 (10th Cir. 1989)

Before the beginning of the 1980-81 school year, Dennis and Sally Hayes were evaluated to determine if they were to be placed in the Personal/Social Adjustment Program (PSA Program) through the Educational Cooperative in USD 377. When it was found that they qualified for the program, their mother, Lucy Hayes, met with school personnel and signed a form agreeing to the placement. While in the PSA program that year, both Hayes children behaved in a disruptive manner and violated school rules. As a result of their behavior, the children were sometimes required to stay in a three-by-five foot time-out room. At no time did the

parents of the Hayes children request a hearing to institute a change in placement or to object to the use of the time-out room. Instead, the Hayes parents filed suit in district court alleging violations under 42 U.S.C. Section 1983 and Kansas state law. The district court granted the defendants' motion for summary judgment and held that the remedies provided for by the Education for All Handicapped Children Act (EHA) were not an exclusive means by which students could bring action. The plaintiffs appealed and the defendants cross-appealed, contending that the action should be dismissed because the plaintiffs did not exhaust their administrative remedies under the EHA.

The first task of the appellate court was to determine if the claims were properly before the court or if the plaintiffs were required to exhaust their administrative remedies under the EHA. The EHA in 20 U.S.C. Sections 1415(b)(2) and (c) provides procedures for parents or guardians to follow if they have a complaint regarding the educational placement of their children. Complaints are first brought to an impartial due process hearing. If the issue is not resolved at this hearing, an appeal may be taken to a state agency. If the matter is not resolved at the state hearing, the parents have the right to bring action in court. While the EHA is not the exclusive remedy available, if relief can be sought under the EHA, exhaustion of the Act's administrative remedies is necessary before action can be brought in court. In order to decide whether the plaintiffs in this case were required to exhaust their administrative remedies, the court had to determine if the disciplinary measures at issue were encompassed in the provision of a "free appropriate public education"

guaranteed by the Act. The plaintiffs argued that the disciplinary measures were not within the scope of the EHA and their claims constituted an independent due process challenge. The district court agreed, finding that because the disciplinary measures did not constitute a "change in placement" they were not the type of action protected by the EHA. The appellate court did not agree. While the time-out room did not constitute a change in placement, the appellate court did not believe that removed "the action from the purview of the Act" (p. 813). The EHA requires that parents and children be given "an opportunity to present complaints with respect to any matter relating to…the provision of a free appropriate public education." 20 U.S.C. Section 1415(b)(2). The appellate court found that the school's use of a time-out room was related to providing an appropriate public education for the Hayes children. The time-out room was used as a method of punishment and for short "cool-down" periods to ensure the safety of other students from disruptive behavior. The appellate court held that "the discipline of a child in the classroom, including short-term suspensions and time-out periods, is a matter that relates to the public education of a handicapped child and falls within the scope of the EHA" (p. 813). Because the disciplinary measures were found to be within the scope of the EHA, the plaintiffs were required to present their complaints concerning this disciplinary action according to the procedures set forth by the Act. Administrative remedies under the EHA must be exhausted before any judicial review is sought, unless adequate relief is not available or if "the pursuit of such relief would be futile" (p. 814). The court could find nothing in the record to indicate that administrative relief would be

inappropriate. The appellate court reversed and remanded to the district court with instructions to dismiss for lack of jurisdiction.

Hall v. Shawnee Mission School District (USD No. 512)
856 F. Supp. 1521 (D. Kan. 1994)

Michael Hall attended kindergarten in North Carolina where he received a special education assessment, and special education and related services. At that time, he had physical and behavioral problems, which included self-destructive behaviors. In 1988, the Halls moved into the Shawnee Mission School District and Michael was placed in the second grade. When enrolling his son, Mr. Hall requested special education services for Michael and provided the evaluations from North Carolina. Michael was evaluated by the district in September of 1988 and an IEP was prepared for him. During his second grade year, Michael was placed in a mainstream classroom and received two one-hour sessions each week of occupational therapy. He had ongoing behavioral problems at home and school, so his parents took him for an evaluation at the Children's Rehabilitation Unit at the University of Kansas Medical Center at their expense. The evaluation report stated that Michael could not work at an independent level in a mainstream classroom for longer than five minutes without certain behavioral components addressed. The Halls informed the District of the results of this independent evaluation, but Michael's placement was not changed at that time. During his third grade year, Michael continued to have problems in the mainstream classroom. In January of 1990, Michael's parents placed him in the

Crittenton Center for a 30-day residential evaluation. A psychiatrist, Judith Pfeffer, determined that Michael was a candidate for "continued residential treatment due to his need for a fully structured educational and home environment" (p. 1525). She also concluded that he would not be able to function if he was mainstreamed. After his release from Crittenton, Michael was placed back into the mainstream third grade classroom with some special services provided outside the classroom. After about four weeks, Michael was placed in the Crisis Intervention Diagnostic Classroom at the Corinth School in the Shawnee Mission School District for a six-week trial period. This change in placement came about as the result of an IEP meeting on March 1, 1990 and it was agreed to by the Halls. Michael remained at Corinth for the rest of the year. In April 1990, a team of doctors from KU Medical Center evaluated Michael's records at the request of the District in order to determine if the school district could meet his educational needs. The team concluded that the District was serving Michael's academic needs. Michael had made good academic progress and had few behavior problems at Corinth. Another IEP meeting was held on April 18, 1990, to discuss Michael's placement. Mr. Hall left the meeting because he believed Michael needed to be hospitalized and subsequently requested a due process hearing. The hearing was not held because another IEP meeting was held in May 1990, and the new IEP was acceptable to the Halls. Michael was placed at Corinth in a behavioral disorders classroom to begin the 1990-91 school year. The long-term goal being that he would gradually work his way back into the mainstream classroom. Mr. Hall again requested residential placement, but the District did not give his

recommendation serious consideration. During the fall of 1990, Michael's teachers reported that he was doing very well and by December, he was attending mainstream classes for the majority of the day. Michael's problems at home continued. The Halls sought assistance from the Kansas Department of Social and Rehabilitative Services (SRS) and a "child in need of care" petition was filed. The petition was granted and preparations were made to place Michael in a residential facility. On December 17, 1990, the Halls removed Michael from Corinth and placed him in the Gillis Center. Gillis was a full-time residential program where the student lives on campus full-time and attends school. In the fall of 1991, the Halls requested a due process hearing concerning the appropriate placement of Michael and sought reimbursement from the District for Michael's Gillis Center expenses. In March 1992, the hearing officer concluded that the evidence presented supported the school district's position that Michael had been provided with an education from which he benefitted. In August 1992, a review officer affirmed the decision of the hearing officer. The Halls next filed this lawsuit with the district court claiming that the school district had failed to provide Michael with an adequate educational benefit which caused them to place Michael in a residential facility at their own expense.

The court was required to make the following inquiries in making a determination of whether the school district was required to pay for residential placement: First, the court had to determine whether the district's IEP was reasonably calculated to provide an educational benefit for Michael. If the court determined that it was not so calculated, then the court must decide whether the Halls choice to place

Michael in the Gillis Center was the appropriate educational choice for Michael. If the answer to that question was "yes," then the Halls would be entitled to reimbursement. The court only considered the August 1990, IEP which placed Michael at Corinth as there were no unresolved objections to any previous IEP's. An IEP that is reasonably calculated to provide some educational benefit had to be likely to produce progress, not regression. However, a free appropriate public education (FAPE) does not require the state to "maximize the potential of handicapped children 'commiserate with the opportunity provided to other children.' " (The court here quoted *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176, 189-90, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Another goal of IDEA is the education of handicapped children in classrooms with non-handicapped children "to the maximum extent appropriate." 20 U.S.C. Section 1412(5). The school district, therefore, had an obligation to balance the goal of providing Michael with some educational benefit with the goal of providing an education in the least restrict environment. The record showed that Michael had been making very good progress at Corinth. His teachers reported that he was performing approximately on grade level in all subjects and had very minor behavior problems. His parents reported that his problems at home were severe. Dr. Pfeffer believed that things had gotten so bad at home that residential placement was necessary. Based on the record before them, the court concluded that Michael was receiving an educational benefit from his placement in the school district. The court further held that Michael's parents had presented no evidence from which the court could conclude that a

residential placement was necessary from an academic standpoint. The Halls had not met their burden of proof to show that the district failed to offer Michael FAPE or that his August 1990, IEP was not reasonably calculated to provide him some educational benefit. The court further noted that, although the Halls may have had the opinion that a residential placement was best for Michael, such a placement was not mandated by IDEA and in fact may have been more restrictive than the district could legally choose. Placing a student who was performing well at school in a residential facility could have caused the school district to "run afoul" of the IDEA's least restrictive environment requirement. Judgment was made in favor of the school district and all of the Hall's claims were dismissed.

Fowler v. Unified School District No. 259, Sedgwick County, Kansas
128 F.3d 1431 (10th Cir. 1997)

Michael Fowler was a deaf twelve-year-old boy who qualified as a child with a disability under the Individuals with Disabilities Education Act, 20 U.S.C. Section 1400-1420 (IDEA). While in public school, he was provided with interpretive services. After four years in the public school system, Michael's parents voluntarily placed him in a private school. They requested that the District provide interpretive services for Michael, but the District denied their request. The Fowler's appealed to the district court which held that the District must pay for the entire cost of Michael's services. On appeal from that decision, the Court of Appeals, 107 F.3d 797 (1997), reversed and found that the District was required to at least pay for part of the sign

language services, and remanded for factual findings. On grant of certiorari, the Supreme Court, 521 U.S. 1115, 117 S.Ct. 2503, 138 L.Ed.2d 1008 (1997), vacated the appellate court's decision and remanded for consideration in light of amendments to IDEA.

IDEA provides federal funds to states that are then given to local educational agencies to assist in educating students with disabilities. One area of contention has been the extent to which children whose parents choose to place them in a private school may participate in special education programs and receive services pursuant to the Act, and what obligation the public school district has to pay for those services. The IDEA was amended in 1997 and addressed the issue of children enrolled in private schools in stating that the "amounts expended for the provision of services by a local educational agency shall be equal to a proportionate amount of Federal funds available." The Act also provided that, in general, a local educational agency would not be required to pay for the cost of special education and/or related services for a child with a disability at a private school if the local agency had made a free appropriate public education (FAPE) available to the child and the parents chose to place the child in the private school or facility. These changes were to take effect on June 4, 1997. The Court of Appeals held that their prior interpretation of the pre-Amendment IDEA applied to the parties with respect to conduct prior to June 4, 1997. The school district was obligated to pay for Michael's interpreter services at an amount up to, but not more than, the average cost to provide that same service in the public school setting. From June 4 onward, the Amendments applied. The court

interpreted this as meaning that the local educational agency's only obligation was to spend a proportionate amount of the Federal funds that they received to provide services for students attending private schools, as long as the local agency had offered FAPE to a child whose parents then voluntarily placed him in a private school. The court went on to state that the Act did not make it clear whether an equal share of Federal funds had to be allocated for each disabled child enrolled in a private school or whether the proportionate amount was to be allocated for disabled private students collectively. It was also not clear whether the local educational agency had discretion as to whether it had to spend a proportionate share on all disabled students in a private school or if it could choose which services to provide to which students. The court hoped that the "Department of Education's final regulations will provide some guidance" (p. 1437). In the mean time, the issue was remanded to the district court to determine the school district's financial obligation to Michael after June 4, 1997. The court held that "further fact finding" was required to determine Michael's share of the "proportionate amount."

The court next considered whether the IDEA Amendments affected their previous analysis of Kansas law. Kansas Stat. Ann. Section 72-5393 provides that "any school district which provides auxiliary school services to pupils attending its schools shall provide on an equal basis the same auxiliary school services to every pupil, whose parent or guardian makes a request therefore, residing in the school district and attending a private, nonprofit elementary or secondary school whether such school is located within or outside the school district..." The Amendments to

IDEA made it clear that states did not need to spend their own money to provide special education services to voluntarily placed private school students. Again, their only obligation was to make available to such students a proportionate amount of their Federal funds. However, nothing prevents a state from providing more from their funds. The court rejected the argument that it was inconsistent with the 1997 Amendments for Kansas law to provide more for disabled private students that was its obligation under IDEA. The Court of Appeals held that, "under Kansas law" Michael was entitled to an interpreter on site at his private school at a cost "no greater than the average cost of providing hearing-impaired students with interpretive services at public schools" (p. 1439). The case was reversed and remanded to the district court for further proceedings. The court also held that the Fowler's were entitled to reasonable attorney's fees as they were deemed the prevailing party in the case.

Logue v. Shawnee Mission Public School District No. 512
959 F. Supp. 1338 (D. Kan. 1997)

Noah Logue was diagnosed with severe hearing loss as a very young child. In 1991, he was placed in a "total communication" preschool at Children's Mercy Hospital in Kansas City, Missouri. At the time of this case, there were two major competing methodologies for teaching hearing impaired students. The goal of the "total communication" method was to help students reach required academic levels by utilizing both speech and sign language. The goal of the second method, "oral communication," was to help students acquire intelligible speech. This method

forbade any use of sign language and insisted that the child use all verbal communication. The Logues moved to the Shawnee Mission School District in September of 1991 and Noah was referred to the District's hearing-impaired preschool. On September 16, 1991, the District held a meeting to develop Noah's IEP. Noah's parents participated in the meeting and consented to place Noah in a self-contained hearing-impaired preschool that utilized the total communication method. Annual IEP's were held in October of 1991, 1992, and 1993, which produced similar IEP's for Noah all using the total communications approach, which his parents did not challenge. During this time, Noah's vocabulary increased and his speech and articulation improved. In June of 1994, the Logues took Noah for testing at the Central Institute for the Deaf (CID) in St. Louis, Missouri. The CID was a private facility that utilized the oral communications method. After completing their testing, the CID recommended that Noah be placed in full-time special education as a hearing-impaired child with other children of his age and ability. The CID also determined that Noah would require "intensive instruction in an oral program focusing on the development of auditory skills, lip reading, and speech" (p. 1345). The Logues met with Mary Conlan, the District Director of Special Education, and gave her a copy of the CID's report. They informed her that they wanted a program for Noah that focused on the development of oral language rather than total communication. The District did not have an oral communications program and Conlan advised the Logues that their request would need to be discussed at an IEP meeting. On August 16, 1994, an IEP meeting was held with the Logues, Conlan, the

school psychologist, Noah's hearing-impaired kindergarten teacher, the speech and language pathologist, and the school principal. The group discussed numerous options. In the end, the district proposed education in a self-contained hearing-impaired classroom; mainstream time in a regular classroom for some subjects; and extensive time for speech, language, and auditory training. The Logues rejected the IEP team's proposal and notified the District that Noah would be enrolling in the CID for the 1994-95 school year. They requested another IEP meeting to come up with "a decision we can live with" and told the school that they would place Noah at the CID until the District developed an "appropriate oral program." On September 28, 1994, the District held another IEP meeting. In attendance were the same people as at the August meeting along with outside resource people, such as a social worker and Dr. Lynn Hayes of the University of Kansas Medical Center's Deaf Education program, who was familiar with both the oral and total communication methods. At that meeting, the District rejected the Logue's request for placement at the CID as being too restrictive for Noah. It did respond to their request for more training in oral speech by increasing Noah's time with the speech and language pathologist. The Logues did not agree to this program and began the due process procedure before a hearing officer. After an extensive hearing, the Kansas Special Education Due Process Hearing Officer found in favor of the school district. She found that the IEP's from August and September "clearly fulfilled all requirements of 34 CFR 300.346(a) and K.A.R. 91-12-14(f), and would give Noah an educational benefit that was likely to produce progress" (p. 1347). The Logues appealed this decision to the State Level

Review Officer who upheld the hearing officer's decision. The Logues next appealed to the district court alleging that: (1) the District failed to create an IEP that would afford Noah a free appropriate public education (FAPE); (2) the September IEP lacked the content required by 91 K.A.R. 91-12-41(f) and 34 C.F.R. 300.346 in that its statement of goals was too general and its statement of present levels of functioning were too broad; and (3) the IEP did not afford Noah the "educational benefits in accord with his abilities and capacities" as was required by K.S.A. 72-962.

In reviewing this case, the court pointed out that the burden of proof rests with the party opposing the IEP. It further noted that the Fifth Circuit Court of Appeals had stated that there was a "presumption in favor of the education placement established by an IEP and the party attacking should bear the burden of showing why the educational setting established by the IEP is not appropriate" citing *Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ.*, 790 F.2d 1153, 1158 (5th Cir.1986). With that in mind, the court first addressed the issue of the IEP's compliance with K.A.R. 91-12-41(f)(1)-(4), which requires that certain items be included in an IEP. K.A.R.91-12-41(f)(1) dealt with present levels of performance and required that an IEP contain a statement of the child's present level of educational performance. Noah's IEP included appropriate information regarding his educational performance. The court did not find these descriptions to be "too broad," as the Logues claimed, and held that the law did not require any more specific statement of his present levels of performance. Noah had been evaluated and assessed on numerous areas related to his disability, intelligence, and development. The court could find no evidence that

the District failed to meet any requirements regarding assessments or present levels of functioning as required by K.A.R. 91-12-41(f)(1) or 34 C.F.R. 300-324(a)(1). Noah's IEP had six annual goals which described the educational performance expected for Noah within a year's time. The Logues argued that the goals were too general, but the court disagreed finding that the IEP met the requirements of K.A.R. 91-12-41(f)(2). Information dealing with short term objectives as required by K.A.R. 91-12-41(f)(3)-(4) was also included in Noah's IEP. The objective criteria were stated and the evaluation procedure was duly noted. Again, the court found that the IEP met the required regulations. Next, the court addressed the Logue's claim that the September IEP denied Noah educational benefits in accordance with his abilities and capacities. The court in reviewing the record, found that Noah had been progressing in his Shawnee Mission program and that further progress could have been expected under the proposed plan. Two of the Logue's own witnesses had testified that the proposed IEP would have afforded Noah some educational benefit. This meant that the IEP met the substance requirement of the IDEA. The Logues argued that the State of Kansas had set higher standards than were required by federal law in K.S.A. 72-962(f)(2). The court found that this statute did not bind the State of Kansas "to anything at all" (p. 1350). K.S.A. 72-962(f)(2) simply defines "exceptional children" and the definition does not require public schools to provide any specific level of educational services. It is K.S.A. 72-966(a) which requires each school district to provide "special education services for all exceptional children" who reside in the state. K.S.A. 72-963(h) defines special education services as "programs for which

specialized training, instruction, programming techniques, facilities, and equipment may be needed for the education of exceptional children." The Logues could not provide any "hard evidence" to show that the legislature intended to impose a higher standard than required by IDEA. They also could not establish that the education offered to Noah by the school district in 1994 violated the Special Education For Exceptional Children Act, K.S.A. 72-961 *et seq.* in any way. The court concluded by holding that the IEP proposed by the school district in September was "reasonably calculated to provide Noah an educational benefit..." (p. 1350). The court also noted that the record showed the Logues to be responsible parents who advocated for Noah. The sticking point, in the court's opinion, was that the Logues and the District were opposed on the appropriate method of providing the best education to Noah. The Logues favored the "oral communications" method while the District utilized the "total communications" method. In citing *Lachman v. Illinois Bd. of Educ.,* 852 F.2d 290 (7th Cir.1988), the court stated that "parents - no matter how well motivated - do not have a right under IDEA to compel the school district to provide a specific program or employ a specific methodology for the education of their disabled child." *Id.* At 297. The issue was not whether the CID offered a better program, but whether the District offered an appropriate one - which the court found it had. Judgment was granted in favor of the school district.

Joshua W. v. Board of Education of Wichita Public Schools U.S.D. No. 259
13 F. Supp. 2d 1199 (D. Kan. 1998)

Joshua W. and his parents lived in Wichita where he attended public schools until approximately January 27, 1995. Joshua was identified as behaviorally disordered and was provided special education services under IDEA during the time he attended Wichita public schools. In November of 1994, the school district revised Joshua's IEP and called for his placement in a special day school. He was transferred to Sowers Alternative School, which offered services to behaviorally-disordered students. While at Sowers, Joshua was confined as a juvenile offender at the Sedgwick County Youth Residence Hall (YRH) on separate occasions. During his confinement, he received services from the school district. On January 27, 1995, Joshua left YRH, did not return to Sowers, and quit attending classes in the District. After this date, Joshua lived in a number of locations and spent time at juvenile and substance abuse facilities. On March 1, 1995, Joshua's mother, Anita O., changed her address to a home outside the U.S.D. 259 boundaries. In September of 1995, Joshua was authorized to attend Kemper Military Academy in Boonville, Missouri while he awaited sentencing on an aggravated criminal assault charge. He was expelled from Kemper in October 1995 for violating the school's code of conduct. On November 4, 1995, Anita O. completed an enrollment form for Joshua to attend Three Springs Outdoor Therapeutic Program in Centerville, Tennessee. On November 17, 1995, she contacted the District Office of Special Education for U.S.D. 259 to discuss Joshua's re-entry into the District. Robert Coleman, the principal of Sowers, told Anita O. that

she should enroll Joshua at Sowers since that was his last placement under the IEP. Joshua was then enrolled at Sowers although he was still attending Kemper. On November 20, 1995, Anita O. met with Coleman, the school psychologist, social worker, and guidance counselor. She signed release forms so the staff could obtain information about Joshua since he last attended Sowers. Coleman told Anita O. that, pursuant to the IEP, Joshua would attend Sowers until the school received additional information on Joshua and developed a revised IEP. Anita O. did not inform the District that she had moved into a different attendance area, nor did she tell them that she had been trying to enroll Joshua at Three Springs in Tennessee. That same day, Joshua was sentenced in Saline County Court to an 18-month prison term. Instead of prison, the court put Joshua on probation for 24 months and required that he enter and complete the program at Three Springs. On November 21, 1995, Anita O. and Joshua flew to Tennessee and Joshua was placed at Three Springs. The District staff tried to contact Anita O. to discover Joshua's whereabouts but she did not return their phone calls. On December 4, 1995, her attorney wrote to notify the District that she was beginning an administrative claim. An administrative hearing officer found that since Joshua was not a residence of the District on November 20, 1995 the District was not financially responsible for his placement. Anita O. appealed the decision, which was affirmed by a state review officer appointed by the Kansas State Board of Education on December 31, 1996. Action was then brought to the district court under the IDEA, 20 U.S.C. Section 1400 *et seq.* against the Wichita School District as well as the

Kansas Board of Education and the Commissioner of Education, Dr. Andy Tompkins. The defendants moved for summary judgment.

The main issue addressed by the court was the IDEA claim by the plaintiffs against the District. A school district's obligation to enroll a student turns upon residency. K.S.A. 72-1046(a) provides a right to attend school in a district based on residence. A child may attend school in a specific district if the child lives with a "resident of the district and that resident is a parent, or a person acting as parent of the child." In this case, Joshua was not entitled to services from the District because he was not living in the District in November 1995, and he was not living with a parent or person acting as a parent in the District. Both of Joshua's parents had moved out of the Wichita School District. Anita O.'s action of moving to Tennessee prevented the District from reviewing Joshua's status and writing a new IEP. *Fagan v. District of Columbia*, 817 F.Supp. 161, 164 (D.D.C.1993), found that if a "parent's acts frustrate the decision making process, the parent may be estopped from relief under the IDEA." *Id.* at 164. When Anita O. contacted the District in November of 1995, she had already worked to have Joshua placed at Three Springs in Tennessee and mentioned none of this to District staff. She acknowledged that the District staff had told her they would need to further evaluate Joshua before they made a final placement decision. When staff asked where Joshua was living, she gave them an address on South Sheridan, even though she knew he was at a military school in Missouri and would be going to Tennessee immediately after her meeting with them. The court found that Anita O.'s actions had not been prompted by a sincere effort to

get a final placement decision from the District, rather she was attempting to "manipulate the District into funding a placement upon which she had already resolved" (p. 1204). The court found the defendants were qualifiedly immune with respect to the section 504 and 42 U.S.C. Section 1983 claims. Accordingly, the motions for summary judgment were granted.

O'Toole By and Through O'Toole v. Olathe District Schools Unified School District No. 233
144 F.3d 692 (10th Cir. 1998)

Molly O'Toole entered the Olathe school district's hearing-impaired program located at Scarborough Elementary School (SEC) in the fall of 1988. While in attendance at SEC, an individualized educational program (IEP) was developed for Molly. During the 1991-92 school year, Molly was in both a regular and a resource classroom. This case involves the adequacy of the IEP that was developed in February of 1993 and then amended in August of 1993. The IEP team, which developed the February IEP, consisted of Kevin O'Toole, Molly's father, Kathy Fulgham, Molly's stepmother, and a multi-disciplinary group of SEC personnel. During the months following the February IEP meeting, Molly's parents received regular reports on her progress. Mr. O'Toole also kept in close contact with Molly's teachers. In June of 1993, Mr. O'Toole had Molly evaluated at the Central Institute for the Deaf (CID), located in St. Louis, Missouri. The CID report recommended that Molly be provided full-time special education as a hearing-impaired child with children of similar age and ability. They believed that placement in a regular

classroom was not appropriate. The report also required that Molly receive intensive, individualized instruction by teachers experienced with hearing-impaired students. In July 1993, Molly was accepted as a full-time residential student at the CID. Mr. O'Toole inquired about reimbursement from the Olathe district for tuition and/or other expenses incurred at the CID and was told that while tuition reimbursement was not available, the district would check on reimbursement for expenses. O'Toole then requested an IEP meeting in late August. Most of the same IEP team members were in attendance at the August 1993 meeting. Various changes were made to Molly's IEP based on the CID's recommendations, and at the end of the meeting, all members of the IEP team, except the O'Toole's, agreed that Molly should remain at SEC. Mr. O'Toole disagreed and signed a form terminating the District's services to Molly. Molly was subsequently enrolled at the CID school. Sometime after the August meeting, Mr. O'Toole was notified by the District that his request for reimbursement for CID expenses was denied. O'Toole then requested a due process hearing regarding Molly's placement at the CID. A thirteen-day hearing took place, at the end of which the hearing officer found in favor of the school district. The O'Toole's appealed the hearing officer's decision to a reviewing officer appointed by the state board of education. The O'Toole's requested the opportunity to present more evidence, but their request was denied by the reviewing officer who determined that additional evidence was not necessary. The reviewing officer affirmed the hearing officer's decision on all but three issues. On those issues, the reviewing officer found that the annual goals and objectives, description of related services, and statement of

present levels of functioning found in the February and August IEP's failed to meet the procedural requirements of Kansas law and the IDEA. The reviewing officer remanded the matter for a determination of whether the O'Toole's were due the relief of requiring that the District comply with all procedural requirements when developing any future IEP's. The O'Toole's next requested a review in district court and the school district cross-appealed challenging the reviewing officer's decision concerning the IEP's compliance with state law. In *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233,* 963 F.Supp. 1000 (D.Kan. 1997), the district court granted the school district's motion for summary judgment, holding that: (1) Kan. Stat. Ann. Section 72-962(f) did not establish a higher educational standard than the IDEA; (2) Molly's IEP provided an adequate statement of her performance levels; (3) the IEP set adequate annual goals; (4) the IEP set adequate short-term instructional objectives and progress monitoring procedures; (5) the IEP contained an adequate statement of related services; (6) the school district had complied with IDEA procedures. The district court also denied the O'Toole's motion for an enlargement of time to file a formal written request to present additional evidence because their counsel had not filed the motion prior to the expiration of the time for discovery and had failed to provide justification for his late filing. The O'Toole's appealed this decision arguing that: (1) Kansas had adopted a higher educational standard than the IDEA; (2) Molly's IEP was not adequate; (3) the district court erred in not allowing them to show additional evidence; (4) the exclusion of evidence which related to the impact teaching sign language in a hearing impaired program denied a free appropriate

public education (FAPE) and violated the IDEA's due process requirements; and (5) the exclusion of additional evidence violated IDEA.

The first issue addressed by the appellate court was whether Kansas had a higher educational standard than the IDEA. In 1993, when Molly's IEP's were written, K.S.A. 72-962(f)(2) defined exceptional children and provided that special education services were necessary "to enable them to progress toward the maximum of their abilities or capacities." The O'Toole's argued that this meant Kansas obligated schools to provide special education services that would maximize each child's potential. The court disagreed with this pointing to *Logue v. Shawnee Mission Pub. Sch. Unified Sch. Dist. No. 512,* 959 F.Supp. 1338 (D.Kan. 1997) in which the court stated, in rejecting a similar argument, that K.S.A. 72-962(f)(2) "does not -by its terms-bind the State of Kansas to anything at all," it simply defines "exceptional children" *Id.* at 1350. K.S.A. 72-966(a) is the statute that obligates school districts to provide special education services for all exceptional children who are residents of the school district. The court found no clear indication from any of the "relevant statutes" that a standard had been adopted which required Kansas schools to provide educational services to exceptional children at a higher level than required by IDEA. The second issue addressed was the adequacy of Molly's IEP. The court sought to discover if the school district complied with IDEA procedures, including whether the IEP conformed with the requirements of the Act. The court here agreed with the Third Circuit that stated the "measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date..." (p. 701).

However, a school district cannot ignore the fact that an IEP is failing, nor can it continue to implement the same IEP year after year, if it fails to provide educational benefits to a student. Kansas regulations, found in Kan. Admin. Regs. 91-12-41(f), specify in detail what an IEP must contain. Federal regulations echo the statutory requirements for an IEP, 20 U.S.C. Section 1401(a)(20); 34 C.F.R. Section 300.346(a), but Appendix C to part 300 of these regulations provides more detailed requirements. After reviewing these requirements, the appellate court stated that while it agreed with the reviewing officer that the IEP did not clearly convey Molly's present levels of performance, it did refer to a specialist's report which provided more detail. The court also opined that there was "no doubt" that Molly's parents and teachers were well aware of her levels of educational performance and discussed them in order to formulate her IEPs. Therefore, the court concluded that the statement of present levels of performance in the IEP's did not violate the procedural requirements of the IDEA and Kansas law. After looking at the annual goals and short-term objectives found in Molly's IEP's, the appellate court agreed with the district court's ruling that they complied with the procedural requirements of the IDEA and Kansas law. As had been noted by the district court, "there is no legal authority requiring a particular level of specificity in the statement of annual goals" (p. 706). Although some of the goals were general, other clearly conveyed specific goals. A FAPE under the IDEA also includes related services, if necessary. As the O'Toole's questioned the IEP's adequacy in this area and the reviewing officer had found it lacking, it was next addressed by the court. Molly's IEP had stated that she

would receive speech/language services, transportation services, a screening by an occupational therapist, school social work services, school counseling, an inclusion facilitator, an annual audiology report, and consult with a behavior specialist "as appropriate." The appellate court agreed with the reviewing officer that the term "as appropriate" failed to adequately specify the level of related services the school was committed to provide. However, the court also found that the record supported the hearing officer and the district court's findings that Molly had never been denied any related service requested by her parents. While the court believed the school district should have specified the level at which related services would be provided, it did not find that these "technical irregularities" violated Kansas law or the IDEA. Next, the court addressed whether the IEP was reasonably calculated to provide a FAPE and whether Molly received any educational benefits. While her progress was not steady in all areas, it was shown that she had made some progress during the 1993 school year. The court found that the record supported the finding, made by the hearing officer, reviewing officer and the district court, that Molly's parents had been in constant contact with her teachers and were aware at all times of her progress at school. In addition, the court believed that the August IEP was a "real attempt" by the school district to respond to the O'Toole's concerns. Since the O'Toole's pulled Molly out of the District in August, there was no way to assess whether the modifications to the IEP had an impact on her learning. The fact that she made progress at the CID did not mean that the CID was the only appropriate placement for Molly. An "appropriate education required by the Act is not one which is guaranteed

to maximize the child's potential" (quoting *Johnson v. Independent Sch. Dist. No. 4,* 921 F.2d 1022, 1025 (10th Cir.1990)). Therefore, the court held that the record supported the conclusion that Molly's IEPs were "reasonably calculated to confer educational benefit on her and she made sufficient progress toward achieving her IEP goals in the 1993 school year" (p. 708). Finally, the court turned toward the issue of the exclusion of evidence by the hearing officer and the district court. U.S.C. Section 1415(e)(2) provides that the district court in an IDEA case "shall receive the records of the administrative proceedings and shall hear additional evidence at the request of a party." However, the district court has discretion to determine if additional evidence is necessary. The district court had denied the motion for extra time to present additional evidence because it was not timely filed by counsel and no explanation was given as to why the evidence was not produced during the discovery period that had closed three months before the motion was filed. The appellate court found no abuse of discretion on the part of the district court. The court also found no error in the hearing officer's decision not to permit the introduction of evidence as to whether the methodology of teaching sign language to a hearing-impaired child was better than that of spoken language. Finding that methodology was "precisely the kind of issue which is properly resolved by local educators and experts," the court held that as the IDEA had not been violated, it would not find error in the refusal of the hearing officer to "engage in a dispute about methodology" (p. 709). The judgment of the district court was affirmed.

Eads ex rel. Eads vs. Unified School District No. 289, Franklin County
184 F. Supp. 2d 1122 (D. Kan. 2002)

This action was brought on behalf of Rachel Eads, a seventh grader with juvenile diabetes. The plaintiffs alleged that the school district defendants failed to recognize that Rachel was a handicapped student and accommodate her accordingly. In September of 1997, Rachel was diagnosed with diabetes. In October of 1997, the school nurse prepared an "Individual Health Care Plan" for Rachel Eads that addressed the health care needs necessary for managing Rachel's illness. When she was at school, Rachel would go to the nurse's office to check her blood sugar levels and administer her own insulin shots. This required her to leave some classes early and arrive late to others. Rachel only attended fourteen school days in the first quarter of school that year. In December of 1997, Rachel's parents requested a Section 504 Plan of Accommodation for her. In it, they requested the modification of assignments and tests so that Rachel's grades for the first and second quarters would be based on the work she had completed up to that point as she was still working on missing work due to her frequent absences. Her parents also requested a modification to her physical education classes in that she would not have to write reports for missed activities. The proposal letter also requested medical accommodations that complied with those already written by the school nurse. The 504 committee met and decided on a plan, which they discussed with Rachel's parents in January of 1998, and all parties signed. On February 16, 1998, the Eads withdrew Rachel from Wellsville Junior/Senior High School for home schooling. They also contacted the

superintendent and requested a Due Process Hearing. The hearing was held in March and the Hearing Officer issued a decision that denied the Eads' request to pay for tuition and transportation for Rachel to attend a different school district. The Hearing officer concluded that the District failed to properly implement the provisions of Section 504 by not promptly convening the 504 committee to evaluate Rachel's diabetic absences whether her parents had requested a plan or not. The Officer also concluded that the 504 committee should have provided individualized accommodations regarding the school attendance policy for Rachel and not have allowed individual teachers to develop and interpret the necessary accommodations. The Officer found "no evidence that R.E. or her parents were discriminated against because of R.E.'s diabetes" (p. 1129). During the Due Process Hearing, Rachel's parents and the 504 committee developed an appropriate 504 accommodation plan that everyone agreed would meet Rachel's educational needs. The Hearing Officer found no evidence that the district would be unable to make the needed accommodations. In spite of this agreement, the Eads appealed the Hearing Officer's decision to the Board of Education which denied their appeal. The plaintiffs did not pursue any further administrative remedies and waited over nineteen months to file judicial action with the court. The case came before the court on the motion for summary judgment or dismissal filed by the defendants. The plaintiffs filed a motion to amend the pretrial order to include a claim for violation of the Family Educational Right to Privacy Act (FERPA) 20 U.S.C. Section 1232(g).

The amended final pretrial order described the plaintiffs' claims as being brought under the federal laws of IDEA and ADA. There was no mention of Section 504, FERPA, or the Civil Rights Act of 1871, 42 U.S.C. Section 1983 in the pretrial order. The burden to assure that the pretrial order accurately reflects the position of a party rests with that party and not the court. The amendment of a pretrial order will only be permitted if it would "prevent manifest injustice." Fed R. Civ. P. 16(e). The plaintiffs never included allegations of FERPA violations in their complaint or the pretrial order. To allow them to add a FERPA claim would create prejudice to the defendants that would be "real and substantial." The court found no reason to believe that the defendants had conducted any discovery relevant to the FERPA claim and it stated, "the time for discovery has expired long ago" (p. 1130). Thus, the court found that the plaintiffs had not carried their burden of proving manifest injustice without the amendment to the pretrial order; their motion was denied.

IDEA is an education statute that provides for children with disabilities to have access to a free appropriate public education (FAPE) that emphasizes the services needed to meet their unique needs. Through IDEA, federal funds are distributed to states for the education of children with disabilities. To receive these funds, states "must establish and maintain procedures...to ensure that children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of" FAPE. 20 U.S.C. Section 1415(a). IDEA specifies what procedures must be established and these include the steps to be followed if a complaint is to be filed regarding any matter relating to providing services to an identified child. 20

U.S.C. Section 1415(f)(1) provides that "upon filing a complaint, the parents are entitled to an impartial due process hearing to be conducted by the state or local educational agency. Then, if the local agency holds the hearing, the parent may appeal to the state educational agency "which must "conduct an impartial review." 20 U.S.C. Section 1415(g). Judicial review can then be sought if the party finds the decision of the state educational agency to be unjust. In Kansas, K.S.A. Section 72-961 *et seq.*, the due process is conducted at the local level by a hearing officer, with the right to appeal to the state board of education. The appeal to the state is made by an appointed review officer. The decision of the state board's review officer is then subject to judicial review. In the case at hand, the court found that, as the plaintiffs had not appealed any local agency decision to the state educational agency, they had failed to exhaust all of their administrative remedies. Unless the plaintiffs could establish an exception to the exhaustion requirement, the court had no jurisdiction to review the case. Plaintiffs argued that exhaustion was not necessary because the monetary relief they sought could not be awarded administratively. The court disagreed finding that the plaintiffs not only sought monetary damages "but are also pursuing claims for injunctive or non-monetary relief based on the defendants' alleged failure to provide Rachel Eads with a free appropriate public education and other accommodations required by law." The court also pointed out that a review of other court decisions showed that even if the plaintiffs were only seeking monetary damages, they still must exhaust administrative remedies. The court went on to state that "the plaintiffs' allegations almost exclusively deal with Rachel's educational

needs and the defendants' failure to meet them" (p. 1137). As the alleged injuries were almost exclusively educational in nature, they would be addressed through IDEA's administrative procedures. Accordingly, the court dismissed the case for lack of jurisdiction pursuant to 20 U.S.C. Section 1415(l).

Johnson ex rel. Johnson v. Olathe District Schools Unified School District No. 233
316 F. Supp. 2d 960 (D. Kan. 2003)

This case involves the parents of an autistic child, Ben Johnson, who sued the school district claiming violations of the Individuals with Disabilities Act (IDEA). Their son, Ben, had attended school in the Olathe School district since preschool. Up until the 5th grade, Ben was placed in the regular classroom. Beginning in the 5th grade, Ben spent most of his school day in a one-on-one placement. At the end of Ben's 6th grade year, the Johnsons met with school district staff for Ben's annual IEP team meeting. The Johnsons did not agree with the placement options discussed, which included extended school year services. They wanted Ben placed in a home program. On May 30, 2000, the Johnsons withdrew Ben from the Olathe Schools. The IEP team met again with Ben's parents in July 2000 to develop a plan for summer and fall placement. The IEP team considered home placement but concluded that the most appropriate placement for Ben would be at Pioneer Trail Junior High's (PTJH) Lifeskills classroom. After that meeting, the Johnsons requested a due process hearing to present their complaints against the school district. In early September 2000, Dr. Barone, the school district's applied behavioral analysis consultant, and

Katie Cook, the autism consultant, visited the Johnson's home. They concluded that the home program was not the most appropriate placement for Ben. The due process complaint was settled in December 2000. Ben's parents agreed to enroll him at PTJH and have him placed in the Lifeskills classroom per his November 2000 IEP. The November IEP also included a plan to help Ben transition from home school to attendance at PTJH as he would only attend school for two hours in the afternoon. Time at school would gradually be increased over subsequent weeks. This transition plan would be adjusted as needed based on Ben's success at PTJH. Ben was educated at home almost exclusively until December 28. To address Ben's behavior, his parents used a technique called "redirection." They decided to use "planned ignoring" beginning in December 2000. Ben started at PTJH on January 2, 2001. The school used both redirection and planned ignoring in dealing with Ben's behaviors. The Johnsons and the IEP team met on January 12, 2001, and agreed to increase Ben's school day by 30 minutes each day. The parties met again on January 22 for another IEP meeting. The IEP team wanted to start Ben on some new academic programs and increase his academic day, but his parents rejected the proposal. Dr. Barone recommended exclusive use of redirection as a means to address Ben's behaviors based on data the school had been collecting. The Johnsons began to consult with Dr. Baer about possible recommendations to Ben's transition plan. The IEP team met again on January 31, 2001, to talk about Ben's progress at PTJH and revise his IEP. Ben's parents discussed Dr. Baer's recommendations and requested that the school provide services in their home in the morning, with his afternoon education occurring

at PTJH. The rest of the IEP team did not agree with this proposal. They wanted to increase Ben's time at PTJH. The Johnsons rejected the IEP team's recommendations. Four other IEP meetings took place in February and March. At these meetings, the Johnsons discussed their desire for the school to follow Dr. Baer's recommendations regarding the use of planned ignoring rather than redirection to deal with Ben's behavior at school and for Ben to receive his services at home before transitioning back to PTJH. On March 7, 2001, after both sides failed to reach an agreement on Ben's services, the Johnsons decided that they would not return Ben to PTJH. A due process hearing was held in March 2001. The due process hearing officer ruled in favor of the school district finding that: (1) the district had complied with the procedural requirements of IDEA in developing Ben's IEP; (2) the November and February IEPs placed Ben in the Least Restrictive Environment (LRE); and (3) the November and February IEPs were reasonably calculated to provide Ben with a free appropriate public education (FAPE). The plaintiffs appealed the ruling, but the state hearing officer affirmed the due process hearing officer's decision on March 12, 2002. The Johnsons next appealed to district court asserting a number of violations of IDEA.

In order to reach the conclusion that an IEP is invalid, it must be shown that there was some rational basis to believe the "procedural inadequacies compromised the student's right to an appropriate education, seriously hampered the parents' opportunity to participate in the formulation process, or caused a deprivation of educational benefits" (p. 964 citing *O'Toole v. Olathe Dist. Schs. Unified Sch. Dist. No. 233*, 144 F.3d 692, 698 (10th Cir. 1998)). It is up to the party attacking the IEP

to show why it is inadequate or did not provide educational benefits. The Johnsons alleged several violations of IEP all of which were addressed by the court. The first allegation by the plaintiffs was that the IEP team did not have the necessary team members because there was no special education or general education teacher present at the meetings. However, Katie Cook, who served as Ben's case manager and was responsible for implementing his IEP, was on the team. The Johnsons argued that because she had the title of case manager, and not special education teacher, she could not fill that role on the IEP team. The court disagreed, finding that as Cook filled the role of a special education teacher her title did not matter. The court also held that there was no need of a general education teacher on the IEP team. Although Ben was provided with a specially designed physical education program, a physical education teacher did not need to serve on the IEP team because Ben only attended school for two and one-half hours per day and did not attend general physical education classes. Another of the Johnsons allegations was that because the school district would not consider home placement, they failed to consider the full continuum of placements for Ben. The court again disagreed. The record showed that the IEP team considered, but rejected placing Ben in a general education classroom based on his needs. The team did consider home placement in other IEP meetings but did not believe it was a viable option for Ben. Their rejection of the Johnson's proposal for home placement did not mean the district had failed to consider all placement options. The court addressed numerous other procedural complaints by the plaintiffs and found in favor of the school district on each of them

because the evidence did not support their allegations. The big issue for the court to decide was whether the school district provided Ben with a FAPE. None of the claims of procedural defects in Ben's IEP were substantial enough to rise to the level of a deprivation of FAPE. The court determined that the "real basis of the plaintiffs' complaints centered on two issues: (1) plaintiffs wanted Ben placed at home; and, (2) plaintiffs believed that defendant should have utilized planned ignoring rather than redirection…" (p. 975). The court concluded that Ben's placement at PTJH did not deny him a FAPE. Previous court cases have held that parents do not have the right to compel a school district to provide a certain program or methodology for their children. Courts "will not second guess the decisions of authorities on educational methodology" (p. 975 citing *Board of Educ. of Hendrick Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 207, 102 S.Ct. 3034, 73 L.Ed.2d 690 (1982). Accordingly, the district court found in favor of the defendant school district.

D.L. v. Unified School District No. 497
392 F. 3d 1223 (10th Cir. 2004)

D.L, the mother of R.L. and J.L. enrolled her children in USD 497 in August 1997. R.L had autism and J.L. suffered from a milder learning disability. An anonymous informant told the district that the children were nonresidents in 1997 and again in November 1999. The district hired an investigator who found that the children were being driven from Kansas City, Kansas, outside the district, to Lawrence to attend school. The district wrote D.L. to notify her that the children

would not be permitted to return to school after January 13, 2000. Plaintiffs requested a due-process hearing under IDEA which the district denied. On January 23, 2000, the mother provided an affidavit of residency stating that R.L. was living with her in the district. The children were readmitted to school that day. However, in March 2000 the district again found out through an investigator that the children were commuting to school from Kansas City. The district had a nonresident admission policy under which nonresident students would be admitted upon completion of an application for nonresident admission if there was space available in the District's schools and if admission of the student would not require the District to hire additional staff. Autistic students were not able to obtain nonresident status because each autistic student was assigned his own paraprofessional. On April 18, 2000, the District sued D.L. and P.P., her cohabiting boyfriend, in Kansas state court, seeking damages as compensation for the cost of educating the children while they were nonresidents and an injunction prohibiting the children from attending District schools in the future. On September 5, 2000, D.L., P.P. and the children countered by filing suit in the United States District Court for the District of Kansas against the District, Dr. Eicher, the former director of special education, and members of the school board. They alleged that (1) the District had violated the IDEA by denying them the requested due process hearing and by expelling the children from January 13-January 24, 2000; (2) the District violated the ADA, the Rehabilitation Act, and the Fourteenth Amendment by discriminating against Plaintiffs because of their residence and disabilities; (3) the District violated FERPA by disclosing the

disabilities of the children in the state-court suit; and (4) the District violated Plaintiffs' common-law right to privacy by placing them under surveillance and making public statements about their residency. The plaintiffs sought a variety of forms of relief. The district court dismissed all of P.P.'s claims for lack of standing, dismissed claims against the school board members as being redundant, held that the plaintiffs had failed to state a claim under FERPA, and granted summary judgment in favor of Defendants on the ADA, Rehabilitation Act, Fourteenth Amendment, and invasion-of-privacy claims. The district court further held that Dr. Eicher enjoyed qualified immunity and granted summary judgment in his favor on all claims. Finally, the district court held that the plaintiffs had no right to recovery under IDEA claims, as there had been no substantial loss of educational benefits. The plaintiffs appealed the district court's judgment.

The first issue the court discussed was the conflict between the ongoing state court case and the district court decision. The Court of Appeals held that the district court should have stayed proceedings on the claims for damages and lacked jurisdiction to resolve many of the claims because of the pending state action. They based this holding on what is known as the *Younger* doctrine. See *Younger v. Harris,* 401 U.S. 37, 54, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971). Even when a federal court would otherwise have jurisdiction to hear a claim, the court may be obliged to abstain when a federal-court judgment would interfere with an ongoing state proceeding. Next, the court turned to the plaintiffs' contention that the school district's policy of nonresident-admission violated the ADA, the Rehabilitation Act, and their Fourteenth

Amendment right to travel. The court found that the district court lacked jurisdiction over these claims because each claim made an assertion that the children were entitled to receive an education from the District. If the federal court granted any type of relief to the plaintiffs, then it would have made the conclusion that the children were so entitled. If that were to occur, then there would be no merit to the state court suit in which the District sought reimbursement from D.L. and P.P. for the educational expenses of the children to which they, as nonresidents, were not entitled. Another complication in this case was that the parties listed on the state and federal lawsuits were not identical. Therefore, the court had to determine whether *Younger* barred the claims of J.L. and the Estate of R.L. who were not parties on the state case, as well as the claims against Dr. Eicher who was also not a party in the state case. The court relied on Supreme Court opinions in previous cases to guide them in their decision. As a result of this review of case precedent, the court determined that it was improper under *Younger* to "exercise federal jurisdiction over the claims of J.L. and the Estate of R.L.," (p. 1231), as well as those against Dr. Eicher, because of their close connection to the parties that had been named in the state-court suit.

The court did address the plaintiffs' claim that the District had violated IDEA when it refused the request for a due process hearing. This claim did not violate *Younger* because there was no assertion that the children had a right to the education received by the District, so the court's decision would not interfere with the state litigation. The court turned to *T.S. v. Ind. Sch. Dist. No. 54*, 265 F. 3d 1090 (10th Cir. 2001) in which it held that "for a claim based on the deprivation of [an IDEA] due

process hearing…to be cognizable, it must be linked with a consequent loss of substantive benefits." *Id.* At 1093. The plaintiffs in this case failed to allege any connection between the denial of the due-process hearing and any educational harm. As a result, the appellate court affirmed the district court's decision. The court also affirmed the district court's decision that P.P lacked standing to raise the only claim not barred by *Younger*. U.S. Const. art. III Section 2 requires that, in order for a federal court to hear a Case, the plaintiff is required to "show [that] (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injuries will be redressed by a favorable decision." P.P. failed to show a "redressable injury" with respect to the nonbarred IDEA claim.

The Court of Appeals affirmed the judgment with respect to the IDEA claim based on the alleged denial of a due process hearing, vacated the judgment as to all other claims raised in this appeal, and remanded for the district court to stay proceedings on claims for damages and dismiss the remaining vacated claims.

(On May 23, 2005, a petition for writ of certiori to the U.S. Court of Appeals for the Tenth Circuit was denied. *D.L. v. Unified School District No. 497*, 544 U.S. 1050, 161 L.Ed. 2d. 1090.)

D.L., et al., v. Unified School District No. 497, Douglas County
Not reported in F. Supp. 2d, 2008 WL 4148593 (D. Kan.)

This is a continuation of the previous *D.L.* case from 2004. The plaintiffs had brought suit against the school district in regards to the education of their children, J.L. and R.L. who received special education services. On April 18, 2000, the defendants sued the mother of J.L. and R.L. for fraud related to the autistic children attending school in the district despite not living within the district boundaries (the "state case). On September 29, 2000, the plaintiffs filed the present action asserting claims under IDEA, the Rehabilitation Act, the ADA, and Section 1983 for violation of due process and equal protection under the Fourteenth Amendment, and invasion of privacy under Kansas law. The district court granted summary judgment for the defendants and the plaintiffs appealed. In the Court of Appeals decision, the court affirmed in part and remanded in part for a lack of jurisdiction due to pending state court litigation and conflicts with the *Younger* doctrine. On March 7, 2006, the state case was dismissed on a motion by the defendants. As a result of that action, the district court lifted the stay on March 22, 2007. On October 3, 2007, the parties filed a Stipulation Regarding Status of Claims in which they agreed that the plaintiffs' claims under Section 504 of the Rehabilitation Act, the ADA, and Due Process and Equal Protection Clauses of the 14th Amendments remained for resolution by the district court.

The court first dismissed the Rehabilitation Act and ADA claims because the plaintiffs could not show an "injury in fact" of a legally protected interest. The court next addressed the claims under Section 1983 for violation of plaintiffs' Fourteenth Amendment rights to equal protection and substantive due process. The plaintiffs alleged that the defendants' actions interfered with their right to travel, maintain a residence of choice and education, and treated them differently based on their disabilities. First, the plaintiffs' argument that they had a federally protected right to travel failed because they had not alleged any limitation to their interstate travel. Second, the plaintiffs did not provide any support for their assertion that "based on Kansas law, there is no question that plaintiffs have a constitutionally protected interest in …maintaining a residence of their choice." Even if they could support it, the court noted that a "protected interest 'based on state law' does not create an actionable Section 1983 claim." As to the third claim, the plaintiffs' supplemental filings were not clear as to what action the defendants took to violate their rights. As it is not the duty of the court to "scour the evidence to create and complete plaintiffs' arguments," the court granted the defendants' request for summary judgment on the plaintiffs' Section 1983 claims. As a result of the above action, the plaintiffs had no remaining viable claims in the case.

(The district court decision was affirmed by the United States Court of Appeals on February 23, 2010, 596 F.3d 768, 254 Ed. Law Rep. 49 (10th Cir.(Kan.))

Doe v. Unified School District No. 259
240 F.R.D. 673 (D. Kan. 2007)

Pam Doe, mother of Jane Doe 1 and Jane Doe 2, filed this action requesting class certification. Plaintiffs claimed that USD 259 violated Title IX and 42 U.S.C. Section 1983 and sought to certify "all females, formerly, currently or who in the future may be a student at any school within USD 259 since January 1, 1997" (p. 675). Jane Doe 1 and 2 both alleged that Jane Doe 1 was sexually harassed, both physically and verbally, by a student named S.S during the 2002-2003 school year. Jane Doe 2 reported that S.S. would sexually harass her and other female students during chemistry class. She claimed to have reported one event to the teacher. The teacher denied that this occurred. On August 28, 2004, Jane Doe 1, Jane Doe 2, and their mother completed a police report that contained allegations about S.S. from a private, back-to-school party off school grounds. Mother Doe later signed a Protection from Stalking (PFS) affidavit with the District Court of Sedgwick County. Mother Doe then requested a meeting with administration at South High School and reported what had occurred. At the meeting, the Does were told to document and report any incidents of sexual harassment occurring at school. They were also told to notify the police if anything happened off school grounds. When S.S. was served with the PFS order, school security and administration warned S.S. to stay away from the Does, not to contact them by phone, and to tell his friends to leave them alone. Jane Doe 1 and Jane Doe 2 withdrew from South High School on September 3, 2004. To support their class certification claim, the plaintiffs submitted several examples of the

defendant's failures that alleged caused sexual harassment to "permeate throughout the district" (p. 678). They presented allegations ranging from the investigation of a teacher who had allegedly impregnated a former student to various claims of inappropriate sexual incidents across the district's schools. The plaintiffs claimed that a pattern and practice of deliberate indifference to sexual harassment existed within the school district.

For the plaintiffs to succeed on a motion for class certification, they must show "under strict burden of proof, that all the requirements of Fed.R.Civ.P. 23(a) are clearly met" (p. 678). These requirements are numerosity, commonality, typicality, and adequacy of representation. The plaintiffs met the first requirement of numerosity because there were over 20,000 female students in the district. To determine commonality, the court turned to *General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 102 S. Ct. 2364, 72 L.Ed.2d 740 (1982) which held that members of a class must "possess the same interest and suffer the same injury, while at the same time, present specific questions of common law or fact." *Id.* at 156. In the case at hand, Jane Doe 1 and Jane Doe 2 had claims that were factually different. The plaintiffs' presentation of other harassment allegations that occurred across the district took place in different settings, with different students and involved different relationships. Taken together, these allegations did not represent common issues of fact or law needed for class certification. In addition, the court found that the plaintiffs had not demonstrated that any of the defendants' policies led to the alleged harassment. Therefore, the plaintiffs failed to meet the commonality requirement of

Rule 23(a)(2). The plaintiffs also failed to meet the typicality prong of Rule 23(a)(3) because of the fact that the claim of each proposed class member would differ from the plaintiffs' claims of harassment with respect to both liability and damages. Finally, the court addressed the adequacy of representation requirement. Plaintiffs had to demonstrate that "the proposed representatives' interests are sufficient to induce vigorous advocacy on their part; that their interests are not antagonistic to those of class members; and that they have means, including competent counsel, to pursue their case" citing *Marcus v. Kan. Dep't of Revenue,* 206 F.R.D. 509, 512 (D.Kan.2002). The court held that it need not address the issue further because the plaintiffs' had failed to meet the commonality and typicality requirements. The plaintiffs also argued that they satisfied the requirements under Rule 23(b). In addition to satisfying the requirements of (a), the plaintiffs had to show that the defendants had acted or refused to act on grounds generally applicable to the class which would make injunctive relief appropriate for the class as a whole; or that the questions of law common to the members of the class as a whole predominated over any questions affecting only individual members. The plaintiffs sought injunctive relief under Rule 23(b)(2) against the defendants which would require them to do such things as conduct yearly mandatory training, have an independent liaison handle sexual harassment complaints, and enforce all policies regarding harassment. The court held that the plaintiffs did not meet the requirements for Rule 23(b)(2) because their requested injunctive relief was too "vague and generalized." It found that a request to "enforce all policies" was a statement of policy that did not address the

problem and "could not be fashioned in a manner that would satisfy the requirements of the federal rules" (p. 682). Lastly, the court held that because the plaintiffs had not established common issues of fact, they did not meet the requirements for class certification under Rule 23(b)(3). Although the plaintiffs asserted that Title IX and 42 U.S.C. Section 1983 were the common issues of law, the alleged violations varied too widely among each of the class members. The plaintiffs were not able to meet the burden of showing that there were questions of law common to the members of the class as a whole that would predominate over questions that only affected individual members. The court denied the plaintiff's motion for class certification because they were not able to meet the requirements of Rules 23(a) or Rule 23(b).

Rubio v. Turner Unified School District No. 202
523 F. Supp. 2d (D. Kan. 2007)

Zachariah Rubio attended high school at Endeavor Alternative School in the Turner school district. Rubio's first language was English, but he also spoke Spanish. The principal at Endeavor, Jennifer Watts, had a policy that prohibited students from speaking Spanish at school. This was not a District policy and Bobby Allen, the superintendant, was not aware of Watts' rule. In the spring of 2005, Rubio spoke Spanish to other students and was sent to the office. On November 28, 2005, Rubio was told by two staff members to stop speaking Spanish. He was sent to the office and was suspended for speaking Spanish after being told not to do so. Watts met with Rubio's father and told him the suspension would last for the remainder of the day

and the next day. Rubio's father called Allen that afternoon regarding the suspension. Allen called Watts and told her he was overturning the suspension because there was no district policy prohibiting students from speaking Spanish. Allen also verbally reprimanded Watts. Allen then called Rubio's father and told him that his son would not be suspended and could return to school the next day. Because he had been sent home, Rubio missed one and a half hours of class that afternoon. From December 5 through 12, 2005, the incident was reported in the local news. On December 12, Rubio filed suit against the school district and other individuals. After receiving notice of the lawsuit, Allen told those involved to treat Rubio the same as other students. From January 18 through May 17, 2006, Rubio received several discipline referrals for various reasons. Rubio earned credits towards graduation while at Endeavor and returned to Turner High School for the 2006-07 school year. In September 2006, the district court dismissed Rubio's claims against the superintendent, the board of education, the principal and several teachers at Endeavor. The court further granted Rubio leave to file an amended complaint to assert discrimination and retaliation only against the school district. On October 2, 2007, Rubio filed suit claiming the district had violated his rights under Title VI of the Civil Rights Act of 1964, 42 U.S.C. Section 200d *et seq.* by discriminating against him based on his national origin and race and retaliating against him for complaining of such discrimination. He claimed race discrimination in violation of Title VI when a teacher sent him to the office for speaking Spanish on November 28, 2005. This incident, according to Rubio, created a hostile school environment. The retaliation

claims were based on what Rubio claimed was a verbal attack upon him by four teachers when he was in the office for refusing to go to class and failure to comply with staff instructions during an incident on February 10, 2006. The school district sought summary judgment on both claims.

Title VI prohibits discrimination by federally funded programs. It further states that "no action shall be taken until the department or agency concerned has advised the 'appropriate person' of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." 42 U.S.C. Section 200d-1. The school district in this case could be held liable for the acts of the teachers at Endeavor if Watts had notice of the conduct and failed to take action to end the alleged discrimination. To establish a prima facie case of hostile environment under Title VI, Rubio had to show that (1) he was a member of a protected class; (2) the harassment was based on his race, color, or national origin; (3) the defendant had knowledge of and was deliberately indifferent to the harassment; and (3) the harassment was so severe and offensive that it deprived him of access to educational benefits. The court believed Rubio met the first three elements of a prima facie case. At issue was whether the single incident complained about was sufficient enough to support a hostile environment claim. The court believed that the incident was not severe or offensive enough that it deprived Rubio of educational benefits. However, the school district first raised this argument in its reply brief and the court would not consider the new argument. The court overruled the school district's motion for summary judgment on Rubio's national origin and discrimination claim, but it

directed Rubio to "show cause in writing on or before November 9, 2007," as to why the court should not grant summary judgment in favor of the school district on these claims because "the alleged harassment was not so severe that it deprived Rubio of educational benefits or opportunities provided by the school" (p 1252). The court next addressed Rubio's allegation that because he filed a lawsuit, the school district retaliated against him by giving him excessive office referrals resulting in two suspensions. To establish a case of retaliation under Title VI Rubio had to show (1) he engaged in a protected activity; (2) he suffered adverse action due to such activity; (3) a causal nexus between the protected activity and the adverse action; and (4) the school district knew of the retaliation and did not respond adequately. By filing his discrimination lawsuit, Rubio had engaged in a protected activity. He claimed the adverse action occurred when four members of the Endeavor staff detained him in the office, harassed him, and wrote multiple discipline referrals on the same incident. Rubio also claimed that teachers gave him an increased number of referrals after he filed the suit. The court, in viewing the evidence in a light most favorable to Rubio, found such actions could constitute an adverse action sufficient for a prima facie case. The court also found a causal connection between the filing of the lawsuit and the adverse action. The lawsuit was filed on December 12, 2005, and on February 10, 2006, one of the teachers named in the first suit was involved in the incident in which Rubio was detained in the office. The court believed two-months was a sufficient amount of time to establish causation. On the fourth element, Rubio could offer no evidence showing that Watts was aware of any retaliation by the teachers at Endeavor.

Rubio never reported that staff members were retaliating against him and there was no reason for Watts to suspect that any such thing was occurring. The court therefore held that "no reasonable jury could find that the District had notice that Endeavor staff members retained plaintiff in the office on February 10, 2006, in retaliation for the filing of this lawsuit and failed to take adequate steps to address the retaliation" (p. 1255). The school district's motion for summary judgment was granted on Rubio's retaliation claim. The motion was overruled on Rubio's discrimination claim, but Rubio had to show cause by November 9, 2007, as to why the court should not grant summary judgment in favor of the school district because the harassment was not severe or offensive enough to deprive him of educational benefit.

Part II

Suits by Employees

Chapter 5

Discrimination in Hiring or Promotion

All three of the cases within this chapter deal with claims of discrimination due to a disability. Employees with disabilities are protected by the Americans with Disabilities Act (ADA). The ADA provides that no employer "shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions and privileges of employment." 42 U.S.C. Section 12101. This law applies to people who have a physical or mental condition that "substantially limits one or more major life activities." In the state of Kansas, the Kansas Act Against Discrimination (KAAD), K.S.A. 44-1001 *et seq*. provides definitions and procedures for governmental entities in the state.

Employees are protected from discrimination by Title VII of the Civil Rights Act of 1964. Title VII prohibits discrimination based on race, gender, color, religion or national origin. All employment discrimination complaints must first be filed with the Equal Employment Opportunity Commission (EEOC). In Kansas, complaints may also be filed with the Kansas Commission on Civil Rights (KCCR). If the EEOC or other state fair-employment agency chooses not to take legal action or fails to act on the employee's behalf, then the employee may take his complaint to court.

Employers must ensure that they follow the requirements of all federal and state laws regarding discrimination. In cases of disabilities, it is important to point out that the fact a person has a disability does not mean the person must be employed or cannot be terminated. The law "only prohibits discrimination against people with disabilities who are 'otherwise qualified'; that is who despite their disability have the training, experience, abilities, and skills to perform the essential requirements of their job" (Imber & Van Geel, 2004, p. 393). Employers must make an effort to provide a reasonable accommodation to employees with a disability when it is feasible to do so.

Unified School District No. 259 v. Kansas Commission on Civil Rights
640 P.2d 1291 (Kan. App. 1982)

Patrick Palmer applied for a job as a custodian with the school district. He was hired subject to his successfully passing a physical examination. Palmer was examined by Dr. Low who learned that Palmer had been treated by a Dr. Weber for hematuria (blood in the urine). Low contacted Weber to request information about Palmer's medical history and work restrictions. Weber responded with a written report stating that Palmer should not engage in heavy lifting, stooping or straining. As a result of this report, Low recommended that the school district not hire Palmer. When Palmer learned he had not been recommended for employment, he contacted Weber. Subsequently, Weber wrote a letter to the school district stating he believed Weber was capable of performing the tasks involved in the custodial position. The school district did not change its position. Palmer filed a complaint with the Kansas

Commission on Civil Rights (KCCR) alleging he was discriminatorily denied employment because of a physical handicap. The KCCR ruled that Palmer was a physically handicapped individual whose handicap was unrelated to the position he sought and awarded damages. The school district appealed to the district court. The district court reversed the KCCR's decision finding that Palmer was not a handicapped person within the meaning of K.S.A. 44-1009(c)(3) in that he had no substantial disability and the school district had a "reasonable basis" to believe that his condition was sufficiently job related to disqualify him for the position for which he applied. Palmer and the KCCR appealed.

At the time of this case, K.S.A. 44-1009(c)(3) made it an unlawful practice to discriminate against anyone because of a physical handicap. K.S.A. 44-1002(j) defined a physical handicap as meaning the physical condition of a person "which constitutes a substantial disability but is unrelated to a person's ability to engage in a particular job or occupation." In this case, there was disagreement on the definition of a physical handicap on the part of the authorities who provided testimony to the court. In fact, Palmer, Low, and Weber all testified that they did not believe Palmer had a physically handicapping condition. However, the appellate court decided that even if they gave the broad interpretation to a "substantial disability" requested by the KCCR, the KCCR would not prevail. The appellate court agreed with the district court's finding that the school district had met its burden of proving it had a legitimate, nondiscriminatory reason for not hiring Palmer. The school district had hired an independent contractor to determine Palmer's physical ability to perform the job he

sought. Based on the medical information it received, the school district decided not to hire Palmer because of an existing medical problem that would prevent him from performing the duties of the job. In order to meet the statutory definition of a physical handicap, a disability must not be related to work and in this case, the medical problem was job related. The judgment of the district court was affirmed.

Jewell v. Blue Valley Unified School District No. 229
210 F. Supp. 2d 1241 (D. Kan. 2002)

Christy Jewell began teaching kindergarten for the District in the 1995-96 school year. She sustained an on-the-job injury in May 1996 when she was moving large tables in her classroom. This caused an injury to her left wrist and hand. She reinjured the same hand in May 1997 when a large group of first graders pinned her in the doorway they were moving through the classroom. During her third year of teaching, Jewel had surgery on her left arm and missed numerous days of work. After returning from FMLA leave in October 1998, the school district wanted to place her in a long-term substitute position. She refused this placement because she believed it would be harder on her hand than a regular classroom position. Jewell accepted a position at the district's administrative office to help with a reading grant. She finished out that school year doing light clerical work in the district office. In April 1999, Jewell signed a contract to teach kindergarten for the following school year. However, in July of that year she met with Jim Payne, the Executive Director of Human Resources to tell him that her left arm had worsened and she would likely

need another surgery. Payne met with Jewell several times during the month of August to discuss possible accommodations for her injury. Because he believed that a teaching position with older students would be more manageable for her, Payne offered Jewell several teaching alternatives. She accepted an eighth grade position at a middle school with the understanding that she would not begin until after her surgery and recovery period. Jewell had several discussions with Payne and Steve Davis, the middle school principal, in regards to specific accommodations that the district could provide to enable her to return to the classroom. At these meetings, Jewell told Payne and Davis that she needed help lifting, grading papers, and recording grades in the grade book. Mr. Davis determined that the custodial staff could assist her before and after school with the items she needed carried. The custodians would also be told to report to Jewell's classroom during lunch to see if she needed any additional assistance. Davis also discussed having paraprofessionals in the building assist her during the day. He told her that the school was trying to hire an additional full-time paraprofessional who could also provide some assistance. At no time did the district promise to assign a paraprofessional to work exclusively with Jewell. On October 25, 1999, after her surgery, Jewell was released to return to light work. Beginning on November 1, 1999, after having agreed to the accommodations proposed by Payne and Davis, Jewell returned to the classroom. Upon her return, Jewell found that she needed a great deal of assistance. In her deposition, she stated that she needed help moving desks and overhead projectors, helping kids find things in their textbooks, and grading papers. She further testified that she needed a

paraprofessional to be available at all times to come to her classroom to move equipment and materials when she was teaching and then again during her planning periods to help with grading. The school was using 4 of its 5 paraprofessionals to cover as much of Jewell's working day as possible. Jewell did not want to have several different paraprofessionals because she did not want to have to explain what she needed each time a new person showed up to help her. At one point in November, Jewell refused to come to work because Davis was not able to cover her entire workday with paraprofessionals to assist her; he was only able to cover four of her five class periods. Davis contacted Payne to let him know that he could not get Jewell's entire schedule covered and that she refused to be in a classroom without some kind of para assistance. On December 3, 1999, Jewell left her teaching assignment because she was not getting the kind of paraprofessional help that she needed to perform her job. On December 21, 1999, Jewell left a message for Payne in which she told him that her doctor would not allow her in the classroom without para assistance for the entire time she was there. She also met with Payne to discuss other available positions in the district, but there were none that she was able to perform. Jewell filed suit against the school district alleging they had failed to accommodate her disability in violation of the Americans with Disabilities Act, 42 U.S.C. Section 12101 *et seq.* The District moved for summary judgment on claims that Jewell had failed to show that with reasonable accommodations she could perform the essential functions of her job and that her request for a full-time paraprofessional to be available for her at all times was unreasonable.

The only claim to be addressed by the court was whether the defendant school district had discriminated against the plaintiff, Jewell, in violation of the ADA by failing to make reasonable accommodations for her disability. To establish a prima facie case the plaintiff had to show that she had a disability as defined by the ADA; that the defendant had notice of this disability; that the plaintiff could perform the essential functions of the job with reasonable accommodations; and that the defendant had refused to make the necessary accommodations. *See Spielman v. Blue Cross & Blue Shield of Kansas, Inc.*, 2002 WL 524549, at *4, 33 Fed. Appx. 439 (10th Cir.2002). It was undisputed that Jewell had a disability of which the district was aware and that Jewell could not perform the essential functions of her job without accommodations. The school district claimed that Jewell's request was unreasonable; Jewell argued that the issue was not whether the accommodation was reasonable but whether the district provided her the accommodations it promised to provide. The district had promised to provide some assistance from custodians, some assistance from current paraprofessionals, and some assistance from a new paraprofessional that the school was trying to hire. Jewell received very little assistance from the custodial staff and the school was not able to hire a new paraprofessional. However, the court noted that the idea of accommodation is to "enable the employee to perform the essential functions of his or her job" (p. 1249). In reviewing the record before it, the court found that even if the school district had fulfilled each of its promises, the plaintiff still would not have been able to perform the essential functions of her job. There

was nothing to suggest that Jewell's inability to teach was related to a lack of custodial assistance. Although the school had attempted to hire another paraprofessional that could have provided some additional assistance, there was no evidence to show that the district had suggested that the new para would have spent a specific number of minutes or hours with the plaintiff. The district had promised to provide "some" assistance from the current paraprofessionals in the building, and it fulfilled that promise. The school district had made no promises regarding any length of time that the paras would be able to assist the plaintiff. Jewell refused to come to work even when she had assistance in four of her five classes. The facts of the case showed that Jewell would not return to the classroom without a full-time paraprofessional available to her at all times. For that reason, the court found that it was "irrelevant that the defendant did not fulfill all of its promises to provide plaintiff with accommodations" (p. 1250). The court held that a request for a full-time assistant was not reasonable. Courts have consistently held that employers are not required to assign existing employees or hire new employees to perform essential functions of a disabled employee's job that they cannot perform because of their disability. The plaintiff in this case failed to show that she could perform the essential functions of her teaching position with reasonable accommodations, thus failing to establish a prima facie case. Summary judgment was granted to the school district and Jewell's case was dismissed.

Henry v. Unified School District No. 503
328 F. Supp. 2d 1130 (D. Kan. 2004)

Jerry Henry, a welding teacher, brought an employment discrimination claim in which he alleged that USD 503 violated the Americans with Disabilities Act (ADA), 42 U.S.C. Section 12101, *et seq*. and the Kansas Act Against Discrimination (KAAD), K.S.A. 44-1001, *et seq*. Henry also brought a claim of tortious interference with a business relationship. The matter went before the district court on the school district's motion for summary judgment. This case had a lengthy statement of facts, the highlights and timeline of which will be noted in this brief.

Jerry Henry had taught for the school district for nineteen years. He had been hearing impaired since birth. His hearing loss was permanent and was getting progressively worse. Henry wore hearing aids, but his hearing loss was so severe that he still had difficulty understanding conversations and had difficulty hearing on the telephone and intercom at school. He taught industrial arts classes without any accommodations through 2000. Henry also taught industrial arts courses at Labette Community College (LCC). On February 10, 2000, Ted Hill, the assistant principal, prepared Henry's evaluation. Henry received marks of "Needs Improvement" in the areas of classroom management and control and positive interactions with students. On December 22, 2000, the plaintiff met with Hill and Principal Carter to discuss a list of failing students that he had provided. At that meeting, Carter discussed his concerns regarding the number of students failing Henry's classes, his concern about Henry leaving his class unattended, and various student discipline problems. Carter

wanted Henry to prepare and submit lesson plans that would address his concerns as a part of a Plan of Assistance. At this meeting, Henry expressed concerns with increasing health problems. He said he was having stress and chest pains and complained that his hearing difficulties were causing problems with his classes. Carter asked Henry if he had looked into disability benefits. Henry called a teacher from the district who had started receiving disability benefits and she recommended he talk to Alice Caldwell who worked at the District office.

Henry saw a cardiologist on December 28, 2000 who stated in his notes that Henry "appeared to be disabled from his usual line of work" (p. 1137). Henry met with Caldwell at the District office between Christmas 2000 and New Year's 2001 to talk about disability benefits. He told Caldwell and Assistant Superintendent Linda Proehl that he had heart problems, stress, could not hear the students, and that his doctors would send notes to document his disability. On January 2, 2001, Henry visited Caldwell again and said he would need to quit because of his health problems. Caldwell prepared a chart for him showing the benefits available to him, including KPERS disability benefits. Caldwell noted that Henry seemed stressed, confused, and was not able to remember what she had told him about benefits. On January 2, 2001, the plaintiff told Superintendent John Benson that he needed to resign and apply for KPERS disability benefits and he did not want to return to his teaching duties. When Henry offered to continue to work until they could hire someone in his place, Benson told him that he should not return to work. At a basketball game that same evening, Henry told Principal Carter that he had retired on disability and would

not be back to teach. Carter made an announcement at school on January 3, 2001 to notify the high school staff of Henry's retirement due to health issues.

The school district received a letter of resignation from the plaintiff dated January 4, 2001. Assistant Superintendent Proehl found a replacement teacher on January 5, 2001. After he had resigned, Henry went to Superintendent Benson's office to thank him for allowing him to teach his LCC classes. He asked Benson whether he could take KPERS disability benefits and continue teaching his night classes for LCC. Benson suggested he call KPERS. Henry then asked Caldwell about teaching at LCC while on disability. She called KPERS and they said no. Caldwell told Henry that under total disability he could never work anywhere again. Henry called KPERS and discovered that there was no disability package that would provide benefits and still allow him to work. This was the first time Henry understood that he needed to be "totally disabled" in order to obtain KPERS benefits.

On January 5, 2001, Henry met with Proehl and told her that he wanted to return to work. Proehl told him that he could not because they had already hired someone to take his place and that he needed a doctor's letter to return to work. On January 7, 2001, Henry wrote letters to the District withdrawing his resignation but stating that he was on sick leave and would provide notice from his physician when he could return to work. On January 15, 2001, Superintendent Benson met with Henry and his wife at which time he presented a Memo to him which expressed the district's concern in regards to Henry's health and its effect on his ability to provide satisfactory teaching to his students. The Memo went on to state that if Benson did

not receive a written response that Henry was going to request KPERS disability before March 1, 2001, Benson would implement Negotiated Agreement Policy 5067.01(e). This policy stated that employees absent due to illness may be requested to present a doctor's statement indicating their readiness to return to work. The policy went on to state that the Superintendent of Schools could require an examination by a medical practitioner specified by the superintendent at the expense of the district. Henry was informed that he had to remain on sick leave and that Benson would set up appointments for him to see several doctors. The January 15 Memo also informed the plaintiff that the District would not renew his Supplemental Contracts for an extra teaching period, his position as Department Chair, or approve the teaching of LCC classes while Henry was on sick leave or on a Plan of Assistance. The supplemental contracts were not renewed because the District wanted the plaintiff to concentrate on his primary job.

Shortly after the January 15 meeting and Memo, the District received a letter from Richard Tucker, attorney for Henry, which stated that Henry must be allowed to return to work immediately as he had never requested sick leave. Tucker's letter also demanded that Henry's LCC classes be resumed. Tucker sent work releases from the plaintiff's family doctor and hearing aid provider. These releases did not comply with the District's requirement that Henry be examined by a cardiologist, audiologist, and neurologist. On February 1, 2001, Tucker wrote another letter demanding immediate reinstatement for Henry and that he should not be charged for sick leave. Benson replied that Henry would remain on sick leave and comply with the medical specialist

examination requirements after which the Board would make a decision. On February 27, 2001, Tucker sent a report from a cardiologist, which stated that Henry was "stable to return to work." Benson set appointment dates for March 15, 2001 for Henry to see his regular audiologist and a local neurologist. Henry's evaluation with the neurologist showed him to be within normal limits. His audiologist noted that he should be able to "function well in his work environment." She mentioned several signaling and telecommunication devices that could be incorporated into his classroom, but she did not require any accommodation for Henry to be able to return to work.

On April 12, 2001, a meeting was held with the District's lawyer David Markham, Henry's lawyer Tucker, Henry, his wife, Proehl and Carter to discuss Henry's return to work. At that meeting, Henry requested payment for teaching seven hours, payment for missed LCC classes, and assurance for teaching LCC classes in the high school shop, a flashing light phone, a para, and reinstatement to his supplemental duties. Benson responded on April 16, 2001. His letter stated that Henry's teaching assignment would be for four welding classes along with time in the afternoon to work on his Plan of Assistance with Carter and Hill. Henry would be paid for six hours, was given paid administrative leave from January 17 - April 18, 2001, he would receive no pay for the LCC classes he had not taught, no approval for teaching LCC classes while he was under a Plan of Assistance, no reinstatement to his supplemental duties, and would be provided a flashing light phone. The District

also noted that it would provide paras only when certain special education students were in Henry's class.

Henry returned to work on April 18, 2001 and on April 23, 2001, he told Principal Carter that he did not want a flashing light phone. Instead, he wanted a loud bell and amplified phone handset in the welding shop. On April 25, 2001, Carter noted that a company was coming to talk to Henry about his phone requests. On May 3, 2001, Proehl visited Henry's welding class and found his students unsupervised. Carter and Proehl both spoke to Henry about this concern. On May 7, 2001, Carter met with Henry and gave him a list of issues to be addressed in the Plan of Assistance. Shortly after this meeting, Henry requested an aide as an accommodation. On May 25, 2001, Carter asked Henry about completing the Plan of Assistance and Henry said his lawyer had advised him not to complete the Plan.

On June 8, 2001, the District received Henry's disability discrimination complaint filed with the Kansas Human Rights Commission (KHRC) and Equal Employment Opportunity Commission (EEOC). The alleged unlawful discrimination checked on the Complaint form was "Disability." Markham represented the District before the KHRC. On June 14, Tucker wrote Markham and stated that Henry did not need to complete a Plan of Assistance because he had not received any ratings of "Unsatisfactory" on his evaluation as was required by the negotiated agreement. The evaluation form only had ratings of "Unacceptable" and "Needs Improvement." Tucker also demanded that the sick leave charged to Henry from January 2-17, 2001 be changed to paid administrative leave. He claimed that Henry had been "demoted"

when the District hired another automotive teacher, removed his supplemental duties, and demanded that Henry be reinstated to the same teaching and supplemental duties that he had prior to January 1, 2001. Tucker made other claims of harassment and rude treatment of his client. Markham responded to Tucker on July 24, 2001. He noted the discrepancy in the wording of the negotiated agreement and the evaluation form, but stated that it was clear that a rating of "needs improvement" required job targets or a Plan of Assistance for a teacher. Markham went on to state that if Henry failed to follow Board policies, "his noncooperation with Mr. Carter will be deemed as insubordination" (p. 1146). Markham denied allegations that Henry had been demoted and pointed out that when any teacher was struggling in the classroom, the Board would limit their supplemental duties and other responsibilities. Henry did not comply with the Board's policy and taught for LCC in the fall of 2001 using other facilities.

On August 2, 2001, attorney David Calvert wrote the District and notified them that he was also representing Henry. Calvert claimed that Henry had asked for an aide as a reasonable accommodation due to the noise level in his classrooms and that this had been denied. He requested assurance that Henry would be allowed a classroom aide. Benson had not understood any prior request from Henry asking for a "classroom aide." Rather, Henry had asked for some help from a "para." Typically, a para provided services for disabled students and was paid by the Special Education Cooperative. A classroom aide would have to be paid for by the District. On August 21, 2001, Carter gave Henry a memo to set up a meeting on August 23, which would

include Benson and Hill. The purpose was to discuss Henry's request for a classroom aide. Henry was asked to bring a written request for an aide and his rationale for this need. Henry was also asked to bring his Plan of Assistance. At the August 23 meeting, Henry expressed his belief that a classroom aide would help him with supervision, as he could not hear the student very well due to his disability. A fulltime classroom aide would have cost the District approximately $15,000 per year. The parties discussed other accommodations, and the District agreed to provide a shop bell, flashing light and a separate phone line in the shop. During this meeting, Henry presented a grievance letter to Carter which listed (1) the requirement of a Plan of Improvement; (2) demotion in violation of 5081(9) based on the removal of supplemental duties; and (3) denial of the use of facilities for LCC classes. All three grievances dated back to the January 15, 2001 memo. The grievance was denied by Carter on August 29, 2001, as untimely based on the requirement that all grievances had to be filed within 30 days of an occurrence. Based on recommendations from the Kansas Association of School Boards, the District did not provide Henry with a classroom aide.

On October 3, 2001, Henry's Plan of Assistance was completed and signed. On October 10, 2001, the KHRC found No Probable Cause for Henry's allegations of discrimination. Henry did not file a Petition for rehearing with the KHRC. On October 16, 2001, Calvert wrote to the District's attorney noting that they had not responded to Henry's request for a classroom aide. Ten days later he wrote again and asked about the speaker needed for his plaintiff's classroom and again requested a

classroom aide. Markham responded on November 8, 2001 to inform Calvert that the speaker had been installed and asked for the reason a classroom aide was requested. Calvert responded that the noise level of the classroom required an aide. There was no suggestion that the noise level of the class had changed since Henry's audiologist had released him for work without accommodations, nor had Henry's hearing changed. On January 16, 2002, Henry provided a memo to explain why he needed a classroom aide. He did not describe any change in the welding shop environment that he had worked in since fall 2000. The District did not provide an aide.

On January 10, 2002, the plaintiff was removed from the Plan of Assistance by Carter because his evaluation showed improvement. In April, Henry asked to be reinstated as department chair. Carter responded that the position was filled and Henry could apply if the position became open in the future. In December 2002, Henry asked if he could teach an additional class for LCC in the District's welding shop. Carter discussed the request with new Superintendent Deborah Perbeck and raised some safety and performance issues he had noted in November. In January 2003, they denied the request for use of the District shop. Carter left the District but he issued a reprimand on June 17, 2003 based on Henry's failure to install safety equipment as he had been requested to do in October and November 2002. Carter also recommended that the new principal, Ted Hill, place Henry on an intensive Plan of Assistance to correct the safety issues. Perbeck removed the reprimands from Henry's file and stated that the new building administration would observe his work in the fall and then decide if Henry needed to be placed on a plan. Henry requested

use of the District facilities for September LCC classes and it was approved by Hill. Henry continued to teach for the District and LCC without an aide.

The first claim addressed by the court was that the District had discriminated against Henry in violation of 42 U.S.C. Section 12112(a). To establish a case under the ADA, a plaintiff must demonstrate that: (1) he is disabled within the meaning of the ADA, (2) he is able to perform the essential functions of his job with or without reasonable accommodations, and (3) he was discriminated against because of his disability. As Henry was disabled, the court focused on his ability to perform the essential functions of his job. Henry believed he needed a classroom aide to help with classroom supervision, to help him communicate with students, and to assist him when announcements were given on the intercom. Pursuant to K.S.A. 72-9004 and the school district's policy, classroom management is an essential function of the job. In *Jewell v. Blue Valley Unified School District No. 229*, 210 F. Supp.2d 1241 (D. Kan. 2002), the court noted that "the courts of appeals have consistently held that employers are not required to assign existing employees or hire new employees to perform certain functions or duties of a disabled employee's job which the employee cannot perform by virtue of his or her disability." The court here found that Henry's request for a classroom aide was not reasonable. Summary judgment was granted to the District on this count. Henry's second claim alleged that the defendant had retaliated against him contrary to Section 12203(a). In order to prove this, the plaintiff had to show that (1) he had engaged in protected opposition to discrimination, (2) his employer subjected him to an adverse employment action, and (3) a causal

connection existed between the protected activity and the employment action. By filing a complaint with the KHRC on June 8, 2001, Henry had engaged in protected activity. Henry cited two incidents that he qualified as "adverse employment action." The first was Carter's comments on April 9, 2002 concerning his disapproval of Henrys teaching methods and safety test. The second incident was Carter's June 17, 2003 reprimand that recommended Henry be placed on another Plan of Assistance. The court found that Carter's comments did not rise to the level of "adverse action." Therefore, summary judgment was granted to the District on this claim. The third claim addressed by the court was Henry's claim that the District had tortiously interfered with his LCC teaching contract when they denied the use of its facilities. Henry claimed these denials were a part of the defendants "scheme of harassment" (p. 1159). The District argued that it was "privileged and justified in making its decisions." In *Turner v. Halliburton Co.*, 240 Kan. 1, 722 P.2d 1106 (1986), the Kansas Supreme Court noted that "not all interferences in present or future contractual relations is tortious. A person may be privileged or justified to interfere with contractual relations." The Supreme Court in *Turner* listed seven factors to aid in the determination of whether a defendant's actions were privileged and proper. The district court found that the school district's denial of Henry's requests for facilities use met the definition for privileged and proper. The Negotiated Agreement and Policies that governed secondary employment stated that a second job "must not interfere with the quality of work expected of the employee." Henry's request was denied in January 2001 in the midst of concerns about his ability to teach students

adequately during the time he was placed on a Plan of Assistance. The denial in January 2003 occurred after Henry's medical restrictions on standing and Carter's performance criticisms of Henry. The court granted summary judgment to the school district on Henry's third count. Finally, the court addressed Henry's claim of discrimination under the KAAD. The District argued that the claim should be dismissed because Henry had failed to exhaust all of his administrative remedies before filing suit. If a plaintiff fails to exhaust administrative remedies under the KAAD, the court lacks subject matter jurisdiction over the claim. K.S.A. 44-1010 states, "no cause of action accrues until a petition for reconsideration is at least filed with the administrative agency." On October 10, 2001, the KHRC found no probable cause for Henry's allegations of disability discrimination. Henry did not file a petition for rehearing with the KHRC before he filed his lawsuit. Therefore, the court found that it lacked subject matter jurisdiction over Henry's KAAD claim and granted summary judgment to the school district on his fourth count. All claims against the defendants were dismissed.

Chapter 6

Termination and Other Disciplinary Procedures

Employee termination makes up the majority of Kansas public education litigation and a large number of those cases deal with the non-renewal of a certified employee's contract. This chapter contains sixty-one cases and forty-two of those deal with nonrenewal or termination of a certified teacher's contract. State statutes that provide due process procedures and deadlines for school administrators to follow have changed somewhat since the early 1980's. When possible, language from the current statute has been noted following the briefs within this chapter. However, it would be wise for public school officials to be familiar with all statutes dealing with the termination or nonrenewal of administrative and teacher contracts.

Due process rights vary based on an employee's years of experience. The state of Kansas has specific statutes that outline these differences. K.S.A. 72-5410 *et seq.*, the Teacher Tenure Law, defines tenure and outlines procedures to follow when nonrenewing a teacher's contract. The Kansas Administrators Act, K.S.A. 72-5451, gives the steps to follow for nonrenewal of an administrator.

In general, most cases dealing with the termination of an employee result from the implication of a property interest under the due process clause. Tenured teachers with continuing contracts have much greater property interests than nontenured teachers or school administrators. For that reason, the due process procedures for tenured teachers are much more extensive.

In Kansas, if a school board decides to nonrenew a tenured teacher they must provide a reason for the nonrenewal and notify the teacher of their right to a due process hearing with a hearing officer. K.S.A. 72-5438 through 72-5443 outlines the procedures to follow in such cases. As it is now written, the decision of the hearing officer is final subject to appeal to the district court by either party. Nontenured teachers must be notified of their nonrenewal by the appropriate date but no reason need be given for their nonrenewal and the teacher has no right to a hearing. School administrators who are nonrenewed must be notified by the date specified and may request a meeting in front of the school board. At this meeting, the administrator will be given the reasons for their nonrenewal and have the opportunity to respond. No legal counsel is present for either side as this is not a hearing.

Supplemental contracts for duties other than teaching are not protected by Kansas statute. K.S.A. 72-5412a lists those activities defined as supplemental and notes that due process procedures do not apply to such contracts.

Gragg v. Unified School District No. 287
627 P.2d 335 (Kan. App. 1981)

James Gragg taught and coached football during 1977-78 and 1978-79 school years. His contract was nonrenewed on March 26, 1979. He appealed to the district court and argued that, although he was a nontenured teacher, he should have been allowed a hearing because the notice of his nonrenewal was not given in a timely manner. Gragg's contract for the 1978-79 school year contained two clauses that had

bearing on this case. First, it was written in the contract language that teachers would be notified of any intent to nonrenew their contracts "on or before the 15th day of March." The second relevant clause stated that provisions of the contract would be "subject to all laws, rules, regulations, and orders, now or hereinafter enacted, adopted, issued, altered, or amended..." When the parties entered into the contract in June 1978, K.S.A. 72-5411 provided that written notice to terminate a teacher's contract had to occur on or before March 15. However, a legislative amendment that became effective on July 1, 1978 changed the notice deadline to April 15. The district court granted summary judgment to the school district, finding that the board had given timely notice before the April 15, 1979 deadline. The court found that the paragraph of the contract that specifically mentioned laws that might be amended, effectively extended the deadline for notice of nonrenewal from March 15 to April 15. Gragg appealed this decision.

At issue was whether the notice of nonrenewal was given in a timely manner under the terms of the contract and K.S.A. 72-5411. The Court of Appeals agreed with the trial court's reasoning and added its own analysis. It held that when the legislature amended the law, the amendment applied to the current contract and would have done so "even in the absence of the conformity clause in the contract" (p. 339). As the amendment took effect before Gragg's right to a new contract, it did not deprive him of any vested right. No hearing was required because as a nontenured teacher, Gragg had no property right. The decision of the district court was affirmed.

Scott v. Unified School District No. 377
638 P.2d 941 (Kan. App. 1981)

Eugene Scott was a teacher for USD No. 377 in Atchison County. The school board, upon discovery that Scott had physically injured a student, called a special meeting and notified Scott. At that meeting Scott, and others, made statements. The Board went into executive session and upon reconvening, read a resolution stating that Scott would be suspended with termination to follow. The resolution also stated that Scott was entitled to a hearing under the Kansas Due Process Act. Scott requested a hearing but later withdrew his request and within a week filed action in court. In his petition to the court, Scott stated that a due process hearing would be "useless" because the Board had made up its mind by the end of the executive session. The school district made a motion to dismiss. On March 28, 1980, a hearing was held and the trial court sustained the school district's motion to dismiss for lack of jurisdiction based on Scott's failure to exhaust his administrative and judicial remedies under the Kansas statutes that provide due process for teacher termination. The court in essence stated that it would not hear Scott's case until he had a due process hearing. The trial judge then signed a document titled "Judgment or Order" which was filed that same day. Then, following a hearing to settle form, a journal entry was signed by the trial judge and filed on May 5, 1980. Scott filed a motion to alter or amend judgment pursuant to K.S.A. 60-259 on May 15, 1980. The school district argued that the motion was not timely appealed because the judgment had been entered on March 28, 1980. Scott countered by filing an affidavit from one of

his attorneys which asserted that a copy of the March 28 document was not in the attorney's files and that a clerk of the court had indicated that a copy was never mailed, but instead had been put in a box for the attorneys to pick up. Thus, Scott argued that the May 5 journal entry should be held as the date for the entry of judgment, not the March 28 date. On August 13, 1980, a hearing was held on Scott's motions to alter or amend judgment and the trial judge denied the motions. Although the trial judge indicated that he thought a valid judgment had been entered on March 28, he did not find that the motions had been filed out of time. On September 8, 1980, Scott filed an appeal and the school district moved that the appeal be dismissed.

K.S.A. 60-2103(a) provides that a motion to alter or amend judgment must be filed within 10 days after the judgment form is filed. Scott did not meet this deadline if the court used the March 28 date. However, the appellate court found the evidence to show that a copy of the March 28 judgment form had not been served on Scott's attorneys. K.S.A. 60-258 requires that copies of the judgment form be served on all attorneys either "personally or by mail." As this was not done, the time for filing a post-trial motion did not begin to run when the judgment form was filed on March 28, 1980. Instead, the time for filing such motions began when the journal entry was entered on May 5, 1980. Since Scott's motion to alter or amend judgment was filed on May 15, 1980, he met the ten-day requirement. The appellate court held that Scott's appeal was timely filed and therefore would not be dismissed. Next, the appellate court addressed the issue of whether the district court erred in dismissing the action for lack of jurisdiction based on Scott's failure to exhaust the administrative

and judicial remedies afforded him by statute. K.S.A. 72-5436 *et seq*. provides in part that when a teacher is terminated before the end of his contract, he shall be given written notice of termination along with the reasons and a statement noting that the teacher may have the matter heard by a hearing committee. The hearing committee would then make a recommendation to the school board and the board would decide whether to terminate or retain the teacher based on this recommendation. A teacher could then appeal that decision to the district court. Here, Scott had refused a hearing, which was why the district court determined it lacked jurisdiction. The appellate court noted that this was "generally correct, but not applicable in this case" (p. 945). Scott's action was brought specifically under 42 U.S.C. Section 1983, which is a federal statute. The question for the court to decide was what affect the existence of state statutory remedy, and Scott's failure to pursue that remedy, would have on his right to maintain a Section 1983 action. The majority of courts have relied on *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) when facing similar situations. *Monroe* dealt with the exhaustion of state judicial remedies and held that state remedies "need not be first sought and refused" before federal statutes are invoked. When it examined the petition Scott presented, the appellate court found that the essential point of Scott's argument was that the actions of the school board on February 18, 1980, prior to serving him with the notice of termination, rendered the school board incapable of making an impartial decision under the statutory grievance procedures and violated his right to due process. Therefore, even if the appellate court adopted the qualified rule as to the exhaustion of state remedies, exhaustion

would not be required in this case. It appeared as though it would have been futile for Scott to comply with administrative procedures because his claim would have been rejected. The court held that Scott's failure to comply with K.S.A. 72-5436 *et seq*. did not preclude his action in court. It further noted that this did not mean Scott was entitled to relief, as he would still have to prove his claims of bias and deprivation of due process. The judgment of the district court was reversed and the case remanded.

Speece v. Unified School District No. 420, Osage County
626 P.2d 1202 (Kan. App.1981)

Defendant Reginald Speece worked for one year at Osage City High School. He was a teacher and also performed certain coaching duties for the high school from 1976-77. The extra duties and compensation for those duties was not included in Speece's contract. Speece attempted to negotiate with the school administrators for extra compensation, but was not successful. On March 14, 1977, the school board voted to nonrenew Speece's contract for the 1977-78 school year and notified him in writing the next day. On April 11, 1977, Speece appeared before the school board with an attorney and requested that the board (1) reverse its decision to nonrenew his contract and give him thirty days to accept or reject a new contract and (2) pay him $294.00 for the coaching duties he had performed. On April 18, 1977, Speece's lawyer sent a letter to the school board that restated his request. That same day the board decided to agree to Speece's requests, to include payment of $294.00 if it was "legally permissible." Speece claimed that he met with the superintendent within

thirty days and told him that he would teach for the district the following year. If that conversation occurred, which was in dispute, it was not communicated to the school board. On July 11, 1977, the board voted that Speece did not have a contract for the 1977-78 school year because he failed to respond to the board's April 18 offer. The board also voted not to pay the $294.00 on advice of its attorney. Speece filed a notice of appeal with the school board on August 15, 1977, and his first petition in district court on August 23, 1977. Speece file a claim for $294.00 for extra coaching duties and a breach of contact claim for lost salary for the 1977-78 school year. Speece's original court action was dismissed on jurisdictional grounds. Speece appealed this decision.

The district court claimed a lack of jurisdiction based on its conclusion that Speece's only judicial remedy was by way of an appeal under K.S.A. 60-2101(d). This statute provides that a judgment or final order made by a governmental body exercising judicial or quasi-judicial functions may be reversed, vacated or modified by the district court on appeal. The party must file a notice of appeal within thirty days of the entry of such judgment. Both Speece's notice of appeal and first petition in the district court were filed more than thirty days after the board's decision. The district court believed the school board's action was quasi-judicial, so the case was dismissed. However, if the school board's action was actually executive or administrative in nature, the trial court would have been incorrect in the dismissal because the appeal would have been timely brought as an ordinary breach of contract action. The appellate court sought to determine whether the school board's action had

been quasi-judicial or executive in nature. To do so, the court had to consider Speece's status and rights at the time the board made its decisions. First, the decision to nonrenew was made on March 14, 1977, and that decision was communicated to Speece the next day. The decision to nonrenew met the deadline provided for by the continuing contract law in K.S.A. 72-5411. Speece was not tenured and so was not entitled to a due process hearing. At that point, he had no contract and no right to any contract. On April 18, 1977, the board offered to rehire him and gave him thirty days to accept. Whether Speece accepted the contract or not was an unresolved factual question. Finally, on July 11, the board concluded that Speece had not accepted the offer of a contract. There was no notice of a hearing, no grounds for nonrenewal specified, no evidence gathered, and no hearing was held. As far as the board was concerned, none of that was required because it was not terminating a teacher's contract it was "simply reassuring itself that it had not hired one" (p. 1205). The appellate court found that it could not put that type of determination in the category of quasi-judicial. If the board was wrong and its offer had been accepted by Speece, then the decision would have amounted to a refusal to honor a contract. Either way, according to the appellate court, the decision to breach (if that was what it was) was an executive, not quasi-judicial decision. As far as the $294 claim for extra salary, the board's disallowance of that claim was "just like any public body's disallowance of a claim" (p. 1205). If a governing body disallows a claim it does not mean they have acted in a quasi-judicial manner. The appellate court held that the board had acted in an executive or administrative manner, rather than a quasi-judicial one. The

decision of the district court was reversed and the case was remanded for determination of Speece's two breach of contract claims.

Sells v. Unified School District No. 429, Doniphan County
644 P.2d 379 (Kan. 1982)

The five unified school districts in Doniphan County formed the Doniphan County Special Education Cooperative (Co-op) in 1975 to provide special education services. U.S.D. 429 was the sponsoring district for the Co-op. Each of the districts paid their share of the expenses for the program to U.S.D. 429, which administered it. While each district was represented on a board that provided advice to U.S.D. 429, U.S.D. 429 was the final authority for the Co-op and all of the decisions on the hiring and firing of teachers. All of the teachers who taught in the Co-op had contracts with U.S.D. 429. Margalee Sells was a tenured special education teacher who was employed by the Co-op. Desiring an equal share in the responsibility for the administration of their special education programs, the unified school districts decided to form a separate entity to be known as the Doniphan County Education Cooperative (the interlocal). The districts entered into a written agreement to terminate the Co-op as of June 30, 1979. That agreement provided that U.S.D. 429 was to give written notice of nonrenewal to all of the special education teachers who were then employed by U.S.D. 429. The new interlocal would then hire most of those teachers. All fifteen of the special education teachers employed by U.S.D. 429 received notice by mail of the intent to nonrenew their contracts. Two of those did

not plan to return to the district. Twelve of the remaining thirteen teachers received with their nonrenewal notices a contract offering employment with the new interlocal. The thirteenth, Ms. Sells, only received a notice of nonrenewal. She later received a second notice listing the reason for nonrenewal as being that U.S.D. 429 would no longer serve as the sponsoring district for the special education program. Sells requested a due process hearing from U.S.D. 429. The hearing was held and the committee recommended on a 2-1 vote that Sells' contract be renewed. After considering the committees recommendation, the school board determined not to renew the contract. Sells appealed to the district court. The district court found that the decision made by U.S.D. 429 had not been arbitrary, capricious, or fraudulent. The court further held that the fact U.S.D. 429 would no longer offer special education but would gain services through the new interlocal amounted to "good cause" for not renewing the contract of a tenured teacher. Sells appealed. The Kansas Court of Appeals in *Sells v. U.S.D. No. 429,* 6 Kan.App.2d 968, 637 P.2d 422 (1981) reversed the district court decision and remanded with directions. The school district filed a petition that was granted by the Kansas Supreme Court.

The issue on appeal was whether the notice give to Sells provided "good cause" for her termination. The interlocal cooperation act, K.S.A. 12-2901 *et seq*., applies to all forms of local governmental units. K.S.A. 12-2904(e) precludes "an existing local unit of government from entering into an interlocal cooperation agreement and in doing so avoid its legal responsibilities." The court here questioned what legal obligations and responsibilities were imposed on U.S.D. 429 when the co-

op was ended and the interlocal began. The court did not believe that the statute required the school district to hire all fifteen special education teachers if the interlocal chose not to do so. The legal responsibility of U.S.D. 429 in regards to the special education teachers was to either renew their contracts or give written notice that the contracts would not be renewed. That written notice had to include the reasons for nonrenewal and notification of the teachers' right to a due process hearing. In the eyes of the court, those responsibilities had been met by U.S.D. 429. The reason for Sells' nonrenewal was the discontinuation of special education programs under the sponsorship of U.S.D. 429. The court determined that the school board showed "good cause" as it could find nothing in the evidence to suggest that the school board's decision was arbitrary or capricious. The court further held that "the dissolution of the co-op and the formation of the new interlocal constituted good cause for the nonrenewal of the contracts of the tenured special education teachers" (p. 381). The opinion of the Court of Appeals was reversed and the judgment of the district court was affirmed.

NEA-Valley Center v. Unified School District No. 262, Valley Center-Sedgwick County
644 P.2d 381 (Kan. 1982)

During the 1980-81 school year, and for several previous years, U.S.D. 262 served as the sponsoring district in an agreement pursuant to K.S.A. 72-968 to provide special education services to nine school districts in surrounding counties.

The school district employed 54 special education teachers to provide services to all nine districts, including its own. During the 1980-81 school year, the districts decided to end this method of providing services and created an interlocal cooperative in its place. The cooperative was made up of the same nine school districts. All special education teachers, whether tenured or not, were sent notices of the intent to nonrenew their contracts for the 1981-82 school year. A lawsuit was filed and the issue was brought before the district court. The district court found in favor of the teachers. It held in part that: (1) the joining of an interlocal and the discontinuation of its own special education program did not constitute a valid reason for the school district to nonrenew the teachers' contracts; and (2) the new interlocal cooperative was legally obligated to employ all special education teachers presently employed. The interlocal appealed from this decision.

The main issue for the appellate court to determine was whether the school board had a legal right to nonrenew the 54 special education teachers. This determination was controlled by the finding in *Sells v. U.S.D. No. 429,* 231 Kan. 247, 644 P.2d 379 (1982). *Sells* was a similar case except for the fact that only one teacher challenged the nonrenewal. In *Sells*, the court held that "the termination of a special education cooperative and the transfer of the administrative duties of a sponsoring school district to an interlocal cooperative...whereby the sponsoring school district no longer provides special education services constitutes good cause..." to nonrenew teaching contracts of special education teachers. As in *Sells*, there was no indication that the decision to nonrenew was arbitrary, irrational or irrelevant to building up an

efficient school system. Based on the same rational used in *Sells*, the court here concluded that the school district had good cause to nonrenew the teaching contracts of its 54 special education teachers. Next, the court addressed the district court's holding that the interlocal was legally obligated to employ all of the special education teachers who had previously been employed with them. The Supreme Court found that the district court had erred in this decision because "it would be incongruous to conclude a school district may nonrenew a tenured teacher by reason of joining an interlocal cooperative and then hold that the interlocal cooperative is bound to take over the employment of that teacher in the name of preserving continuity" (p. 384). The decision in *Sells* held that the formation of an interlocal cooperative was sufficient reason to nonrenew a tenured teacher. Once a teacher is nonrenewed, the employer-employee relationship is severed meaning that neither has further rights against or duties to the other. In the absence of any statute requiring an interlocal cooperative to employ teachers whose contracts were nonrenewed by member districts as a result of its formation, the decision in *Sells* controls. The judgment of the district court was reversed and remanded with directions to enter judgment in favor of the defendants.

Arneson v. Board of Education, Unified School District No. 236, Lebanon
652 P.2d. 1157 (Kan. App. 1982)

A teacher, Joe Arneson, brought mandamus action against the Board of Education, U.S.D. 236, seeking his reinstatement. He had been employed as a

teacher in the district for eight years, resigned and taught in another district for one year, and then returned and was reemployed by U.S.D. 236. The District voted to nonrenew his teaching contract after one year without giving any reasons for the termination. Arneson filed a mandamus action claiming that the district failed to afford him his due process rights as a tenured teacher and asked for reinstatement. The District claimed that Arneson had lost his tenure rights when he left the district. The trial court found in favor of the District and stated that "if a teacher leaves, then he loses tenure, any interruption of the time, without a leave of absence, constitutes a waiver of tenure pursuant to K.S.A. 72-5445" (p. 1158). Tenure, as defined by K.S.A. 72-5445, applies to those teachers who have completed two consecutive years of employment in the school district*, except where the teacher alleges his termination or nonrenewal is the result of his exercising a constitutional right. It further stated that a board may waive the two year requirement for any teacher employed by it, who had taught not less than two consecutive years in any school district in the state. Both parties agreed that Mr. Arneson had earned tenure in his last period of employment with the district. The issue on appeal was whether he was considered a tenured employee of the district when he received his letter of nonrenewal or whether his resignation had terminated that tenure.

The Court of Appeals turned to state statute to make its determination in this case. In looking at the terms of K.S.A. 72-5445, the court could find "nothing which could be said to prescribe the cessation of tenure upon resignation" (p. 1158). The court went on to say the fundamental rule in construing statute is that if intent can be

determined from the language itself, the court is not warranted in looking beyond the terms of the statute. In this case, the statute only discussed when tenure was attained, not how or when it may be lost. Therefore, while resignation of a teacher may end the contract with a school district, it does not appear to affect tenure with that district. The Court concluded that the trial court had been in error and that Mr. Arneson was entitled to due process rights as a tenured teacher. Judgment was reversed and the case remanded to enter judgment for the plaintiff.

Without contrary legislative language stating otherwise, a teacher's resignation does not terminate his tenure. Therefore, the teacher could not be terminated without due process afforded him under K.S.A. 72-5445.

(*Note: Applicable to the case above, as it is written today: Statute 72-5445: Application of act; years of employment requirements, waiver; effect of nonrenewal or revocation of license. (a) (1) Subject to the provisions of subsection (b), the provisions of K.S.A.72-5438 through 72-5443, and amendments thereto, apply only to: (A) Teachers who have completed not less than three consecutive years of employment, and been offered a fourth contract, in the school district, area vocational-technical school or community college by which any such teacher is currently employed; and (B) teachers who have completed not less than two consecutive years of employment, and been offered a third contract, in the school district, area vocational-technical school or community college by which any such teacher is currently employed if at any time prior to the current employment the teacher has completed the years of employment requirement of subpart (A) in any school district, area vocational-technical school or community college in this state. (2) any board may waive, at any time, the years of employment requirements of provision (1) for any teachers employed by it.)

Schmidt v. Unified School District No. 497, Douglas County
644 P.2d 396 (Kan. 1982)

April Schmidt was employed by USD 497 on September 4, 1973, as a part-time Title I teacher. As her position was federally funded and the Board was unsure of whether the funding would continue, her position was nonrenewed in the spring of 1974. In July of 1974, Schmidt signed a new part-time contract under the same Title I program. In December of 1974, Schmidt resigned her position. On March 1, 1977, Schmidt signed a contract to teach part time under the same federally funded program for the rest of the 1976-77 school year. That contract was nonrenewed in the spring. Schmidt was hired to teach summer school from June 6 to June 30, 1977. In September, Schmidt interviewed for another Title I position and on September 22, 1977, she signed a contract. Notice of nonrenewal of this contract was given in the spring of 1978. On June 6, 1978, Schmidt was hired by the Board as a regular classroom teacher. On April 11, 1979, the Board gave Schmidt written notice of nonrenewal of her teaching contract. Schmidt complained that this notice did not comply with due process protections. The Board informed Schmidt that as she was not a tenured teacher, she was not entitled to those protections. Schmidt filed for declaratory judgment seeking a declaration that the Board's nonrenewal of her teaching contract was deficient because it did not state the reasons for her termination and did not mention her right to a due process hearing. The district court found in Schmidt's favor and the Board appealed.

Relevant statutes to this case were K.S.A. 72-5436 through 72-5445. These statutes provided a definition for "teacher" and provided the due process protections for tenured teachers. The Board argued that Schmidt was not a "teacher" within the definition of the statutes because she had been employed on a part-time basis. In looking at the language of K.S.A. 72-5436, the court found "no attempt to limit the meaning of "teacher" to full-time employee" (p. 399). Schmidt had been employed under written contracts and each year the Board gave her a notice of nonrenewal. Thus, in the eyes of the appellate court, she qualified as a "teacher" under the definition of the statute. The next factor to consider was whether Schmidt met the definition of a tenured teacher. K.S.A. 72-5445 provided that statutory due process protections applied only to "those teachers who have at any time completed two consecutive years of employment in the school district..." The district court had found that since Schmidt was in the classroom teaching from March 1977 through May or June of 1979, she had achieved tenure. The district court also determined that the summer session she taught in June of 1977 compensated for the late start in the fall of 1977. The Board argued that a "year" within the context of the statute meant calendar year, so the two-year period should be calculated from the date a teacher is employed regardless of when that work begins. The appellate court agreed with the Board. In order to meet the consecutive years requirement, Schmidt would have had to be employed from March 1, 1977, to February 29, 1978, and from March 1, 1978, to February 28, 1979. In actuality, Schmidt had been employed from March 1, 1977

to June 30, 1977, and from September 26, 1977, to June 30, 1979. The gap from June to September of 1977 interrupted the successive nature of her employment. Schmidt argued that the Board should not be allowed to deny tenure by delaying her assignment to a teaching position for a month. While the court agreed that such abuse was possible, "it was not the case here" (p. 402). The court believed that the "good faith uncertainty of federal funding" was the reason for the delay in Schmidt's employment in 1977. Thus, the court held that a teacher's tenure "time clock" starts running the first day of employment during the regular school term, whether part-time or full-time, and continues running so long as the teacher is employed during the regular school term. Summer employment was to be disregarded. If there was a good faith gap in the employment, the time clock stopped. As the court could find no evidence of bad faith on the part of the Board, it determined that Schmidt was a nontenured teacher and not entitled to due process under K.S.A. 72-5445. The judgment of the district court was reversed and remanded with directions to enter judgment for the school district.

Haddock v. Board of Education, Unified School District No. 462, Cowley County
661 P.2d 368 (Kan. 1983)

Dwight Haddock was a tenured teacher who had been employed by U.S.D. 462 as a teacher of vocational agriculture. On April 11, 1979, Haddock was informed by letter that the Board intended to nonrenew his contract for the 1979-80 school year. The reasons given were: (1) failure to work with administration, (2) failure to

maintain classroom control, (3) failure to maintain adequate lesson plans, (4) failure to properly care for school livestock over the weekend, and (5) failure to care for the school equipment. In August, the Board provided more specificity on what they meant by a "failure to work with administration." They listed such things as, failing to leave adequate lesson plans for substitute teachers when Haddock was absent, allowing students to drive school vehicles after being ordered by his principal not to do so, and failing to follow directives to supervise students as they loaded the bus. Haddock requested a due process hearing. The hearing committee voted two to one in recommendation of renewing Haddock's contract for the coming year. The school board considered the hearing panel's decision and voted five to two to reject it. Haddock appealed to the district court which held that the Board's decision was "not supported by substantial evidence and the Board had denied the teacher's right to due process" (p. 370). The Board appealed this decision.

K.S.A. 72-5410 *et seq.*, the Teacher Tenure Law, provides that a tenured teacher may only be terminated or nonrenewed if good cause is shown. The burden of showing substantial evidence of good cause rests with the school board. In *Kelly v. Kansas City Kansas Community College*, 231 Kan. 751, 648 P.2d 225 (1982), the court defined substantial evidence as that "which possesses relevance and substance and which furnishes a substantial basis of fact from which the issue can reasonably be resolved." *Id.* at 755. In its attempt to meet this burden, the Board provided as evidence testimony of the principal, Bob Wesbrooks; the superintendent, Dean McGrath; the custodian, Edwin Flower; and Myrl Dobbs, who taught in the shop next

to Haddock. The court first addressed the accusation that Haddock had failed to follow the orders of his administrators by not having adequate lesson plans for substitute teachers. Wesbrooks testified that Haddock's performance had deteriorated from above average in 1977 to needing improvement in 1979. The Board offered three letters written to Haddock expressing concern about his lack of lesson plans. Haddock responded by stating that prior to 1979 he had either called in his lesson plans on the morning of his absence or left instructions written on his tablet without any objection from administrators. Wesbrooks admitted that lesson plans were not essential for shop courses because the students often worked on their ongoing projects. Next, the court looked at the issue of classroom control. The Board provided evidence of Haddock's failure to maintain classroom control by providing photographs of the shop area in disarray, statements from the custodian that shop tools were sometimes left outside the shop area, and testimony from Dobbs who claimed Haddock's students did not respect him because they would sometimes leave Haddock's classroom to visit his (Dobbs') students. The Board offered administrative evaluations showing the rating in Haddock's ability to control his students had declined from above average in March 1978 to needs improvement in March 1979. Upon further questioning, Wesbrooks admitted he only had "indirect" knowledge that damage to the shop had been done by Haddock's students. The shop was often used by the public and outside student groups. There was no direct evidence proving Haddock's students had caused any damage or had failed to take care of school equipment. In regards to the claim that Haddock had allowed his students to drive

school vehicles after being ordered not to allow them to do so, Haddock alleged that he had permitted his students to drive the tractor twice to clear a path through the snow in order to feed the livestock. However, he stated that after he received a memo from Wesbrooks his students were not allowed to use the tractor again. Another teacher testified that he had witnessed students of other teachers drive the tractor on numerous occasions after Wesbrooks' memo to Haddock. The other accusations by the Board were questionable in that there was little to no evidence that Haddock was at fault. In reviewing previous evaluations, the court noted that there had been "considerable evidence" that Haddock had been willing to work with his administrators. All evaluations contained positive comments regarding Haddock's enthusiasm and co-operation until March 1979 when negative comments appeared. It was discovered that Haddock had been the chief negotiator for the teachers' Association during negotiations in 1977-78 while McGrath was the chief negotiator for the Board. When asked about this fact in court, McGrath stated that it was "one of his [Haddock's] problems" (p. 375). The court believed this to be the reason for the sudden change in the ratings on Haddock's evaluation. In light of all the Board had presented, and after listening to testimony from both sides, the court determined that the Board's complaints were not supported by substantial evidence. The court also found that the Board had violated Haddock's right to due process in two ways. First, three of the five board members who voted to nonrenew Haddock's contract had conducted their own independent investigations by interviewing witnesses and sampling public opinion. This was a violation of due process in that Haddock had no

opportunity to hear the evidence gathered against him during the independent investigations, which was "fundamentally unfair" (p. 376). They also violated Haddock's right to due process when, in the final decision to terminate Haddock's contract, the Board presented reasons for their decision that were different from those they had initially presented. This gave Haddock no time to prepare a defense, as he had received no notice of the items. The court determined that Haddock had been improperly nonrenewed. The judgment of the district court was affirmed and the case remanded for determination of the amount of salary owed to Haddock.

Coats v. Board of Education, Unified School District No. 353, Sumner County
662 P.2d 1279 (Kan. 1983)

Leota Coats was a tenured high school English teacher who taught at Wellington Senior High School in USD No. 353. The high school enrollment declined during the time Ms. Coats taught there. As a result of this decline, the decision was made to reduce force in the language arts department at the high school. The administration removed from consideration for nonrenewal those teachers who taught specialized language arts courses, which left four English teachers. Leota Coats had the least seniority of these four. Junior High School English teachers were not considered for nonrenewal because the school board considered the high school teachers to be “unqualified” to teach in junior high. So, although there were three nontenured teachers at the junior high level, they were not considered for nonrenewal. In March, the board adopted a resolution that indicated its intent to nonrenew Ms.

Coats due to a decline in enrollment. As she was entitled to the protection of the Teacher Tenure Law, K.S.A. 72-5436 *et seq.*, Ms. Coats requested a due process hearing pursuant to K.S.A. 72-5438. The three person hearing committee was formed with the school district choosing its attorney as its designee. The committee recommended by a two-to-one vote that Ms. Coat's contract be nonrenewed. The Board followed this recommendation. Ms. Coats appealed to the district court which found in her favor and reversed the school board decision. The district court held that: (1) the appointment of the school board's own attorney to the hearing committee violated Ms. Coats' right to due process, and (2) the school board had acted "fraudulently, arbitrarily, and capriciously" when they nonrenewed Ms. Coats yet retained nontenured language arts teachers. The school board appealed.

Under the Teacher Tenure Law, K.S.A. 72-5436 *et seq.*, a tenured teacher may be terminated or nonrenewed only if good cause is shown. There must be evidence to support the good cause claim and the burden of proof is on the board. In this case, a reduction in force could be used as a good cause claim. However, Ms. Coats argued that the method of the reduction in force was arbitrary and capricious. She was certified to teach composition, grammar, and literature at both the senior and junior high school levels, as well as social studies at the junior high level. She argued that the school board's nonrenewal of tenured teacher legally certified to teach junior high English while keeping nontenured junior high English teachers was not consistent with the purposes of the Teacher Tenure Law. The court here found that a mere good faith requirement had the potential of "emasculating the Teacher Tenure Act" (p.

1284). In this case, the school board's action might be upheld if good faith was the only requirement. There was a decline in enrollment, no evidence that the school board was out to get Ms. Coats, and the school board had considered other alternatives to the reduction in staff. However, the court found that "when probationary teachers are retained while a tenured teacher certified to teach the same subjects is terminated, much of the theoretical protection of the Teacher Tenure Act is lost" (p. 1284). The school board of USD 353 determined that high school teachers were not qualified to teach at the junior high level. That determination was not recognized in school board policy, teacher certification, or the law. There were several nontenured teachers who taught subjects in which Ms. Coats was certified to teach and yet they were rehired while Ms. Coats was nonrenewed. The court found that the board had acted improperly in this manner and held that "unless good cause is otherwise shown, a tenured teacher may not be nonrenewed due to reduction in force until all nontenured teachers teaching subjects which the tenured teacher is qualified to teach are first terminated" (p. 1285). Next, the court turned to the issue of whether Ms. Coats' due process rights were violated when the school board appointed its own attorney to the hearing committee. K.S.A. 72-5438 governs the selection of a hearing committee. Each side is to designate one person to sit on the panel and then those two people designate a third person who serves as chairperson of the panel. If the two people cannot agree on a third person, a district judge from the school districts county appoints a chairperson. The procedural requirements for this hearing, found in K.S.A. 72-5439, state in part that the hearing shall afford procedural due process to

include “the right of the teacher to a fair and impartial decision based on substantial evidence.” The statute does not place limitations on whom the parties may appoint to serve on the hearing committee, but it does require that the method of decision must not “offend the concept of fundamental fairness.” The court held that in this case, the school board’s appointment of its own attorney to the committee violated this fundamental fairness rule. The attorney would have a conflict of interest as he prepared the documents and gave counsel to the school board when it was making its decision to nonrenew Ms. Coats. This was a violation of Ms. Coats’ right to due process. The judgment of the trial court was affirmed and the case was remanded with an order to reinstate Leota Coats and to determine back pay owed to her.

In cases involving a reduction in force, school districts must show good cause for the nonrenewal of a tenured teacher, which includes ensuring that nontenured teachers teaching subjects in which the tenured teacher is certified have first been nonrenewed.

Unified School District No. 251 v. Secretary of Kansas Department of Human Resources
661 P.2d 1248 (Kan. 1983)

The North Lyon County Teachers' Association (NLCTA) filed a prohibited practices complaint with the Kansas Department of Human Resources (KDHR) that alleged the nonrenewal of two of its members, teachers William Tolliver and Holly Myers, was based on their activities on behalf of the Association. NLCTA requested the secretary of KDHR to order the school district to reinstate the teachers and to

cease and desist from its prohibited practices. The school district filed a motion to dismiss on the grounds that the complaint did not allege a prohibited practice and that the KDHR was without authority to grant the relief requested by NLCTA. A labor conciliator with the KDHR determined that: (1) the Secretary of Human Resources was granted the authority to rule on any controversy regarding a prohibited practice, (2) a non-renewal based on an employee's exercise of his right to participate in an employee organization did qualify as a prohibited practice, (3) the Secretary was empowered with the authority to grant or deny the relief sought by NLCTA, and (4) the complaint filed by NLCTA was within the jurisdiction and was properly before the Secretary of Human Resources for resolution. Subsequent to receiving the conciliator's letter, the school district filed action in the district court as an appeal pursuant to K.S.A. 72-5430a(b). The NLCTA filed a motion to dismiss on the grounds that the labor conciliator's ruling was not a final order and the school district had not exhausted its administrative remedies. The district court overruled the motion to dismiss and found in favor of the school district. The NLCTA and the secretary of the KDHR appealed this ruling.

The appellate court's first task was to determine if the district court had jurisdiction. K.S.A. 72-5430a(b) provides in part that the "secretary shall make findings of fact upon all the testimony…and shall enter a final order granting in whole or in part the relief sought. Any person aggrieved by the final order of the secretary may obtain a review of such order in the district court…" If the KDHR rulings were final orders and the school district had exhausted its administrative

remedies, then the rulings were appealable to the district court. If they were not final orders, then they would not be appealable. In reviewing the order from the labor conciliator, the appellate court determined that it was not a final order as it did not dispose of the merits of the complaint and was entered before any hearing or testimony. The action in district court was premature because it was not an appeal from a final order of the KDHR. Therefore, the school district had not exhausted all of its administrative remedies. The judgment of the district court was reversed and remanded with directions to sustain the NLCTA's motion to dismiss.

Atkinson v. Board of Education, Unified School District No. 383
684 P.2d 424 (Kan. App. 1984)

In April of 1982 public school teacher, Waunetta Atkinson, was notified by the school board that after 12 years of service her contract would not be renewed. She requested a due process hearing which was held in July of 1982. The hearing committee supported the Board's decision and recommended her contract not be renewed. On September 1, the Board, in an open meeting that Ms. Atkinson did not attend, voted to adopt the hearing committee's recommendation to nonrenew her contract. The Board mailed a letter to Ms. Atkinson on September 3 stating its decision to nonrenew. On October 5, Ms. Atkinson filed her notice of appeal with the district court. The Board received this notice by mail on October 6. The district court sustained the Board's motion to dismiss Ms. Atkinson's appeal on the basis that her appeal had not been filed in a timely manner. Atkinson appealed to the Court of

Appeals, 9 Kan. App.2d, 175, which reversed the district court's decision stating that the teacher's appeal *had* been timely filed. The Board petitioned the Supreme Court for Review, which was accepted.

K.S.A. 72-5443 provides that a teacher is entitled to appeal a school board's decision to terminate her contract. In part, it states, "…the hearing committee shall render a written recommendation not later than thirty (30) days after the close of the hearing, setting forth its findings of fact and recommendation as to the determination of the issues. The recommendation of the hearing committee shall be submitted to the teacher and the board which shall…decide whether the teacher's contract shall be renewed or terminated. The decision of the board shall be submitted to the teacher not later than thirty (30) days after the close of oral argument or submission of written briefs." The board met its obligation in the prescribed time. At issue was whether Ms. Atkinson's filing of appeal was timely under K.S.A. 60-2101(d), which states in part: "…it shall be sufficient for an aggrieved party to file notice that such party is appealing from such judgment…within thirty (30) days of its entry…" The court concluded that when the Board of Education mailed its decision by letter, the act of depositing the letter constituted the submission of the Board's decision not to renew the teacher's contract. Time for appeal began to run when the decision was mailed to the teacher, which the court determined to be September 3. Ms. Atkinson's appeal was not filed until October 5, which was 32 days after the board submitted its decision. She argued that when the Board chose to submit its decision by mail, she was entitled to three additional days in which to appeal. Her claim was based on

K.S.A. 60-206(e), which states in part: "Whenever a party has the right or is required to do so act…within a prescribed period after the service of a notice…and the notice is served upon her by mail, three (3) days shall be added to the prescribed period." The Board contended that subsection (e) should not be applied because service of a notice is not required as a condition for an appeal. The court reasoned that K.S.A. 72-5443 required the board submit its decision to the teacher, and whether the word *submitted* rather than *served* was used in K.S.A. 72-5443 did not matter. It was the submission of the decision that required the teacher to file her notice of appeal within a 30-day period or forfeit the right. K.S.A. 60-206 (e) was brought into play when the Board submitted its decision by mail, thus increasing the filing period by three days. As Ms. Atkinson's appeal was received by the court in 32 days, she had invoked the jurisdiction of the district court to hear her case in a timely manner. The Court of Appeals decision was affirmed and the judgment of the district court was reversed and remanded to the district court for trial on its merits.

When notice of a school board's decision is submitted by mail, and it is the submission of the decision that begins the time to ask for an appeal, the three-day extension applies.

Martin v. Unified School District No 434, Osage County, Kansas
728 F.2d 453 (10th Cir. 1984)

On April 14, 1980, the board of education voted unanimously to nonrenew A.V. Martin's contract. Martin had served as the principal of an elementary school

for eleven years pursuant to a series of one-year contracts. The school board refused to provide Martin with a written reason or a hearing on its decision.* On June 15, 1980, Martin and his attorney met with the superintendent of schools to discuss the reasons. Martin filed a 42 U.S.C. Section 1983 action in which he alleged that his property and liberty rights were impaired by the school board without due process. The trial court granted summary judgment in favor of the defendants, finding that Martin had no constitutionally protected property interest in his job and that the nonrenewal of his contract did not damage his liberty interest. Martin appealed.

In 1974, the Kansas legislature passed the Teacher Due Process Act, K.S.A. 72-5436 *et seq.* which granted teachers tenure and the right to due process before termination. School principals were not included in this legislature. As an administrator, Martin had no formal tenure. Martin argued that he had an expectation of continued employment because of an "implied promise" the he would not be fired unless there was good cause and he had an opportunity to correct any deficiencies. The court noted that a constitutionally protected property interest could arise through a mutual understanding between parties, but a "unilateral expectation is not sufficient" (p. 455). Martin's claim of expectancy was based on the fact that he had been renewed eleven times previously. However, he could not show that there was any sort of mutual understanding that would give rise to a protected property interest. Martin was notified before April 15, as was required by the Kansas Continuing Contract Law, and he had been evaluated once that year, as required by the Kansas Evaluation of Certificated Personnel Law. The school district had not violated any of

the Kansas statutes that Martin based his claim upon. The court held that Martin had no constitutionally protected property right that would have entitled him to a hearing before he was nonrenewed. Next, the court addressed Martin's claim that the board president had violated his liberty interests. Martin based his claim on one statement that appeared in the local newspaper in which the board president was quoted as saying that Martin's nonrenewal was "based on occurrences this year and continuance of previous concerns" (p. 455). The liberty interest that is protected by the Constitution is an individual's good name and reputation. A liberty interest "is implicated only when his ability to obtain other employment is damaged" (p. 456). A statement would have to be such that it harmed the "honor and integrity of the person discharged." Martin could not prove that the single statement made in the paper had done any more harm to his good name than had the dismissal itself. The court found that Martin's liberty interests had not been impaired. The decision of the trial court was affirmed.

(*Note: Applicable to the case above, as it is written today: K.S.A. 72-5452 states that (a) Written notice of a board's intention to not renew the contract of employment of an administrator shall be given to the administrator on or before May 1 of the year in which the term of the administrator's contract expires. K.S.A. 72-5453 states that (a) Whenever an administrator is given written notice of a board's intention to not renew the administrator's contract, the administrator may request a meeting with the board by filing a written request therefore with the clerk of the board within 10 days from the date of receipt of the written statement of nonrenewal of a contract. (b) The board shall hold such meeting within 10 days after the filing of the administrator's request. The meeting provided for under this section shall be held in executive session and, at such meeting, the board shall specify the reason or reasons for the board's intention to not renew the administrator's contract. The administrator shall be

afforded an opportunity to respond to the board. Neither party shall have the right to have counsel present. Within 10 days after the meeting, the board shall reconsider its reason or reasons for nonrenewal and shall make a final decision as to the matter.)

Swager v. Board of Education, Unified School District No. 412, Sheridan County
688 P.2d 270 (Kan. App. 1984)

Harvey Swager had been employed as a teacher with U.S.D. 412 for four years. During the 1982-83 school year, Swager taught math and coached basketball and football. At the end of the school year, Swager was informed that he would not be retained as head basketball coach and if he did not resign from that position, he would be removed from it. On March 30, 1983, Swager wrote a letter to the board of education resigning his position as head basketball coach. On April 8, 1983, the board president responded with a letter stating that the Board had accepted Swager's resignation of his employment contract for the 1983-84 school year. In the letter, the Board stated that Swager's coaching duties were an "integral and substantial part" of his employment contract. Swager wrote a subsequent letter contesting the Board's interpretation of his resignation and formally requesting a hearing on his nonrenewal. On May 2, 1983, the board president responded in a letter stating that Swager had not been nonrenewed by the Board. Rather, Swager, by his own general resignation letter, had nonrenewed the contract. Swager filed suit in district court. The court granted summary judgment in favor of the Board, finding that Swager had been employed by a single primary contract, which he tried to divide into a primary and supplemental

contract. The trial court held that all of Swager's teaching and coaching duties were parts of a single, indivisible primary contract of employment and when he resigned his coaching duties, he severed the entire contract. The court concluded by finding that Swager was not entitled to any of the due process provisions in K.S.A. 72-5438 because he had nonrenewed his own contract. Swager appealed this decision.

K.S.A. 72-5413(o) defines supplemental contracts as meaning "contracts for employment duties other than those services covered in the primary contract," including services such as coaching. K.S.A. 72-5412(a) provides the same definition and adds the provisions of state statutes that "relate to the continuation of teacher contracts and to due process upon termination or nonrenewal of a teacher's contract, do not apply to any supplemental contract of employment." The question before the court was whether Swager's contract was several contracts: a primary contract to teach math and two secondary contracts to coach basketball and football; or whether his contract was a single contract to fill one position that required the performance of different duties. The court reviewed the language of the contract and found that the provisions of K.S.A. 72-5412(a) required that Swager's primary contract was as a math teacher and his coaching duties were supplemental. The language in the statute was a "clear expression of a legislative intent to prohibit school districts from making supplemental duties, such as coaching, part of a teacher's primary contract" (p. 276). The school district could not change supplemental contracts into primary ones by combining the contracts into one written document. The court further concluded that it would reach the same result even if it applied the traditional rules of contract

construction. In terms of contract construction, the court found the actual written instrument to be "ambiguous." It could be construed as a single, primary contract, which consisted of several duties, or as a primary contract with supplemental duties. However, when looking at past practice, the court found that the school district had removed coaches from their positions without any due process. By doing this, the school district demonstrated that it believed coaching duties to be outside the scope of the Kansas statutes dealing with nonrenewal and due process rights for teachers. In other words, the district had in the past treated coaching duties as separate, supplemental contracts. The fact that there was only one written contract of employment did not dissuade the court from this conclusion. In the language of the employment contract, Swager's duties as a high school math teacher were labeled as his "tentative major assignment" and his coaching duties were described as "additional duties." The court found these to be comparable to "primary contract" and "supplemental contract." The court rejected the school district's claim that Swager's letter of March 30, 1983, was a resignation from all of his duties. In the mind of the court, Swager had clearly stated his intent to resign only from his position as a basketball coach. Swager was within his right to nonrenew his supplemental contract as a basketball coach and this nonrenewal had no effect on his primary contract as a math teacher. The court determined that the school district's letters from April and May of 1983 were notices of nonrenewal of Swager's primary contract. As such, they failed to meet the requirements of K.S.A. 72-5438. The district had also been remiss in not allowing Swager a hearing on his nonrenewal. The appellate court

concluded that Swager was entitled to reinstatement to his former position as a high school math teacher, as well as salary owed to him for the 1983-84 school year. The judgment of the district court was reversed and the case remanded.

Unified School District No. 503 v. McKinney
689 P.2d 860 (Kan. 1984)

On May 23, 1980, Don McKinney, Marilyn Taylor (a teacher employed by the district and wife of McKinney), and Steve Stocker went to the board offices of U.S.D. 503 to file a grievance. On June 8, 1980, Stocker distributed a news release to the local media that stated there would be a press conference held at the district office before the next school board meeting to discuss the "turmoil" in the school district that included a state investigation and other problems in the schools. The news release also stated that the superintendent of schools, Salvatore Alioto, and elementary school principal, Calvin Dill, would be present on the site. Alioto did not know about the press conference until the news director of a local radio station questioned him about it. Dill found out about it when he heard a news broadcast on the radio station the morning of June 9, 1980. The board meeting was to be held on June 9 at 7:00 p.m. That afternoon, the school district filed a petition seeking an order restraining McKinney, Taylor, and Stocker from coming on the premises of the superintendent's office, from making derogatory comments, from holding an unplanned press conference, and from any acts of harassment toward Alioto and Dill. The restraining order was issued by the judge at 4:00 p.m., on June 9, 1980.

McKinney, Taylor and Stocker met with the news media at 6:45 p.m. in the parking lot of the district office. The restraining order had been served on them prior to that meeting, so they did not discuss their concerns about the district with the media. On June 12, 1980, the district court held a hearing on the school district's motion for a temporary injunction. The court ordered a temporary injunction against the defendants and required the school district post a $1,000 bond. The injunction stated that the defendants were "enjoined from holding a press conference or any other public meeting" on any school district property, and from "disrupting or interfering with any meeting" of the Board of Education or "any activities of the school administrators" (p. 864). The defendants did not appeal this temporary injunction. On November 16, 1983, the district court held a hearing on the defendants' motion to reconsider and set aside the temporary injunction. The court ordered the temporary injunction become permanent. On November 23, 1983, McKinney and Taylor filed their notice of appeal.

In order to be granted injunctive relief, the petitioner must show that some act has been done, or has been threatened, that would produce irreparable injury. K.S.A. 60-903 provides for the issuance of a restraining order to prevent action pending a hearing on the request for a temporary injunction. Restraining orders are matters of discretion for courts and are ordinarily done *ex parte* or without notice to the party affected. Restraining orders that restrict free speech are valid only where necessary to" protect compelling public interests." In this case, the defendants claim the restraining order and temporary injunction violated their constitutional right of free

speech. They also claimed the restraining order violated provisions of K.S.A. 60-906 because it did not set forth the reasons for its issuance. The appellate court cited previous decisions dealing with ex parte restraining orders and found that the Supreme Court and various circuit courts have required that notice be given to those affected by a restraining order that denies them of a First Amendment right. Only in "extreme circumstances or emergency can such orders be entered ex parte" (p. 865). In the case at hand, there was no evidence of an emergency or extreme circumstance that would have been prevented the school district from notifying the defendants of the restraining order against them. Certain principles guide the allowable restraint for governmental regulation of speech and there are limited categories of written or spoken words that are not protected by the First Amendment. Fighting words, obscenity, libel, and incitement are such examples. Courts have emphasized that the First Amendment provides for the freedom to discuss matters of public concern without restraint by the courts, so long as they are discussed truthfully. In order for courts to restrict free speech, the government must show a compelling state interest. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), dealt with a public school teacher who wrote a letter to the local newspaper criticizing the actions of the superintendent and school board and how they handled proposals to raise school taxes. The court in *Pickering* held that public school teachers did not relinquish their rights of free speech to comment on matters of public interest, even if those statements were directed at their supervisors. Without proof of false statements, a teacher's right to speak on issues of public importance could not be abridged. The

appellate court found that the defendants had the right to comment on matters concerning the school district, whether at a public meeting or at a school board meeting. The injunction restrained them from this right. The injunction also prevented the defendants from interfering with the administrators' work activities, yet there was no proof that they ever attempted or intended to do any such thing. In order to issue an injunction to restrain certain conduct, there must be some indication of a threatened injury. That was absent in this case. Only in instances where the expression of free speech threatens a significant state interest is the state allowed to restrict a person's exercise of a right guaranteed them by the U.S. Constitution. The district court had issued a restraining order and injunction preventing the defendants from holding public meetings or speaking at school board meetings. The appellate court considered this type of injunction to be an unconstitutional prior restraint as it violated the defendants' constitutional right to freedom of speech. Accordingly, the injunction issued by the district court was dissolved and the case was remanded to determine the amount of damages suffered by the defendants.

Hein v. Board of Education, Unified School District No. 238, Smith County
698 P.2d 388 (Kan. App. 1985)

Jerome Hein was a tenured teacher whose contract was nonrenewed. Hein was notified of his nonrenewal by a notice sent to him by the superintendent that stated that the board had voted 7-0 in favor of his nonrenewal due to staff reduction and the creation of a new position. Hein requested and was granted a due process

hearing. Hein did not contend that the decision was arbitrary or capricious, rather he argued that the notice he received on April 12, 1983, was "deficient" which he believed meant his contract should have been continued as prescribed by K.S.A. 1984 Supp. 72-5437. The district court granted summary judgment in favor of Hein and ordered his reinstatement. The school board appealed this decision.

The specific procedures for nonrenewal of a tenured teacher's contract are found in K.S.A. 72-5437. It states in part that the teacher must be given written notice of the proposed termination that should include the reasons for nonrenewal, and a statement explaining the teacher's due process rights along with the timeline associated with this process. The statue also mandates that a tenured teacher's contract "shall continue unless notice is served as provided." The letter that the superintendent sent to Hein did not state specifically that he was being nonrenewed nor did it inform him of his statutory right to a due process hearing. In spite of the deficient notice, Hein requested a hearing in writing, filed the request with the Clerk of the Board, notified the board that he had selected counsel, and designated a hearing committee member. Hein acknowledged that he had received a fair hearing in which he was able to present his side of the controversy. As a result of this, the court found that Hein received all of the rights he would have been entitled to if he had received proper notice. The court could find "no harm" caused by the deficient notice. The court also held that "even if the notice was defective, his request for a hearing before the school board and his participation therein constituted a waiver of any deficiencies present in the notice" (p. 391). The decision of the district court was reversed.

Neunzig v. Seaman Unified School District No. 345
722 P.2d 569 (Kan. 1986)

On October 15, 1979, Kurt Neunzig was notified of the proposed termination of his contract as a teacher with U.S.D. 345. His termination was due to four unexcused absences in a row that occurred while he attended a religious event. Neunzig received a hearing before the Board of Education on October 22, 1979. On October 30, Neunzig was notified by the Board of his termination. Neunzig requested and was granted a due process hearing. At the hearing, Neunzig argued that the termination of his contract was based on the performance of his constitutional right of free exercise of religion. On March 14, 1979, the hearing committee made its recommendation to the Board that Neunzig's termination should be final based upon a breach of his employment contract. The Board approved this recommendation and terminated Neunzig's employment. Rather than appealing this decision to the district court pursuant to K.S.A. 72-5443, Neunzig filed a complaint on April 3, 1980, with the Kansas Commission on Civil Rights (KCCR) under the Kansas Act Against Discrimination (KAAD) in which he claimed that his termination was discriminatory and a violation of his constitutional right to a free exercise of religion. A public hearing was held on November 16, 1983, and the hearing examiner for the KCCR ordered that Neunzig be reinstated and compensated for the loss of income. This decision was approved by the KCCR chairperson on May 3, 1984. U.S.D. 345 appealed that decision to the district court and claimed that the KCCR lacked jurisdiction to hear Neunzig's complaint. The district court found in favor of the

school district. It ruled that Neunzig could have initially filed his complaint with the KCCR, rather than requesting a due process hearing. After he chose to have the due process hearing, Neunzig should have appealed to the district court pursuant to K.S.A. 72-5443. Neunzig and the KCCR appealed this decision.

The due process procedure for terminating a teacher's contract is found in K.S.A. 72-5436 *et seq*. It provides for a full due process hearing if requested by the teacher. At the due process hearing, all parties may be represented by counsel, may cross-examine each other, may present witnesses, and may testify on their own behalf. The hearing committee may administer oaths, issue subpoenas, receive evidence, regulate the course of the hearing and take other actions necessary to make the hearing accord with procedural due process. Once the hearing committee makes its recommendation to the Board, the Board issues its decision. The decision of the Board is final, subject to appeal to the district court pursuant to K.S.A. 60-2101 and K.S.A. 72-5443. Under the KAAD, the KCCR is empowered to receive and investigate complaints alleging discrimination in employment because of things such as religion. The KCCR can hold a public hearing if necessary at which notice, representation, introduction of evidence, cross-examination, etc..., will take place. Once the KCCR has made its determination, a dissatisfied party may file for a rehearing, and if denied may take their appeal to the district court. The question for the appellate court to decide was whether Neunzig was prevented from filing a complaint with the KCCR on the same allegations that had been litigated before a hearing committee. Neunzig first litigated his claim of discrimination in front of a

hearing committee. After receiving the results of that hearing, he filed a second complaint with another administrative body in which he alleged the same matter previously heard by the hearing committee. Essentially, he "moved laterally" - from one administrative body to another without exhausting his remedy under K.S.A. 72-5443 by appealing to the district court. The doctrine of res judicata prevents such a lateral move as the court next explained. In citing *United States v. Utah Constr. Co.*, 384 U.S. 394, 86 S.Ct. 1545, 16 L.Ed.2d 642 (1966), the court found that" res judicata should cut off a second administrative proceeding when the first proceeding has provided opportunity for something like the procedural protection that a court provides." *Id.* at 422. Both the hearing committee and the KCCR are quasi-judicial in nature and perform functions similar to those associated with a court proceeding. Res judicata prevents the relitigation of claims previously heard and contains four elements: (1) the same claim; (2) the same parties; (3) the existence of claims that were or could have been raised; and (4) a final judgment on the merits. In this case, all four elements of res judicata were satisfied. For these reasons, the appellate court held that Neunzig was prevented under res judicata from instituting a second administrative claim before the KCCR on issues that were or should have been previously raised in front of the hearing committee. The judgment of the district court was affirmed.

Burk v. Unified School District No. 329, Wabaunsee County, Kansas
646 F. Supp. 1557 (D. Kan. 1986)

Ron Burk brought a civil rights action under 42 U.S.C. Section 1983 against USD 329, the Superintendent, and the Board claiming they had violated his civil rights when they nonrenewed his contract as the high school principal. In connection with the nonrenewal, Burk claimed he had been denied a hearing to "clear his good name and reputation" (p. 1560). Burk was employed as the principal of Wabaunsee High School in 1982-83. His contract was renewed in the spring of 1983 for another year. In January 1984, he was evaluated and rated "inadequate" on the "Public Relations" objective. On the evaluation form, the Superintendent recommended that the Board nonrenew Burk's contract. The Board met in executive session on February 13, 1984 and reached consensus to nonrenew the principal's contract. During that session, a letter from a student was read in which the student complained that Burk had made inappropriate sexual comments to her at school. Legal counsel for the district was informed of the student letter on February 14, 1984. As the letter had nothing to do with the nonrenewal of the principal's contract, counsel advised the Board "not to discuss the letter and to do nothing further with it" (p. 1560). Burk was informed of his nonrenewal on February 14, 1984 but was not told about the student complaint. Later, rumors began in the community about a student letter that charged Burk with sexual misconduct. Rumors also surfaced that Burk's misconduct was the reason for his nonrenewal. On March 5, 1984, the Board met with Burk in executive session and informed him that he had been nonrenewed for his failure to develop a

positive rapport with his faculty. When Burk asked about the letter, the Board refused to discuss it with him and also refused his request for a hearing to clear his name. The case was tried before a jury on October 14, 1984 through October 28, 1984. At the close of the plaintiff's evidence, the defendants moved for a directed verdict on Burk's claims that he was deprived of his liberty and property interests without due process of law, and for all of the claims against the individual defendants.

The court first turned toward the plaintiff's claim that although he was a nontenured administrator, he had a property interest in continued employment with the district. Plaintiff claimed that the Board's evaluation policy in conjunction with the Kansas Evaluation Act and other documents created an implied contract of employment. The Board's policy required that an employee (regardless of tenure) be given notice of any performance deficiencies and then be given the opportunity to improve. The court stated that the "sufficiency of entitlement must be decided by reference to state law" (p. 1561). In the court's opinion, the plaintiff's position that he had a property interest based on the Evaluation Act and the school board's policy was contrary to the intent of the Teachers' Due Process Act and the Administrators' Act. The Administrators' Act, K.S.A. 72-5451 *et seq.*, only applies to administrators who have completed two consecutive years of employment with the same school district. The Act requires that a tenured administrator receive timely notice of their nonrenewal and be provided with the opportunity to meet with the school board to hear their rationale and given the chance to respond. A nontenured administrator receives none of the protections of the Administrators' Act, other than an entitlement

to timely notice, and may be nonrenewed for any reason. Although the purpose of the Evaluation Act is to provide a method of improvement for school personnel, there is no requirement that an employee must be given an opportunity to improve before they are given notice of nonrenewal. The Board's evaluation policy did require that an employee be given a chance to improve once they are notified of concerns in their performance. However, this requirement is in opposition to the Due Process and Administrators' Acts which provide nontenured employees no expectation of continued employment. The court stated that "any attempt by a district or board to enter into a contract or formulate a policy that violates state law is ultra vires and void" (p. 1564). Thus, the court held that Burk had no contractual right to continued employment and the defendants' motion for directed verdict on his claim that he was deprived of a property interest was granted.

The court next turned towards the claim that the defendants had deprived the plaintiff of his liberty interests in two ways. First, the plaintiff claimed that the statements made in his evaluation regarding his reasons for nonrenewal had damaged his reputation and foreclosed future employment. Second, the plaintiff claimed that a defamatory impression was created by the defendants with regard to the student complaint that had "stigmatized his good name and foreclosed future employment" (p. 1565). If an employee's dismissal comes with charges that stigmatize the employee's reputation or foreclose future employment opportunities, due process requires that the employee must be given a hearing in which he/she can clear his reputation and refute the charges. The court determined that Burk was entitled to go to the jury on his

claim that his reputation and ability to obtain another job were harmed in connection with the Board's handling of the student complaint. It was the opinion of the court that this complaint, and the rumors associated with it, clearly called the plaintiff's morality into question and this was sufficiently stigmatizing so as to implicate a liberty interest. On the other hand, the allegations of improper job performance were not considered to be so stigmatizing as to harm the plaintiff's reputation or prevent him from getting another job as a principal. After a review of cases, the court found that the Ninth Circuit had held that "only charges of moral turpitude may implicate a liberty interest" (p. 1566). As a result of these findings, the court held that a directed verdict was proper against the claim that comments in his evaluation had damaged his reputation and foreclosed him from future employment. The court also granted the defendants' motion for a directed verdict on all claims against them on the grounds that they were entitled to qualified immunity.

The Evaluation Act only requires that a school board follow its own procedures and evaluate an employee at some point before they are nonrenewed. It does not require that an employee be given the chance to improve before they are nonrenewed. Any attempt by a school district to enter into a contract that violates state law is beyond the scope of their powers and such contract will be void. If an employee is dismissed with charges that are harmful to their reputation, due process requires that the employee be given a hearing. Those charges must be serious enough to not only damage a person's reputation but also prevent them from gaining further employment. Claims against a person's morality or honesty would be sufficient to

require due process. Charges that a principal cannot get along with faculty members or is an ineffective communicator are not sufficient enough to invoke a liberty interest.

Unified School District No. 241, Wallace County v. Swanson
717 P.2d 526 (Kan. App. 1986)

Charles Swanson was a tenured teacher who also coached boys' basketball and track. On May 11, 1984, Swanson wrote a letter resigning from his position as basketball coach. In August of 1984, the school district issued a contract to Swanson with the basketball position eliminated. In September, the superintendent posted notices seeking applications for the basketball job but no one applied. Subsequently, the superintendent assigned the position to Swanson. When Swanson declined the assignment, the school district brought a declaratory judgment action in district court. The district court entered judgment in favor of the school district, finding Swanson's refusal to take the extra position amounted to insubordination and was a breach of contract. Swanson appealed.

The district court had relied upon a provision in the negotiated agreement for teachers in U.S.D. 241 that allowed for the assignment of supplemental duties when those duties could not be filled voluntarily. That provision stated, "Vacant extra duty positions shall be first filled by teachers willing to accept the position. The balance…shall be assigned by the administration." In addressing this issue, the appellate court turned to *Swager v. Board of Education, U.S.D. No. 412,* 9 Kan.App.2d 648, 688 P.2d 270 (1984). In *Swager*, the court held that a teacher could

not be required to accept supplemental duties as part of the primary teaching contract and could unilaterally terminate or nonrenew the supplemental contract. Language found in K.S.A. 72-5412(a) clearly demonstrates the legislature's intent to prohibit school districts from making supplemental duties, such as coaching, part of a teacher's primary contract. In *Ottawa Education Ass'n v. U.S.D. No. 290*, 233 Kan. 865, 666 P.2d 680 (1983), the court held that provisions of a negotiated agreement that conflicted with statutory language were void and unenforceable. In the case at hand, the provision of the negotiated agreement conflicted with the statutory scheme as it related to the assignment of supplemental contracts. Therefore, the appellate court found the provision to be void and not the basis for the finding of a breach of contract. The judgment of the district court was reversed and remanded with directions to enter declaratory judgment in favor of Swanson.

Hein v. Board of Education, Unified School District No. 238, Smith County
733 P.2d 1270 (Kan. App. 1987)

Jerome Hein was a tenured teacher certified to teach English, driver's education, health and physical education. In the spring of 1983, the Board asked Hein to appear at a school board meeting to discuss his contract. At that meeting, Hein was asked if he was certified to teach speech because the Board was considering the creation of a new course that would include speech as a replacement to the current English IV class. The English IV course was taught by a retiring teacher and the Board wanted to create a new course titled English, Speech, and Drama. Although

Hein was certified to teach English, he was not qualified to teach speech and in April 1983, the Board voted to nonrenew his contract. He obtained a due process hearing, which was discussed in *Hein v. Board of Education, U.S.D. No. 238*, 10 Kan. App.2d 303, 698 P.2d 388, *rev. denied*, 237 Kan. 886 (1985). The due process hearing panel unanimously recommended that if Hein agreed to become certified to teach speech, as he had offered to do, his contract should be renewed. The Board ignored the hearing committee's recommendation and did not renew Hein's contract. Hein appealed to the district court which found that the Board had acted in an arbitrary, capricious, and unreasonable manner and ordered Hein's reinstatement along with back pay. The Board appealed this decision.

Previous court decisions dealing with the nonrenewal of a tenured teacher held that a school board must show good cause and make a good faith effort to examine the competence and training of a teacher before a tenured teacher could be replaced by a nontenured teacher. In its justification for nonrenewing Hein's contract, the Board cited increased operational expenses, lost tax base, decline in enrollment, and the teaching efficiency of combining a retiring staff member and Hein's position into an English, Speech, and Drama course. The Board noted that there was not a nontenured teacher in this area who could be released before Hein and that Hein could not become certified in speech in less than two or more years. The only change in the courses, which Hein was teaching, would have been the modification to the English IV class to include speech and drama. The retiring teacher had taught elements of speech and drama in the English IV class, but they were not part of the

curriculum requirements. Mr. Hein was not certified to teach speech and drama but he had offered to obtain a provisional license and become fully certified in two years by taking additional courses. At the time of this action, there had been no cases in Kansas dealing with the issue of whether a school board had acted in good faith when making a curriculum change that had the effect of replacing a tenured teacher with a nontenured one. The court turned to other states which had dealt with this type of situation and found in *Catron v. Board of Education,* 126 Ill.App.3d 693, 81 Ill. Dec. 750, 467 N.E.2d 621 (1984) that "incidental reassignment of single courses to established teaching positions to maximize the use of staff and accommodate changes in enrollment and economy may be permissible...as long as [1] the tenured teacher is not qualified to teach the course and [2] teaching assignments are not aligned in bad faith to avoid the existence of a position which could be filled by a tenured teacher for whom dismissal is sought." *Id.* at 697. In Hein's case, the Board had claimed to be acting on good faith due to economic reasons. However, they only made one curriculum change that consisted of adding one component to one course in an effort to eliminate a tenured teaching position. The court did not find this to be a substantial change, since elements of speech and drama had been present in the original English IV class for many years. The Board had made no effort to investigate or accept Hein's offer to get a provisional certification and take courses to become fully certified in speech. The court agreed with the district court and held that the Board had not acted in good faith and was arbitrary, capricious, and unreasonable in its decision to nonrenew Hein. The district court decision was affirmed.

Bauer v. Board of Education, Unified School District No. 452, Johnson, Kansas
765 P.2d 1129 (Kan. 1988)

James Bauer, a tenured industrial arts teacher who was also certified to teach social science, was nonrenewed by the board of education. His position was reduced due to a decrease in the enrollment in his auto mechanics class. Bauer's remaining classes were to be taught by the district's other industrial arts teachers who had more seniority. The Board voted to terminate Bauer due to a "reduction in force." The Board later hired a nontenured teacher certified to teach social science and physical education for a junior high school position. Although he was certified to teach social science, Bauer was not considered for the social science position. Bauer claimed that because he was certified to teach social science, he was improperly terminated by the board. After being notified of the nonrenewal, Bauer requested a due process hearing claiming that the enrollment numbers were not correct, that the administration had no authority to change the course of study, and that the Board had not followed its own policy regarding reduction in force situations when they nonrenewed him and hired a nontenured teacher to teach a subject in which Bauer was certified. The hearing panel voted to uphold the Board's decision. Bauer appealed to the Stanton County District Court. After reviewing the evidence of the decrease in enrollment, the district court found in favor of the Board. Bauer appealed. The Court of Appeals agreed with the district court holding that under *Coats v. U.S.D. No. 353*, 233 Kan. 394, 662 P. 2d 1279 (1983),"certification by the State Board of Education is not synonymous with qualification" (p. 1132). The Court of Appeals believed Bauer

needed to show he was both “certified” and “qualified” to teach social science in order to have priority over the nontenured teacher. Bauer was only able to show he was certified, as all of his teaching experience and background was in the field of industrial arts. The Court of Appeals placed the burden of proof on Bauer to show he was qualified to teach social science. Bauer appealed. The Kansas Supreme Court granted review. In his petition for review, Bauer did not argue that a reduction in force had been necessary in the industrial arts teaching staff. He claimed that the Board’s methods to accomplish the reduction in force were “arbitrary and capricious” because (1) he should have been considered a candidate for the social science position, and (2) the Board improperly determined that that the position had to be filled by someone who was certified in both social science and physical education.

In order to terminate or nonrenew a tenured teacher, a board of education must follow the procedures outlined in K.S.A. 72-5436 *et seq.* A tenured teacher may only be released if good cause is shown. The decision must not be shown to be arbitrary, irrational, or unreasonable. "Good cause must be supported by substantial evidence and the burden of proof is on the Board." Citing *Schmidt v. U.S.D. No. 497*, 231 Kan. 267, 269, 644 P.2d 396 (1982). In *Coats*, the court held that under Kansas statutes a “school board should first conduct a good faith examination of the competence, interest, and training of all teachers in the area where the reduction in staff is to occur” *Id.* at 401-402. Upon review of this case, it was found that the Board had made no determination regarding Bauer’s certification to teach the social science class. It appeared that the Board was unaware that Bauer was certified to teach social

science until it came up during his initial due process hearing. Once it was known that Bauer was certified to teach social science, the Board made no determination as to whether or not he was qualified to do so. Therefore, Bauer had been nonrenewed without good cause. In addition, K.S.A.72-1394 (a) and (b) provide in part: "(a) the state board of education shall prescribe an examination designed to insure that *certification* of a person as a teacher is a reliable indicator that the person has the basic knowledge and *qualifications* necessary to engage in the profession of teaching. (b) …the state board of education shall select an examination which will measure the …*qualifications* of applicants for certification as teachers…" Similar legislative intent is found in K.S.A.72-1381 that provides the state board of education, upon being satisfied with the qualifications of an applicant may issue a "special certificate specifying the subjects that the holder of the certificate is authorized to teach." A teaching certificate indicates that the teacher has completed a required course of study and passed an examination, which determines the teacher's qualifications in a particular area. Accordingly, "every teacher is entitled to rely on his or her certificate as substantive proof of the teacher's qualifications to teach the subject endorsed" (p. 1135). Thus, Bauer was both certified *and* qualified to teach social science, unless the school board could show otherwise.

The Board next argued that Bauer was not qualified for the job because he was not certified to teach both social science and physical education. Upon review, it was shown that the only connection to physical education was a need for someone to assume some coaching duties. There was no requirement to actually teach a physical

education class. K.S.A. 72-5413(o) lists duties such as coaching as being considered supplemental. Statute prohibits a school district from requiring supplemental duties be part of a teacher's primary contract. Therefore, a teacher is not required to accept supplemental duties as part of his primary contract of employment. The Board's requirement of coaching duties with the social science position was an "impermissible joining of primary and supplemental contracts" (p. 1136). The judgment of the Court of Appeals and the district court were reversed. The case was remanded with an order to reinstate James Bauer and to determine the amount of back pay owed to him.

When there is a need for a reduction in force, the Board must conduct a good faith examination into all of the areas a tenured teacher is certified to teach before they vote to nonrenew a contract. When vacancies exist in areas in which the tenured teacher is certified to teach, they must be placed into that position unless there is good cause not to do so. The burden of proof is placed on a Board to show that a tenured teacher is not qualified to teach in an area in which they are certified.

Hachiya v. Board of Education, Unified School District No. 307, Saline County
750 P.2d 383 (Kan. 1988)

Plaintiffs Robert Hachiya and Cheri Livingston were both full time, tenured teachers who taught six class periods and had one planning period. Both were coaches and their sixth period classes were seventh and eighth grade athletics. This class was practice time for the competitive seventh and eighth grade sports teams who

did not practice after school. In November 1984, both Hachiya and Livingston resigned from their supplemental duties as head coaches for all junior high sports for the 1985-86 school year. In March 1985, the resignations from the "position of coach for" junior high athletics were accepted by the Board. In April, the Board minutes were amended by deleting the words "coach for" to state that the Board would accept the resignations of their positions "of seventh and eighth grade athletics." Both plaintiffs were then offered 6/7 contracts for the 1985-86 school year. This meant they would be paid for one less class period. In June 1985, the plaintiffs filed petitions with the Board alleging the reduction in their teaching contracts was a violation of their right to resign from a supplemental duty without penalty. Both plaintiffs and defendant filed motions for summary judgment and on April 23, 1986, the trial court granted summary judgment in favor of the defendant. The district court held that the plaintiff's obligations to coach the junior high school practice classes was governed by their primary teaching contract and that they had "voluntarily resigned" one of their regular classroom duties. The teachers appealed and the Court of Appeals affirmed the decision. The Court of Appeals found that the Board was within its rights to make what is normally a supplemental duty a part of the contract of junior high teachers. The teachers then petitioned for review from the Supreme Court of Kansas.

At issue was whether the junior high school athletics classes taught by the plaintiffs were covered by their primary contracts of employment, or whether they were duties that fell under a supplemental contract. K.A.R. 91-31-14(c)(4) (1986

Supp.) permitted junior high schools to schedule one hour of practice time per school day to prepare for interscholastic athletic competition. Therefore, the Board was within its right to schedule practice time during the school day. They argued that because the practice sessions were held during the day, they were a part of the teachers' primary teaching contracts. K.S.A. 72-5412(a) provides language dealing with supplemental contracts. It states in part that a supplemental contract "means a contract for services other than those services covered in the principal or primary contract of employment and shall include but not be limited to such services as coaching, supervising, directing and assisting extracurricular activities..." The Kansas Supreme Court determined that while Kansas Administrative Regulations permitted junior high schools to hold practice during the school day, that regulation had "no relevance in resolving the issue of the type of contract which governs the coaching of such practice sessions" (p. 387). Kansas statutory law requires that coaching positions fall under a supplemental contract. K.S.A. 72-5412(a) mandates that coaching duties be governed by a supplemental contract, it does not contain language that permits an exception for coaching activities that occur during the school day. The Board treated the plaintiff's coaching duties as being subject to their primary contracts when they reduced the plaintiff's salaries by one-seventh after they resigned their coaching positions; something that is not allowed by statute. The mandate of a statute cannot be negated by an administrative regulation. The Supreme Court found that the plaintiffs were "within their rights to resign their supplemental coaching duties without affecting their primary contract duties as junior high school

teachers" (p. 389). The Board failed to meet the requirements of state statute when it did not renew their primary contracts as full-time teachers. The decision of the Court of Appeals was reversed, the judgment of the district court was reversed, and the case was remanded with directions to find in favor of the plaintiffs.

Leaming v. Unified School District No. 214
750 P.2d 1041 (Kan. 1988)

Larry Leaming was a tenured teacher for the Ulysses, Kansas school district. In the spring of 1983, two high school students qualified for the International Science Exhibition Fair (ISEF) meeting in Albuquerque, New Mexico that would be held May 9-14, 1983. The superintendent of schools, Dr. Timothy Rundus, was informed that Leaming, a seventh grade science teacher, planned to accompany the two girls on their trip to New Mexico. Because Leaming had not made a formal request to attend the meeting, Rundus called him on May 3, 1983. Leaming then informed Rundus that he was planning on going to the ISEF. Rundus told Leaming that he had teaching responsibilities on those dates and would not be give permission to attend because the two students were not under his jurisdiction. On May 5, 1983, Leaming was again advised by Rundus that he would not be allowed to make the trip. Leaming informed him that he intended to go anyway. Leaming was told that if he chose to go, he should submit his resignation to the school district by 4:00 p.m. on May 6, 1983. On May 7, 1983, Leaming called Rundus and told him that he was leaving school on May 9, 1983 to attend the science fair. Rundus urged him to

reconsider, encouraged him to have someone else attend, and told him that if he went without submitting his resignation Rundus would make a recommendation to the board of education that he be suspended or that the board make some other arrangement concerning his contractual obligation. Rundus advised Leaming that possible consequences of his action could be suspension, loss of pay for the time he was away from school, and/or nonrenewal of his teaching contract. Leaming left to attend the science fair on May 9, 1983 and a substitute teacher was hired to teach his classes. Leaming would later acknowledge that he had committed an act of defiance toward the superintendent and that he was aware he had signed a contract in which he agreed to obey the rules and regulations of the board of education and the directions of the superintendent of schools. On May 12, 1983, Rundus sent a letter to Leaming in which he advised him that an inquiry into his alleged breach of duty as a teacher would be held by the board of education on May 16, 1983. At that meeting, the Board unanimously voted to terminate Leaming's teaching contract for the 1983-84 school year. On May 27, 1983, Leaming requested a hearing by a hearing committee and designated Melvin Wilson as a member of the committee. The school district designated Richard Pickler. The hearing was held on January 20, 1984. Testimony was heard and cross-examination was allowed for all parties. At Leaming's request, a continuation of that hearing was granted and a second hearing was held on March 31, 1984. The hearing committee unanimously upheld and sustained the decision of the school district to terminate Leaming's contract. This recommendation was submitted to Leaming and the school district. Leaming did not appeal to the district court as

provided in K.S.A. 72-5443, rather he filed a separate court action in which he alleged wrongful termination and denial of due process by the failure of the school board to provide a fair hearing. The district court granted summary judgment in favor of the school district. The court held that it could grant summary judgment because the basic facts of the case were undisputed; the facts showed that Leaming had not been denied a due process hearing, and Leaming's own evidence clearly showed that he had violated his teaching contract. Leaming appealed this decision.

On appeal, Leaming claimed that the district court erred in granting summary judgment in favor of the school district because he had been denied certain due process rights under the Kansas Due Process Procedure Act (K.S.A. 72-5436 *et seq.*). Leaming had been provided a full evidentiary hearing before a hearing committee. The hearing committee upheld the decision of the school board and submitted its recommendation to both Leaming and the school district. The record does not show whether the school board ever took any action on the committee's recommendation. In fact, the school board did not notify Leaming whether or not it had adopted the decision of the hearing committee. It was clear from the record that both Leaming and the school board knew that it was the intention of the board to nonrenew Leaming's teaching contract. Leaming had already obtained another teaching position at the time of the hearing committee's final decision. Prior to July 1, 1984, K.S.A. 72-5443 provided that "after considering the hearing committee's recommendation and after receiving oral arguments or briefs from the teacher, the board of education was required to decide whether the teacher should be terminated or not." K.S.A. 72-

5443 was amended, effective July 1, 1984, to provide that if the hearing committee's decision was unanimous, "the board of education shall adopt the opinion as its decision in the matter and such opinion shall be final, subject to appeal to the district court." That amendment had been approved within a week following the close of Leaming's final hearing, although it did not go into effect until July. The Kansas Supreme Court believed that under those circumstances, both Leaming and the school district could have assumed that his teaching contract had been terminated. Leaming had made no request for a hearing or the chance to offer arguments or submit briefs to the school board. He did not do anything until over a year later when he filed his court action on May 15, 1985. Those facts created a jurisdictional issue that the court first addressed. Typically, if a teacher fails to make a timely appeal to the district court in a contract termination case, as required by K.S.A. 60-2101, that ends any chance of litigation. Although his court action was not taken in a timely manner, Leaming was allowed to bring his case to both the district and Supreme courts because the school board had failed to act on the report of the hearing committee as required by K.S.A. 72-5443. Because there was no final decision of the school board, the right of Leaming to appeal to the district court was "never triggered" (p. 1048). Next, the court addressed Leaming's claim that he had been denied procedural due process. Leaming maintained that there were three reasons he had been denied this right: (1) his hearing before the hearing committee was completed ten months after his contract was terminated; (2) Richard Pickler, the school districts choice as hearing committee member, was treasurer for U.S.D. No. 214 which violated the rule of

fundamental fairness; and, (3) the school board failed to review the hearing committee's decision and render a final decision as required by K.S.A. 72-5443, which denied him the right to an appeal to the district court. The Supreme Court addressed each of these reasons. Concerning the delay in his committee hearing, K.S.A. 72-5438 required that a teacher request a hearing within fifteen days of the school board's decision to terminate. The school board then had fifteen days from that point to designate a hearing committee. The court found no statutory guidelines which set a specific time for holding a committee hearing.* Leaming had received appropriate notice and a hearing. The hearing had been continued for two months at Leaming's request. At no time did Leaming object to the time of the hearing. For these reasons, the court found that the trial court had correctly determined that Leaming's due process rights were not violated by any delay in the committee hearing. Next, the court addressed the selection of Richard Pickler who served on the hearing committee as the board's representative. Pickler was a local attorney who had no financial interest in the outcome of the hearing. Although he served as treasurer for the school district, he did so voluntarily; his services were provided free to the district. Pickler was not an attorney or legal advisor for the school board. At no time during the hearing did Leaming's attorney object to the service of Pickler on the committee. The decision of the committee was unanimous which included the vote of Leaming's designee, Melvin Wilson. The court held that this was not similar to the situation in *Coats v. U.S.D. No. 353*, 233 Kan. 394, 662 P.2d 1279 (1983) because in that case the school board had appointed its own attorney to serve on the hearing committee which

created an obvious conflict of interest. A school board attorney would have a financial interest in confirming the school board's decision, whereas Pickler had no such interest. Thus, the court supported the trail court's decision that Leaming's due process rights were not violated by the service of Pickler on the hearing committee. Finally, the court turned to the claim that Leaming had been denied a right of appeal to the district court by the board's failure to review the hearing committee's decision and render a final decision. The court agreed that the board "should have considered the hearing committee's report and acted thereon so that plaintiff's statutory right of appeal to the district court would have been made possible" (p. 1050). However, the court did not believe remanding the case just so the school board could make its final decision on the hearing committee's decision was warranted. The court did not believe there was any reason to do so because the hearing committee's decision had been unanimous, which meant that according to statute it had to be adopted by the board of education. The district court had already examined the record and determined that Leaming's due process rights had not been violated. Remanding the case would accomplish nothing new. In the opinion of the court, the only real issue was whether Leaming had suffered a denial of any due process rights by reason of his contract termination. The court determined that "the evidence in this case was undisputed that Leaming violated his contract of employment" (p. 1051). The superintendent gave Leaming specific directions and he willfully violated those directions. Contract language gave the board of education the right to terminate a teacher if they failed to obey the directions of the superintendent. Leaming had been

terminated for good cause and received notification and a hearing as prescribed by law. The Kansas Supreme Court affirmed the judgment of the district court.

(*Note: Applicable to the case above, K.S.A.72-5438 now provides that whenever a teacher is given written notice of intent by a board to not renew or to terminate the contract of the teacher, the teacher has 15 calendar days from the date of such notice of nonrenewal or termination to request a hearing. Within 10 calendar days after the teacher files their written request, the board must notify the commissioner of education to obtain a list of qualified hearing officers. The commissioner then has 10 days after the receipt of notification from the board to provide a list of five randomly selected hearing officers to the board and the teacher. Once the hearing officer is selected, the hearing "shall commence" within 45 calendar days unless the hearing officer grants an extension.)

Miller v. Board of Education, Unified School District No. 470, Cowley County
752 P.2d 113 (Kan. 1988)

Doris Miller was a teacher with several years of teaching experience in another district in Kansas. U.S.D. 470 first employed her for the school year 1984-85. Her contract was renewed for the 1985-86 school year, but during that second year, she was given notice that her teaching contract would not be renewed for the following year. No reason was given for the nonrenewal by either the school board or the building principal. During the time she was a teacher for the district she had received five evaluations and never received an "unsatisfactory" rating. Nothing in her evaluations indicated that she was not performing in a satisfactory manner or that her job might be in jeopardy. Article XI in the teachers' negotiated agreement

provided for a procedure to evaluate and assist all teachers in the school district. This agreement basically followed the Kansas Evaluation of Certified Personnel Act, K.S.A. 72-9001 *et seq*. In relevant part, Article XI provided that if a teacher received an unsatisfactory rating they would be placed on a Plan of Assistance. On May 7, 1986, Miller filed suit alleging a breach of the Board's "contractual duty to provide notice to plaintiff of any alleged unsatisfactory performance on her part and to place her on a plan of assistance" (p. 114). She also alleged that the Board acted in an arbitrary and capricious manner and violated K.S.A. 9004(f), which prohibits nonrenewal based on incompetence without an evaluation of the teacher in compliance with the Board's policy. The Board filed their answer in which they alleged that Miller had failed to state a claim upon which relief could be granted and requested summary judgment. The trial court found in favor of the Board and sustained their motion for summary judgment. Although it was questionable that Miller even came under Article XI, the trial court chose to base its decision on a determination that the school board was precluded as a matter of law from entering into any agreement that would restrict its right to nonrenew a nontenured teacher. Miller appealed to the Court of Appeals, which affirmed the decision of the trial court in *Miller v. U.S.D. No. 470*, 12 Kan.App.2d 368, 744 P.2d 865 (1987). The appellate court also based its decision on whether the school board could "by a collectively negotiated contract, restrict its right to terminate a nontenured teacher" (p. 114). In their decision, the appellate court discussed the four acts controlling the formation, continuation, and termination or nonrenewal of teacher contracts. They found that as

Miller was a nontenured teacher, and the school board had given her timely notice as required by K.S.A. 72-5411 and K.S.A. 72-5437, she had no cause for action without a valid contract for the following year. Previous court decisions and state statute did not provide the same protection for nontenured teachers as for tenured teachers. Article XI, according to the court, could not protect Miller because a school district could not enter into a contract that would have the effect of defeating the two consecutive years of employment provision found in K.S.A. 72-5445. Miller filed a writ of certiorari, which was granted by the Supreme Court of Kansas.

The Supreme Court agreed with the decision reached by both the trial court and the Court of Appeals, but it was of the opinion that those decisions were reached for the wrong reason. In the opinion of the Supreme Court, the issue, which the lower courts should have addressed, was whether Miller even came under the provisions of Article XI of the negotiated agreement which she relied upon for her cause of action. Miller had been evaluated regularly, as was required by contract. At no time did she receive a mark of unsatisfactory which would have required school officials to put her on a plan of action. Miller was under the assumption that under the negotiated agreement a nontenured teacher could not be nonrenewed unless she was rated unsatisfactory. Yet, nowhere in the negotiated agreement was there "any indication that it was the intent of the parties to limit the Board's ability to nonrenew a nontenured teacher under any and all circumstances" (p. 115). Article XI simply sets forth a procedure for a plan of assistance for teachers who had been evaluated as unsatisfactory. Miller was not rated as unsatisfactory, and Article XI should have had

no bearing on the Board's decision to nonrenew her contract. Because she failed to show that she came under the provisions of Article XI, the Supreme Court agreed with the Board's initial point that Miller failed to state a cause of action. Because Miller failed to meet the "threshold requirement" of showing that Article XI applied to her case, the Supreme Court determined that the Court of Appeals opinion as it related to the "issue of whether a school board could restrict its authority to nonrenew a nontenured teacher is dicta and should not be considered as precedent on that issue" (p. 115). The judgment of the district court and the Court of Appeals were affirmed.

Butler v. Board of Education, Unified School District No. 440, Harvey County
769 P.2d 651 (Kan. 1989)

Kenneth Butler, although tenured, was the lowest in seniority of the industrial arts teachers. His contract was nonrenewed due to a need to reduce the teaching force in this area because of decreasing enrollment. The only other area in which Butler was certified to teach was physical education grades 7-12. In the spring of 1984, the superintendent of schools met with Butler and recommended he become certified in another area because of the declining enrollment in industrial arts courses. On February 20, 1986, Butler was advised of the possibility of a reduction in staff and was asked if he could teach in another area. On March 19, 1986, the superintendent met with all of the industrial arts teachers and asked if they could be certified in a number of other areas, one of which was elementary physical education. None of the teachers indicated that they could or would become certified in any of the mentioned

areas. The superintendent suggested to the Board on March 17, 1986 that either Butler's contract be nonrenewed or he become certified to teach elementary physical education. On March 31, 1986 the Board compared Butler's certification with that of Steven Serer, the nontenured football coach who taught three elementary physical education classes along with a freshman health class, none of which Butler was qualified to teach. The Board adopted a resolution to nonrenew Butler's contract and the superintendent notified him after the meeting. Butler requested and was granted a due process hearing, which was held in November of 1986. The hearing committee recommended his reinstatement with a 2-1 vote. However, since the vote was not unanimous, it was not binding upon the Board, pursuant to K.S.A. 72-5443(c). The Board heard arguments of counsel, reviewed the record, and made a determination on May 18, 1987 to reject the committee's recommendation. On June 5, 1987, Butler's attorney mailed a notice of appeal to the Board's attorney and to the clerk of the district court. In July, Butler found out that the district court had not received his notice of appeal due to a problem with its mail delivery. Therefore, he filed a copy of his original notice on July 24, 1987. The district court heard Butler's case and affirmed the decision of the Board. Butler appealed.

The court first determined that, although the notice of appeal was not filed with the district court within 33 days of Butler's nonrenewal, the trial court still had jurisdiction of the case. In *Atkinson v. USD No. 383,* 235 Kan. 793, 684 P.2d 424 (1984) the court held that a teacher had 33 days in which to file a notice of appeal from the Board's action with the district court. Butler had filed his notice of appeal

with the Board within the required 33 days but there were 49 days between the notice to the Board and the actual filing of the appeal with the district court. The court turned to *LeCounte v. City of Wichita*, 225 Kan. 48, 587 P. 2d 310 (1978) in which they held that as long as the notice of appeal is filed with the administrative board within the prescribed amount of time, the "aggrieved party is allowed a reasonable amount of time to perfect the appeal" before filing with the district court. It was determined that 49 days was a reasonable amount of time. Next, the court turned to the issue of Butler's nonrenewal. In *Coats v. U.S.D. No. 353,* 233 Kan. 394, 662 P.2d 1279 (1983), the court found that without good cause, a tenured teacher may not be nonrenewed until all nontenured teachers teaching subjects which the tenured teachers is qualified to teach are first released. Butler argued that he should have been assigned to teach Seirer's three physical education classes for which he was certified and two periods assigned to the nontenured basketball coach for which no certification was required. He believed that his other required hour could be made up of a supplementary position, such as study hall monitor. The court noted that doing this would have required that two nontenured teachers be placed on half-time contracts. The nontenured teachers' duties could not be completely absorbed by Butler because they taught courses he was not certified to teach. The court used a balancing test to weigh the rights of students, the school board, and the teacher to determine whether Butler had the right to be retained in the school system. In doing so, the court found that the hardship the Board would face if it had to rearrange the entire class schedule and then end up with three part-time teachers outweighed the

tenured teacher's right to contract renewal. The Board had made a good faith effort when they informed Butler of the effects declining enrollment could have on the industrial arts program and recommended he expand his certification. Absent bad faith, the court found that a school board is not required to make such drastic changes to its teaching assignments. Finally, the Board turned toward the issue of Butler's expanded certification. In April 1986, Butler had informed the superintendent that he would see about becoming certified in another area. Over the summer, he became certified to teach 5th and 6th grade physical education which would have made him certified to teach five scheduled classes. The Board was not informed of this new certification until several weeks into the school year. Pursuant to K.S.A. 72-5411, a Board must give notice of nonrenewal to a teacher by April 10 of each year. In this case, when the Board made its decision to nonrenew Butler as he was only certified to teach three of the six scheduled classes taught by Seirer. The court held that a "teacher's certification status prior to April 10 is controlling absent a specific agreement otherwise" (p. 658). The judgment of the district court was affirmed.

Copp v. Unified School District No. 501
882 F.2d 1547 (10th Cir. 1989)

Richard Copp, head custodian at Topeka High School, was transferred to a different building in the district. He claimed this transfer was because he had made a speech at a board meeting in support of the high school principal, who was one of his close friends. Frank Blackburn, the principal, had been transferred due to a lawsuit

brought about by a female employee who claimed sexual harassment. During his time at Topeka High, Blackburn delegated considerable authority to Copp. It was reported that Copp sat in on staff meetings and performed functions that many considered to be administrative. In June 1984, Copp had spoken at a public meeting of the Board of Education and expressed his opposition to Blackburn's transfer. The Board, nonetheless, transferred Blackburn to an elementary school and three weeks later transferred Copp to the Topeka Adventure Center. Dennis Dunklee, the acting principal of Topeka High, had recommended Copp's transfer because he thought it would be the "least disruptive way to diminish the excessive authority" (p. 1549) that Copp had acquired. Copp brought action against the Board claiming it had transferred him out of retaliation for his speech and because of his association with Blackburn. He also claimed that the Board had deprived him of due process of the law. The jury found for the plaintiff and awarded him $83,000 in damages. Defendants moved for a judgment notwithstanding the verdict. The trial court granted the motion in regards to the due process claim but left the verdict standing on the freedom of speech and association claims. Defendants then appealed on the grounds that neither Copp's speech nor association with Blackburn was protected by the First Amendment.

In addressing the freedom of association claim, the court determined that while there was evidence to support the assertion that Copp was transferred due to his general association with Blackburn, it was not the type of association that is sheltered by the First Amendment. The right to associate protects an individual's decision to

"enter into and maintain certain intimate human relationships." *Roberts v. United Stated Jaycees*, 468 U.S. 609, 617-18, 104 S. Ct. 3244, 3249, 82 L.Ed.2d 462 (1984). However, in a review of cases it was found that, in general, the relationships protected by association have involved "familial" settings. Thus, the Court of Appeals held that Copp possessed no First Amendment right to associate with Blackburn. After determining that Copp did not have a valid freedom of association claim, the court turned towards the issue of whether Copp was transferred because of his speech at the school board meeting. In order to prevail on this issue, the court determined that Copp had to satisfy the three-prong test established by the Supreme Court in *Mount Healthy City School Dist. Bd. of Ed. v. Doyle,* 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed.2d 471 (1977). Under *Mount Healthy*, an employee who challenges an employment decision must first show that, as a matter of law, his speech is protected. If the speech is worthy of constitutional protection, the employee must next prove that the protected speech was a "substantial or motivating factor" in the employment decision. If both of these prongs are met, the burden shifts to the employer to show that the same employment decision would have been made "even in the absence of the protected conduct." *Mount Healthy* at 287. The first prong of *Mount Healthy* involves the two-part test from *Pickering v. Board of Education*, 391 U.S. 563, 88 S. Ct. 1731, L.Ed.2d 811 (1968), the court found that Copp's speech was a matter of public concern and that his interest in making statements regarding Blackburn's transfer did not have any negative effects on the regular operations of the school. Because he met this two-part test, the court determined that Copp's speech was

protected. The court next attempted to determine if Copp could meet the second prong of *Mount Healthy*, which was the question of causation. It was the court's opinion that there was enough evidence of cause to send the speech issue back to the jury. They based this opinion in part on (1) a comment that had been made by the acting principal after Copp's speech to the board, (2) the lack of documentation supporting the districts claim that the transfer was a "human relations problem" of Copp's inability to get along with people, and (3) the chronology of events led to the inference that Copp's speech may indeed have led to his transfer. In turning to the third prong of *Mount Healthy*, the court found that the school district had presented evidence showing they had transferred Copp due to his association with Blackburn and because of his human relations problem. Because the court had determined there was no constitutional right to associate with Blackburn, the district would be relieved of liability if they could show that they would have reached the same decision if Copp had not made his speech. However, because the district court jury had combined the speech and association claims it was not possible for the Court of Appeals to determine if the jury had concluded Copp had been transferred because of his association with Blackburn or because of his speech. For these reasons, the Court of Appeals reversed the district court's denial of the defendants' motion for judgment notwithstanding the verdict on the plaintiff's association claim and remanded for a new trial to determine whether the plaintiff's speech was a "substantial or motivating" factor in the plaintiffs transfer. The court also remanded for a new determination of the damages awarded to plaintiff.

Peterson v. Unified School District No. 418, McPherson County, Kansas
724 F. Supp. 829 (D. Kan. 1989)

Jerry Peterson had been the principal of Lincoln Elementary School from 1983-1986. Each year he entered into a one-year contract with the District. On February 24, 1986, the school district's superintendent, Jack Hobbs, recommended to the school board that Peterson's contract not be renewed for the following year. Hobbs told the board that he did not think Peterson could regain the confidence of several of his staff members. Several staff members had contacted Hobbs regarding their concerns. This, in Hobbs' opinion, would make it very difficult for Peterson to be effective. The Board followed Hobbs' recommendation and elected not to renew Peterson's contract. The Board president notified Peterson of the decision a month later. Peterson met with the Board in executive session on April 14 and April 18, 1986, to discuss his nonrenewal. After these meetings, the Board informed Peterson that his contract would be nonrenewed due to "staff relationships." Peterson filed a civil rights action under 42 U.S.C. Section 1983 stating that U.S.D. No. 418 violated his civil rights when it nonrenewed his employment as principal and denied him a hearing to clear his good name and reputation. The school district made a motion for summary judgment.

The court began by determining if Peterson had a statutory property interest in continued employment. In order to make this determination, the court looked at state statute. The Administrators' Nonrenewal Procedure Act (Administrators' Act). K.S.A. 72-5451 *et seq.* outline the procedures that must be followed for

administrators who have completed two consecutive years of employment with the district. These statues provide that a tenured administrator must be given notice of nonrenewal by April 15. Administrators are entitled to a hearing with the school board in executive session in which the board must provide its reasons for the nonrenewal and the administrator is given the opportunity to respond. In the case at hand, Peterson was given his notice on March 24 and was advised on that same day that he could request a hearing before the board. At Peterson's request, two such hearings were held in which he had the opportunity to respond to the Board's rationale for nonrenewal. After considering all of the evidence, the court held that the school district had complied with the Administrators' Act. Principals in Kansas are also covered by the Evaluation of Certified Personnel Act, K.S.A. 72-9003, which provides that a school board must adopt a written evaluation policy and file it with the State Board of Education. K.S.A. 72-9004(f) further provides that "the contract of any person subject to evaluation shall not be nonrenewed on the basis of incompetence unless an evaluation of such person has been made prior to notice of nonrenewal of the contract..." The court found that the school board had complied with this statute as well. Peterson had been evaluated and received a copy of his evaluation on or about February 10, 1986. Peterson also claimed he had a statutory property right in the form of an implied contract with the school district. He argued that he was entitled to notice of any deficiencies in his job performance and an opportunity to improve. Peterson based this on the past practice of the superintendent of assisting principals by making them aware of problems that could lead to

nonrenewal. Peterson admitted that the perceived problems he was having with his staff had been brought to his attention in the fall of 1984 by the assistant superintendent. Thus, even if Peterson had implied contractual rights to notice of and the opportunity to improve his alleged deficiencies, the court could find no indication that the school district had failed to honor those rights. The court next addressed Peterson's claim that his meetings with the school board in April did not afford him procedural due process as required by the Fourteenth Amendment. Peterson argued that he was entitled to, among other things, the right to confront and cross-examine witnesses, the opportunity to be represented by counsel and a hearing conducted by a fair-minded and impartial decision-maker. The court noted that the "law is clearly established that fourteenth amendment due process 'requires some kind of hearing' prior to the discharge of an employee who has a constitutionally protected property interest in his employment" (p. 833). However, due process does not have to be a full evidentiary hearing prior to termination. As required by statute, Peterson had been afforded a meeting with the Board where he had an opportunity to hear the reasons for the Board's intent to nonrenew and to respond to those reasons. The court here believed that the procedures provided in K.S.A. 72-5452 and K.S.A. 72-5453 were sufficient to protect the property interest of a school administrator. Finally, the court addressed Peterson's claims of a violation of his liberty interests. The Fourteenth Amendment concept of liberty recognizes a public employee's interest in the protection of his good name, reputation, honor, or integrity. In order to establish a liberty interest, Peterson had to show that: (1) he was stigmatized in connection with

his termination; (2) the stigma arose from substantially false characterizations of him or his conduct; and (3) the damaging characterizations were made public through channels other than litigation. Peterson claimed that his private and professional reputations were damaged by his termination. He claimed that the superintendent knew of rumors that related to his alleged behavior and that board members added to those rumors when they stated that there was "a very good reason" for his nonrenewal. He also claimed that the Board did not allow him the opportunity to clear his name. The court found nothing in the evidence to show that the manner in which Peterson's contract had been nonrenewed would implicate a liberty interest. After the court reviewed all of the evidence, it held that it could find "no indication beyond Peterson's conclusory allegations that rumors were created, furthered or publicly disseminated by the school district" (p. 835). Thus, the court found no violation of Peterson's liberty interest. The school district's motion for summary judgment was granted.

Pitts v. Board of Education of U.S.D. 305, Salina, Kansas
869 F.2d 555 (10th Cir. 1989)

James Pitts was a tenured physical education teacher at Lincoln Junior High School. On April 26, 1984, three students reported that Pitts was intoxicated to Vice Principal Don Heath. When Heath investigated, he found that Pitts was hung over from consuming alcohol the previous night. Rumors of Pitts' condition became widespread in the school and the assistant superintendent received a number of

complaints from parents. As a result of the complaints, Pitts was suspended with pay for two school days. Pitts was cleared in a formal hearing and returned to work. On November 24, 1984, the school board passed a resolution not to renew Pitts' contract for the 1985-86 school year. There were numerous grounds cited, but those grounds were "not relevant" to the court's decision and so were not discussed. The resolution of intent to nonrenew was the first step in the process required by Kansas law to terminate a tenured teacher. Pitts received notice of the Board's decision as well as an outline of his procedural rights. Pitts requested a due process hearing. In April of 1985, before the hearing committee met, Pitts filed a lawsuit in court under 42 U.S.C. Section 1983 against the school board of Salina and a number of individuals alleging that his property and liberty interests were violated when he was discharged without due process. He also charged the defendants with a conspiracy in violation of 42 U.S.C. Section 1985(3). The hearing committee held a prehearing conference in May, which neither Pitts nor his counsel attended. In a letter dated July 25, 1985, Pitts indicated that he was waiving his right under Kansas law to the pretermination hearing. In September, the Board finalized its decision to nonrenew Pitts' contract. With regard to his court action, the district court dismissed the action on the defendants' motion for summary judgment. The district court first held that Pitts' initial two-day suspension was not a violation of property without due process because he had been suspended with pay. The district court also found that Pitts' termination had not deprived him of property without due process because he waived his due process rights when he refused to take advantage of the procedural due

process rights he was afforded under Kansas law. Pitts appealed the district court decision.

In addressing Pitts' first claim that the two-day suspension was a denial of property without due process, the appellate court cited *Bailey v. Kirk*, 777 F.2d 567, 575 (10th Cir. 1977) and noted that "while suspension of a public employee without pay may infringe upon a property right, the two-day suspension *with* pay did not deprive Pitts of any measurable property interest." *Id.* at 575. Next, the court turned to the claim that Pitts had been deprived of property without due process, and that some of the grounds listed by the Board deprived him of a liberty interest by stigmatizing him. K.S.A. 72-5436 *et seq*. outlines the procedural steps required before a tenured teacher may be dismissed. Pitts was fully informed of these rights. Because Pitts knowingly failed to take advantage of those procedures, he waived his right to challenge them in federal court. Pitts argued that this holding required him to exhaust his administrative remedies before proceeding to federal court and he believed that he should exempt from any exhaustion requirement. The appellate court stated that Pitts misunderstood the nature of his federal claim. He asserted that he was denied due process. The purpose of a federal court is not to determine the merits of a discharge decision, but to "ensure that employees are provided due process when the decision is made" (p. 557). Therefore, the holding of the appellate court was not that Pitts had to exhaust his administrative remedies before bringing his case to federal court, but that unless state law failed to provide him with adequate due process, he had no federal constitutional claim to begin with. When he waived his

right to a hearing, Pitts "deprived the school board of the opportunity to provide him with due process, and he gave up his right to test the correctness of the Board's decision" (p. 557). Pitts also argued that the defendants' actions constituted a conspiracy in violation of U.S.C. 42 Section 1985(3). The appellate court found that the district court had correctly dismissed this claim for a failure to allege any "class-based animus" behind the conspiracy. The judgment of the district court was affirmed.

Unruh v. Board of Education, Unified School District No. 300
775 P.2d 171 (Kan. 1989)

Marcia Unruh was a tenured teacher for U.S.D. 300. She had been a learning disabilities teacher for the Ki-Com Special Services Cooperative from 1977 through 1986. On April 9, 1986, the school board notified Unruh of its intention to nonrenew her teaching contract for the 1986-87 school year. The reasons given were a failure to obey reasonable rules and consistent below-expectation ratings in the areas of instructional procedures, management skills, and professional relationships. In a letter dated April 14, 1986, Unruh requested a due process hearing and demanded that the school board state the specific actions constituting the grounds for her nonrenewal. The director of special education, Mary Ann Jones, responded with a letter dated June 30, 1986, which included a four-page document that provided examples of Unruh's actions. The school board had given Jones the responsibility of responding to Unruh's letter. The due process hearing committee conducted a series of hearings in

September and November of 1986. Four witnesses testified on the Board's behalf and fifteen witnesses testified on behalf of Unruh. In April of 1987, a majority of the hearing committee found that the school board had produced substantial evidence to support the reasons for nonrenewal on the grounds that Unruh had failed to obey reasonable rules and received below-expectation ratings in the areas of management skills and professional relationships. The committee unanimously found the board had not presented sufficient evidence supporting their allegation that Unruh was consistently below expectations in the area of instructional procedures. On June 1, 1987, the school board considered the hearing committees' decision. After approximately 15-20 minutes in open session, the board unanimously adopted a resolution to nonrenew Unruh's contract. Unruh appealed to the district court. The district court found in favor of Unruh. In doing so, the district court found that none of the board members attended the due process hearing, they did not read or review the transcript of testimony from the hearing, nor did they have the contents of the record made known to them. The district court further held that the school board made its final resolution to nonrenew Unruh's contract solely on the recommendations of the administrators without any attempt to make an independent review of the facts presented at the due process hearing. The district court ordered Unruh reinstated at the same classification, rank and salary she would have been entitled if her employment had not been interrupted. The school board appealed the judgment of the district court claiming that: (1) the court erred in finding that the school board had not conducted a good faith review that satisfied the requirements of due process;

(2) the court erred in finding the decision of the board was not supported by substantial evidence; and (3) the district court had not applied the appropriate standard of review in examining the school board's decision.

The appellate court first addressed the issue of whether the school board had conducted a good faith review that satisfied the requirements of due process when they considered the decision to nonrenew Unruh's contract. K.S.A. 72-5443(c), at the time of this case, required that once the decision of the hearing committee was made, it was to be submitted to the teacher and the school board. If members of the hearing committee were not unanimous in their decision, the board was required to "consider the opinion, hear oral arguments or receive written briefs from the teacher and a representative of the board, and decide whether the contract of the teacher shall be renewed or terminated." *Haddock v. U.S.D. No. 462*, 233 Kan. 66, 661 P.2d 668 (1983) held that once the hearing committee's decision is rendered, the school board acts as a quasi-judicial body in reviewing its prior decision to nonrenew a contract. In so doing, the board must become more objective, "abandon its role as prosecutor…, and make a good faith review of its previous tentative decision in light of the case presented to the hearing committee." *Haddock* at 78. While the Teacher Tenure Law does not require the school board read the entire transcript of the due process hearing, the board must consider all information available from the hearing. Procedural due process requires that the decision be made in a manner that "does not offend the basic concept of fundamental fairness" (p. 174). In the case at hand, none of the school board members read any of the record from the hearing committee proceedings.

There was only a brief discussion at the school board meeting following receipt of the hearing committee's recommendation. As the hearing committee's decision was not unanimous, K.S.A. 72-5443(c) outlined specific tasks the board was required to undertake. Although the school board received the hearing committee's recommendation, oral arguments were not presented by counsel; instead, the written briefs of closing arguments filed with the committee were presented to the school board. Only one board member could even recall reading the brief. All of the school board members indicated during testimony in district court that they had acted upon the recommendation of district administrators. There was no evidence that a summary of the evidence presented at the due process hearing was made available to the board members. No executive session was held to review any of the evidence. There was nothing to show that the school board looked beyond the recommendation of its administrators and the brief of its own attorney when it made its final decision to nonrenew Unruh's teaching contract. The appellate court found that this failure offended the "basic concept of fundamental fairness and deprived [Unruh] of property without due process of the law under the Fourteenth Amendment" (p. 176). The appellate court agreed with the district court's conclusion that the school board had acted in an arbitrary and capricious manner. The appellate court did not find it necessary to consider the other issues raised by the school district on appeal because of its finding on this matter. Therefore, the judgment of the district court was affirmed.

Ware v. Unified School District No. 492, Butler County, Kansas
881 F.2d 906 (10th Cir. 1989)

After working for the school district for sixteen years, nine of which were as the superintendent's secretary, Norma Ware was fired. Ware had also served as clerk of the board of education from 1968 until her dismissal on April 8, 1980. The year before she was terminated, the superintendent, Larry Geil, and the school board had developed a plan for a proposed bond issue to raise funds for new construction of a new school building and for maintenance and repairs to old ones. Ware agreed with most of the bond proposal, but in some discussions with board members and district patrons, she had expressed her displeasure of the proposal to seek money for certain repairs. Geil had two conversations with Ware regarding the bond issue. In February of 1980, Geil asked why Ware opposed the bond issue and she told him of her concerns with the portion that was to pay for maintenance work. After that conversation, Ware stopped calling patrons and talking openly about the bond issue. The second conversation took place on April 2, 1980, when Geil told Ware he was going to recommend that the board not renew her contract. Geil gave Ware three reasons for his recommendation: poor working relationships in the office; his belief that working on the bond issue would upset Ware; and Ware's resistance to typing, authority, computers and changes in the office. That evening Ware and her husband called several school board members complaining that Ware was being fired for her disagreement on the bond issue. The next day, Geil had the locks on the school district offices changed and did not give Ware a key. At the April 8 school board

meeting, the board reviewed employment contracts for all non-certified personnel. The board went into executive session where Geil made a formal recommendation not to renew Ware's contract. He gave several reasons for his recommendation, including his belief that he and Ware could not work together. One board member, Dale Remsburg, moved to reject Geil's recommendation regarding Ware's contract, but his motion was voted down. A second motion to accept all of Geil's recommendations passed with a four to three vote. Ware brought suit against the school district and Geil alleging she had been terminated in retaliation of her exercise of free speech rights protected by the First and Fourteenth Amendments. The district court determined that Ware's speech was protected but entered a directed verdict for the school board. The court concluded that Ware had presented no evidence showing her speech had played a part in the school board's decision to terminate her contract. The district court also granted Geil's motion for a judgment notwithstanding the verdict (j.n.o.v.) following a jury verdict against him. In granting the j.n.o.v., the court held that Ware had failed to present sufficient evidence proving that her speech was a motivating factor in Geil's decision to fire her. Ware appealed.

The court first addressed the issue of whether Ware's speech on the bond issue was constitutionally protected. *Connick v. Meyers*, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) held that in determining whether a public employee's speech is protected, a court had to first consider whether the speech related to a matter of public concern, that was, "a matter of political, social, or other concern to the community." Ware met that burden with evidence that the bond issue was a matter of community

interest. Once it has been shown that the matter was one of public concern, the court must balance the interest of the employee with that of the employer in maintaining the efficiency of its public services. In *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), the court held that an employee's First Amendment rights were protected "unless the employer shows that some restriction is necessary to prevent the disruption of official functions or to insure effective performance by the employee." In reviewing the record of this case, the appellate court found no evidence that Ware's speech interfered with the functioning of Geil's office or impeded the performance of Ware or those with whom she worked. Therefore, the appellate court determined that Ware's speech was entitled to First Amendment protection. Next, the court addressed the district court's decision to overturn the jury verdict against Geil. In order to render a judgment n.o.v., the court must have evidence that is so strong that "reasonable minds could not differ" (p. 911). Further, it must be shown that the jury verdict was supported by sheer speculation with no factual support. For each of the reasons Geil gave for his recommendation that Ware be dismissed, Ware was able to show evidence to the contrary. Geil claimed his decision was based partly on poor working relationships in the office, but Marguerite Banks, who worked as a secretary in the office with Ware and Geil, described the office atmosphere as friendly. Banks further testified that she thought Geil and Ware's relationship remained pleasant even after the bond issue. Ware also presented evidence that demonstrated the high quality of her job performance. She received a raise every year of her employment and Geil had never criticized her. The

court further noted evidence in the form of statements by Geil indicating he was not happy with Ware's stance on the bond issue. In light of this evidence, the appellate court concluded that the district court had erred when it determined Ware's evidence was insufficient. Therefore, the grant of j.n.o.v. in favor of Geil was reversed. Finally, the appellate court addressed Ware's claim that the district court erred in granting a directed verdict for the school board. Ware believed she had presented sufficient evidence to impose liability on the board for Geil's illegal actions. In order to state a claim for liability, there must be a direct causal connection between the acts of the governing body and the alleged constitutional deprivation. This connection can be established when the governing body delegates its decision-making authority to the official whose conduct caused the harm or when the governing body retains its authority but acts with deliberate indifference to the constitutional rights of those affected by its decisions. The appellate court believed that the evidence presented was sufficient for a jury to conclude that the school board had delegated its power to fire Ware to Geil. Geil changed the locks to Ware's office the day after he told her he was going to recommend her dismissal and five days before the school board's decision. That could lead a jury to believe Geil considered his decision to be final. During testimony, a board member stated that when Geil was hired it was with the understanding that he could choose his immediate secretary. The court also found evidence to support Ware's claim that even if the school board retained its decision-making authority, it acted with deliberate indifference to Ware's First Amendment rights. The record provided evidence showing the board members knew about Ware's

disagreement with parts of the bond issue and that they had been told Ware believed her termination was in retaliation for her opinions of the bond. The school board made no independent investigation into Ware's concerns and they did not ask Geil any questions about the matter. In the appellate court's opinion, this was sufficient evidence for a jury to question whether the school board had acted with deliberate indifference. The judgment of the district court was reversed and remanded with instructions to reinstate the jury verdict against Geil and for further proceedings in the directed verdict decision for the school board.

Ware v. Unified School District No. 492, Butler County, Kansas
902 F.2d 815 (10th Cir. 1990)

In the previous *Ware* case, the appellate court reversed a directed verdict in favor of the school board on Norma Ware's claim that she was dismissed in violation of her First Amendment rights. The school board filed for a rehearing alleging that under Kansas law the school board, not school superintendent Larry Geil, was the final decision-maker regarding Ware's employment and there had been no delegation of authority. The board also argued that the court had erred when it applied the deliberate indifference standard.

The appellate court turned to a recent Supreme Court decision in *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), to help it decide the question of whether the board was liable for the termination of Ware's contract. The court in the previous *Ware* case held that the board had delegated its

authority to Superintendent Geil who then made the final decision. However, after reviewing the *Jett* decision, the appellate court concluded that state law provides the school board with final decision-making authority. It further held that the board in this case had not delegated this authority to Geil. The Supreme Court in *Jett* found that a local government entity could only be held liable for decisions made by officials who have authority under state law to speak as final decision makers on an issue. The school board in this case argued that it was the final authority, it did not delegate its authority to Geil and it should not be held liable for approving Geil's decision because it had no notice of the motive underlying his decision. The court agreed that the school board was indeed the final decision-making authority and turned to the issue of whether the board could be held liable under section 1983 for the alleged constitutional deprivation that arose from its decision to fire Ware. In spite of the board's argument to the contrary, the court reaffirmed its previous decision that the deliberate indifference standard was the appropriate one to use in this case to determine whether a "direct causal link" existed between the alleged deprivation of Ware's First Amendment rights and the board's decision, as final policymaker, to fire her. The appellate court believed there was evidence in the record to support Ware's claim that the board had acted with deliberate indifference. There was evidence showing that board members knew about Ware's opinions on the bond issue and some had been told that Ware believed her termination was because of her contrary opinions. The school board made no independent investigation into the termination and did not ask Geil any questions about his reasons for the

recommendation. School boards are charged with the knowledge that an employee may not be fired for a lawful exercise of a first amendment right. Accordingly, the court concluded that there was sufficient evidence on the issue to create a jury question as to whether the board had acted with deliberate indifference.

Gaylord v. Board of Education, Unified School District No. 218, Morton County
794 P.2d 307 (Kan. App. 1990)

Steve Gaylord's teaching contract for the 1987-88 school year was renewed by the Board in April of 1987. Gaylord wanted to explore other employment opportunities and scheduled a job interview for May 21, 1987. He requested personal leave for that day but it was denied by his principal, Steve Barnes, because it fell during the last week of school. The negotiated agreement forbade teacher absences the first or last week of any semester. Barnes told Gaylord that the only person who could approve his personal leave request during that time period was the superintendent, Kenneth Fowler. Gaylord submitted his request to Fowler and it was denied. Gaylord's wife called Barnes on the morning of May 21, said that Gaylord was sick, and would not be at work. Later that day, a high school principal in Texas called Barnes to request a recommendation for Gaylord. From the conversation, Barnes discovered that Gaylord had been in Texas interviewing for a job that morning. The next day, Gaylord completed a sick leave form for his May 21 absence and attached a physician's note. Fowler called Gaylord to his office, told him he knew about his interview in Texas, requested his keys, and told him to leave school

property. Later, the Board notified Gaylord of their intent to nonrenew his contract. The reasons given were insubordination, failure to follow Board policy, and abusive treatment of students. Gaylord called for a due process hearing. The due process panel determined, by a two to one vote, that there was just cause to terminate Gaylord's contract on the finding of insubordination. The panel unanimously concluded that there was insufficient evidence of the other two charges. Following the statutory mandate found in K.S.A. 72-5436 *et seq.* to review less than unanimous decisions of a hearing panel, the Board considered the opinion and voted to terminate Gaylord's contract. Gaylord appealed to the district court, which affirmed the Board's decision. Gaylord next appealed to the Court of Appeals. He argued that there was not sufficient evidence to support the finding of insubordination and that the Board's decision was arbitrary and capricious.

Under K.S.A. 72-5436 *et seq.*a board of education must follow certain procedures in order to terminate the contract of a tenured teacher. K.S.A. 72-5443 provides in part that when more than one reason is given for a nonrenewal or termination, and the hearing committee is unanimous on one or more reasons but not on another, the board "is required to adopt the unanimous portions of the committee's decision and may make its own decision on the nonunanimous portions." In this case, the only issue the court had to review was the charge of insubordination. Insubordination is defined as "disobedience to constituted authority. Refusal to obey some order which a superior officer is entitled to give and have obeyed" (p. 309 citing Black's Law Dictionary). Gaylord requested a personal day off during a time

prohibited by the negotiated agreement and was denied twice. When he did not get permission, he had his wife call in sick for him and drove to Texas for a job interview. Upon his return, he filled out an absence sheet claiming he had been ill that day. Upon review of these facts, the court found that there was "substantial evidence" to support the finding of insubordination. The court also held that the Board had acted within the scope of its authority, and found no evidence that the Board had acted in an arbitrary or capricious manner. The decision of the district court was affirmed.

Mason v. Board of Education, Unified School District No. 209
741 F. Supp. 879 (D. Kan. 1990)

Jones Mason had been employed as an elementary principal and a high school counselor for five years. On April 9, 1987, the Board sent two notices of nonrenewal to Mason informing him that his contract would not be renewed for the 1987-88 school year. At its meeting on April 13, 1987, the Board voted to extend Mason's contract another year with his duties divided 55% as elementary principal and 45% as high school counselor. Mason's employment was governed by a single contract titled "Principal's Contract for Moscow Public Schools." In April of 1988, Mason was notified by letter that the Board had voted that his contract as an administrator not be renewed for the 1988-89 school year. The letter explained Mason's right to request a meeting in executive session with the Board at which time the Board would specify the reasons for its decision. The letter also cited a provision of the Administrator's Act that states neither side shall have the right to have counsel present at the meeting.

The letter did not mention the portion of Mason's contract that dealt with his duties as a counselor. The Board held a meeting and Mason was told the Board's reasons for his nonrenewal and he was given a chance to respond. At this meeting, the Board also told Mason that he was not being renewed as a high school counselor and that no additional hearing would be provided to him. Mason brought a civil rights action under 42 U.S.C. Section 1983 against the school board and the board president alleging that the Board's nonrenewal of his contract as a teacher violated K.S.A. 72-5436 *et seq.* and denied him due process. The Board first filed a motion of summary judgment in which it argued that Mason had "post-deprivation remedies under state law which adequately redress[ed] him for any denial of due process" (p. 881). The Board and defendant William Preheim, school board president, joined in a second motion for summary judgment arguing that Mason had to show that the Board's actions were taken as a result of a practice or policy of the Board and that Preheim was entitled to qualified immunity.

The court first addressed the Board's motion on the adequacy of post-deprivation state law remedies. It held that "in the present case the State is undeniably in a position to provide predeprivation process, since it has done so under the Teachers' Due Process Act, K.S.A. 72-5436, *et seq.*, and the Administrators' Act, K.S.A. 72-5451 *et seq*." (p. 882). Therefore, post-deprivation remedies alone would not sufficiently protect Mason's property interest in employment. For that reason, the court denied the Board's first motion for summary judgment. The court next addressed the second motion. The court first rejected the Board's argument that

Mason had to prove that the Board's denial of his due process rights was the result of an existing Board practice, instead of an isolated decision. In *Pembaur v. Cincinnati*, 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court held that "...a municipality may be liable under Section 1983 for a single decision by its properly constituted legislative body - whether or not that body had taken similar action in the past or intended to do so in the future..." *Id.* at 479-80. The Board, in this case being the legislative body, had decided not to renew Mason's contract without affording him the procedural protections under K.S.A. 72-5436 *et seq*. Thus, the Board's argument was without merit. Next, the court turned to the issue of whether Preheim was entitled to good faith immunity on the grounds that Mason's right to the procedures under the Teacher's Due Process Act was not clearly established at the time of his renewal. Preheim argued that because Mason had responsibilities as both an administrator and a teacher, and because the Board acted on the advice of legal counsel, it was not clear whether Mason was entitled to the process under the Teacher's Due Process Act. Qualified immunity provides that a government official is "generally shielded 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" (p. 884). The burden is on the plaintiff to prove that the law was "clearly established" and to show how the defendants' conduct violated this clearly established law. Neither the Administrators' Act nor the Teachers' Due Process Act address or offer guidance on the type of situation presented in this case. Mason was both an administrator and a teacher under

a single contract. In fact, the statutory definition of a teacher excludes anyone who is an administrator, but the definition of an administrator does not exclude anyone who is a teacher. The court found that it was "objectively reasonable for an official faced with applying two distinct procedural acts for nonrenewal of an employee's contract to believe that compliance with one act is sufficient and to opt for conformance with that act appearing to be most applicable to the employee's circumstances" (p. 886). The court also held that it was not a matter of "clearly established law" that the procedures in the Administrators' Act would not provide due process to Mason. Because Mason was unable to show that it was clearly established that only the procedures of the Teachers' Due Process Act would have met the constitutional requirement of due process, the court found that Preheim was entitled to summary judgment on his defense of qualified immunity. The Board's motions for summary judgment were denied in both instances.

O'Hair v. Board of Education, Unified School District No. 300, Comanche County
805 P.2d 40 (Kan. App. 1990)

Carl O'Hair was a tenured teacher whose contract was nonrenewed because of a Board-directed policy to reduce the budget following a loss in the school district's assessed valuation. At the time of his nonrenewal, O'Hair was a part-time assistant principal at Coldwater High School and taught three classes. After he was nonrenewed, other administrators assumed his administrative duties and three other tenured teachers with less seniority than O'Hair took over his classes. After he

received notice of his nonrenewal, O'Hair requested a hearing that was held on January 30, 1989. At the hearing, O'Hair presented evidence alleging he could have been given a full schedule if he had been allowed to teach physical education and American History at the other high school in the district. The Board presented evidence explaining the procedure they followed before recommending O'Hair be nonrenewed. The hearing committee voted 2-1 in support of the Board's decision to nonrenew O'Hair. The Board heard the arguments of counsel on the findings of the hearing committee on February 15, 1989, but no action was taken at that meeting. Before the next meeting on March 6, 1989, Superintendent James Chadwick prepared a resolution confirming O'Hair's contract nonrenewal. At the March 6 meeting, the Board went into executive session, discussed the nonrenewal issue with the superintendent and reviewed the exhibits that had been presented to the due process committee. The Board returned to an open meeting and voted unanimously to approve O'Hair's nonrenewal. O'Hair appealed to the district court. The district court reversed the Board's decision and found that (1) the preparation of the resolution in advance of the hearing precluded due process and showed that the Board had acted in an arbitrary and capricious manner; (2) the Board's failure to examine O'Hair's competence and training, as well as that of the teachers who replaced him, was arbitrary and capricious; (3) no good cause was shown for O'Hair's nonrenewal because the three teachers who took on his classes had less seniority than did O'Hair and one, John McNeely, was not certified to teach American history: (4) there was no evidence that O'Hair was not competent; (5) the Board failed to consider O'Hair for

other full- or part-time positions for which he was certified; and (6) the decision to nonrenew O'Hair was made in executive session which violated K.S.A. 75-4319 and was another example of how the decision to nonrenew O'Hair's contract was arbitrary, unreasonable, and capricious. The Board was ordered to reinstate O'Hair and pay him the salary and fringe he would have been due had he been an employee. The Board appealed the decision.

The first question addressed by the Court of Appeals, was whether the Board's decision to nonrenew O'Hair had been properly reached. Board policy GBQA dealt with the procedures to follow in case of the need for a reduction in teaching staff. A review of this policy and of the record from the due process hearing showed the court that "ample evidence" had been presented to indicate that school administrators had followed Board policy in choosing O'Hair's contract for nonrenewal. The administrators had first looked to see if there were any nontenured teachers who could be dismissed. Once it was found that there were none, the administrators evaluated the teaching skills and abilities of the tenured teachers in relation to the district's need to maintain existing programs. Every teacher was assessed to determine if his or her termination would still allow the district to continue a program. The only person who met those criteria was O'Hair. The administrators next looked to see if O'Hair could bump someone who was in another position that O'Hair could teach. After this process, the administrators determined that O'Hair was one of the employees who would fit into the reduction in force. The court found the record showed that the trial court was incorrect in its finding that the school district had not

considered O'Hair's competence, skill and training. It was true that they had not assessed the various levels of competence among all employees, but that was not required by Board policy. O'Hair contended that he could have had a full schedule if the Board had allowed him to teach American history and high school physical education. To do this, the Board would have had to place three tenured teachers on part-time contracts. In *Butler v. U.S.D. No. 440*, 244 Kan. 458, 769 P.2d 651 (1989), the court considered the question of whether a school district had to reduce some teachers to part-time in order to retain a tenured teacher. The court in *Butler* held that "in the absence of bad faith, a board is not required to make such a drastic rearrangement of its teaching assignments." *Id.* at 470. Citing the court's finding in *Butler*, the appellate court held here that the Board could not be required to force three tenured teachers to become part-time teachers in order to accommodate one tenured teacher, O'Hair. The court also noted that there was nothing in either Continuing Contract Law, K.S.A. 72-5410 *et seq.*, or the Due Process Procedure Act, K.S.A. 72-5436 *et seq.*, stating that a reduction in size of a teaching staff must be accomplished on a seniority basis. The court did find it "troubling" that although administrators thought McNeely was fully certified to teach American history, he was not. The evidence showed that an inquiry had been made to the State Department of Education by administrators and it was believed that he was certified. The court determined that in this circumstance, there was no finding of bad faith on the part of the Board to retain McNeely, as it did not appear that the educational opportunities of students were compromised by allowing him to teach American history.

The next question for the court to decide was whether the actions of the Board in considering the opinion of the hearing committee violated O'Hair's due process rights. The Board president had testified that each member of the Board read the transcript of the hearing committee and listened to the arguments from counsel for the teacher and the school district. No one testified that they had acted only on the superintendent's recommendation. The appellate court determined that the superintendent's involvement, and his writing of a resolution prior to the March 6 meeting, was "inadvisable," but it did not amount to a due process violation. The appellate court further held the district court's finding that the decision to nonrenew O'Hair's contract had been made by the Board either before or during executive session was incorrect. The Board president's deposition clearly stated that no decision was reached during executive session and that all of the evidence was discussed. When the executive session ended, the Board voted in open session that O'Hair's contract be nonrenewed. The action was not taken in closed or executive session so the Kansas Open Meetings act had not been violated. The subject discussed in executive session was "personnel matters of non-elected personnel," which is allowed under K.S.A. 75-4319(b)(1). Although the Board indicated that consensus was reached in executive session as to how each member intended to vote, the motion and the action all took place in an open meeting. The decision of the district court was reversed and the decision of the Board to nonrenew O'Hair's contract was reinstated.

Unified School District No. 457, Finney County, Kansas v. Phifer
729 F. Supp. 1298 (D. Kan. 1990)

Jimmy Phifer served as superintendent of schools beginning on July 1, 1984. He was then given a two-year contract that began on July 1, 1985. During his time as superintendent, Phifer submitted monthly requests for reimbursement that totaled $116,000 during the first twenty months of his employment. On March 31, 1986, the local newspaper published an article that discussed Phifer's problems with personal debt. Later articles questioned some of the reimbursements Phifer had received from the school district. The school board held a special meeting on April 2, 1986, in which the board decided that any insinuation of impropriety by Phifer would be investigated by an independent auditor. On April 9, 1986, the board decided to hire a local accounting firm to handle the investigation into the reimbursements paid to Phifer. On April 12, 1986, Phifer submitted a letter of resignation to the school board. In his letter Phifer stated that his resignation was conditioned on stipulations that he be placed on paid leave until June 30, 1986 and that his insurance continue until that time as well. Phifer also requested that he be paid for any unused vacation leave. He explained that he was resigning due to the series of "false and malicious articles" that had appeared in the local newspaper. Phifer and his wife left town on April 13, 1986, for Arizona and never returned. The school board met on April 14 and accepted Phifer's resignation on his stated conditions but withheld payment of the money he requested until the district's investigation was concluded. The board's attorney sent a letter to Phifer dated April 15, 1986, which informed him of the board's decision.

The letter included language explaining that the board would "suspend or otherwise escrow in a special account the balance of the contract remuneration as called for under the terms of accepted resignation pending a satisfactory conclusion of the special investigations currently being conducted" (p. 1302). The investigation was completed and the auditors reported on May 28, 1986, that Phifer owed the school district at least $15,178.65. A copy of the audit was mailed to Phifer who responded in a letter dated June 24, 1986, to the items listed. On March 10, 1987, the county attorney filed a seventeen count criminal complaint against Phifer in the district court. He was charged with multiple counts of theft of funds and presenting false claims to the school district. On April 20, 1987, the school board voted to rescind its conditional acceptance of Phifer's resignation and to terminate him for a material breach of contract. The school district brought suit against Phifer seeking damages on claims of wrongful conversion of district property and breach of contract. Phifer brought a countersuit claiming that the school district had breached a contract to him to pay him additional earned and unearned salary and vacation pay. Phifer also claimed that the district had deprived him of a protected property interest and/or liberty interest without due process of law. The school district moved for summary judgment.

In order to state a claim for due process, the claimant must show that he was deprived of an interest within the Fourteenth Amendment's protected institutions of property or liberty. Generally, a public employee hired for a definite term has a property interest in continued employment. The school district argued that Phifer lost

any property interest he may have had when he resigned. Phifer claimed that his resignation was conditioned upon certain terms and, because those terms were not unconditionally accepted, his contractual stake in the superintendent position continued until the school board voted to terminate his contract. At issue was whether Phifer's resignation ended any interest he might have reasonably had in continued employment. After his resignation, Phifer never attempted to act as superintendent nor ever demanded his job back. He left town the day after he resigned and moved out of state. The court found nothing ambiguous about either parties' intent after April 14, 1986. Both the school district and Phifer obviously considered that his employment with the district had ended. Phifer's attempt at building his property interest claim on the school board's conditional acceptance of his conditional resignation was "legally insufficient." The school board's conditional acceptance did not give rise to any legitimate claim of an expectation of continued employment. Thus, the board's decision to terminate Phifer did not deprive him of any property interest. The court next examined whether Phifer had been deprived of any liberty interest. Liberty, in public employment, consists of: (1) the protection of the employee's good name and reputation, and (2) his freedom to take advantage of other employment opportunities. An injury to an employee's reputation alone will not trigger due process protection unless it is "entangled with the loss of some more tangible interest, such as employment." Phifer claimed that the "more tangible interest" behind in liberty claim was his contractual right to continued employment, which existed as a result of the school board's "ineffective" acceptance of his

conditional resignation. The court again reiterated the point that no employment relationship existed after Phifer resigned and the school board's acceptance, conditional or not, of it. In the court's opinion, Phifer voluntarily relinquished all rights to continued employment by submitting his resignation and no longer performing under his contract. The court found no implication of a liberty interest and held that Phifer was without an action under Section 1983. Finally, the court turned to Phifer's claims that the school district owed him for unearned salary and vacation pay. Phifer based this claim on the fact that his resignation was offered pursuant to certain conditions that he believed the school district accepted in its April 15 letter. After reviewing all of the evidence, the court determined that the school board did not unconditionally accept Phifer's conditions; instead, it made a counteroffer consisting of changes to Phifer's terms. Therefore, the school district's motion for summary judgment was granted.

Ginwright v. Unified School District No. 457
756 F. Supp. 1458 (D. Kan. 1991)

Nadine Ginwright filed action in which she claimed that the school district had dismissed her from her teaching position due to her race. Ginwright had been hired as an elementary school teacher in 1983 by the defendant school district. In 1986, she was transferred to the new Edith Scheuerman Elementary School. At that time, Ginwright was the only black teacher within the school district. During her time at Scheuerman, Ginwright was under the supervision of Ron Brown, the

principal. When Brown introduced the new teachers at the school during an assembly, he referred to Ginwright as "the lady with the best suntan" (p. 1460). Brown claimed that he introduced other teachers by reference to their physical characteristics in order to help students remember their names. Ginwright disagreed with Brown's statement, claiming that she was the only one singled out by her physical characteristics. In October 1986, a conflict developed between Ginwright and a special education teacher. The nature of the disagreement was disputed between parties, but Ginwright received an oral reprimand from Brown as a result of the problem while the white special education teacher did not. Other issues were identified by the defendants as having occurred in 1986, including the allegation that Ginwright had abused her teenage daughter. However, other than the child abuse claim, little was offered in terms of elaboration or explanation of these concerns. Charges had been filed in the district attorney's office against Ginwright for the abuse of her 15-year-old daughter. Those charges were dismissed with prejudice under a plea agreement. The allegations against Ginwright did not cause the district to nonrenew Ginwright's teaching contract. She was renewed for the 1987-88 school year and her annual evaluation report, completed by Brown, was complementary of her teaching skills. Brown allegedly made other racially-oriented remarks in February of 1987. Again, the parties did not agree on the nature or context of the remarks. In the spring of 1987, Brown was allegedly contacted by parents who complained that Ginwright gave too much homework, he did not name the parents and according to Ginwright, Brown never discussed these phone calls with her. Other parent complaints were

alleged by Brown and denied by Ginwright. In April 1987, Ginwright was suspended by Brown for one day because she had permitted a student to post test scores of other students. Ginwright claimed that teachers had been allowed to do so in her previous school. On May 27, 1987, the last day of school, Brown relieved Ginwright of her position as the head of the math and science department because of a parent complaint regarding a math competition. Ginwright again stated that Brown had not discusses the complaint with her nor had he allowed her an opportunity to present her side of the story. When the next school year started, Ginwright was placed on a "Plan of Assistance." This plan was a seven-page document that required Ginwright to undergo a psychiatric examination, established a system for monitoring her classroom instruction, and required her to follow a program to correct her errors cited in the plan's "Statement of Deficiency." This portion of the plan stated that Ginwright's teaching was not conducive to learning, that her behavior had been unprofessional, that she disregarded school rules, and that she evidenced a pattern "suggesting emotional instability" (p. 1467). After receiving the plan, Ginwright underwent two psychiatric evaluations both which indicated that Ginwright was not a danger to herself or her students. In November, Brown made his quarterly review of Ginwright's performance. He stated that she needed further improvement in creating an atmosphere "conducive to learning," and in correcting her unprofessional behavior. The report did not provide any examples of misconduct on the part of Ginwright. In February, Brown made his annual review of Ginwright's teaching and concluded that she had not "lived up to the minimum teacher expectations" (p.1468). Again, Brown

provided no elaboration or specific examples to support his conclusions. At a school board meeting on March 21, 1988, the assistant superintendent recommended that Ginwright's contract not be renewed. The Board unanimously passed the motion to give Ginwright a notice of nonrenewal. The notice of intent was given to Ginwright on March 22 and she was informed of her right to request a hearing. Ginwright initially requested a hearing, but on May 24, 1988, her attorney informed the school district that she was dropping her due process hearing request and pursuing her remedies under federal law. Ginwright denied the truth of the various allegations made against her in the plan of assistance. She also denied the validity of the defendant's claims that her teaching did not meet "minimum teacher expectations." Ginwright claimed that the term had never been defined by the defendants and that Brown had never explained how her teaching deviated from these standards. She brought action against the school district and certain school officials asserting claims under federal civil rights law and state tort law. The defendants moved for summary judgment against Ginwright's civil rights action.

When considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the nonmoving party. In this case, Ginwright's claims would be assumed true, unless the defendants could demonstrate their entitlement to summary judgment beyond a reasonable doubt. Because of this standard, the court rejected the defendant's arguments that Ginwright's claims of discrimination lacked evidentiary support and that she could not establish that their stated reasons for her termination were pretextual. In accepting Ginwright's version

of the facts, the defendants showed a consistent racial motive against Ginwright starting on the first day of school when she was introduced as the teacher with the suntan. Brown made other racial remarks in Ginwright's presence without any legitimate reason to do so. The defendants could show no legitimate rationale for their treatment of Ginwright and offered no evidence of her teaching below minimum standard. The court also found that white teachers who had been accused of similar deeds received no disciplinary action nor had they been placed on plans of assistance. For these reasons, the court denied the defendant's request for summary judgment on Ginwright's Title VII claims of disparate treatment and recommended that the matter be placed on trial. The defendant's motion for summary judgment on a Title VII harassment and retaliation claims were also denied. Although the court viewed with "some doubt" the strength of the plaintiff's claims on these allegations, it believed that the matters could be "addressed in a more satisfactory fashion at trial, where further evidence" (p. 1475) would be available. The defendant's motion was also denied with respect to Ginwright's equal protection claims under 42 U.S.C. Section 1983, as the court found evidence from which an intent to discriminate could be inferred. Ginwright's due process claim was dismissed because the school board had extended the opportunity for a hearing, but Ginwright waived that opportunity in order to bring the action to court. Ginwright's state tort claims of outrage, wrongful discharge, defamation, and breach of privacy were also denied, as she made "no great effort to salvage them from the defendant's attack" (p. 1476). The court therefore ordered that the defendant's motion for summary judgment granted in part and denied in part.

Loewen v Board of Education, School District No. 411, Marion County, Kansas
813 P.2d 385 (Kan. App. 1991)

Martha Loewen was a tenured Kindergarten teacher for U.S.D. No. 411. In the fall of 1986, Perry McCabe, the building principal, expressed concern about Loewen's teaching methods and classroom management. McCabe had been contacted by parents who expressed similar concerns. After evaluations, McCabe determined that Loewen was an ineffective teacher who needed to be placed on a plan of assistance. In April of 1987, McCabe and the superintendent, Robert Van Arsdale, met with Loewen and told her that although her teaching contract would be renewed for the following school year she would be placed on an intensive assistance plan and be required to submit to a physical and mental examination. All parties agreed to bring in Dr. Jeri Carroll, professor of elementary and early childhood education at Wichita State University, to observe Loewen in the classroom and provide her with suggestions for improvement. After his visits, Dr. Carroll made specific recommendations to Loewen and the administration and these were added into the plan of assistance in January of 1988. In March of 1988, the Board decided not to renew Loewen's contract based on her failure to maintain the requirements of the assistance plan and implement Dr. Carroll's suggestions. Written notice of the nonrenewal was served and Loewen requested a due process hearing. Loewen also requested and was given a more specific statement from the Board providing the reasons for her nonrenewal. A hearing was held on January 11, 12, and 13, 1989 with the majority of the hearing committee finding that Loewen should be reinstated. The

Board considered the opinions of the hearing committee panel and accepted briefs from both parties as required by K.S.A. 72-5443. An executive session was held in early August in which the members of the school board, the superintendent, McCabe, who was being replaced as principal, and Chet Roberts, the incoming principal, were present. At the next school board meeting on August 14, 1989, the Board voted unanimously to affirm its earlier decision to nonrenew Loewen's contract. Loewen appealed this decision to the district court. In June of 1990, the trial court found that Loewen had not been denied due process, that she had received a fair and impartial hearing, that evidence outside the record was not considered, and that substantial evidence existed to justify her nonrenewal. Loewen appealed the district court decision on the grounds that she had been denied due process and that the Board's decision was arbitrary and not supported by the evidence.

As required by K.S.A. 72-5436 *et seq.*, a nonrenewed tenured teacher has the right to a due process hearing before a three-person hearing committee. If the hearing committee does not reach a unanimous decision, "the board shall consider the opinion, hear oral arguments or receive written briefs from the teacher and a representative of the board, and decide whether the contract of the teacher shall be renewed or terminated." K.S.A. 72-5443(c). Evidence and depositions of Board members revealed a thorough discussion of the hearing committee's transcript and a conscious attempt to make the best decision for all parties involved. However, these depositions also showed that Board members had discussed Loewen's situation with patrons after the end of the due process hearings. In *Haddock v. U.S.D. No. 462*, 233 Kan. 66, 661

P.2d 368 (1983), three board members had conducted their own outside investigations into the facts in a teacher nonrenewal case. The Supreme Court found these actions to be a violation of due process because the teacher in the case would have had no opportunity to hear evidence gathered during independent investigations. This procedure, according to the Supreme Court, "was fundamentally unfair." The fact that Board members in this case also obtained the opinions of members of the public was clearly in violation of the Supreme Court's prohibition in *Haddock*, where it was stated that a teacher "whose contract is being nonrenewed is entitled to be judged solely on the reasons enunciated in the notice of nonrenewal. Due process requires no less" 233 Kan. at 78. Loewen also contended that the presence of the superintendent and the principal during the Board's executive session violated her right to due process. The court pointed out that there were actually three administrators present, as both the former and present building principals were in attendance. Kansas courts have held that allowing a superintendent to be present at due process deliberations is not a violation of due process. However, the presence of McCabe and Roberts "severely damaged the elements of 'fundamental fairness' that the Board had the obligation to establish" (p. 391). The court did not agree with the Board's contention that because McCabe and Van Arsdale had not been asked for their opinions during the meeting, their presence had no effect on due process. Finally, the court addressed Loewen's complaint that the Board had relied on reasons for nonrenewal not recorded in their notice for nonrenewal. The court determined that it could not determine whether the allegation had merit based on the Board's

decision. K.S.A. 72-5443(c) only requires that the Board "decide whether the contract of the teacher shall be renewed or terminated." The statute does not require the Board to set forth its findings of fact. In the case at hand, a majority of the material facts were in dispute by the parties. For that reason, the court held that "when the controlling facts are disputed, as here, meaningful review cannot be made of a school board's decision without it either adopting the findings of the hearing committee or making its own specific findings upon which its conclusion is deemed to be justified" (p. 393). The court did not order reinstatement of Loewen, as it believed there were valid factual issues presented that could jeopardize the educational opportunities of students. There were also facts that could support her reinstatement, but the court chose not to express an opinion either way. The decision of the trial court was reversed because of the procedural due process violations previously mentioned. The matter was also remanded with instructions that the trial court remand the case to the Board for due process considerations and for the Board to make findings of fact upon which its decision could be justified.

Thompson v. Unified School District No. 259, Wichita
819 P.2d 1236 (Kan. App. 1991)

LeRoy Thompson was a tenured avionics teacher in the vocational education program. Thompson was only certified to teach avionics. In May of 1989, the director of the school board's division of vocational education recommended that the avionics program be discontinued. In order for the vocational department to received

state funding, at least 70% of its graduates had to be placed in jobs in private industry. The Wichita program had not come close to this placement rate and the enrollment in the vocational program was low. On July 10, 1989, the Board voted to discontinue the avionics program and to layoff Thompson and another avionics teacher. In a letter dated July 11, 1989, the school board notified Thompson that he was laid off effective August 11, 1989. The letter also informed Thompson that the layoff was in accordance with Article XVIII of the teacher's negotiated agreement. Thompson filed suit in district court claiming that his employment had been terminated unlawfully. He further claimed he was entitled to notice on or before April 10 of the year he was terminated pursuant to K.S.A. 72 5411 and K.S.A. 5437. Thompson's final claim was that Article XVIII of the negotiated agreement was void because it violated state statutes and his Fourteenth Amendment due process rights. The trial court found in favor of the school district. It determined that Thompson had been laid off, not terminated, and the layoff was governed by Article XVIII and not by K.S.A. 72-5411 and 72-5437. Thompson appealed the trial court's decision.

Article XVIII of the negotiated agreement provided that teachers whose positions were eliminated could be laid off. The agreement further provided that only 30 days written notice needed to be given in cases of teacher layoffs. Under the agreement, a layoff was not to be considered a termination or nonrenewal under K.S.A. 72-5436 or K.S.A. 72-5411. K.S.A. 72-5411 and 72-5437 clearly state they apply to teacher terminations or nonrenewals, not layoffs. Layoff and recall of teachers is a mandatory negotiable topic under the Professional Negotiations Act and

it had been negotiated by both the Board and NEA-Wichita. Thus, Thompson was bound by the negotiated agreement. Thompson next argued that the district court's interpretation of the statutes resulted in a taking of his property interest under the Fourteenth Amendment without due process. The essential elements of due process are notice and an opportunity to be heard. Under K.S.A. 72-5210 *et seq.* public school teachers have a property interest in expectancy of continued employment sufficient to require notice and hearing prior to nonrenewal of the contract. In this case, the negotiated agreement waived the April 10 notice requirement for instances of teacher layoffs. Thompson received his notice within the agreed upon 30-day time period and the Board had provided him with an opportunity to be heard. Therefore, Thompson had been afforded the due process rights required. The judgment of the district court was affirmed.

Ames v. Board of Education, Unified School District No. 264
864 P. 2d 233 (Kan. 1993)

A tenured teacher, Everett Ames, was notified of the board's intent to nonrenew his contract after 12 years of teaching in the district. The Board stated that the rationale for nonrenewal was "inadequate teaching and communication techniques over an extended period of time with basic resistance to change." Ames requested and was granted a due process hearing. After conducting a full evidentiary hearing, the committee found that Ames probably had inadequate teaching and communication techniques but did not possess a resistance to change; that the evaluation procedures

in K.S.A. 72-9001, which is, in part, an act that provides for a "systematic method for improvement of school personnel in their jobs" were not followed properly; and that the nonrenewal was improper. The Board adopted the committee's findings, but still nonrenewed Ames' contract without providing any further rationale for doing so. Ames sought judicial review of the decision and the trial court entered a judgment in favor of the Board. The trial court found that the Board had adopted the decision of the hearing committee as required by K.S.A. 1991 Supp. 72-5443 and concluded that the Board's decision was supported by the evidence introduced at the due process hearing. Ames sought review of his case with the Court of Appeals.

K.S.A. 1991 Supp. 72-5443 provides: "(b) Upon receiving the written opinion of the hearing committee, the board shall adopt the opinion as its decision in the matter and such decision shall be final, subject to appeal to the district court as provided in K.S.A. 60-2101, and amendments thereto." In this case, the Board had no discretion to exercise, as it was required to adopt the committee's opinion as its own. While the Board stated its two reasons for nonrenewal were inadequate teaching techniques and resistance to change, the committee found that Ames did *not* resist change. The committee also found that statutory evaluation procedures had not been followed and concluded that Ames' nonrenewal was improper. K.S.A. 1991 Supp. 72-5443 mandates that the Board must adopt the committees' opinion as its own. If nonrenewal was improper, as determined by the committee, then Ames should have had his contract renewed. The Appeals Court determined that the Board, and on

appeal the district court, did not follow K.S.A. 1991 Supp. 72-5443. The trial court's decision was reversed.

Statute requires that a Board of Education must adopt the written opinion of a due process committee as its own on issues of renewal of tenured teachers. In this case, the board should have reinstated Everett Ames after the hearing committee determined that nonrenewal was not proper.

Unified School District No. 380, Marshall County v. McMillen
845 P.2d 676 (Kan. 1993)

Dwight McMillen was a tenured teacher for U.S.D. No. 380. On April 1, 1991, the school board adopted a resolution stating its intent to nonrenew McMillen's contract for the following year. On April 19, 1991, the board notified McMillen in writing of their intent to nonrenew. McMillen requested a due process hearing which was held in August 1991. On October 30, 1991, the hearing committee issued its written opinion that, in a two-to-one decision, it had found that McMillen's contract should have been renewed because the school board failed to show good cause for the termination. The committee concluded that McMillen should be reinstated to his teaching position with back pay. On November 4, 1991, the school board adopted the opinion of the hearing committee as was required by K.S.A. 72-5443. The board filed a notice of appeal on November 20, 1991 in district court. The school board alleged that it did not agree with the opinion of the hearing committee, but was forced to accept it by state statute. The school district included an allegation that K.S.A. 72-

5443 was unconstitutional because it violated Sections 2 and 5 of Article 6 of the Kansas Constitution. After the briefs were filed, the trial court held a hearing on the issue of the constitutionality of K.S.A. 72-5443. The court first found that the authority granted to the hearing committee was not an unlawful delegation of legislative authority. The court next found that K.S.A. 72-5443 did violate Sections 2 and 5 of Article 6 because the statute removed the authority from the school board to make the final decision on whether a teacher's contract should be renewed. The trial court further concluded that the board was not bound by the statutory requirement to adopt the hearing committee's decision. McMillen appealed the district court's order finding K.S.A. 72-5443 unconstitutional.

A review of the legislative history of the statute was first discussed by the court. K.S.A. 72-5443 was originally adopted in 1974 and at that time, it permitted a board of education to accept or reject the recommendation of a hearing committee. In 1984, the statute was changed to state that if the hearing committee's decision was unanimous it had to be accepted by the board. In 1991, the statute was amended to make all decisions by the hearing committee binding on a school board. The statute was changed again in 1992 at which time the legislature replaced the hearing committee with a single hearing officer. The decision of the hearing officer is final, subject to appeal by either party. It was the 1991 amendment that was controlling when this case was brought to court. The merits of McMillen's dismissal and findings of the hearing committee were not at issue in this case. The question the Kansas Supreme Court sought to answer was whether K.S.A. 72-5443 violated the Kansas

Constitution. Section 2(a) of Article 6 of the Kansas Constitution provide in part that the legislature shall provide for a state board of education "which shall have general supervision of public schools, educational institutions and all the educational interests of the state, except educational functions delegated by law." Section 5 of Article 6 discusses local public schools. It provides in relevant part that local public schools under the general supervision of the state board, "shall be maintained, developed and operated by locally elected boards." The school board maintained that it had a constitutional right to hire and fire, and K.S.A. 72-5443 was usurping this right by taking it out of the hands of the board and placing it in the hands of a hearing committee. However, the court pointed out that Section 2 limits the power of the state board to "general supervision." In *State, ex rel., v. Board of Education*, 212 Kan. 482, 511 P.2d 705 (1973), general supervision was defined as the "power to inspect, to superintend, to evaluate, and to oversee for direction." The powers of the hearing committee, in the opinion of the court, did not unconstitutionally infringe on the state board of education's general supervision authority. Hiring and firing teachers or other employees in a school district had not been considered part of the supervisory duty of the state board, thus K.S.A. 72-5443 did not violate Section 2(a) of Article 6 of the Kansas Constitution. Next, the court addressed the school districts' claim that the statute violated Section 5 of Article 6. The school district argued, and the trial court agreed, that the duty to "select and maintain an efficient, knowledgeable, and adequate teaching staff is one that devolves upon the local school board under its constitutional mandate to maintain, develop, and operate the local school system" (p.

683). The court agreed that this argument made sense and even "appealed" to most of the members of the court. However, it held that as long as a legislative enactment was constitutional, the members of the court could not substitute their own opinion for that of the legislature. If K.S.A. 72-5443 did not clearly oppose the provisions of Section 5, the duty of the court was to uphold the statute. To determine its constitutionality, the court weighed the power granted to the legislature by Section 1, Article 6 against the power granted to the school board by Section 5, Article 6. It found in Article 1 that the legislature had the "broad duty" of establishing and maintaining the public school system. The local school board's duties under Section 5 were dependent upon statutory enactments of the legislature. The court held that the "duties and obligations vested in the legislature and the local school boards by the Kansas Constitution must be read together and harmonized so both entities may carry out their respective obligations" (p. 685). The court did not find that K.S.A. 72-5443 was so irrational that it interfered with the school boards' performance of its duty to maintain, develop, and operate the local public school. According to the court, the legislature had the power to give a hearing committee the right to make a binding determination on the issue of a teacher's nonrenewal and this determination was subject to the board's right to appeal. The judgment of the district court was reversed and the case remanded for further proceedings.

McMillen v. U.S.D. No. 380, Marshall County, Kansas
855 P.2d 896 (Kan. 1993)

This court action is related to the decision in *U.S.D. No. 380 v. McMillen*, 252 Kan. 451, 845 P.2d 676 (1993). The details of that case were previously discussed and the case will be referred to as *McMillen I*. In *McMillen I*, the Supreme Court of Kansas remanded the case to the district court for review on the merits. While that case was pending in district court, Dwight McMillen filed a petition for mandamus in district court in which he sought an order requiring the school board to continue payment of his salary until his continuing contract with the district was terminated as a result of the appeal in district court. The trial court denied his petition because it believed that the board had followed the applicable law for teacher termination. The district court also reasoned that McMillen would be fully compensated if the school district lost its appeal and so he was protected. McMillen appealed and the appeal was transferred to the Supreme Court of Kansas.

The issue before the court was whether the school board was required to pay McMillen's salary past the end of the 1990-91 contract year, and if so, for how long thereafter. The court relied heavily on language from *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985) to determine the extent of due process required prior to the termination of a tenured teacher's right to continue to receive his salary. In *Loudermill*, the court held that "all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by [state] statue." 470 U.S. at 545.

Once a pretermination hearing is provided, an employee may be terminated as long as state statutes provide for a full administrative hearing thereafter. K.S.A. 72-5436 *et seq.* establish due process procedures for tenured teachers who disagree with a school board's notice of intent to nonrenew their contracts. There is nothing in Kansas statute requiring a nonrenewed teacher's salary be paid until all the statutory due proceedings are completed. Based on *Loudermill* and the failure of Kansas statutes to address the issue, the court determined that McMillen had a right to continue to receive his salary until given a pretermination hearing. A pretermination hearing need not be anything more than a hearing in which the teacher is advised of the charges and given a chance to present his or her side of the story. In this case, however, no pretermination hearing was provided before or after the 1990-91 contract year. The comprehensive due process hearing provided for in K.S.A. 72-5439, absent any pretermination hearing, would fulfill constitutional due process and supplant the need for a pretermination hearing. Thus, McMillen had a constitutional right to continue to receive his salary, but only until the due process hearing was completed. McMillen next argued that he should continue to receive his salary until all court proceedings were completed because he had not been "legally discharged" from his teaching position. He relied on one sentence from K.S.A. 72-5412 to support his argument. That sentence provided that all contracts were binding until the teacher had been "legally discharged from such teacher's teaching position or until released by the board of education from such contract." The court pointed out that this argument ignored the language of K.S.A. 72-5411 and K.S.A. 72-5437. Both statutes

state that all contracts of employees were deemed to continue for the next succeeding year *unless* written notice of intent to nonrenew a contract was served by a board of education on or before April 10. The court held that "when all applicable statutes are read together, it appears clear that the legislature intended the contract to terminate at the end of the contract year if appropriate notice was given. Termination of the contract also terminates the teacher's right to receive any further salary" (p. 904). The court concluded that if a predetermination hearing as described in *Loudermill* had been provided, McMillen's right to receive his salary would have ended along with his contract at the end of the contract year. In McMillen's case, no pretermination hearing was held which meant he was entitled to continue to receive his salary until the statutory due process hearing was completed. The court further held that, in a case such as this, the appropriate time for termination of the contract and salary is "when the school board rejects the opinion of the hearing committee and files an appeal to the district court" (p. 905). The court recommended that if a statutory due process hearing could not be completed before the end of the contract year, a school board should comply with the pretermination hearing requirements of *Loudermill* as early as possible. The court concluded by finding that McMillen was entitled to receive his salary until November 20, 1991, which was the date the school board filed its notice of appeal with the district court. The judgment of the trial court was reversed and the case remanded for further proceedings.

Unified School District No. 434, Osage County v. Hubbard
868 P.2d 1240 (Kan. App. 1994)

Robert Hubbard had taught at Santa Fe Trail High School for ten years. During free time in one of his art classes, some of his students made a videotape that contained off color humor that included zoom shots of crotch areas and alleged sexual harassment. Hubbard was in his work area during the videotaping. After the Board watched the tape, they decided to terminate Hubbard's contract. The Board claimed the tape showed his lack of classroom control and his failure to intervene and prevent a female student from being sexually harassed by two male students. Because he was a tenured teacher, Hubbard requested a due process hearing. The three-member Committee watched the videotape and concluded that the evidence did not warrant the termination of Hubbard's contract. The Board disagreed with the decision of the Committee and filed an appeal with the district court. The district court affirmed the Committee's decision, denied the Board's appeal and ordered the Board to reinstate Hubbard with pay. The Board appealed.

The first issued addressed by the appellate court was whether the Committee or the Board's decision was entitled to deference upon review. A hearing committee's purpose is to determine if the school board's decision to terminate a tenured teacher was for good cause. An amendment to K.S.A. 72-5436 *et seq.* in 1991 made the decision of the hearing committee final, subject to appeal to the district court. Therefore, the Board is not the factfinder and its decision is not entitled to any deference upon review by the courts. Next, the court determined that the proper

standard of review was to decide if: (1) the committee's decision was within the scope of its authority; (2) the committee's decision was supported by substantial evidence; and (3) the committee did not act fraudulently, arbitrarily, or capriciously. The Board argued that the Committee acted beyond the scope of its authority when it failed to consider the Board's sexual harassment policy. However, the Committee *had* reviewed the sexual harassment policy and determined that the behavior captured on the videotape did not rise to the level necessary to constitute sexual harassment. No female students complained of harassment and the actions were not repetitive in nature. The Committee believed that these isolated incidents did not warrant termination of Hubbard's contract. The appellate court found this to be substantial evidence and concluded that the Committee had acted within the scope of its authority. The Board next contended that the Committee had acted outside its scope of authority when it ignored the Board's standards of teacher conduct and adopted a different one for "free time." The Board's standards required a teacher to maintain control of his classroom at all times, with no distinction between free time and regular class time. The court agreed that the Committee acted outside the scope of its authority in adopting a standard that was contrary to the expectations of the Board. However, its distinction between free time and regular time simply pertained to its final decision that the Board lacked good cause to terminate Hubbard. Thus, the court again found that the Committee had acted within the scope of its authority. The court also concluded that the Committee's decision was supported by substantial evidence as it had listened to all of the evidence presented and viewed the videotape. The

Committee's determination that the activities on the videotape were isolated and did not justify Hubbard's termination was not arbitrary or capricious. The decision of the district court was affirmed.

Hubbard v. Board of Education, U.S.D. No. 434, Osage County
882 P.2d 483 (Kan. App. 1994)

Robert Hubbard was a tenured teacher in Osage County. On April 7, 1992, the Board of Education informed him of their intent to terminate his contract due to the behavior of some of his students recorded in a videotape that had been made during his class. On April 14, the Board conducted a hearing and suspended Hubbard pending a due process hearing. On September 28, the due process hearing committee recommended reinstating Hubbard. On October 5, 1992, the Board voted to appeal the hearing committee's decision to the district court. The Board also voted to hold another hearing to determine if Hubbard should be suspended with or without pay during the pendency of the court case. At that hearing, the Board adopted a resolution to suspend Hubbard without pay until the case was resolved. Hubbard filed a petition in district court seeking injunctive relief and damages pursuant to 42 U.S.C. Section 1983 (1988). The court granted the injunction, which prevented the Board from suspending Hubbard's pay pending the district court's decision on the Board's appeal. When the district court affirmed the hearing committee's decision, the Board appealed to the Court of Appeals. *U.S.D. No. 434 v. Hubbard*, 19 Kan.App.2d 323, 868 P.2d 1240 (1994), *rev. denied* June 7, 1994. After the district

court decision, and while awaiting the appellate court case, the Board moved for summary judgment in the civil rights case (this case), asking for a cancellation of the restraining order and a decision in its favor on the issue of monetary damages. The district court entered summary judgment for the District and held that they were entitled to qualified immunity. The court also lifted the injunction. Hubbard appealed this decision claiming the injunction should not have been lifted, the school district was not entitled to qualified immunity, and he should be entitled to relief by mandamus.

Qualified immunity is a way to protect government officials who are required to use their discretion and the related public interest when performing their official duties. Hubbard argued that the Board did not have the authority to suspend him without pay while they were appealing the hearing committee's decision. In *McMillan v. U.S.D. No. 380,* 253 Kan. 259, 855 P2d 896 (1993) (*McMillan II*) the court determined that a school board may terminate a teacher's contract and pay after the board decides to appeal a due process hearing committee's recommendation to reinstate the teacher. The school board had not violated any clearly established laws, nor had Hubbard's due process rights been violated. Thus, the Board was entitled to qualified immunity for its actions. Hubbard next argued that the district court should not have removed the temporary injunction that prevented the Board from suspending him without pay. The appellate court disagreed and pointed out that "by the time Hubbard's 42 U.S.C. Section1983 action was heard in district court, the same district judge had already ruled in Hubbard's favor on the on the substantive issue" (p. 488).

Therefore, the need for the injunction had ended. Hubbard had applied to the Court of Appeals for an injunction pending the resolution of the appeal, but the court denied his motion. The district court did not have the authority to continue the injunction once it was denied by the Court of Appeals, so the issue was without merit. Finally, the court addressed Hubbard's claim that he was entitled to mandamus. Mandamus is a remedy that compels a public agency to perform an act required by law when it has neglected or refused to do so. Mandamus is not appropriate when one is not seeking action but instead is seeking redress from action that has already been taken. The Board in this case was not refusing to act. It was just acting in a way that Hubbard thought was against the law. The appellate court stated, "Mandamus was not an appropriate remedy - Hubbard did not want action, he wanted redress" (p. 488). The decision of the district court was affirmed.

Francis v. Unified School District No. 457
871 P.2d 1297 (Kan. App. 1994)

Loralea Francis was an elementary school principal whose employment was terminated after she was charged with shoplifting. She received an administrative suspension on July 30, 1992, which was followed by a notice of intent to terminate on August 31, 1992. Francis requested a due process hearing which was granted on November 9, 1992. On December 3, 1992, she was notified in person of the Board's decision to end her contract. Francis filed a petition in district court on January 4, 1993, which she described as an appeal of the "action taken by the defendant pursuant

to K.S.A. 60-2101(d) as well as an original action for breach of contract, continuing contract damages and tort" (p.1298). A copy of this petition was served on the school board on January 6, 1993. The district court dismissed the case for lack of jurisdiction owing to the fact that Francis had not filed her notice of appeal with the school board within 30 days pursuant to K.S.A. 60-2101(d). Francis appealed this dismissal.

The Court of Appeals set out to determine if Francis' appeal of her termination was timely and, if not, what affect that would have on her independent action for breach of contract and tort. K.S.A. 60-2101(d) is the only means available to appeal a school board's termination of an employment. That statute requires that the notice of appeal be filed within 30 days of the entry of the order being appealed. It is only after filing this notice with the school board that anything is required to be filed with the district court. In this case, the plaintiff filed with the district court within 30 days, but not with the school board. Because nothing was filed with the school board within the time frame set forth by statute, Francis' appeal was "not timely perfected." Filing with the district court did not satisfy the statutory requirements. As the appeal was not timely filed, the trial court lacked jurisdiction to proceed with the action and correctly dismissed the case. Next, the appellate court turned to the issue of whether the untimely appeal of her contract termination was fatal to the maintenance of an independent action for breach of contract and tort. The trial court held that the fact that Francis did not follow "the statutory procedure for appeal from the board order of December 3, 1992, this court is without jurisdiction to hear this independent action

collaterally attacking the board's order" (p. 1300). The Court of Appeals agreed with the holding of the trial court. In referencing the holding in *Schulze v. Board of Education*, 221 Kan. 351, 559 P.2d 367 (1977), the court found that as the school board had been acting in a quasi-judicial nature, the only remedy was an appeal under 60-2101(d). Because she had failed to comply with the requirements of the statute, Francis was prohibited from making a collateral attack on the school board's decision by an independent action. The trial court's decision was affirmed.

Allen v. Board of Education, Unified School District 436
68 F.3d 401 (Kan. 1995)

A school principal, Carlton Allen, whose contract was not renewed for the school year sought judicial review of the school district's decision. While the appeal was pending in state court, the principal began separate original action in state court in which he raised both state and federal claims. Mr. Allen sought actual and punitive damages against all defendants plus attorney's fees, interest, and costs. The defendants removed the action to federal district court. After removal of action, the US District Court for the District of Kansas granted the school district's motion to dismiss, and Allen appealed. The district court granted defendants' motion to dismiss on the ground that it had no jurisdiction over the action because Mr. Allen's suit was an attempt to attack the Board's decision, an action prohibited by state law. Mr. Allen then appealed to the Kansas Court of Appeals.

The Appeals Court did not agree that the case was governed by state law. Mr. Allen raised issues of federal law, which were in federal court at that time. Therefore, because he had two cases pending in two different courts, the district court should have considered whether abstention was appropriate (under abstention doctrine, district courts can decline or postpone the exercise of its jurisdiction in light of parallel state proceedings). The district court would need to determine whether or not the state and federal proceedings were parallel, meaning the same parties are litigating essentially the same issues in two different forums. If the cases are not parallel, the district court should proceed. If they are parallel, the court must decide whether to abstain. The Appeals Court noted a preference in abstention in cases for issuances of a stay rather than dismissal. By issuing a stay in the federal action pending the outcome of the state proceedings, a federal forum is available in which to litigate the claims not resolved in state court without the plaintiff having to file a new federal action.

Because the Appeals Court did not agree that this case was governed by state law and believed that the district court needed to make a determination of whether to abstain in light of parallel state proceedings, the judgment of the United States District Court of Kansas was reversed and the case remanded for further proceedings.

Allen v. Board of Education, Unified School District 436
Not reported in F. Supp., 1997 WL 374289
D. Kan., 1997

High school principal, Carlton Allen, brought various claims against the school district that employed him. Mr. Allen was principal at Caney Valley Junior/Senior High School from 1979 to 1993. He was an "at will" employee and his contract was voted on each year by the school board. The school superintendent, Harold Howard, had recommended his renewal every year except for 1992 and 1993. Mr. Allen had been placed on a plan of improvement as the result of a survey done in 1990 that indicated a number of issues, including low staff morale and poor treatment of employees. The principal had not made significant improvements and was recommended for nonrenewal in 1992. As the resulting school board vote was tied, Mr. Allen's contract was automatically renewed. The following year, Mr. Allen again received marginal ratings on his evaluation. After considering his previous year's evaluations, the school board voted to nonrenew Mr. Allen's contract. The board held several subsequent hearings to allow Mr. Allen a chance to respond to the intent of nonrenewal. The final decision was made in March of 1993 to nonrenew. Mr. Allen appealed to the courts bringing action against the district based on claims of age discrimination. His claim was based on the fact that he would have been eligible for the district's early retirement bonus program had he been renewed for the 1993-94 school year. He was replaced in May 1993 by a Mr. Van Winkle, who was 52 years old.

Under the Age Discrimination and Employment Act (ADEA), it is illegal for an employer to discharge an employee because of his or her age. A violation of the ADEA only occurs when age is the "determining factor" in the employer's challenged decision. A plaintiff making an ADEA claim must show that an employment decision was motivated by age by presenting direct evidence of motive. A plaintiff must first present a prima facie case by showing that he was (1) within the protected age group; (2) doing satisfactory work; (3) discharged or received adverse employment action; and (4) replaced by a younger person. *Greene v. Safeway Stores, Inc.* 98 F. 3d. 554, 558 (10th Cir. 1996). If a prima facie case is established, the burden shifts to the defendant who must provide evidence that the adverse employment actions were taken for a nondiscriminatory reason. In this instance, even if Allen could establish a prima facie case, his case must be dismissed since the school district met its burden of coming forward with a legitimate, nondiscriminatory rationale for its decision. The only evidence of either pretext or direct discrimination presented by Allen was that he was one year away from eligibility for an early retirement program. However, as there was no other corroborating evidence of age discrimination, simply being eligible for a retirement program did not qualify as the reason for the board's action.

All of the evidence presented in court supported the conclusion that the school board's decision to nonrenew was based on legitimate, nondiscriminatory reasons. It was ordered that all claims against the defendants be dismissed.

(* In an unpublished opinion, Carlton Allen appealed to the US Court of Appeals Tenth Circuit in 1998. The judgment of the US District Court for the District of Kansas was affirmed. 162 F.3d 1172 (Table), 1998 WL 777376 (C.A.10 (Kan.))).

Baldwin v. Board of Education, Unified School District No. 418
930 P.2d 18 (Kan. 1996)

Allen Baldwin, a tenured teacher, initiated an action for injunctive relief and damages under 42 U.S.C.Section 1983 (1994) claiming that the Board of Education violated his due process rights by nonrenewal of his teaching contract. For five years prior to the 1991-92 school year, Mr. Baldwin had been allowed 30 paid extended duty days in addition to the contract-designed minimum days. These extended days were considered additional work and not treated as a supplemental contract. In June of 1992, the McPherson Education Association, which was the authorized bargaining agent for teachers, and the Board ratified a negotiated agreement which added five duty days to all teacher contracts and decreased the number of extended duty days for some teachers. Mr. Baldwin's extra duty days were reduced from 30 to 12. Rather than follow the grievance procedure outlined in the negotiated agreement, Baldwin complained to the superintendent about the reduction. The superintendent took his complaint to the Board, which chose not to change Baldwin's contract. Baldwin contended that the reduction in his extended duty days resulted in a "partial" nonrenewal of his contract. He alleged that the Board violated K.S.A. 72-5437 by not providing him with notice of the nonrenewal by May 1, which, in turn violated the

due process procedures of K.S.A. 72-5438. Baldwin took his case to the district court which granted summary judgment to the Board of Education. Baldwin appealed.

The basic elements of a claim under Section 1983 entail a "person" acting "under color of" state law to deprive the claimant of a constitutional or federal right. Baldwin's claim that he had been deprived of a property right by the Board of Education satisfied these elements. The court sought to determine if he truly had any property interest that had been violated causing his due process rights to be denied. Tenured teachers in Kansas receive a property interest in continuing employment. K.S.A. 72-5438 gives specific procedures a board must follow whenever a teacher is given notice of nonrenewal. In this case however, unless the negotiated agreement, which reduced Baldwin's extended duty days, constituted a nonrenewal of his contract, the due process procedures of K.S.A. 72-5438 would not be applicable, and there could be no 42 U.S.C. Section 1983 action. Kansas statutes relating to teachers' contracts are divided into three subsections: Continuing Contract Law, K.S.A. 72-5410; Professional Negotiations, K.S.A. 72-5413; and Due Process Procedure, Contract Termination, K.S.A. 72-5436 *et seq*. K.S.A. 72-5437 states that a teacher's contract shall continue for the next year unless written notice of "termination or nonrenewal" is given. The court found nothing in the language of the statute to support an interpretation of the term "nonrenew" to mean a change in the terms of the contract as Baldwin proposed. Nothing found in the Continuing Contract Law, K.S.A. 72-5410 *et seq*. would suggest that a change in terms of professional service constitute a nonrenewal of an existing contract. Nor did the court find anything in the

Professional Negotiations subsections that would suggest that a change in conditions of professional service constitute a nonrenewal of an existing contract. The Professional Negotiations subsection gives the recognized bargaining agent the ability to negotiate terms and conditions of professional service with a board that will become binding on all teachers after the contract is voted upon by members and ratified by the board. In this case, the Board and Association bargained to change the terms of all teacher contracts. The agreement was ratified. Thus, the negotiated agreement became the contract that would be subject to the Continuing Contract Law. K.S.A. 72-5436 *et seq.* only comes into consideration when a board "severs an employment relation with a teacher, thereby affecting the teacher's property interest in continued employment" (p. 22). The statute provides that the terms of a contract can be changed at any time by mutual consent as outlined by the Professional Negotiations subsection. The decision of the district court was affirmed.

Procedural due process rights do not come into play unless a property interest has been impaired. Reducing the teacher's extended duty days did not constitute nonrenewal of the contract, thus it did not invoke statutory notice and due process procedures.

Brown v. Board of Education, Unified School District No. 333, Cloud County
928 P.2d 57 (Kan. 1996)

Barbara Brown had been an elementary school principal in Cloud County for four years. In March 1995, the Board adopted a resolution which directed that Brown

be notified of the Board's intent to nonrenew her contract. Brown received the notice and requested a meeting with the Board in executive session pursuant to K.S.A. 72-5453. The Board met with Brown within the time required and provided her with the rationale for their decision to nonrenew her contract. Brown was given the opportunity to respond to the Board's statement. Neither party had legal counsel present nor was a record of the meeting taken. After meeting with Brown, the Board decided not to renew her contract for the following school year. Brown appealed this decision to the district court who found that Brown had been denied due process. The district court determined that the Board had not shown good cause for the nonrenewal and that their action had been arbitrary. The Board appealed this decision. In their appeal, the Board contended that it had not exceeded its authority because it had followed the requirements of the Kansas Administrators' Act, K.S.A. 72-5451 *et seq.*, for nonrenewing the contract of an administrator. The Board believed it had provided Brown with all the due process necessary. Brown contended that the Board had failed to act in a quasi-judicial manner because it had not investigated the facts, failed to present evidence to support its reasons for the nonrenewal and had not complied with the Evaluation of Certificated Personnel Act, K.S.A. 72-9001 *et seq*., the year of her nonrenewal. The Board countered by stating that the required meeting a Board has with a nonrenewed administrator is not quasi-judicial in nature and K.S.A. 72-9001 *et seq*. is not applicable to this case.

This case involved the application of the Kansas Administrators' Act. This Act imposes certain requirements when a school board nonrenews the contract of an

administrator who has completed two consecutive years as an administrator with the district. The Act requires in part that: (1) an administrator is given written notice of the board's intention to nonrenew before April 10 of the year in which the contract expires; (2) once written notice has been given, the administrator may request a meeting with the board by filing a written request within 10 days of receipt of the nonrenewal notice; and (3) the board will hold the meeting within 10 days of the administrator's request. The Act specifies that during the meeting with the board and administrator, the board must specify reasons for the nonrenewal and provide the administrator an opportunity to respond. There is no right to legal counsel for either party. Through the application of the Act, the court determined that the intention of the legislature was to limit the procedures granted to administrators to a "meeting" without legal counsel, or the more formalized procedures required if it had intended for a "hearing" to take place. Therefore, the court determined that an administrator who had been employed for at least two years could be nonrenewed without a show of good cause. The court next turned towards the issue of whether the board's action was of a quasi-judicial nature. The court cited Black's Law Dictionary as defining quasi-judicial as a term that is applied to the action of public administrative officers or bodies who are required to investigate facts, hold hearings, weigh evidence, and draw conclusions as a basis for their official action and to exercise discretion of a judicial nature. The meeting held between the Board and Brown had none of the formalities of a hearing or any other judicial-type proceeding. Because no hearing was required, the court found the action to be of an executive nature rather than a

judicial one. The final issue the court addressed was the argument that Brown had some right under K.S.A. 72-9001 *et seq.* that had been violated. This act deals with the evaluation of certified personnel. K.S.A. 72-9003(d)(1) states in part that every board will adopt an evaluation procedure in which every employee during the third and fourth years of employment shall be evaluated at least once by February 15. Brown had not been evaluated the year she was nonrenewed. She argued that the Board could not nonrenew her contract because K.S.A.72-9004(f) provides "the contract of any person subject to evaluation shall not be nonrenewed on the basis of incompetence unless an evaluation of such person has been made prior to the notice..." The Board did not believe K.S.A. 72-9004(f) was applicable because incompetence was not the reason for Brown's nonrenewal. She was nonrenewed because her performance was unsatisfactory. The court agreed with the Board's position and held that the "failure to make the February 15, 1995 evaluation does not preclude the nonrenewal of Brown's contract" (p. 70). The court reversed the district court's decision and the case was remanded to the district court with instructions to dismiss Brown's appeal for lack of jurisdiction because the Board's proceedings were not quasi-judicial under K.S.A. 72-5453.

A good cause requirement is not a part of the Kansas Administrators' Act. An administrator's expectation of continued employment should extend no further than an expectation that a school board will follow the procedures defined by the statute. The property interests of administrators are similar to those of nontenured teachers in contract renewal, which does not require a hearing or other protective processes. The

state law procedural rights afforded by the Act do not invoke the protections of the Due Process Clause. As long as a board meets the procedural formalities, they have satisfied the requirements of the Act.

Miller v. Brungardt
916 F. Supp. 1096 (D. Kan. 1996)

Plaintiff, Jane Miller, was employed as a counselor at Lansing Middle School for U.S.D. No. 469 beginning in August of 1992. During all relevant times, Kerry Brungardt was the Vice-Principal at the Middle School and Richard Flores was Superintendent. Miller alleged that during the course of her employment, Brungardt made sexually inappropriate comments to her and she lodged a formal grievance with Flores. In her complaint, Miller claimed that Brungardt had walked into her office and made comments that included accusing her of having a lesbian relationship with a student's mother and other inappropriate comments regarding lesbian behavior. She alleged that she had felt threatened and intimated by his comments. Miller also claimed Flores had verbally reprimanded her for lodging the grievance against Brungardt. Miller filed a sexual harassment and retaliatory discharge complaint with the Kansas Human Rights Commission (KHRC) and the Equal Employment Opportunity Commission (EEOC). She also requested, and was granted, a transfer to Lansing High School. On April 4, 1994, approximately six weeks after her transfer, Miller was notified that her contract would not be renewed for the following school year. Miller sued the school district, vice principal and superintendent alleging sexual

harassment and retaliatory discharge in violation of Title VII and the Kansas Act Against Discrimination (KAAD). She also alleged intentional infliction of emotional distress under Kansas common law. The defendants moved to dismiss the complaint for lack of subject matter jurisdiction on the grounds that Miller had failed to comply with the notice requirement of K.S.A. Section 12-105b (1991). The District Court, in *Miller v. Brungardt*, 904 F.Supp. 1215 (D.Kan.1995), held that: (1) Miller's claim against the board was defective because it failed to refer to amount of monetary damages claimed, but (2) the claims against Brungardt and Flores were sufficient. Following that court decision, the defendants brought the case before the court on a motion to dismiss by defendants Brungardt and Flores and a motion to reconsider the court's previous memorandum and order.

In her complaint, Miller listed Brungardt and Flores as individuals. Brungardt and Flores argued that the Title VII claims against them should be dismissed because, under Title VII, suits against individuals must proceed in their official capacity. They further argued that if they were being sued in their official capacities, the Title VII claims against them would not stand. In *Redpath v. City of Overland Park*, 857 F.Supp. 1448 (D.Kan.1994), the court found that "if the employer has been sued directly, it is duplicative to sue the supervisory employees in their official capacities." *Id.* at 1456. The court here agreed that it was duplicative to sue Brungardt and Flores in their official capacities because Miller had directly sued their employer, the school district. Therefore, the court dismissed the Title VII claims against Brungardt and Flores. The court also found federal court decisions applying Title VII were

"persuasive authority" in analyzing KAAD claims because the statutory schemes were similar. So, for the same reasons the Title VII claims were dismissed against Brungardt and Flores, the KAAD claims were also dismissed. Because the Title VII and KAAD claims were dismissed, the only remaining state-law claim against Brungardt and Flores for the court to reconsider was that of emotional distress. Under K.S.A. 12-105b(d) (1991), "any person having a claim against a municipality which could rise to an action brought under the Kansas tort claims act shall file a written notice as provided in this subsection before commencing such action." Under *King v. Pimentel*, 20 Kan.App.2d 579, 890 P.2d 1217 (1995), the notice requirements applied to "municipal employees who caused injury or damages to another while acting within the scope of their employment." This meant that Section 12-105b(d)'s notice requirements had to have been completed before Miller filed her claim of intentional infliction of emotional distress against Brungardt and Flores if their actions occurred within the scope of their duties. Accepting Miller's allegations as true, Brungardt's actions were not within the scope of his employment because sexual harassment would obviously not be found within the job description of a school administrator. Thus, the Kansas notice requirement did not apply to Miller's claim against Brungardt. However, the claims that Flores had verbally reprimanded Miller for filing a sexual harassment grievance, had inadequately investigated the grievance, and had failed to take proper remedial action would fall within the scope of a superintendent's employment. Therefore, Miller was required to comply with 12-105b(d) notice requirements, which she had failed to do. Accordingly, the intentional

infliction of emotional distress was dismissed. The only two remaining claims were Miller's Title VII claim against U.S.D. 469 and the intentional infliction of emotional distress against Brungardt. The motion to dismiss was granted in part and denied in part. The motion to reconsider was granted in part and denied in part. Richard Flores was dismissed from the action.

Forsythe v. Board of Education of Unified School District No. 489, Hays, Kansas
956 F. Supp. 927 (D. Kan. 1997)

Olga Forsythe had been employed as a high school Spanish teacher for two years. When her contract was nonrenewed at the end of her second year of teaching, Forsythe accused the Board of discrimination stating that she was terminated because of her strong Hispanic accent and national origin. The Board denied these allegations. They argued that the decision to nonrenew Forsythe was based upon their conclusion that her students could not understand her instructions and assignments, that she was not effectively able to teach students, and that numerous parents and students had complained about her performance. Forsythe was an Hispanic female who had been born in Cuba. The district hired her in 1992 to teach Spanish at Hays High School. Despite generally favorable employer reviews during her first two years of teaching, several students and their parents voiced repeated concerns that they had a hard time understanding Forsythe. These complaints were attributed to her strong accent and fast manner of speech. Forsythe agreed that she spoke quickly and with a strong accent. Other district employees offered to assist Forsythe in addressing some of the

shortcomings in her teaching manner and skills, but those efforts were often met with resistance. Members of the board, as well as the school's principal, cited both student complaints and Forsythe's unwillingness to change as reasons for nonrenewing her contract. Forsythe's contract was not renewed by the Board on April 4, 1994. As she was a non-tenured teacher, no reason was given for her termination pursuant to K.S.A. 5436 *et seq.* until Forsythe pursued her discrimination claim. Forsythe appealed the Board's decision to the District Court and the school district made a motion for summary judgment.

The court held in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 that in the absence of direct evidence, a plaintiff in Title VII actions must establish a "prima facie" case of racial discrimination. To establish such a case, a plaintiff must show (1) she was a member of a protected class; (2) she was qualified and satisfactorily performing her job; and (3) she was terminated under circumstances giving rise to an inference of discrimination. If the plaintiff is successful in proving a prima facie case, then the defendant is presumed to have discriminated against the plaintiff unless they can show "legitimate, non-discriminatory reasons" for their decision. The Tenth Circuit in *Arzate v. City of Topeka,* 884 F. Supp. 1494 (D. Kan. 1995) held that a "foreign accent that does not interfere with a Title VII claimant's ability to perform duties of the position he has been denied is not a legitimate justification for adverse employment decisions." *Id.* at 1504. However, if language difficulties are shown to interfere with a performance of duties, this may be considered in employment decisions. Although Forsythe

identified a few instances in which employees of the district mentioned or commented on her accent in an uncomplimentary manner, most of those comments were made in the context of evaluating her teaching skills or addressing student /parent concerns. The court found that Forsythe had not presented anything that would cast any doubt on the fact that many students had expressed concerns regarding their difficulty in understanding her speech. It went on to state that "as the ability to communicate is one of the hallmarks of effective teaching, the Board's concern that Forsythe was unwilling or unable to slow down or otherwise address students' complaints is undoubtedly the basis of a legitimate business decision to not renew her contract" (p. 934). The court held that the limited number of comments that could have been construed as derogatory, along with Forsythe's belief that she was the victim of discrimination, were "insufficient to create a genuine issue of material fact precluding summary judgment" (p. 934). As the court could find no evidence that would cause them to conclude the reasons offered by the Board for not renewing Forsythe's teaching contract were pretexts for discrimination, the Board's motion for summary judgment was granted.

Munguia v. Unified School District No. 328, Ellsworth County, Kansas
125 F.3d 1353 (10th Cir. 1997)

Ramon Munguia taught high school Spanish in three different school districts between 1983 and 1994. He was under a written contract with USD 327 (the Ellsworth School District) from 1983-84 through 1990-91. For 1991-92 and 1992-93,

Munguia was under contract with USD 401 (the Chase School District). During 1993-94, he was under a one-year contract with USD 328 (the Lorraine School District). Although Munguia had taught in the Lorraine District from 1985-1993 through a series of inter-district agreements, he had not signed a written contract with Lorraine until 1993-94. Inter-district agreements are used to gain the services of teachers from other school districts. They are often found in smaller, rural school districts not able to afford full-time teachers in specialty areas, such as foreign language. Prior to 1993-94, the Lorraine District would pay the Ellsworth or Chase Districts for Munguia's services. Munguia was not a party to these inter-district agreements and he did not have a written contract with, nor did he receive a paycheck from, the Lorraine District. In March of 1993, Munguia notified the Chase District that he was resigning. On July 1, 1993, he began to receive Kansas Employees Retirement System benefits derived from his employment with the Ellsworth and Chase school districts. On August 2, 1993, Munguia signed a contract with the Lorraine District to teach half-days with the district during the 1993-94 school year. In April 1994, the Lorraine District notified Munguia that it was not going to renew his teaching contract for the upcoming school year. Munguia requested a due process hearing under K.S.A. 72-5438(b), but it was denied by the school district on the grounds that Munguia did not meet tenure requirements pursuant to K.S.A. 72-5445 (1992). Munguia brought action against the Lorraine District based on the allegation that the school district had denied his request for a hearing in violation of his constitutional right to due process and equal protection under the Fifth and Fourteenth

Amendments. The defendant school district moved for summary judgment on the ground that, under Kansas law, Munguia was not a tenured teacher and had no property interest in continued employment. The district court granted the school district's motion. Munguia appealed claiming that the district court had erred in finding he was not a tenured employee of the Lorraine School District.

Under the Kansas Teacher Due Process Act, K.S.A. 72-5436 to -5446, a tenured teacher's contract may only be terminated for good cause and the teacher must be afforded timely notice and an opportunity for a hearing. Nontenured teachers are only entitled to timely notice of their nonrenewal. Munguia argued that a written contract was not necessary to satisfy the tenure provisions of the statutes. He claimed that the fact that the Lorraine District had considered him to be certified personnel and evaluated his performance for eight years was enough to make him tenured in their district. Munguia further asserted that he had an implied contract of employment with the Lorraine District during the eight-year period he was on written contracts with the Ellsworth and Chase Districts. The appellate court did not agree with Munguia's arguments. It cited K.S.A. 72-5412 as evidence that the Kansas legislature determined the position of a teacher in a public school system would be created by a contract, the terms of which are binding on both the teacher and the board of education of the contracting school district. As a result, the appellate court did not find the statutes permitted a school district to create an employment relationship simply on the grounds that it evaluated a teacher's performance. Personnel evaluations and classifications alone do not qualify as a contract between a

school district and a teacher. From 1983 through 1993, the Ellsworth and Chase Districts paid Munguia's salary and contributed to the Kansas Public Employees Retirement System on his behalf. The appellate court found no support for Munguia's claim that he had been employed by the Lorraine District at any time before the 1993-94 school year. As Munguia was only employed by the Lorraine District for one year, he did not meet Kansas tenure requirements and was not entitled to the protections found under the Kansas Teacher Due Process Act. Accordingly, the judgment of the district court was affirmed.

Schartz v. Unified School District No. 512
953 F. Supp. 1208 (D. Kan. 1997)

John Schartz worked as a science teacher for U.S.D. No. 512 for twenty-nine years. From 1981-87 there were six documented complaints of Schartz's classroom conduct. From spring 1994 through spring 1995, several students brought complaints to the principal, Blanche Banks, regarding Schartz's behavior. In April 1994, a female student alleged that Schartz had made several inappropriate comments, some of a sexual nature, in class. When Banks met with him, Schartz denied the allegations and said he could not remember exactly what he said in class and that it was taken out of context. Banks and the associate principal informed Schartz that further incidents could result in disciplinary action. In September 1994, another female student complained that Schartz had said "I'll bet you're sweet 16 and never been kissed" (p. 1212). The student was embarrassed by this comment and other remarks, and

requested to transfer from his class. Schartz admitted making the comment, but claimed that the statement was a common phrase and not intended to embarrass the student. In October 1994, a student complained that Schartz had been sarcastic and used loud, inappropriate language. Banks again met with Schartz to discuss the complaint. At that meeting, Banks documented the student's complaint and Schartz's response, but did not formally reprimand Schartz. In December 1994, an African American female student and her mother complained of Schartz making inappropriate comments of a racial nature when he talked about a "negro girl" in class. Banks, the student, her mother, and Schartz all met to discuss these concerns. In early January 1995, Banks prepared a formal letter of reprimand to Schartz stating that his conduct was inappropriate and unprofessional. Later that month, a female student brought a number of complaints against Schartz and her mother alleged that Schartz had allowed her daughter to leave campus without permission. Banks, Schartz, and Dr. David Stewart, the Associate Superintendent, met to discuss these complaints. Schartz denied the allegations and Stewart advised him that he would investigate the complaints. On February 16, 1995, Mr. Steve Martin, counsel for the school district, sent Schartz's counsel a letter explaining that Schartz's upcoming meeting with Mr. Robert DiPierro, the Deputy Superintendent, would be his final opportunity to present his position. Martin's letter also explained the options available to Schartz should the school district suspend, terminate, or nonrenew his contract. On about February 28, 1995, DiPierro and other school district representatives met with Schartz, his attorney, and his KNEA representative. To start the meeting, Martin announced

that the hearing was a "pre-termination" hearing. When the meeting was over, Schartz's KNEA representative told him that, based on her experience, she thought the school district would fire Schartz or nonrenew his contract. On or about March 3, 1995, Schartz chose to retire because he did not want to risk losing his health insurance benefits. Schartz then brought action against the school district and Ms. Banks claiming they had forced him to retire from his teaching position. Schartz's complaint included claims of age discrimination, breach of contract, and wrongful termination against the school district. His complaint also included allegations of intentional interference with contract or business expectancy and intentional infliction of emotional distress against Banks. The defendants moved for summary judgment.

Counts I and VI of Schartz's complaint alleged age discrimination in violation of the Age Discrimination in Employment Act of 1967 (ADEA), and the Kansas Age Discrimination in Employment Act (KADEA). The court considered the claims together because the analysis of the ADEA and KADEA were identical. To establish a prima facie case of age discrimination under ADEA, the a plaintiff must show that: (1) he was a member of the protected class, which for the ADEA is individuals at least 40 years old; (2) he was performing his work satisfactorily; (3) he was discharged; and (4) his position was filled by a person who was substantially younger. As Schartz met elements one and four, the court addressed the second and third requirements. Because Schartz was not discharged, he voluntarily retired; he had to rely on the theory of constructive discharge in order to meet the third prong of a prima facie case. The standard for determining whether constructive discharge has

occurred is whether a reasonable person in the employee's position would have felt compelled to resign. Here, Schartz claimed he was faced with the choice of retirement with health benefits or termination without benefits. Although the defendants denied that Schartz was ever given this choice, he voluntarily retired, the evidence favored Schartz. Counsel for the school district had called the hearing a "pretermination hearing," the KNEA representative thought the district would probably fire or nonrenew Schartz's contract, and counsel for the school district told Schartz's counsel that the district was contemplating termination. The court found this to be enough evidence for a jury to conclude that a reasonable person would have felt compelled to retire under similar circumstances. The final element to address was whether Schartz was performing his work satisfactorily. The school district argued that he was not. Schartz offered evidence in the form of affidavits and his 29-year performance record to show that he was performing his work in a satisfactory manner. The court concluded that although the student allegations, if true, could suggest unsatisfactory performance, the school district had to do more to support their contention that Schartz could not meet his prima facie burden. Thus, Schartz met the four necessary elements of establishing an age discrimination case. Once a plaintiff establishes a prima facie case, the burden shifts to the defendants to give a nondiscriminatory rationale for its actions. The school district's offered reason for termination was unsatisfactory job performance based on five student complaints in 9 months. The burden then shifts to the plaintiff to show that the reasons provided by the defendants are not true. In this case, Schartz could offer no direct evidence of age

discrimination. Schartz argued that he had presented data to show a pattern in discrimination in the school district's practices, but the court found that the data offered showed no significant disparity in the District's treatment of its employees. Schartz had no comparative evidence showing older employees were treated any differently than younger employees. The court next addressed Schartz's claim that Banks and the school district made statements suggesting that age was a factor in the termination decision. However, the court found these statements to be "isolated, stray, and ambiguous" (p. 1217) as they were mainly random comments about teachers who happened to be over the age of forty. All were hearsay and none had been directed at Schartz. Accordingly, the court granted summary judgment in favor of the District on Schartz's age discrimination claims (counts I and VI). The remaining claims were all state law claims. The court first dismissed without prejudice Schartz's breach of contract claim (count II). The court found that as the contract issue could not be resolved without further proceedings, it did not have jurisdiction over the claim. The other state claims were addressed because they could be resolved without further proceedings, which meant the court could exercise supplemental jurisdiction. The court first granted summary judgment in the District's favor in Schartz's claim that he had been terminated due to his age. Because Schartz had an adequate remedy available under the ADEA and KADEA that he had not pursued, the court determined there was no cause of action for wrongful discharge (count III). Next, the court addressed the claim of tortious interference with a business claim brought against Banks. To maintain a cause of action for tortious interference, Schartz had to

establish: (1) the existence of a contract; (2) knowledge of the contract by Banks; (3) and intentional interference by Banks with the known contract rights without legal justification; and (4) resulting damage. Banks conceded that Schartz could establish the first, second, and fourth elements. In order to meet the third element, Schartz had to show that Banks caused his constructive discharge. The only thing the record showed was that Banks had recommended a two-day suspension without pay for Schartz's alleged comments. There was nothing to prove that Banks' actions were the proximate cause of the school district's decision to give Schartz the choice between termination and retirement. The court found that Banks actions were consistent with her duties as a principal. Her recommendation of a two-day suspension was intended to protect the students, not to force Schartz to retire. Accordingly, the court granted summary judgment in favor of Banks on the claim of intentional interference with a contract (count IV). Finally, the court examined the claim of intentional infliction of emotional distress or outrage against Banks (count V). To prove such a claim, Schartz was required to present evidence that: (1) the conduct of the defendant was intentional or in reckless disregard; (2) the conduct was extreme and outrageous; (3) there was a causal connection between Banks' conduct and Schartz's mental distress; and (4) Schartz's distress was extreme and severe. Schartz also had to meet two threshold requirements to maintain a claim for outrage. The court found that Schartz was not able to meet the first threshold requirement because he had not established that Banks' conduct could "reasonably be regarded as so extreme and outrageous as to permit recovery" (p. 1221). Schartz's claim was based on allegations that Banks

targeted older teachers for retirement, accepted the allegations of complaining students without meaningful investigation, and sided with students when older teachers were involved. In the opinion of the court, Schartz had not offered enough factual support for his allegations to prevent summary judgment on his claim. Even if the court assumed Schartz's claims to be true, Banks' alleged conduct did not meet the "stringent standard" for an outrage cause of action. Banks was granted summary judgment on count V. The defendants' motions for summary judgment were granted on counts I, III, IV, V, and VI. The motion for count II was denied.

Unified School District No. 500, Wyandotte County v. Robinson
940 P.2d 1 (Kan. 1997)

Mable Robinson had been a teacher for U.S.D. 500 for twenty-seven years. Dr. Nelda Kibby was the principal at the elementary school where Robinson worked for most of Robinson's tenure. Kibby originally believed Robinson was a "mediocre" teacher but felt with support she would improve over time. Kibby's concern over Robinson's performance continued so she placed Robinson on intensive assistance for the 1993-94 school year. During that year, Kibby worked with Dr. Georgia Berry, another elementary principal in the district, on Robinson's assistance program. Berry helped in developing the program and observed Robinson six times throughout the school year. Robinson also had an "efficacy consultant," Eva Tucker, who was assigned to support Robinson and work with her on the goals of her assistance program. By the spring of 1994, the decision was made to terminate Robinson. She

received notice of the intent to nonrenew her contract which stated the grounds as being a failure to satisfactorily plan and teach lessons, and a failure to provide an orderly teaching and learning environment. Robinson filed a request for a due process hearing. After a two-day hearing in which evidence was presented by both sides, the hearing officer found that the school district had failed to sustain its burden of proof because the evidence presented did not support the district's stated reasons for nonrenewal. The hearing officer also ordered reinstatement with back pay and benefits. The district appealed twice, losing in the district court and winning in the Court of Appeals (*U.S.D. No. 500 v. Robinson*, 22 Kan.App.2d 892, 924 P.2d 651 (1996)). The Supreme Court of Kansas then granted Robinson's petition for review.

The issue before the Supreme Court was whether the hearing officer erred in calling for Robinson's reinstatement. The court considered three questions. Did the hearing officer: (1) apply his own standards of teacher performance and thus exceed the scope of his authority; (2) ignore undisputed evidence which supported the school district's decision to nonrenew Robinson's contract; and (3) act arbitrarily or erroneously in considering the school district's evidence? K.S.A. 72-5443b provides "the decision of the hearing officer shall be final, subject to appeal to the district court by either party." The Court of Appeals in the first *Robinson* case set out the factors a hearing officer must consider and apply in teacher due process hearings. Those factors were: (1) the burden of proof is on the school board, (2) the school board's reasons for termination had to constitute good cause, and (3) the decision had to be supported by substantial evidence. In reviewing the testimony, the Supreme Court

found that the reasons for nonrenewal provided by the school district did not "lend themselves well to objective determination" (p. 6). Kibby and Berry presented evidence showing that Robinson had failed to meet the goals of her improvement program. However, Robinson, along with Tucker and Debbie Parker, a special education teacher who spent two hours a day in Robinson's classroom, presented evidence that she had not failed. The school district did not give Robinson any other reasons for her nonrenewal, other than what was in the notice. The hearing officer concluded that there was not substantial evidence proving Robinson had failed to satisfactorily plan and teach lessons and failed to provide an orderly teaching environment. Evidence presented by both sides was conflicting, but it was for the hearing officer to weigh the evidence and make findings of fact to determine if Robinson had been terminated for good cause. Kibby had stated that Robinson's failure to maintain accurate grade records, failure to supervise children outside her classroom, failure to use team resources, inadequate parent participation at conferences, and failure to use manipulatives all factored into her decision to nonrenew Robinson. Berry described Robinson's teaching as "inconsistent" and not to the level of second grade teachers at the elementary school. Parker, who spent much more time in Robinson's classroom than either Kibby or Berry, provided a different view of Robinson. She saw Robinson as doing an acceptable job in dealing with difficult students and being as effective with them as other teachers at the school. Parker believed that Robinson tried to follow the goals set for her by Kibby, but "no matter what she [Robinson] did, Kibby could not see anything positive" (p. 8). Eva

Tucker, the efficacy consultant who also had nineteen years of teaching experience, stated that Robinson was not a substandard teacher. When the hearing officer asked Tucker to review a sample of Robinson's lesson plans from the 1992-93 school year, Tucker stated that she could have taught from them. Tucker believed her own personal plans would have been more detailed, but Robinson's were adequate. There were also inconsistencies in the school district's evidence. Tucker had been teaching for twenty-seven years and no previous action had been taken to put her on a plan of assistance. Robinson consistently received satisfactory ratings on her evaluations. Although none of the witnesses described Robinson as a "star teacher," it was the court's opinion that the testimony of Parker, Tucker, and Robinson cast doubt on the credibility of the school district's evidence. The court held that it did not appear that the hearing officer had applied his own standards of teacher performance but simply determined which evidence was more credible. The court further held that the hearing officer had not ignored undisputed evidence, nor had he acted in an arbitrary manner. The school district presented opinion evidence that Robinson was a substandard or incompetent teacher, but those reasons were not stated as reasons for nonrenewal in the notice the district had given to Robinson. The court found that the hearing officer did not ignore evidence that Robinson was a substandard teacher but instead considered it in connection with the grounds for nonrenewal given in the district's notice (failure to satisfactorily plan and teach lessons and failure to provide an orderly learning environment). The judgment of the Court of Appeals was reversed; the judgment of the district court was affirmed.

Seaman Unified School District No. 345 v. Kansas Commission on Human Rights
990 P.2d 155 (Kan. App. 1999)

Donald Reed was hired as a night custodian for U.S.D. 345 in February 1990. Reed had insulin dependent diabetes, which he controlled with daily insulin injections, proper diet and regular medical checkups. When he was hired, Reed was being treated for diabetic retinopathy, a disorder that would cause the blood vessels in his retinas to hemorrhage. Reed had surgery for his eye disorder and was placed on postoperative restrictions by his doctor requiring that he not stoop over, strain or lift and remain in a semi-upright position for 2 weeks. Reed started back to work on February 15, 1990, but the next day took sick leave without pay through March 6, 1990. Additional eye surgery was performed with similar restrictions. Treatment ended for his retinopathy in April 1990, and no restrictions were placed on Reed's activity. Reed was concerned that the lifting he would be required to do in the summer would affect his eyes and asked his physician to write a letter that limited the amount of weight he could lift. His physician provided a letter setting a 25-pound lifting restriction. Reed gave the assistant superintendent the letter and shortly thereafter was terminated. The assistant superintendent stated that Reed was fired because of the lifting restrictions, poor work performance, and falsifying his job application. The lifting restrictions would not allow Reed to perform the necessary parts of his job, which often required unsupervised, heavy lifting. Reed filed a complaint with the Kansas Human Rights Commission (KHRC), which found U.S.D. 345 had discriminated against Reed based on his disability. The KHRC then denied a

motion for reconsideration and the district filed a petition for judicial review with the district court. The district court found in favor of the school district. KHRC and Reed appealed.

The Americans with Disabilities Act of 1990 (ADA) and the Kansas Act Against Discrimination (KAAD) both define a disability as a "physical or mental impairment that substantially limits one or more...major life activities." Employers are prohibited from discriminating against individuals because of their disabilities. For Reed to establish a case of disability discrimination he had to prove that: (1) he was a disabled person within the meaning of the KAAD; (2) he was able to perform the essential functions of the job with or without reasonable accommodations; and (3) his employer terminated him because of his disability. Based on these requirements, the appellate court concluded that Reed did not meet the definition of a disability. Reed had testified that he was able to control his diabetes with proper diet and monitoring and his physical activities were not limited. The court found no evidence that Reed's diabetes, in its medicated state, substantially limited the major life activity of working. The Equal Employment Opportunity Commission (EEOC) defined "substantially limits," in regards to the major life activity of working, as "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities" (p. 158). The inability to perform a single, particular job, such as lifting, does not constitute a substantial limitation to working. In this case, Reed failed to demonstrate there was a "genuine issue of material fact" as to whether he was

regarded as disabled. Reed was fired because he could not perform the heavy lifting that was part of his position as night custodian. According to the appellate court, at most, Reed was "regarded as unable to perform only a particular job, not a broad class of jobs" (p. 159). This was not sufficient to prove that Reed was substantially limited in the major life activity of working. The judgment of the district court was affirmed.

Baughman v. Unified School District No. 500
10 P.3d 21 (Kan. App. 2000)

The appellees in this case were four tenured teachers at Area Vocational Technical School (AVTS) in the Kansas City school district. During the 1997-98 school year they taught summer classes under an extended contract in addition to their primary contract. In April 1998, the teachers were notified that their summer contracts would not be renewed due to low enrollment in the summer classes. The appellees requested, and were given, the enrollment data the district had used in making its decision. They prepared a memorandum voicing their objections to the ending of the summer classes and presented it to their superintendent. The superintendent took this to the board of education, along with some additional information beyond which had been given to the teachers. The school board voted not to renew the teachers' summer contracts. The teachers then requested a hearing per K.S.A. 72-5436 *et seq.*, which they received on November 5, 1998. The hearing officer determined that the appellant school district had demonstrated good cause for the nonrenewal of the summer contracts, but found that the teachers had been denied

adequate pretermination process to allow them to respond. The hearing officer also found that the teachers should have received a "salary inclusive of the extended contract amount through an appropriate period of time" (p. 24). Both parties appealed to the district court, which affirmed the hearing officer's decision. The school district appealed.

In order to determine if the teachers had received a proper hearing prior to the nonrenewal of their extended contracts, the court had to determine whether they had a constitutionally protected property right, and if so, to what extent. In Kansas, a tenured teacher's right to continued employment is a property right that is covered by the Continuing Contract Law, K.S.A. 72-5410 *et seq*. The contract issues in this case were extended contracts for additional duties during the summer, which are considered supplemental. K.S.A. 72-5412(a) states that due process procedures do not apply to supplemental contracts. The language within their extended summer contracts stated: "It is hereby understood and agreed that this Extended Contract is valid only for the 1997-98 school term and is not renewed under the terms of the Continuing Contract Law K.S.A. 72-5437" (p. 24). In spite of the language of the contract and the exception of K.S.A. 72-5412(a) regarding supplemental contracts, the teachers were still given timely notice and an opportunity to respond in writing. Since both the school district and teachers assumed that the teachers had a property interest sufficient to require due process requirements, the court turned to the question of "how much process is due teachers who have for a number of years been teaching summer courses in addition to primary teaching assignments, before a decision is

made to eliminate the courses?" (p. 25). The teachers argued that (1) they had received inadequate notice because they had not received *all* of the information that the superintendent presented to the board when recommending the courses be dropped and (2) they were not given an adequate hearing because they were not allowed to address the board in person. In this case, the board was faced with a policy decision regarding whether or not to offer certain courses. There were no personal allegations against the teachers nor were their primary contracts affected. In *Gilbert v. Homar,* 520 U.S. 924, 930, 117 S.Ct. 1807, 138 L.Ed.2d 120 (1997), the United States Supreme Court "rejected the proposition that due process *always* requires the State to provide a hearing prior to the initial deprivation of a property interest." They listed three factors to consider when determining how much process is constitutionally due: (1) the private interest that will be affected by the official action; (2) the risk of erroneous deprivation of such interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the government's interest in prompt termination. Under the facts presented in this case, the court determined that "whatever private interest that was implicated was adequately protected by the procedure that was followed" (p. 26). The teachers retained their positions under their primary contracts. The property interest in question was not on the same level as if this had been a case of teacher termination. The decision of the district court was reversed.

Although the teachers may have expected their summer contracts to continue, their expectation was not reasonable considering the language of their supplemental

contract. Supplemental teacher contracts are not afforded the same due process rights as primary contracts. The decision to end the contracts was an objective one based on enrollment data and not on any allegations of teacher misconduct. The district in this case actually provided more due process than was required.

Kansas State Board of Education v. Marsh
50 P.3d 9 (Kan. 2002)

On February 28, 2000, Chris Kurz, a teacher and coach at the Kansas State School for the Deaf (KSSD) asked an assistant football coach to recruit KSSD football players to go to Charles Marsh's property to move railroad ties. Marsh was also a teacher at KSSD and owned forty acres of land that he was in the process of improving. Kurz gained approval from LuAnn Ward, the Head Teacher, who signed the request form on March 6, 2000. On the field trip request form, the purpose of the trip was stated to be "community service - help Charles Marsh move train tracks to his Haven" (p. 11). Before giving permission, Ms. Ward asked Kurz to clarify the words, "train tracks." Kurz told Ward that it meant moving railroad ties to Mr. Marsh's property. Two KSSD football players, Justin Barnett and Brian Harmon, met Kurz and Marsh at the property on March 11, 2000. Marsh and Kurz reported that they talked to the students about safety, specifically the importance of watching for trains. After working for an hour, Marsh went inside to make lunch and Kurz remained outside with the boys. Kurz told Justin to stand in a ditch to keep watch of the tracks while he and Brian moved a railroad tie to the van. As Kurz and Brian

were moving a railroad tie, Kurz noticed a train approaching. Kurz also saw that Justin had left the ditch and was standing with a railroad tie supported on his shoulder right next to the track. Kurz and Brian tried to warn Justin by throwing snowballs and waving their arms, but they were not successful. Justin was hit and killed by the train. The Kansas State Board of Education (Board), the governing body of the KSSD, investigated the incident. The Board appointed a committee to interview witnesses and create a report. As a result of the report, the Board gave Marsh notice that it had made a motion to terminate his teaching contract for the following reasons: (1) Marsh jeopardized the health and safety of two KSSD students by engaging in an inappropriate and dangerous activity, (2) Marsh failed to exercise appropriate professional judgment and care regarding student safety, (3) Marsh failed to comply with school policies and regulations, and (4) Marsh failed to conduct himself in a manner that reflected positively on the school and to maintain the respect and confidence of other professional employees, students and the employer. Marsh requested to have the matter heard before a hearing committee. The hearing committee heard testimony from both parties. A majority of Marsh's witnesses were from the deaf community and they were of the opinion that educational experiences for deaf students should be no different from those for hearing students. They did not believe the railroad tie activity was unreasonable. The witnesses for the Board criticized Marsh for his decision, which placed a deaf person on an active railroad track. The hearing committee determined that the Board's evidence could be placed into three categories: (1) that Marsh failed to properly inform the parents as to the

nature of the project, (2) that Marsh did not have permission from the railroad company to remove their ties, and (3) that Marsh improperly organized an activity around an active railroad track. As it related to the first category, the committee found there was no evidence that Marsh was required to inform the parents of the activity, as this was the responsibility of the head teacher. The committee stated that while there was evidence that Marsh had not obtained permission from the railroad company, there was no evidence that his actions were "knowingly violative of railroad rights," (p. 14) as it was common for people to remove the ties without first getting permission. The committee also found that the Board's evidence did not substantiate their claim of Marsh's lack of professional responsibility. The committee also found no evidence that Marsh had failed to maintain the respect and confidence of other staff or students. After listening to the testimony and evidence, the hearing committee found in Marsh's favor and ordered his reinstatement. The Board appealed the hearing committees' decision. The district court found that the hearing committee's decision was not supported by substantial evidence and that it was arbitrary and capricious. Marsh appealed.

The court had previously held in *U.S.D. No. 434 v. Hubbard*, 19 Kan.App.2d 323, 868 P.2d 1240 (1993) that the standard of review of a due process hearing officer's decision was limited to deciding if: (1) the hearing officer's decision was within the scope of his/her authority; (2) the hearing officer's decision was supported by substantial evidence; and (3) the hearing officer did not act fraudulently, arbitrarily, or capriciously. The court first found that the hearing committee had acted within the

scope of its authority as it was granted to them by the provisions of K.S.A. 76-11a06 through 76-11a11. The hearing committee, according to the court, had "appropriately recognized its legislative authority" (p. 19) in making the final determination as to whether the Board had shown good cause to terminate Marsh's contract. Next, the court found that although there was conflicting evidence, the conflicts had been resolved by the hearing committee and "there *was* substantial evidence to justify its opinion" (p. 20). Finally, the court addressed the issue of whether the hearing committee had acted in a manner that could be considered arbitrary or capricious. The hearing committee had listened to testimony for two days from fourteen different witnesses. It had fully discussed and reviewed the four stated reasons given by the Board for Marsh's termination before determining that the Board had not provided substantial evidence that good cause existed to release Marsh from his contract. For these reasons, the court stated that it could "find nothing which compels a finding of any fraudulent, arbitrary, or capricious action" (p. 20). The court held that the procedures established in K.S.A. 76-11a04 had been followed. The decision of the district court was reversed.

Lassiter v. Topeka Unified School District No. 501
347 F. Supp. 2d 1033 (D. Kan. 2004)

Sandra Lassiter had been an employee of U.S.D. No. 501 for thirty-three years. During that time, she served as a counselor, teacher, and administrator and never had any grievance or disciplinary actions taken against her. In March 2002, while

Lassiter was the principal at Quinton Heights Elementary School, six teachers at the school made allegations against her to her supervisor, Barbara Davis, the Director of Elementary Education. Davis did not inform Lassiter of the allegations until May 13, 2002. On May 14, Lassiter met with the superintendent of schools, Robert McFrazier, and informed him that the allegations were false. An investigation into the allegations began on June 6, 2002. McFrazier scheduled a meeting with Lassiter on July 25, 2002 to discuss the results of the investigation. Because she was concerned about the way McFrazier was handling things, Lassiter brought two people to be witnesses at the meeting. McFrazier became upset with the presence of the witnesses, cited Lassiter with insubordination and wrote her a letter of reprimand. On July 31, 2002, Lassiter attended the rescheduled meeting with McFrazier and Davis where she was informed that she would be placed on probationary status for the 2002-2003 school year due to an unsatisfactory evaluation performed by Davis. The evaluation was based in part on the false allegations made by the teachers despite the fact that those allegations had been cleared by the investigation. During the first semester of the school year, Lassiter reported that she was harassed by McFrazier and Davis. In December of 2002, McFrazier gave Lassiter a document that consisted of questions dealing with the same false allegations. He told her to respond to the questions within five days. Lassiter hired an attorney to help her respond. On January 3, 2002, McFrazier suspended Lassiter and told her that he was going to request that she be terminated because he did not agree with her responses to his questions. Lassiter and her attorney requested a due process hearing. On February 7, 2003, Lassiter entered

into a resolution of personnel matter with McFrazier. In this resolution, McFrazier withdrew his recommendation that Lassiter be terminated, Lassiter withdrew her request for a due process hearing, Lassiter was reassigned to an administrative position within the district for the remainder of the school year, and it was agreed that Lassiter would be considered for employment in the district for the following year if she complied with the terms of her probation and successfully completed the school year and the evaluation process. The resolution also included a confidentiality clause and a waiver and release of liability from the events surrounding Lassiter's evaluation, the fact she had been placed on probation, and McFrazier's recommendation that she be terminated. Lassiter completed the 2002-2003 school year with a satisfactory evaluation and met with McFrazier on April 30, 2003 concerning the completion of her probationary status. McFrazier told her that her probation was complete and that he would "take care of it later" (p. 1039). McFrazier retired at the end of June without having cleared Lassiter's probationary status. Lassiter met with Tony Sawyer, the new superintendent of schools, on August 3, 2003. She explained the situation regarding her probation and asked him to clear her probationary status. Sawyer refused to do anything about her status. When Lassiter told Sawyer that she was concerned about being in a position created by McFrazier for which she was not certified, Sawyer either responded by telling her that she could stay in that position or retire. Lassiter appealed to the school board numerous times, but they did not provide any recourse or clear her probationary status. Lassiter alleged that because the defendants kept her in an uncertified position on probationary status she could have

been terminated, which would have affected her retirement benefits. Therefore, she retired. Lassiter brought a lawsuit against the school district, school board, McFrazier, Davis, and Sawyer on seven separate claims which were entitled: (1) violation of 42 U.S.C. Section 1983; (2) violation of her Fourteenth Amendment due process rights; (3) violation of 42 U.S.C. Section 1981; (4) breach of contract; (5) negligence under the Kansas Tort Claims Act (KTCA), K.S.A. 75-6103; (6) malice or reckless indifference; and (7) forced retirement. The defendants made a motion to dismiss arguing that Lassiter waived any claims against them when she signed the waiver and release provision contained in the resolution of personnel matter.

The court first addressed the issue of whether the waiver and release provision in the resolution should be enforced. Although the resolution did include such a provision, Lassiter argued that it was not enforceable because the defendants committed a material breach of the confidentiality clause by sharing confidential information with members of the public. A provision of the resolution stated, "each and every element of this agreement is a material part of the agreement and a breach of any such element is a breach of the entire agreement" (p. 1041). The court stated that it could "envision that the confidentiality portion may have been material in the sense that it was one of the major benefits that plaintiff anticipated receiving by virtue of entering into the resolution" (p. 1042). Accordingly, the court found that the defendants' argument based on the waiver and release provision was without merit and the motion to dismiss the case on that basis was denied. Next, the court addressed the plaintiff's 42 U.S.C. Section 1983 claims. Her Section 1983 Fourteenth

Amendment claims included alleged deprivation of procedural due process with respect to her property interest in continued employment and her liberty interest in her good name and reputation, as well as an alleged deprivation of substantive due process. The court looked at Kansas law to determine the extent of Lassiter's alleged property interest. Lassiter was an administrator at the time in question and not afforded the same rights as a tenured teacher. The Kansas Administrators' Act (KAA), K.S.A. Sections 72-5451 and 72-5455, provide details of the protection give to a school administrator. The KAA merely gives administrators the right to be notified of a nonrenewal and the right to an executive session "meeting" with the board of education. Because of this, the plaintiff had no property interest in her continued employment with the school district. The district was not constrained by state law to discharge Lassiter only for cause, so she was "terminable at will" and had no claim of entitlement of continued employment. Thus, the defendants' motion to dismiss was granted with respect to the procedural due process claim. The motion to dismiss with respect to Lassiter's liberty interest was also granted as she failed to identify any specific defamatory statements made by the defendants. She alleged that McFrazier and Davis disclosed confidential information, but the nature of those disclosures was not clear to the court. Lassiter next argued that her deprivation of substantive due process claim was that her good name, reputation, honor and integrity were stigmatized by the defendants' actions of making false allegations and statements to the public regarding her suspension and leaving her on probationary status without clearing her name. The court noted that in order to state a substantive

due process claim a plaintiff must "demonstrated a degree of outrageousness and a magnitude of potential or actual harm that is truly conscience shocking" (p. 1047). In this case, the court did not find the defendants alleged conduct to be outrageous and they granted the defendants' motion to dismiss on the substantive due process claim. Next, the court addressed the plaintiff's claim of forced retirement, or constructive discharge. Constructive discharge is viable under 42 U.S.C. Section 1983 if the plaintiff has been deprived of a protected property interest. Because the court had already concluded that Lassiter failed to show a constitutionally protected property interest in her continued employment, her complaint of forced retirement failed to state a Section 1983 constructive discharge claim. Lassiter's third complaint was that of a violation of 42 U.S.C. Section 1981. To make a claim under Section 1981, the plaintiff had to show that the defendants "intentionally or purposefully discriminated against her on the basis of her race or ethnicity." Lassiter did not allege any direct or circumstantial evidence that would show she had been discriminated against. In fact, she did not even allege that she belonged to a minority group. Thus, the defendants' motion was granted with respect to the plaintiff's Section 1981 claim. Because the court had dismissed all of the plaintiff's federal law claims, the court declined to resolve the parties' remaining arguments, for example the defendants' claims of qualified immunity. The court also declined to exercise supplemental jurisdiction over the plaintiff's awaiting state claims. Finally, the plaintiff requested leave to amend her complaint. Because some of her claims were not specific enough, the court determined to grant Lassiter the opportunity to make amendments. The court

granted the defendants' motion to dismiss without prejudice to plaintiff filing an amended complaint on or before January 3, 2005.

Unified School District No. 215 v. McGlynn
107 P.3d 1234 (Kan. App. 2004)

Five tenured teachers, who were employed by U.S.D. 215, were given extended day contract assignments. The salary for those extended contracts was fixed by a negotiated formula. The Lakin Teachers' Association (LTA) represented all teachers for contract negotiations with the Board. The LTA had negotiated a base contract for a school year of no more than 186 days for teachers, with the exception of those who had entered into extended day contracts. In January 2002, the school district notified the LTA that it intended to reduce or eliminate the extended contracts due to financial constraints. The school district did eventually renew the base contracts with reduced or no extended days. The teachers who lost their extended days were originally told they would be entitled to a hearing. However, both the teachers and the district agreed to continue the hearing pending a court order on whether the teachers were entitled to a hearing. The district court heard the case and concluded that any agreements to extend the teachers' contract beyond the 186 negotiated days would be considered supplemental contracts and not subject to due process hearings. The teachers appealed this decision arguing that their extended day contracts warranted the same protections afforded under K.S.A. 72-5436 *et seq.* as their primary contracts.

K.S.A. 72-5436 *et seq.* outlines the due process procedures that a school district must follow when a primary contract is terminated or nonrenewed. These procedures do not apply to supplemental contracts. Any assignment that is beyond the normal teaching duties is considered supplemental and cannot be turned into part of the primary contract. The court in *Swager v. Board of Education, U.S.D. No. 412*, 9 Kan.App.2d 648, 688 P.2d 270 (1984) held that "even when all duties are included in a single instrument, the supplemental duties can still be unilaterally terminated by either party." *Id.* at 656. The extended duty day contracts went beyond the teachers basic requirements. The evidence for this was the fact that these duties increased the teachers' salaries above that which had been negotiated in the base contract. Only the primary teaching contract is protected by the Due Process Procedure Act. As the extended days fell under the definition of a supplemental contract, no hearing was required when the district terminated those duties due to budget constraints. The decision of the district court was affirmed.

Dockery v. Unified School District No. 231
382 F. Supp. 2d 1234 (D. Kan. 2005)

This action, filed by Reginald Dockery, alleged claims of employment and racial discrimination against USD 231 and Tim Yoho, the director of human resources for the school district. Dockery, an African American, was hired as a custodian by the school district in 2002. His children, including K.C.D., attended

schools in the district. K.C.D. was the victim of racial slurs and was physically attacked by other students while on school grounds, on the bus, and at the bus stop. In early December 2002, Mr. Dockery called Dr. John Hetlinger, the superintendent to report the racial harassment of his children and his concerns about the lack of response by school officials. A series of letters were exchanged, but the Dockerys were not satisfied with the resolution. Mr. Dockery also alleged that at about this time in December he was cleaning the classroom of Nikki Lovell, a teacher at the high school, and was offended by a movie she was showing in class that contained a scene involving sexual activity. A few days after this, Ms. Lovell complained to her supervisors about Mr. Dockery's poor work performance. On February 19, 2004, Dockery met with Dr. Yoho and other school administrators and attempted to initiate a written complaint of sexual harassment and retaliation against Ms. Lovell, but Dr. Yoho would not accept it. Yoho did not believe that Ms. Lovell's conduct constituted sexual harassment or a pattern of retaliation. On March 2, 2004, two of Dockery's supervisors met with Dockery to discuss his time sheet. Dockery had indicated that he had worked on a Saturday. Mr. Dockery acknowledged that he had not worked on that day and that the entry was a mistake. He removed the entry from his time sheet at his supervisor's instruction who then signed the time record. On March 5, 2004, Dockery was called to a meeting with Dr. Yoho and other school administrators. Yoho informed Dockery that he was being terminated because he had falsified his time record. Mr. Dockery attempted to appeal his discharge by sending letters to his supervisors, Dr. Hetlinger, and each member of the school board. No one responded

to these attempts. Mr. Dockery then filed a complaint seeking redress for himself on February 15, 2005. The first amended complaint was filed in April 2005 so that Dockery could pursue claims on behalf of K.C.D. There were six counts included in Mr. Dockery's suit. In Count 1, Dockery alleged that the school district retaliated against him for exercising his First Amendment rights; in Count II, Dockery alleged that the school district and Dr. Yoho fired him because of his race in violation of Section 1981; in Count III, Dockery alleged that the district terminated him in retaliation for opposing sexual harassment in violation of Title VII; in Count IV, Mr. and Mrs. Dockery, on behalf of K.C.D., alleged that the district violated Title VI when it failed to provide K.C.D. with a nondiscriminatory educational environment; in Count V, the Dockerys, on behalf of K.C.D., alleged that the school district deprived K.C.D. of his Constitutional and statutory rights to a nondiscriminatory educational environment in violation of Section 1983; and in Count VI, the Dockerys, on behalf of K.C.D., alleged that K.C.D. was subjected to a hostile educational environment due to his race, which threatened his personal security and denied him the benefits of a program receiving federal funding in violation of Section 1981. The defendants moved to dismiss all counts.

As it related to Count 1, the court sited *Pickering v. Board of Educ.*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811(1968) when it noted that a government employer may not, as a condition of employment, compel an employee to relinquish his First Amendment right to comment on matters of public concern. To prevail on a claim of retaliation due to free speech, an employee must show: (1) the speech involved a

matter of public concern, (2) the employee's interest in engaging in the speech outweighed the employer's interest in regulating the speech, and (3) the speech was a "substantial motivating factor" behind the decision to take adverse employment action. Mr. Dockery had only brought this complaint against the school district. For Dockery to establish liability against the school district, he "must show (1) the existence of a municipal policy or custom, and (2) that there is a direct causal link between the policy or custom and the injury alleged." At p. 1240 citing *Hinton v. City of Elwood,* 997 F.2d 774, 782 (10thCir.1993). Dockery had not alleged the existence of any policy or custom that caused an injury. Absent the facts that would establish liability against a governmental unit, the district dismissed Dockery's claim in Count 1 of his complaint. Next, the court addressed the Count II and Count IV claims, which arose under Section 1981. In *Jett v. Dallas Indep. School Dist.,* 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989), the Supreme Court held that Section 1983 is the only means for a plaintiff to pursue a Section 1981 claim against a municipality. The court in this case, found that Count II and Count IV had "pleading defects," (p. 1241) as Section 1983 offered the exclusive remedy for damages against a state actor. Therefore, the court granted the Dockerys leave to amend those counts so that the claims brought under Section 1981 could be brought under Section 1983. In regards to Count II, Dr. Yoho argued that the complaint must be dismissed against him as he was entitled to qualified immunity. Qualified immunity "protects all but the plainly incompetent or those who knowingly violate the law." At p. 1241 citing *Holland ex rel. Overdorff v. Harrington,* 268 F.3d 1179, 1185 (10th Cir.2001). Courts employ a two-

part test to determine qualified immunity. First, the facts alleged by the plaintiff must show that the conduct of the defendant violated a constitutional right. If it does this, the next step is to determine if the right was clearly established at the time of the defendant's conduct such that a reasonable person would have known that the alleged conduct violated the law. Mr. Dockery failed to allege that Yoho had individually engaged in conduct that violated a clearly established law. He asked for, and was granted by the court, leave to amend this complaint. In regards to the Count III claims of retaliation due to Dockery's opposition of sexual harassment, the court found that the single incident of viewing a movie that contained sexual activity was not severe enough to create the conditions necessary for sexual harassment. To raise an actionable claim for sexual harassment under Title VII, the harassment must be "so severe or pervasive as to alter the conditions of [the victim's] employment and create an abusive work environment" (p. 1243). Mr. Dockery's claims fell far short of this requirement and as a result, his Count III claim was dismissed by the court. Finally, the court addressed the Count IV and V claims of personal injury due to discrimination filed on behalf of K.C.D. The defendants argued that as two years had passed since plaintiffs knew of the conduct complained about; the statue of limitations prevented them from filing a claim. The Dockerys contended that K.S.A. 60-515(a) which tolls the statute of limitations for minors, allowing a minor to bring suit one year after turning eighteen, allowed them to bring these claims on behalf of K.C.D. who was ten years old. The court here held that the Kansas two-year statute of limitations applied to the Title VI and Section 1983 claims of discrimination

presented in Counts IV and V. They further stated that the "plaintiffs missed the purpose of K.S.A. 60-515(a)" (p. 1244). The purpose of the statute is to mitigate difficulties of maintaining a civil suit while under a legal disability; it does not suspend or extend the statute of limitations. The statute of limitations had run out on the Dockery's ability to bring a claim on their son's behalf. Accordingly, the court dismissed Counts IV and V of the complaint.

Courts may grant leave to amend a complaint when "justice so requires, unless the amendment would be futile." (*See* Fed.R.Civ.P. 15(a)) The plaintiffs in this case were given until August 30, 2005 to amend Count II and IV of their complaint.

Dockery v. Unified School District No. 231
406 F. Supp. 2d 1219 (D. Kan. 2006)

This is the amended complaint from Reginald Dockery resulting from the district court decision in *Dockery v. Unified School District No. 231*, 382 F. Supp. 2d 1234 (2005). In this action, plaintiff asserted two counts. Count I was a claim by Mr. Dockery against both the school district and Mr. Yoho, the human resources director, for racially discriminatory discharge in violation of 42 U.S.C. Section1981, 1983. Count II was a claim by K.C.D., minor child of Mr. Dockery, against the school district for a racially hostile environment in violation of 42 U.S.C. Section 1981, 1983. The plaintiffs also sought to amend their complaint for a third time to assert a Section 1983 complaint against the school district for retaliatory discharge in violation of Mr.

Dockery's First Amendment free speech rights. The defendants asked the court to dismiss both counts and to deny plaintiffs' motion to amend.

The Federal Rules of Civil Procedure provide in Fed.R.Civ.P 15(a) that a party may amend his pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." The court has discretion when determining whether to grant leave to amend. The court may refuse leave to amend on grounds of undue delay, bad faith, repeated failure to cure deficiencies by previously allowed amendments, or futility of the proposed amendment. If the amendment failed to state a claim, it may be deemed futile. If it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim then the court may dismiss for failure to state a claim. The court relied on the Federal Rules of Civil Procedure as it considered both the plaintiffs' and defendants' requests.

Count I had been previously brought before the court only under Section 1981. This complaint placed the claim as a violation of Section 1981 "and" Section 1983. The court determined that Section 1981 created the statutory right for Mr. Dockery's discriminatory discharge claim and Section 1983 provided the exclusive remedy for the alleged violation of his statutory right. Next, the court turned to Mr. Yoho's claim of qualified immunity with respect to Count I. To evaluate this claim, the court used a two-part inquiry. First, they determined that Mr. Yoho's actions, as alleged in the complaint, violated a statutory right under Section 1981. The complaint alleged that Mr. Dockery's race was the factor in Yoho's decision to discharge and Section 1981

"forbids all intentional racial discrimination in the making or enforcement of private or public contracts." Thus, the plaintiffs' complaint alleged a statutory violation. Second, the court had to determine whether the right violated was "clearly established" and "…was sufficiently clear that a reasonable official would understand that what he is doing violates that right" (p. 1225). In this case, the court determined that any reasonable official would understand that dismissing an employee based on race violated that employee's rights under Section 1981. Thus, Mr. Yoho's claim of qualified immunity failed as a result of this two-part inquiry. The court pointed out that Mr. Yoho was "free to test these allegations in light of facts revealed during discovery on a motion for summary judgment" (p. 1226). Count II alleged that the school district discriminated against K.C.D. by subjecting him to a racially hostile environment as the result of school district policy because the school board was aware of the racial harassment but failed to initiate an investigation and take any reasonable remedial action. The court found this claim, as it was pleaded, adequately placed the school district on notice of the nature of K.C.D.'s claim against it. Plaintiffs next sought to amend their complaint to allow Mr. Dockery to assert a claim of retaliatory discharge based on the district's violation of his First Amendment free speech rights. In order to hold the school district liable on this claim, Mr. Dockery had to show that the "governmental entity's policies caused the constitutional violation" (p. 1228). Plaintiffs argued that Mr. Yoho was a final policymaker for the purposes of establishing the school district's liability. The amendment alleged that the retaliatory discharge resulted from the school district policy because the board of

education delegated final policymaking authority to Mr. Yoho, and the board then approved Mr. Yoho's decision to dismiss Mr. Dockery. The court concluded that if the allegations were true, Mr. Yoho's decision to discharge Mr. Dockery constituted school district policy, which caused the alleged violation of Mr. Dockery's First Amendment free speech rights. Thus, the proposed amended complaint contained the causal link needed to establish the school district's liability. The plaintiffs' motion to amend their complaint was granted. Defendants' motion to dismiss the complaints was denied.

Dees v. Marion-Florence Unified School District No. 408
149 P.3d. 1 (Kan. App. 2006)

Kerry Dees was a tenured elementary school counselor who was nonrenewed due to a need for the Board of USD 408 to reduce staff because of declining enrollment in the elementary school. The district had been experiencing a significant decline in student enrollment for a number of years and this was having an adverse impact on the school district's budget. The Board directed the school administration to reduce personnel at the elementary level and suggested that the reductions be made in areas that would have the least impact on instructional programs. The elementary principal was directed to make a recommendation to the Board. As the principal placed a higher priority on the classroom teachers working directly with students, the counselor's position was one that she recommended be reduced. Based on that recommendation, the Board passed a resolution to nonrenew Dees' contract in April

2003. Two weeks after receiving her notice of nonrenewal, Dees requested a due process hearing. At the request of Dees' counsel, the hearing was delayed until March 2004. The final brief took place in May 2004. It was agreed upon by both parties that the written decision would be completed by July 12, 2004. The final decision was issued on September 10, 2004. At the hearing, Dees contended that the high school counselor, Phoebe Janzen, should have been nonrenewed because she had less seniority. Dees was certified as a K-12 counselor and had been in the district longer than Janzen. The District's negotiated contract contained a systematic procedure for the Board to follow in case of a necessary reduction in force. Dees' contention was that step 1(e) specifically stated that if the Board had followed all previous steps and a reduction was still necessary, "then teachers with the least number of years of continuous teaching experience" in the district will be "terminated first, provided they are fully qualified fully certified, teachers to replace and perform all the needed duties of the terminated teachers" (p. 4). The negotiated contract went on in step 2 to define "fully qualified and fully certified." The Board held that it had acted in good faith when it initiated the reduction in force and that the decision to nonrenew Dees was not arbitrary or capricious. The hearing officer found for the Board. Dees appealed to the district court where she argued that the Board did not comply with the reduction in force provisions in the negotiated teachers' contract and that the hearing officer violated her due process rights by failing to issue the written opinion within the statutory time frame. The district court affirmed the decision of the hearing officer. Dees appealed.

First, the court considered whether the Board correctly followed the contractual procedure for a reduction of force. It was found that the superintendent had followed the step-by-step approach in the teachers' contract and considered each subparagraph of section 1 in order. Dees contended that step 1(e) should have governed her situation. The court focused on the sentence in step 1(e) which stated that teachers with the least seniority are terminated first "provided there are fully qualified, fully certificated" teachers to replace them. The court believed it was incumbent on the Board to determine if Dees was fully qualified to perform the duties of a high school counselor. In making their decision regarding qualifications, the Board used the definition in step 2(a) of the negotiated contract which stated that "fully qualified shall be taken to mean recency of training and experience" (p. 6). The superintendent identified the required duties of a high school counselor and the experience and training of Dees and Janzen was compared. Dees had no experience at the high school level and her recent training had not been directed at performing duties of a high school counselor. Janzen, who was also tenured, not only had experience in fulfilling the required duties of a high school counselor but she had numerous hours of recent training that focused on the high school level. This evidence established that Dees was not "fully qualified" to replace Janzen and perform her duties. As a result, the court found that the Board had followed the reduction in force procedure as it was designed by the negotiated teachers' contract. Dees argued that pursuant to *Bauer v. U.S.D. No. 452,* 244 Kan. 6, 765 P.2d 1129 (1988), she was "fully qualified" for the high school position because she was

certified K-12. The court pointed out that in *Bauer* there was no definition of "fully qualified" in that district policy and the Board in that case had not made an effort to examine the areas in which the teacher was certified. The *Bauer* decision did not prevent USD 408 from establishing, through a negotiated contract, a standard for measuring the qualification of a certified, tenured teacher to replace another certified, tenured teacher. In fact, having such a provision provided the Board with the method to meet the *Bauer* directive to "conduct a good faith examination of the competence, interest, and training of all teachers in the area where the reduction of staff is to occur" (p. 9). While Dees had a contractual right to preference because of her seniority, the court found nothing in case law or state statute that would have precluded the school district from creating the condition that the senior teacher must possess the training and experience necessary to perform the duties of the less-senior teacher. Finally, Dees claimed that she should have been granted summary judgment because her due process right had been violated by the hearing officer's delay in issuing a decision. Her argument was based on K.S.A. 72-5443(a) which provides that, unless otherwise agreed upon, "the hearing officer shall render a written opinion not later than 30 days after the close of the hearing…" The hearing officer's decision was issued approximately 60 days after the agreed upon July 12, 2004 deadline. The court found this issue to be analogous with the finding in *Expert Environmental Control, Inc. v. Walker*, 13 Kan.App.2d 56, 761 P.2d 320 (1988) in which the court found that the 30-day limit of K.S.A. 1987 Supp. 77-526(g) was not mandatory but directory in nature because it did not require strict compliance with the provision and

there was no penalty or other consequence for noncompliance of the 30-day limit. This same analysis could be applied to K.S.A. 72-5443(a). Thus, the court held that the 30-day limit in K.S.A. 72-5443(a) was directory, not mandatory. Because Dees made a due process claim, the court also had to consider whether the hearing officer's delay denied Dees notice and an "opportunity to be heard at a meaningful time in a meaningful manner" (p. 12). Dees contended that she suffered damages because of a loss of a teaching position and salary while she waited on the hearing officer's decision. The court pointed out that Dees had requested continuances, which delayed the due process hearing by approximately 4 months, and her counsel agreed to the submission of the closing arguments in writing, which extended the proceedings for another 2 months. As a result, it took over a year to complete her due process hearing. Because she actively participated in extending the hearing process by at least 6 months, the court did not find Dees' claim of prejudice from a 60-day delay to be persuasive. The court held that the "minimal delay of 60-days" did not deprive Dees of her due process hearing at a meaningful time and in a meaningful manner. The decision of the district court was affirmed.

When a school district must reduce the number of its teachers, no statutory law or case law requires that the reduction must be based solely on seniority. Districts may require that a teacher possess the training and experience needed to perform the duties of the position in question. It would be wise for a school district to include language in its negotiated agreement with teachers that defines how the district would determine whether a teacher was qualified for a position.

Rettie v. Unified School District 475
167 P.3d 810 (Kan. App. 2007)

Helen Rettie was a tenured teacher for USD 475 in an early childhood handicapped classroom. Rettie renewed her teaching contract for the school year 2003-04, but on July 7, 2004, her teacher's certificate lapsed due to her failure to complete the required continuing education requirements. She applied for a substitute teacher's certificate, which was granted on July 12, 2004. A letter dated July 12, 2004, was sent to Rettie notifying her that her position with the district had been terminated because she had let her contract lapse and, therefore, no longer met the requirements of her teaching contract. The Board had not passed a resolution terminating Rettie before the July 19 letter, and the Board passed no resolution authorizing or approving her termination. Rettie filed in district court alleging that she had not been provided with a due process termination hearing. At trial, the Board acknowledged that no resolution had been adopted regarding Rettie's contract because it was the position of the Board that Rettie was not entitled to any of the protections of a property interest in continuing employment because her contract was void. The trial court found in favor of the Board. Rettie appealed.

The question for the appellate court to decide was whether a void employment contract eliminated a tenured teacher's property interest in continued employment. Paragraph seven of Rettie's employment contract provided that "the contract shall be void if the Teacher fails to have on file with the Board continuously during employment a valid Kansas Teaching Certificate..." Contract language clearly

showed that the school district was within its authority to terminate Rettie's employment for the 2004-05. However, the court pointed out that the "right to terminate employment is distinct from the right to due process" (p. 813). It is Kansas statutes, not contract provisions, which provide tenured teachers with a property interest in continued employment. Because Rettie was tenured, she qualified for protection under the Teachers Due Process Act, K.S.A. 72-5436 *et seq*. Although her certificate lapsed, she was still entitled to the protections of this Act. K.S.A. 72-5445(b) requires that the provisions of the Act be applied to "any tenured teacher except those whose certificate is revoked due to a conviction or diversion for specific crimes listed in the statute." Under this Act, Rettie had a property interest in continued employment unless she received notice of termination or nonrenewal that included a statement of the reasons for her termination and of her right to a hearing within 15 days of the notice. In this case, Rettie had received a notice of termination, but the notice failed to provide for the right to request a hearing. Whether the school district would have been justified in terminating Rettie's contract was immaterial in the eyes of the court. Because they failed to comply with 72-5438, they had violated due process. No matter how strong the grounds for dismissal may have been, Rettie could not be deprived of her property interest in continued employment without the due process required in the Act. The appellate court held that "the contract cannot trump the due process policy embodied in the Teachers Due Process Act" (p. 814). The judgment of the district court was reversed and remanded for further proceedings.

Nickels v. Board of Education of Unified School District 453
173 P.3d 1176 (Kan. App. 2008)

Leslie Nickels had been a teacher for USD 453 for three years when she was notified on May 1, 2006, that her teaching contract would not be renewed for the following year. Nickels filed a notice of hearing with the Board in which she alleged that her constitutional right to employment had been abridged by her nonrenewal. She also claimed that her contract had not been renewed because of her age. The Board denied Nickels' request for a hearing, stating that the hearing procedures required by K.S.A. 72-5446 were not applicable to the circumstances in Nickels' notice of nonrenewal. The Board stated that the statute required Nickels provide notice that her contract had been nonrenewed by reason of her exercising a Constitutional right. Nickels had only claimed that her constitutional right to employment had been curtailed, and the Board noted that there was no Constitutional right to remain employed. Nickels appealed to the district court and claimed that she had the right to a due process hearing as the result of the abridgment of her constitutional right to not be discriminated against in her job because of her age. The district court held that Nickels' allegations fell within the statute and she was entitled to a due process hearing. The Board appealed.

K.S.A. 60-2102(a)(4) provides that a party has the right to appeal a "final decision" in any action. The issue for this court to decide was whether the district court's decision was a final, appealable decision. The court looked to *NEA-Topeka v. U.S.D. 501*, 260 Kan. 838, 925 P.2d 835 (1996) which was a similar case in which the

school district had appealed the district court's decision that they submit to arbitration with the union. The appellate court in that case concluded that because the trial court had ordered arbitration, the parties had to submit to arbitration first and "then challenge the arbitrator's decision before there is a final order which is appealable to an appellate court." *NEA-Topeka* at 843. The case at hand was very similar to *NEA-Topeka* in that the Board was appealing the decision of the district court that they hold a due process hearing. The district court made no factual findings and had made no final decision regarding the outcome of the case. Thus, the court held that because the due process hearing had not been held, the Board's appeal was not a final, appealable order. The appeal was dismissed.

Chapter 7

Professional Negotiations

The nineteen cases in this chapter were suits brought by employees on issues dealing with professional negotiations. Kansas collective-bargaining laws clearly specify provisions giving public school employees the right to join a union and prohibit employers from retaliating against a teacher due to their membership in a union. Court cases in Kansas over the past thirty years have typically dealt with negotiability of an issue or the perceived refusal of a school board to negotiate in good faith. K.S.A. 72-5413(l) lists the items that are mandatorily negotiable in the state of Kansas. School officials may not make changes to these mandatory items without first negotiating with union representatives.

K.S.A. 72-5423 is another important statute that provides, "notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 in any school year by either party, such notices shall be in writing and delivered to the chief administrative officer of the board of education or to the representative of the bargaining unit and shall contain in reasonable and understandable detail the purpose of the new or amended items desired." School district officials and union representatives must meet that deadline in order to propose changes to the current negotiated agreement.

School boards would do well to keep in mind that they are held to requirements of state statute and the power delegated to them through those statutes.

They cannot add clauses into agreements that extend or broaden this power. Courts will generally rule contract language that is contrary to statute or attempts to provide more authority to a board than is required by statute to be invalid.

Dodge City National Education Association v. Unified School District No. 443
635 P. 2d 1263 (Kan. App. 1981)

The National Education Association (NEA) of Dodge City and the Board of Education entered into professional negotiations for the 1980-81 school year. On June 4, 1980, they reached an agreement, which was ratified by the Board and the teachers. Prior to this time, six class periods were held at Dodge City Junior High and each teacher taught five periods. No mention of any change to this practice was discussed during negotiations. Shortly after the agreement was reached, the Board changed the number of class periods at the junior high from six to seven, which would have required the teachers to teach one additional class each day. NEA challenged the Board's action by filing suit. The district court held that since the number of teaching periods is a mandatorily negotiable item, the Board had "no authority to unilaterally change the number of teaching periods without first submitting the proposed change to negotiations pursuant to K.S.A. 72-4523" (p. 1265). The Board appealed.

In *Chee-Craw Teachers Ass'n v. U.S.D. No. 247*, 225 Kan. 561, 593 P. 2d 406 (1979), the court determined that the number of teaching periods is mandatorily negotiable under K.S.A. 72-5413(l) as part of that statue includes "hours and amounts

of work." The Board in the case at hand made a change in a mandatorily negotiable item through a unilateral action. K.S.A. 72-5423 provides in part that notices to negotiate may include new items or items that change an existing contract. The number of class periods was not negotiated, nor was it included in the negotiated agreement. That made it a "new item," and since it was an item that was mandatorily negotiable, it should have been noticed and negotiated before being changed. The Board argued that the individual teacher contracts permitted them to make such a change because the contract language provided that a teacher was "to teach, govern, and conduct classes assigned and conform to the Rules and Regulations and Policies of the Board of Education" (p. 1265). The court answered by pointing out that the negotiated agreement was a part of the individual contracts, and no change in the number of teaching periods was authorized. If the Board wanted to make a change to the number of class periods, it had to notice the item for negotiation as provided by statute. The decision of the district court was affirmed.

After a negotiated agreement is reached, a school board may not make any changes to mandatorily negotiable items. Written notice of the intent to make changes to a contract must be provided before the negotiations process begins.

Unified School District No. 315, Thomas County v. DeWerff
626 P.2d 1206 (Kan. App. 1981)

Neil DeWerff had been employed for many years as a teacher and basketball coach. On June 28, 1978, DeWerff gave the school district notice of his resignation.

He was notified that his resignation would be accepted upon receipt of the $400 fee required by the negotiated agreement. DeWerff refused to make the payment and the school district sued. The contract provision in the negotiated agreement at issue was titled "Penalty for Breaking Contracts." It proposed that staff members would be considered under contract after April 15 of the current school year. If a teacher under contract failed to honor the full term of the contract, a lump sum of $400 would be collected between contract acceptance and August 1. After August 1, a penalty of $75 would be charged for each full or part of a month remaining in the contract. The provision further stated that the Board "reserves the right to waive the provisions of this penalty policy" (p. 1208). The district court found in favor of the school district. It held that the contractual provision was a "valid liquidated damages clause," the $400 amount was reasonable, and the school district had applied the contract provision impartially and fairly in the past. DeWerff appealed this decision.

Parties to a contract may stipulate to the amount of damages for breach of contract as long as the stipulation is deemed to be a liquidated damages clause rather than a penalty. The difference between a liquidated damages clause and a penalty is that the purpose of a penalty is to ensure performance, while a liquidated damages clause is for "payment of a sum in lieu of services" (p. 1208). Liquidated damages provisions are generally enforceable in employment contracts. According to the appellate court, the use of the term "penalty" in the negotiated agreement provision did not defeat the district court's finding that the provision was a liquidated damages clause. The appellate court cited *Beck v. Megli*, 153 Kan. 721, 114 P.2d 305 (1941)

which explained, "courts must look behind the words used by contracting parties to the facts and the nature of the transaction. The use of the terms "penalty" or "liquidated damages" in the instrument is of evidentiary value only." *Id.* at 726. *Beck* further stated that there were "two considerations that are given weight in support of a holding that a contractual provision is for liquidated damages rather than a penalty," the first being that the amount is reasonable "in view of the value of the subject matter of the contract"; and the second being that the "nature of the transaction is such that the amount of actual damage resulting from the default would not be easily determined." *Beck* at 726. A contract provision will generally be held to be a penalty when there has been no attempt to determine the true amount of damages that might be incurred if a breach of contract occurs. In the case at hand, the school district had testified that it was harder to find qualified teachers after the April 15 contract deadline. As the school year progressed, the contract required payment of a larger sum. The court took this as proof that the school district had made an attempt to calculate the amount of damages that might occur if there was a breach in a teacher's contract. DeWerff claimed that the contract provision was "coercive" because there was a waiver provision that allowed the school district discretion in their enforcement of the provision. The appellate court did not agree with this reasoning. It held that there was no requirement that enforcement of a liquidated damages provision had to be mandatory. In reviewing the testimony, the appellate court found that the school district had only waived enforcement in cases where the teacher was forces to resign for health reasons or other circumstances beyond his control. The provision was

enforced in all other cases where the teacher had voluntarily broken his contract. The appellate court also found that the amount of actual damages in cases such as this would be difficult to establish. The school district's superintendent had testified to the actual expenses incurred in advertising for DeWerff's vacated position. He also testified to the number of hours spent on recruiting, interviewing and hiring. The uncertainty of actual damages resulting from a teacher's breach of contract had also been addressed in previous court cases. The appellate court determined that in this case, the school district had suffered real but unascertainable damages when DeWerff resigned past the April 15 deadline. There had been no challenge to the original finding that the amount of damages was reasonable and not excessive. Therefore, the two requirements of a valid liquidated damages clause had been met. The judgment of the district court was affirmed.

National Education Association-Topeka v. Unified School District No. 501
644 P.2d 1006 (Kan. App. 1982)

This case involved a grievance initiated by a teacher who was employed by USD 501. The details of the grievance were not included in the court's syllabus, but it was noted that the grievance process had been followed as provided for in the negotiated agreement. On April 15, 1980, the arbitrator issued a decision sustaining the teacher's grievance. The school district refused to accept the arbitrator's decision, claiming that it was not in accordance with the jurisdiction of the arbitrator. The action was taken to district court and the plaintiff sought confirmation of the

arbitrator's award under the Uniform Arbitration Act, K.S.A. 5-401 *et seq.*, or in the alternative for specific performance of the contract between the plaintiff and the defendant. The district court judge granted summary judgment under K.S.A. 5-401 which confirmed the arbitration award. The school district appealed.

The appellate court first sought to determine whether the school district's refusal to abide by the arbitrator's decision was a prohibited practice under K.S.A. 72-5430(b)(7). K.S.A. 72-5430(b)(7) states in relevant part that it shall be a prohibited practice for a board of education to "refuse to participate in good faith in the...arbitration pursuant to an agreement entered into pursuant to K.S.A. 72-5424..." The court believed that the language of the statute was "plain and unambiguous." The words "refuse to participate" are basic and easy to understand. They do not apply in this case because the school district participated in the arbitration; it just failed to abide by the arbitrator's decision. The court held, "there is no way that a refusal to abide by the decision could be a prohibited practice if in fact the decision was not made in accordance with the jurisdiction and authority of the arbitrator" (p. 1008). For that reason, the appellate court found the district court had subject matter jurisdiction. The next issue addressed was whether the Uniform Arbitration Act should have been applied to an arbitration clause in an employment contract between a school district and a teachers' bargaining unit. K.S.A. 1981 Supp. 5-401 provided that a "written agreement to submit any existing controversy to arbitration or a provision in a written contract, other than a contract of insurance or a contract between an employer and employees or between their respective representatives...is

valid, enforceable and irrevocable..." Again, the court found the language in the statute to be plain and unambiguous and it excluded all contracts between an employer and employees, or their respective representatives. Thus, the court found that the district court had erred in granting summary judgment under the Uniform Arbitration Act. The district court's judgment was reversed and the case remanded with directions to proceed with the plaintiff's action for specific performance of contract.

National Education Association-Wichita v. Unified School District No. 259, Sedgwick County
674 P.2d 478 (Kan. 1983)

The National Education (NEA) of Wichita was the exclusive bargaining representative for all teachers in USD 259. Between February and October of 1981, NEA and Unified School District No. 259 (the Board) participated in negotiations concerning the terms and conditions of professional service. The effective date of the contract was August 1, 1981 and it extended through July 3, 1983. During the 1978-79 school year, the schedule at Roosevelt Junior High School consisted of a six period day in which teachers taught five periods and had one planning period. The schedule was unilaterally changed by Roosevelt's administration for the 1979-80 school year. Without changing the length of the school day, the number of periods was increased from six to seven periods with the length of each period being shortened. A new team concept was instituted by the administration and in order to provide for a team-planning period, the extra class period was added. Teachers

taught for five periods, had one personal planning period and one period to meet with their team. The unilateral implementation of the team teaching process was accepted by all of the teachers at Roosevelt. The seven-period team teaching concept was in effect at Roosevelt when the August 1, 1981, agreement took effect. In February of 1982, the Board issued to Roosevelt's principal a bulletin that required the seventh period be used for teaching regular subjects rather than for team planning. The Board directed this change in order to implement remedial reading classes, which had been recommended by a community task force. The principal changed the schedule and the team period was converted to a teaching period. The result of this change was that the teachers at Roosevelt had to prepare for and teach one additional class each day. NEA-Wichita claimed that the Board had unilaterally changed, without negotiations, the teachers' "hours and amount of work," a mandatorily negotiable item provided for in K.S.A. 72-5413(l). The district court granted the NEA's motion to permanently enjoin the Board from unilaterally changing a term and condition of the teachers' employment without first negotiating the topic with the NEA. The district court relied upon the decisions made in *Chee-Craw Teachers Ass'n v. U.S.D. No. 247,* 225 Kan. 561, 593 P.2d 406 (1979) and *Dodge City Nat'l Education Ass'n v. U.S.D. No. 443*, 6 Kan.App.2d 810, 635 P.2d 1263 (1981) in finding that the number of class periods taught per day is a topic that is, by statute, mandatorily negotiable. The court also found that the number of class periods taught during the school day by a classroom teacher in USD 259 from 1981-83 had not been a subject of the negotiations process that led to the agreement in force during the time of this dispute.

The Board appealed from the district court's decision and the case was transferred from the Court of Appeals to the Supreme Court.

The Board first contended that it *had* negotiated the number of class periods to be taught with the NEA during negotiations. They argued that the language in Article V, Section D, Paragraph 7 had been changed to delete the term "hours" and substitute the term "periods" pursuant to a proposal made by the Board. This language change only occurred in a paragraph that dealt with the activities and hours of a department coordinator, not to all teachers. The trial court had concluded that this change in wording was made as an attempt at "semantic clarification concerning departmental coordinators and not the result of full negotiations concerning the number of class periods to be taught by all certified personnel" (p. 482). The Supreme Court agreed with the trial court's finding that the number of class periods to be taught per day had not been negotiated. The Board next alleged that there was a distinction between *Dodge City* and this case because the contract at issue in *Dodge City* contained neither a "management rights clause" nor a "closure clause." Both of these clauses appeared in the language of the contract between the Board and NEA-Wichita. The management rights clause stated in part that the Board and the Superintendent had "certain exclusive statutory rights and responsibilities" which they could not surrender and nothing within the negotiated agreement could be construed to limit that power. The closure clause provided in part that the Board and the NEA "acknowledge that all mandatory subjects of negotiations have been negotiated and neither party has any right to negotiate further on these or any other subjects during

the term of this agreement" (p. 482). The Board argued that its inclusion of these clauses justified its unilateral change in the number of class periods taught. The court noted that school districts in Kansas have only the power and authority that has been delegated to them and the inclusion of a management rights clause could not increase the authority granted to the Board by the legislature; it simply preserved that which had already been granted. That authority is limited by K.S.A. 72-5413(l) which provides that certain topics are mandatorily negotiable. Among those topics is "hours and amounts of work." This item has been interpreted to include the number of class periods per day. The existence of a management rights clause could not extend the power granted to the Board and did not distinguish this case from *Dodge City*. The closure clause, in the opinion of the court, was nothing more than a "diluted form of a waiver" (p. 483). A waiver of a union's right to bargain must be "clear and unmistakable." In the case at hand, NEA-Wichita had not waived any of its bargaining rights. Neither of the clauses presented by the Board justified the Board's unilateral change in the number of class periods taught at Roosevelt. The court found that there was not sufficient basis for distinguishing this case from *Chee-Craw* and *Dodge City*. Justice Miller in *Dodge City* stated that "since the number of teaching periods is a mandatorily negotiable item, the Board has no authority to unilaterally changed the number of teaching periods without first submitting the proposed change to negotiations pursuant to K.S.A. 72-5423." 6 Kan.App.2d at 811. The appellate courts in Kansas have held that if a topic is by statute made a part of the terms and

conditions of professional service, then that topic is mandatorily negotiable. The decision of the district court was affirmed.

Ottawa Education Association v. Unified School District No. 290
666 P.2d 680 (Kan. 1983)

The Ottawa Education Association (OEA) and the Board entered into a negotiated agreement for the 1981-82 school year. Article XIII of that agreement set procedures to be followed in case of a need to reduce teaching staff due to declining enrollment or lower revenues. The article required the administration to follow certain steps before releasing teachers. In short, the procedure stated that if a reduction was necessary, it should first be achieved through "normal attrition." If further reductions were then needed, K-8 principals and junior and senior high department heads would submit the names of one or two teachers for consideration. An evaluation committee, made up of three members selected by the Board and three members selected by the OEA, would determine which teachers would be released. Any teacher who had the potential of being affected by the proposed reduction would be notified by April 1 that his position had been terminated pending a decision of the evaluation committee. Teachers wanting to stay would have to submit "merit folders" to the superintendent's office by May 1. The evaluation committee would review the merit folders and then determine which teachers would be released from their contracts. Teachers affected by the committee's decision would be notified by May 15. The Board would then make the final decision. The purpose of this article was to

give the teachers, through the OEA, some input in deciding which teachers would be released when a reduction in staff was required.

While this negotiated agreement was in effect, the number of students attending Ottawa schools for the upcoming school year was predicted to be much less than current student numbers. As a result of this declining enrollment, the Board found it necessary to reduce staff. On March 8, 1982, the Board met and voted to nonrenew the contracts of ten nontenured teachers. Notice of intent was given to the ten teachers and on March 15, the Board unanimously passed a motion to nonrenew the contracts. As the Board did not follow the procedures found in Article XIII, the OEA filed action in court. The OEA sought judgment declaring that the Board violated Article XIII, and for temporary and permanent orders enjoining the Board from breaching the provision of Article XIII, and an order of mandamus directing the Board to reinstate the ten teachers. The Board filed a motion to dismiss for failure to state a cause of action. The district court heard arguments on April 29, 1982, and found in favor of the Board. The OEA appealed that decision.

The appellate court first considered the meaning of the word "attrition." The district court had concluded that "normal attrition" included the process of nonrenewing nontenured teachers. The appellate court disagreed and quoted the Webster's Dictionary definition of attrition as meaning the "reduction chiefly as a result of resignation, retirement or death." Relying on that definition, as well as the fact that the word attrition typically carries the connotation of voluntary or natural reduction in employees, the appellate court found that the trial court erred when it

included nonrenewal of nontenured teachers within the scope of the meaning of "normal attrition." The next issue addressed by the court was whether Article XIII conflicted with any of the provisions of the teachers' contracts statutes, K.S.A. 72-5401 *et seq.* K.S.A. 72-5437 provided in part that written notice of termination or nonrenewal of a contract "shall be served by a board upon any teacher on or before the fifteenth day of April.*" If notice was not given by that deadline, a teacher's contract would be deemed to continue for the next school year. Under this statute, the Board was required to make a determination of which teachers were to be nonrenewed and give those teachers their notice by April 15. If the Board had followed the procedures of Article XII, it would not have given notice until May 15. The Board was bound by statute to provide notification by April 15, or else it would lose its chance to reduce the teaching staff. The April 1 notification that a teacher's *position* was being terminated would not be the same as a notice of intent to nonrenew a *contract*. The Board could have given notice to nonrenew the contracts of a large group of teachers on April 15 and then waited until the evaluation committee's decision before deciding which of those teachers would be retained and which would be released. However, as the court pointed out, that would not have been a realistic option, as it would have left the affected teachers, departments, and the Board in "limbo" for a month. The court concluded that the Board was "fully authorized by statute" to give notice of nonrenewal to the nontenured teachers before April 15, 1982. The provisions in Article XIII of the negotiated agreement conflicted

with the purposes of the statute and were therefore "ineffective and void" (p. 684). The judgment of the district court was affirmed.

(* As it is written today, K.S.A. 72-5437 requires that notification be given on or before May 1.)

Unified School District No. 501 v. Secretary of the Kansas Department of Human Resources
685 P.2d 874 (Kan. 1984)

The National Education Association-Topeka (NEA) provided notice for renegotiation of all provisions contained in the negotiated agreement for teachers. During the course of negotiations, the school board refused to negotiate eight topics proposed by the NEA. Subsequently, the NEA filed a prohibited practice complaint with the Secretary of the Kansas Department of Human Resources (secretary). After considering the eight topics, the secretary determined that five of them were not mandatorily negotiable. Three topics entitled "Reduction in Staff," "Employee Files," and "Student Teacher Program" were deemed to be mandatorily negotiable. The school district filed an appeal with the district court, which considered the negotiability of the three topics. The district court affirmed the decision of the secretary and found that the school board had violated K.S.A. 72-5430(b) by refusing to negotiate those proposals. The school board appealed.

At issue on appeal, was whether the three proposals fell within the category of subjects that are mandatorily negotiable. Both the secretary and the district court used the "topic approach" in determining the question of mandatory negotiability.

Under the topic approach, a proposal does not have to be specifically listed under K.S.A. 72-5413(l) to be mandatorily negotiable. All that is required is that the proposal be within the scope of one of the categories listed under "terms and conditions of professional service." K.S.A. 72-5413(l) provides an extensive list of those topics that fall under the meaning of terms and conditions of professional service. Relevant to this case are the categories of "hours and amounts of work," "termination and nonrenewal of contracts," and "re-employment of professional employees." The statute further states "except as otherwise expressly provided in this subsection, the fact that any matter may be the subject of a statute or the constitution of this state does not preclude negotiation thereon so long as the negotiation proposal would not prevent the fulfillment of the statutory or constitutional objective." K.S.A. 72-5413(l). None of the parties challenged the use of the topic approach to consider the mandatorily negotiable categories under K.S.A. 72-5413(l). The court next addressed the three specific proposals in this appeal to determine if they would be mandatorily negotiable under the statute. One of the proposals the secretary and district court found to be under the statute was a reduction in staff. The specific NEA proposal described the process that the school district was to follow in the event of a reduction in staff of teachers beyond what could be accommodated by attrition. The secretary and the district court found that the *mechanics* of staff reduction was a mandatorily negotiable subject under K.S.A. 72-5313(l). The NEA's proposal was contained within the topics of "termination and nonrenewal" and "re-employment." The appellate court agreed with the secretary and the district court. The decision to

reduce staff is a managerial decision for the school board and is not negotiable. However, the *mechanics* for termination and nonrenewal of teachers as a result of a reduction in staff are mandatorily negotiable items. Another proposal from the NEA dealt with employee files and the rights of an employee to have access to such files. The secretary and district court found that the topic of Employee Files was mandatorily negotiable under K.S.A. 72-5413(l). A school district could use an employee's file to determine salary and wages, termination and nonrenewal of contracts, and re-employment of teachers. Employee files also contained evaluations and under K.S.A. 72-9005, a teacher has the right to examine and respond to evaluations. Therefore, the district court believed that the employee was entitled to have access to all evaluation documents and supporting materials and any other information contained in his personnel file. The appellate court agreed with the district court's decision that the subject of Employee Files was mandatorily negotiable under K.S.A. 72-5413(l). Finally, the appellate court addressed the NEA proposal entitled Student Teacher Program. In this proposal, the NEA outlined provisions that would allow for teachers to opt out of being assigned a student teacher and set a deadline for notification of any student teaching assignment. The secretary ruled that the subject matter contained in the student teacher proposal fell under the categories of "hours and amounts of work" and perhaps "nonteaching duty assignments" which are mandatorily negotiable topics. The district court affirmed the secretary's decision and noted that the NEA proposal did not affect the board's managerial policy to maintain a student teacher program. The proposal only dealt with the fact that

because teachers would have to spend extra time assisting and evaluating a student teacher, their "hours and amounts of work" would be affected. The appellate court agreed with the district court's finding that the Student Teacher Program proposal was mandatorily negotiable under K.S.A. 72-5413(l). The judgment of the district court was affirmed.

The appellate court emphasized that the fact a proposal is mandatorily negotiable does not require a school board to accept the proposal. K.S.A. 72-5413(l) simply requires the school board to discuss the proposal and try to arrive at a fair result.

Board of Education, Unified School District No. 259, Sedgwick County v. Kansas-National Education Association
716 P. 2d 571 (Kan. 1986)

This dispute arose as the result of a refund paid by Blue Cross and Blue Shield of Kansas (BCBS) to the school district as trustee. The premiums collected by BCBS for the plan year November 1, 1981 to October 31, 1982, exceeded total claims, expenses and reserves by $354,839.83. This amount is referred to as “divisible surplus.” BCBS refunded the surplus to the Board and it was the distribution of these funds that created controversy. The National Education Association-Wichita (NEA-W), the exclusive bargaining agent for the teachers of USD 259, negotiated a contract with the district in 1981, which was ratified by teachers and signed by the Board. Health insurance for teachers was negotiated and was a part of this contract. A divisible surplus rider was included as part of the contract between the Board and

BCBS which provided for the distribution of any refund. This provision stated that the surplus would be paid in cash "to the Contract Holder or upon written request applied as an adjustment of future dues" (p. 573). It also stated that this excess would be applied for the "sole benefit of the Subscribers." The Board filed seeking declaratory judgment that the surplus be determined to be a mandatorily negotiable item under K.S.A. 72-5413(l). The district court found that the refund was a mandatorily negotiable item and the teachers employed by USD 259 were entitled to share in the benefit of the divisible surplus. The court further determined that the Board, as contract holder, was entitled to negotiate how the surplus would be applied. The teachers appealed this decision.

The first issue was whether or not the surplus was a mandatorily negotiable item pursuant to K.S.A. 72-5413(l). The court here found that since the health insurance policy had been a part of the negotiated agreement, thus making it a mandatorily negotiable item, and as the surplus came about as a result of this contract with BCBS, it fell under the negotiated agreement. The policy included a Divisible Surplus Rider and so there was no reason to renegotiate the refund as it resulted from benefits paid through the previously agreed upon contract.

The second issue was to determine who was entitled to receive the refund. The Board as "Contract Holder" made no claim to the refund and the teachers declined to have the surplus applied as an adjustment of future dues. Therefore, the section of the divisible surplus rider that provided "any excess refund shall be applied for the sole benefit of the Subscribers" was at issue. The BCBS policy defined

subscribers as the person named on the identification card, and so the court determined that any individual covered by the health insurance fell into this category. Finally, the court turned to the divisible surplus rider of the BCBS contract to determine who was entitled to the refund. While the school district and teachers believed the surplus should be divided among all the subscribers during the two-year term of the teaching contract, the rider showed otherwise. The divisible surplus rider provided that the determination of any surplus accrued would be made at each "anniversary of the contract date." When looking over the BCBS "Merit Rated-Retrospective Worksheets," the court found that the only year in which a divisible surplus occurred was for the plan year November 1, 1981, through October 21, 1982. The court had "no hesitation" in concluding that the subscribers for the period of November1, 1981, through October 21, 1982, were entitled to the refund of the premium overpayment. The judgment of the district court was reversed and the case remanded for further proceedings to determine the names of the individual subscribers and the amount of premium paid by each, with the refund apportioned accordingly.

A divisible surplus that falls under a group insurance policy purchased by a school board pursuant to a negotiated agreement with teachers is not subject to additional mandatory negotiation. If there is a provision in the health plan which specifies how a divisible surplus is to be divided, that provision stands.

Unified School District No. 252 v. South Lyon County Teachers Association
720 P.2d 1119 (Kan. App. 1986)

On January 31, 1985, the president of the South Lyon County Teachers Association (SLCTA) sent a letter to the school district's superintendent that served notice the SLCTA intended to meet with the Board for negotiations. Within the letter, the union stated its "intent to notice on each and every article in the unilateral contract" (p. 1120) in effect at the time the letter was written. The Board refused to negotiate on the grounds that the notice was insufficient. The SLCTA brought action in the district court. The district court found the teachers' union had provided sufficient notice of intent to negotiate under the Professional Negotiations Act. The school board appealed this decision.

K.S.A. 72-5423(a) provides in relevant part that notices to negotiate on new items or to amend an existing contract must be filed on or before February 1 and must be delivered to the superintendent or a representative of the bargaining unit. The statute further states that notices "shall contain in reasonable and understandable detail the purpose of the new or amended items delivered." The appellate court, in considering the language of the statute, determined that the notice provision of K.S.A. 72-5423(a) appeared to be mandatory. Compliance with the notice provision would be essential to preserving the rights of all parties. The negotiations process is facilitated when the notice "fully details the purpose behind the proposed additions or amendments to an existing contract" (p. 1121). In the case at hand, the notice provided to U.S.D. 252 was not specific. It informed the school board of the general

topics to be discussed but it did not state the purpose of any new or amended items in "reasonable and understandable detail." Because of its lack of detail, the appellate court held that the notice did not comply with the requirements of the statute. Therefore, the school board was never served with a timely sufficient notice and was under no obligation to enter into professional negotiations with SLCTA. The judgment of the district court was reversed.

Board of Education, Unified School District No. 352, Goodland v. NEA, Goodland
785 P. 2d 993 (Kan. 1990)

In the fall of 1985, the Board of Education of U.S.D. 352 put together a committee to study evaluation procedures. The committee met monthly and had the purpose of assisting the Board in adopting a policy of written evaluation. The policy, which the committee developed, was called the Professional Improvement Plan. During negotiations between the Board and NEA, a dispute arose regarding the Professional Improvement Plan. The Board was willing to negotiate the portions of the plan dealing with evaluation procedures but would not negotiate portions regarding evaluation criteria. The NEA filed a prohibitive practice complaint against the Board with the Department of Human Resources. A hearing with a representative of the Secretary of the Department of Human Resources found in favor of the NEA. An order from this hearing stated in part that the examiner was "convinced the legislature contemplated inclusion of the criteria upon which one is evaluated in their use of the words ‘employee appraisal procedures’ when defining those subjects listed

at K.S.A. 72-5413(l) as terms over which bargaining was mandatory" (p. 994). The Board petitioned the district court for review of this decision and argued that professional appraisal *procedures* are different than the appraisal *criteria.* NEA contended that the two terms were dependent upon one another. The district court found in favor of the Board and stated that while "professional appraisal procedures involve the 'mechanics' and the 'how' and 'when' of employee evaluation and are mandatorily negotiable," (p. 995) the criteria involve the "what" used to evaluate the quality of work expected which is a managerial decision. The district court determined that as the school district was not required to negotiate teacher evaluation criteria, no prohibitive practice occurred. The NEA appealed this decision.

K.S.A. 72-5414 gives teachers the right to organize in order to negotiate with boards of education "for the purpose of establishing, maintaining, protecting or improving terms of service." Professional employee appraisal procedures are listed in the K.S.A. 72-5413(l) definition of "terms and conditions of professional service." A topic is mandatorily negotiable if by statute that topic is made a part of the terms and conditions of professional service. At issue was whether procedures and criteria are distinguishable. In *U.S.D. No. 501 v. Secretary of Kansas Dept. of Human Resources,* 235 Kan. 968, 685 P. 2d 874 (1984) the court "distinguished *managerial* decisions and policies and the *mechanics* of such policies." *Id.* at 963. In applying this distinction to the case at hand, the court defined evaluation criteria as a managerial policy solely within the domain of the Board. Evaluation procedures were defined as the mechanics of applying such criteria. Thus, evaluation criteria and evaluation

procedures were found to be distinct from one another. NEA accused the Board of committing a prohibited practice when it refused to negotiate evaluation criteria. Included in K.S.A. 72-5430, which defines prohibited practices, is the refusal to negotiate in good faith. The court found that evaluation criteria were not mandatorily negotiable under the Professional Negotiations Act. Therefore, the court concluded that the Board did not commit a prohibited practice. The decision of the district court was affirmed.

Evaluation procedures and criteria are distinguishable from one another. Procedures are specifically stated in K.S.A. 72-5413(l) and thus are mandatorily negotiable; evaluation criteria are not.

Unified School District No. 279, Jewell County v. Secretary of the Kansas Department of Human Resources
802 P.2d 516 (Kan. 1990)

In January 1985, the Jewell-Randall Education Association (Association) and the Board of Education of Unified School District No. 279 (Board) submitted notice of the items they proposed to negotiate for the 1985-86 school year. During negotiations, the parties agreed to all of the issues except base salary and fringe benefits. In May 1985, both parties declared an impasse and the impasse procedures of mediation and fact-finding were started. In October 1985, the Board's representative rejected the fact finder's recommendations and made a counter proposal to the Association. The Association rejected the proposal. As no agreement was reached, the Board issued each teacher a unilateral contract. The Association

filed a complaint against the Board alleging that the unilateral contract altered certain terms not noticed for negotiations and that the Board's failure to negotiate those terms was a prohibited practice. A hearing was held before the Secretary of the Kansas Department of Human Resources (Secretary) who concluded: (1) the Association had standing to file a timely complaint after the Board issued a unilateral contract offer, (2) the Board's act of changing unnoticed topics in the unilateral contract was remedied by subsequent negotiations, (3) the deduction of $8,536 from the Board's original salary offer and the suggestion that $7,700 of the deduction was used to pay for the Board's fact-finding services was a violation of K.S.A. 72-5430(b)(1) and (5). The Secretary ordered the Board to pay $7,700 to the Association for reimbursement of teachers in the district. The Board appealed the Secretary's order to the district court. The district court held the issue was moot because contracts had been entered into for the two years following the years in question. The case went to the appellate court and in an unpublished opinion filed January 20, 1989, the court reversed and remanded the case for a determination of whether the Board had complied with K.S.A. 72-5439. On remand, the district court held that: (1) the teachers' association had the authority to file prohibited practice after negotiations with the school board were completed, (2) the school board was free to include terms which had not been noticed for negotiation, (3) the Board committed a prohibited practice when it reduced the offered teacher salary by the costs of mediation and fact-finding, (4) the Board did not commit a prohibited practice when it did not make the unilateral salary increase retroactive, (5) the Secretary did have the authority to order the Board to pay $7,700

to the Association, and (6) the authority granted to the Secretary did not violate the Kansas Constitution. The Board appealed rulings (1), (3), (5), and (6). The Association and the Secretary cross-appealed rulings (2) and (4). The Court of Appeals, in 14 Kan.App.2d 248, 788 P.2d 867 (1990), affirmed in part and reversed in part. The case next went to the Supreme Court of Kansas.

The Supreme Court addressed each issue in the order noted above. In determining whether the teachers' association had the authority to file a prohibited practice complaint after impasse and mediation procedures had been completed, the court reviewed state statutes. It found no restrictions requiring that such a complaint had to be filed during negotiations. Thus, the findings of the district court and the Court of Appeals were affirmed as to this issue. The court next considered the Secretary and Association's issues on cross-appeal. First addressed was whether the Board committed a prohibited practice when it included terms in the unilateral contract that had not been negotiated. The unilateral contracts were not issued by the Board until the negotiations process had been completed, as required by K.S.A. 72-5428(a). Where mediation and fact-finding fail, K.S.A. 72-5428(f) mandates that the board of education "shall take such action as it deems in the public interest…and make such action public." The court believed this to indicate intent by the legislature to grant school boards "complete freedom" in their actions where impasse procedures fail, subject to the limitation to act in the public interest. There is no requirement within the statutes that a school board must offer the same terms negotiated prior to impasse. Therefore, the Supreme Court found no violation of statute by the inclusion

of non-negotiated items in the unilateral contracts offered by the Board. The second issue on cross-appeal was whether the Board had committed a prohibited practice by refusing to make the unilateral contracts retroactive with respect to salary increases. As previously discussed, the unilateral contracts were not issued until after negotiations were completed and impasse procedures had been unsuccessful. The court found no evidence that the Board had negotiated in bad faith and held that their action was within the authority granted in K.S.A. 72-5428(f). The next issue considered was whether the Board had committed a prohibited practice by reducing the teachers' salaries by the amount of the Board's mediation and fact-finding costs. K.S.A. 72-5429 provides in part that all of the costs incurred for mediation and fact-finding "shall be borne equally by the board of education and the professional employees' organization…" The Supreme Court held that K.S.A. 72-5429 only pertained to the costs of the mediator and the impasse board. The $7,700 at issue in this case was the Board's attorney fees and other expenses. The court held that the Association did not owe any of those expenses, just as the Board was not responsible for the Association's legal fees. The Supreme Court further found the Board's action a prohibited practice and thus bad faith negotiations in violation of K.S.A. 72-5430(b)(1). The final issues examined were whether the Secretary had the authority to award the Association $7,700 as a remedy and, if so, whether that authority violated the Kansas Constitution. K.S.A. 72-5430(a) states in relevant part that any controversy related to prohibited practice may be submitted to the Secretary and the Secretary "shall enter a final order granting or denying in whole or in part the relief

sought." The Court of Appeals had reversed the district court and determined that the reimbursement of $7,700 would benefit the teachers. The Court of Appeals believed that the teachers were not parties to the complaint and the Association's right to request reimbursement on their part ended when the teachers signed unilateral contracts, thus the Secretary did not have the authority to reimburse the Association. The Supreme Court disagreed. It found the Court of Appeals ruling contrary to the legislative intent to grant the Secretary discretionary authority to determine appropriate relief. Requiring teachers to decline a unilateral contract or "otherwise lose the right to seek a remedy for a prohibited practice is harsh and contrary to the express intent of the Professional Negotiations Act…" (p. 524). After reviewing cases in federal court that dealt with labor relations, the Supreme Court was "convinced" that the Court of Appeals had erred when it ruled the Association lacked the authority to request a monetary remedy for the Board's violation of K.S.A. 72-5429. Finally, the court addressed the Board's contention that the power granted to the Secretary was in violation of Article 2, Section 1 of the Kansas Constitution. The Supreme Court found that legislative authority could be delegated to an administrative body where guidelines were set forth in statutes. There are definite standards on the exercise of authority granted to the Secretary in several statutory provisions of K.S.A. 72-5413 *et seq.* The court further held that the Secretary exercised a quasi-judicial function in investigating, initiating, and conducting hearings on impasse procedures and prohibited practice complaints, not a legislative function. The Secretary's function did not conflict with the basic mission of school

boards and was not in violation of the Kansas Constitution. The judgment of the Court of Appeals was affirmed in part and reversed in part. The judgment of the district court was affirmed.

Garden City Educators' Association v. Board of Education, Unified School District No. 457, Garden City, Finney County
805 P.2d 511 (Kan. App. 1991)

During negotiations for the 1988-89 school year, the Board suggested the addition of a liquidated damages clause to Article VII, Section A of the teachers' contract. Previous contracts had simply stated that if a teacher did not fulfill the terms of their contract they would be subject to "any and all legal remedies available." The Board wanted to add a clause that would specify the amount of money a teacher would be required to pay if they attempted to get out of their contractual agreement with the school district. The Garden City Educators' Association (GCEA) did not agree to the addition of a liquidated damages provision and so it was not a part of the 1988-89 negotiated agreement. Between May 10, 1988 and August 5, 1988, eighteen teachers submitted requests for resignation from their contracts. In each instance after June 1, 1988, the Board required damages be paid by the employees. On August 26, 1988, GCEA filed a complaint with the Secretary of the Department of Human Services alleging that the Board had committed prohibited practice under the Professional Negotiations Act, K.S.A. 72-5413 *et seq.*, when they imposed a liquidated damages clause after the clause had been negotiated for but not included in the contract. The Board filed a complaint with the State Board of Education pursuant

to K.S.A. 72-5412 against the five teachers who had not paid damages. The Board also filed a civil suit against each of them in district court alleging breach of contract. The Secretary determined that a prohibited practice had not occurred and denied GCEA's complaint. The Secretary found that the Board was entirely within its rights to demand damages from the teachers who had broken their contracts because the negotiated agreement specifically stated that any breach of contract would subject the teacher to "any and all legal remedies available." Legal remedies could include the right of the board to be reimbursed for its incidental and consequential damages in the event a teacher chose not to fulfill his contract. The fact that collective bargaining failed to result in agreement on the inclusion of such a clause in the contract, did not cause the board to lose its right to seek damages against individual teachers for breach of contract. GCEA appealed to the district court. The district court affirmed the Secretary's decision that a prohibited practice had not occurred, but it enjoined the Board from requiring "liquidated damages" for breach of contract in the future and ordered them to reimburse the money collected from teachers who had requested to be released from their 1988-89 contracts. The court viewed the Board's attempt to collect damages as unenforceable. Both parties appealed the district court decision.

The GCEA complained that the Board had committed prohibitive practice under K.S.A. 72-5340(b)(5) and (6) which state that it shall be prohibitive practice for a board of education to refuse to negotiate in good faith with representatives of a recognized professional employees' organization and to deny the rights accompanying recognition of a professional employees' organization which are granted in K.S.A. 72-

5415. GCEA claimed that the Board had forced the usage of its rejected proposal for liquidated damages, which violated its duty to negotiate in good faith. The court disagreed, finding that the Board had not refused to negotiate in good faith as was required by statute. The Court of Appeals did not agree with the trial court's decision to grant injunctive relief and order of the return of monetary damages collected. K.S.A. 72-5430a grants authority and power to the Secretary to dismiss a complaint of prohibitive practice or to grant any relief sought. Thus, the court held that because the authority granted to the Secretary by legislature was limited to dismissal or the finding of a prohibited practice and a prohibitive practice did not exist in this case, the only correct finding was the dismissal of the complaint. The trial court could not award relief beyond the authority of the administrative agency. The ruling that prohibitive practice had not occurred was affirmed. The judgment that enjoined the Board from attempting to collect liquidated damages and awarded damages to teachers who had already paid liquidated damages was reversed.

Board of Education, Unified School District No. 314, Brewster, Thomas County v. Kansas Department of Human Resources By and Through Dick
856 P.2d 1343 (Kan. App. 1993)

In January 1989, the Board formed an evaluation committee to develop a teacher evaluation instrument. On January 31, 1990, the Board and the NEA submitted letters noting the items each wanted to negotiate for the coming year. Neither letter mentioned an evaluation form or procedure. In April, the Board directed the superintendent to begin revising the current evaluation document. No

copies of the proposed form were presented to the NEA for their input. At the May 1990 Board meeting, the evaluation form was read and adopted without objection. The new evaluation form was included in the August teachers' handbook. NEA then wrote the superintendent requesting that the old form continue to be used until a new one could be developed through negotiations. The superintendent responded by saying that the changes had "involved criteria, not procedure, and therefore, were not mandatorily negotiable" (p. 1345). In September 1990, NEA filed a complaint with the Kansas Department of Human Resources, alleging that the Board had engaged in a prohibited practice by "unilaterally imposing a change in the evaluation procedures by imposing a new evaluation instrument." At the hearing, the Board was found to have failed to negotiate in good faith with NEA in violation of K.S.A. 72-5430(b)(5). They were ordered to "cease and desist" from using the new evaluation form. The Board petitioned for judicial review and the district court adopted the findings set out in the initial order and concluded that "the new evaluation form is an evaluation procedure and involves the 'mechanics' and the 'how' and 'when' of employer evaluation and is mandatorily negotiable" (p. 1345). The Board appealed this decision.

The Kansas Supreme Court, in *USD No. 352 v. NEA-Goodland,* 246 Kan. 137, 785 P. 2d 993(1990), held that teacher evaluation procedures are mandatorily negotiable but evaluation criteria are not. The Board argued that in this case no new evaluation procedures were required to implement the new evaluation criteria. They stated that the "same evaluation procedures were in effect for February 1, 1990 that

were used as of February 1, 1989, and in fact were the same procedures used under the old criteria" (p. 1346). Failure to negotiate an item that is mandatorily negotiable is a prohibited practice under K.S.A.72-5430. K.S.A. 72-5430(b) states that it is prohibited practice for a board to willfully refuse to negotiate in good faith with representatives of a recognized professional employees' organization. NEA's contention was that the new evaluation instrument required new evaluation procedures and the Board's failure to negotiate these procedures amounted to a refusal to negotiate in good faith. The question for the court was whether the new evaluation instrument adopted by the Board contained any procedural matters. In comparing the two evaluation instruments, the court found that although they looked similar they were in fact quite different. The Board had changed the rating system for teachers and a Board member testified that this was a change in the "mechanics" of applying the criteria listed. The Board also made changes in requiring that detailed lesson plans be submitted for evaluation, thus changing the frequency of evaluations and the manner in which the teachers' work was evaluated. These new criteria could not be implemented in the absence of adequate procedures, and procedures are mandatorily negotiable. While in some cases existing procedures can be used to implement new criteria, that did not hold in this case. When the NEA wrote a letter requesting that the old evaluation form be used until a new one could be developed through negotiations, the Board did not respond or indicate a willingness to proceed to negotiations. The court found that the Board's failure to "enter into professional negotiations concerning the procedures employed to implement the new criteria when

requested by the NEA constituted a failure to negotiate in good faith and a prohibited practice as set forth in K.S.A. 72-5430(b)(5)" (p. 1347). The decision of the district court was affirmed.

While teacher evaluation criteria are not mandatorily negotiable, evaluation procedures must be negotiated with the teachers' bargaining organization before implementation. It is prohibited practice to fail to negotiate an item that is mandatorily negotiable. In this case, the new evaluation criteria could not be implemented without adequate procedures and these procedures are mandatorily negotiable.

National Education Association-Topeka v. Unified School District No. 501
925 P.2d 835 (Kan. 1996)

The individual plaintiffs in this case were Duane Pomeroy, an Adult Homeless Literacy Instructor, Mari John, a Kan-Work Instructor, Nancy Meschke and Kathy Fox, Adult Basic Education Instructors, were all employed by USD 501. All of these individuals performed their duties during the regular professional duty day and were required by the Kansas State Board of Education to meet teacher certification requirements. NEA-Topeka was the union, which represented the employees of USD 501. NEA- Topeka filed a grievance on behalf of the individual teachers alleging they were not receiving the proper salary and benefits as established in the negotiated Professional Agreement. USD 501 refused to hear the grievance because it claimed that because the employees were "continuing education only" they were not members

of the bargaining unit as established in Article 3 of the Agreement and not entitled to file a grievance. When USD 501 refused to hear the grievance, NEA-Topeka requested arbitration. USD 501 refused to arbitrate, and again alleged that the plaintiff teachers were not parties to the negotiated Agreement and not entitled to the Agreement remedy of arbitration. NEA-Topeka filed an action in district court asking the court to compel USD 501 to submit to arbitration. They argued that the defendants had to submit to arbitration so that an arbitrator could interpret the Agreement and determine whether the plaintiffs were part of the bargaining unit and entitled to grievance and arbitration procedures. The defendant school district filed a cross-motion for summary judgment in which it argued that only a court could determine if the plaintiffs were actually parties to the arbitration agreement because an arbitrator would not have the power to determine his own jurisdiction. The district court granted the plaintiffs' motion for summary judgment and denied the defendants' motion. The court ruled that under Article 10 of the Agreement, the parties had agreed to arbitrate all matters dealing with the "application or interpretation of the Agreement." Since the question of whether the teachers were part of the bargaining unit dealt with the application or interpretation of the Agreement, the court found that the parties had contractually agreed to allow an arbitrator to decide the issue. Accordingly, the district court ordered the defendant to submit to arbitration. The defendant appealed the ruling to the Court of Appeals and the case was transferred to the Supreme Court of Kansas.

K.S.A. 72-5424(b) allows a party to file a motion with the district court asking the court to compel the opposing party to submit to arbitration. The statute does not mention anything about the right to appeal from the grant or denial of such a motion. Under K.S.A. 60-2012(a)(4), a party can appeal a final decision in any court action. The question for the Supreme Court to decide was whether the district court's grant of the plaintiffs' motion for summary judgment equated a final, appealable order. The court looked at several cases under the Kansas Uniform Arbitration Act that addressed what type of orders were appealable, similar to this case and could be used as authority in reaching a decision. From a synthesis of these cases, the court concluded, "if a trial court denies a motion to arbitrate, then no other action can be taken by either party. Thus, that is a final order and appealable. However, if the trial court grants a motion to compel arbitration, then the parties must submit to arbitration and then challenge the arbitrator's decision before there is a final order which is appealable to an appellate court" (p. 838). The court cited several cases, including *In re Estate of Ziebell*, 2 Kan.App.2d 99, 575 P.2d 574 (1978) which found that "an order must have some semblance of finality to be appealable." *Id.* at 100-01. In the case at hand, the grant of NEA-Topeka's motion for summary judgment resulted in an order compelling arbitration. There was more for the parties to resolve, which meant this was not a final and appealable order. The Supreme Court held that there was no right to appeal an order to submit to arbitration. The appeal was dismissed for lack of jurisdiction.

Junction City Education Association v. Board of Education, Unified School District No. 475, Geary County
955 P.2d 1266 (Kan. 1998)

The Junction City Education Association (JCEA) and the Board of Education entered into negotiations for the 1996-97 school year. An article in the 1995-96 agreement was in dispute during their negotiations sessions. Article XIII dealt with involuntary transfers and stated that if a teacher was involuntarily transferred within five days of the first contract day of any school year they would receive additional compensation. Negotiations reached an impasse and the parties implemented impasse procedures pursuant to K.S.A. 72-5426 with the Secretary of the Department of Human Resources (Secretary) to resolve the dispute. One issue was whether Article XIII from the 1995-96 negotiated agreement was mandatorily negotiable under the Negotiations Act. Mediation was not successful and a factfinder was appointed. The factfinding hearing was scheduled for October 17, 1996, when the JCEA filed a declaratory judgment action seeking a determination from the Geary County District Court that the involuntary transfer proposal was mandatorily negotiable. The JCEA requested an injunction that would require the Board to negotiate the terms of the proposal. The Board moved to dismiss. It alleged that the district court lacked jurisdiction because the JCEA had failed to exhaust all administrative remedies. A hearing was held on November 1, 1996, and the court ruled that it had jurisdiction pursuant to K.S.A. 60-1701 as well as *Chee-Craw Teachers Ass'n v. U.S.D. No. 247,* 255 Kan. 561, 593 P.2d 406 (1979). The court also ruled that a provision for

involuntary transfers was not a mandatorily negotiable item, nor was compensation for such transfers. The JCEA appealed the denial of its requested relief.

When *Chee-Craw* was decided, disputes regarding impasses and prohibited practices were resolved by filing with the district court pursuant to K.S.A. 72-5426(a) and 72-5430. In 1980, the Kansas Legislature amended both of these statutes to allow parties to submit disputes to the Secretary, rather than the district court. Subsection (d) of K.S.A.1979 Supp. 72-5430 which allowed a board or professional organization to file for injunctive relief in district court was deleted by Section 12 of the 1980 amendments. In its place, the legislature enacted Section 13 which provided in relevant part that "any controversy concerning prohibited practices may be submitted to the secretary." Parties are not to seek review from the courts unless they have been aggrieved by the final order of the secretary. In reading the Negotiations Act as it was amended in 1980, the court determined that "all disputes involving professional negotiations are to be resolved through the Secretary" (p. 1273). In light of these statutory changes, *Chee-Craw* was no longer appropriate. The district court had also offered K.S.A. 60-1701 as a ground for jurisdiction of this case. Other court cases have rejected 60-1701 as a method of obtaining jurisdiction over a case being litigated in another forum. For these reasons, the court held that the district court did not have jurisdiction over this matter and the JCEA had failed to exhaust its administrative remedies. The appeal was dismissed.

Marais Des Cygnes Valley Teachers' Association v. Board of Education,
Unified School District No. 456, Osage County
954 P.2d 1096 (Kan. 1998)

The negotiated agreement between the school district and the teachers union of Marais Des Cygnes for the 1995-96 school year contained an evaluation procedure for certified personnel. The procedure required the development of a written improvement plan for any teacher who received a "5" (Must Improve) rating on any of the evaluation criteria. During the 1995-96 school year, three tenured teachers received at least on "5" rating and were given a plan of assistance. Despite the fact that all teachers must be evaluated by February, pursuant to K.S.A. 72-9003 and the teachers' negotiated agreement, the plans of assistance were dated March 11, 1996 and the evaluations were dated March 15, 1996. All three teachers had their contracts renewed for the following school year. The Teachers' Association filed a declaratory judgment action in October 1996, in which they requested that the evaluations and plans of assistance be removed from the files of the three employees on the grounds that they were not completed by February 15. The school district contended that the only statutory penalty for failing to complete an evaluation before the February 15 deadline was that an employee's contract could not be nonrenewed based on incompetence. The trial court denied the Teachers' Association's motion and ruled that the court "specifically notes that the February 15 date in K.S.A. 72-9003(d)(1) is not as restrictive as the Plaintiffs claim" (p. 1098). The evaluations were not used for nonrenewal, but for plans of assistance. The Teachers' Association appealed this decision.

The court determined that it needed to address one question: When a teacher's evaluation is completed after February 15 of the school year, is the evaluation and resulting plan of assistance invalid? In order to do so, they had to ascertain whether the February 15 provision of K.S.A. 72-9003(d)(1) was mandatory or directory. The court found that the only condition in the Evaluation Act for a penalty or consequence of noncompliance related to nonrenewal of personnel. In this case, that was not an issue as all three teachers had their contracts continued for the upcoming school year. The court also determined that the language in the Evaluation Act did not "reflect a mandatory interpretation that would invalidate any evaluation for all purposes when completed after the February 15 deadline" (p. 1099). The purposes of the evaluations in question was to improve personnel, not to nonrenew them. The court noted that although it did not encourage or suggest that evaluations should be completed after the deadline, it was not willing to invalidate attempts to improve teaching when "the remedy the Teachers' Association requests is absent from the provisions of the Evaluation Act" (p. 1100). Accordingly, the decision of the trial court was affirmed.

NEA-Coffeyville v. Unified School District No. 445, Coffeyville,
Montgomery County
996 P.2d 821 (Kan. 2000)

This case involved a dispute between teachers represented by the National Education Association-Coffeyville (NEA-C) and Unified School District No. 445 (the

District) over a refund on the group health insurance policies. The amount of $138,775.52 was paid to the District by Blue Cross and Blue Shield (BCBS) as a "divisible surplus." A divisible surplus occurs when there is a lower use of insurance benefits by subscribers than was anticipated when the premiums were determined. The health insurance that created the divisible surplus was part of the teachers' fringe benefit package. When the District received the refund, it did not notify the Board or the individual members who were insured. The District deposited $60,000 of the surplus into a special education fund and put the remaining $78,775.52 into a health insurance account. During contract negotiations in July 1996, NEA-C negotiator Darrel Harbaugh found out that BCBS had refunded money to the District the previous year. In August 1996, Harbaugh requested a copy of the previous year's BCBS policy, but was told that the District could not locate one. Harbaugh spent the next six months writing letters and making phone calls in an attempt to gather information about the refund. Harbaugh made a written request to the Coffeyville School Board that he be placed on the agenda during the next scheduled meeting to request that the surplus be returned to the subscribers. On March 10, 1997, Harbaugh appeared before the Board and made his request. The Board made no decision and tabled the matter until its next meeting in April. At the April 14 meeting, the Board went into executive session to discuss the matter and then stated that it would delay its action until July when the new Board members were in place. NEA-C filed action on May 15, 1997, in district court. The district court determined that the refund belonged to the teachers. In its decision, the district court cited equitable principles

and the decision in *U.S.D. 259 v. Kansas-National Education Ass'n*, 239 Kan. 76, 716 P.2d 571 (1986). The District appealed and the case was transferred to the Supreme Court of Kansas.

The Supreme Court first found that the NEA-C was a proper party to bring this action. The District had argued that NEA-C, as an unincorporated association, could only sue a school district under situations involving a dispute arising from the negotiations process. The Supreme Court disagreed as it found that NEA-C satisfied the requirements set about by the United States Supreme Court in *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 97 S. Ct. 2434, 53 L.Ed.2d 383 (1977). In *Hunt*, the U.S. Supreme Court held that an association had standing to sue on behalf of its members when: (1) the members had standing to sue individually; (2) the interests the association sought to protect were pertinent to the organization's purpose; and (3) neither the claim asserted nor the relief requested required participation of individual members. As NEA-C met all three prongs of this test, the court held that it was a proper party plaintiff. Next, the court addressed the District's claim that NEA-C had failed to exhaust its administrative remedies before bringing the case before the courts. The Supreme Court agreed with the district court's holding that the administrative procedure available to NEA-C was not an adequate one and based on the facts of the case, the NEA-C had exhausted their administrative remedies. Finally, the court turned to the central issue of the case which was a determination of to whom the divisible surplus belonged. The District claimed it was entitled to the entire refund because it paid the premiums that created the refund. NEA-C argued that the

subscribers were entitled to the entire refund because they, not the District, paid the premiums that created the refund. The health and medical insurance policies had been bargained for and were a part of the teachers' fringe benefit package. In NEA-C's opinion, the insurance premiums paid to BCBS were part of each teacher's annual salary and, thus, paid by them. The only contracts to mention the refund were the contracts between the District and BCBS. In the section of the contract titled "Distribution of Divisible Surplus," the language stated that the refund would be paid in cash to the Contract Holder. There was no dispute that the District was indeed the contract holder, thus the entire divisible surplus should have been paid to the District. That conclusion did not resolve the issue present in this case because the insured teachers were not a party to the contract. In the opinion of the court, the agreement between BCBS and the District defined the rights and responsibilities of BCBS and the District but "it did not govern the rights in and to the divisible surplus between the District and NEA-C" (p. 828). The court next addressed the language within the negotiated agreement and found that it was silent on how a refund was to be divided. Accordingly, the court determined that it was faced with "an omitted term." The Restatement (Second) of Contracts Section 204 (1981), provided that "when the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court." In the case at hand, the negotiated agreement failed to foresee the possibility of the refund. Deciding which party is entitled to the surplus is essential in determining the parties' rights and duties

under the contract. The court determined that under these circumstances, it should apply a term that would be considered reasonable. In order to reach a decision, the court turned to the only other Kansas case that concerned a divisible surplus, *U.S.D. No. 259 v. Kansas National Education Ass'n,* 239 Kan. 76, 716 P.2d 571 (1986). Although *U.S.D. No. 259* is factually distinct, the court considered that it had addressed community standards of fairness and policy. In *U.S.D. No. 259*, the court held that the divisible surplus in that case had occurred "as the result of lower use of insurance benefits by the subscribers than was anticipated when the premiums were determined. The subscribers overpaid their premiums. Hence, those who overpaid their insurance premiums created the surplus and should receive the refund." 239 Kan. at 80. Applying that finding, the court determined that there was no dispute that the divisible surplus was created by the actions of the teachers who filed fewer and/or smaller claims than were anticipated when BCBS set the premiums. Thus, the court concluded that in the absence of a contract provision, those whose conduct generated the refund, the teachers, were entitled to the refund. The decision of the district court was affirmed.

National Education Association-Topeka v. Unified School District No. 501
7 P.3d 1174 (Kan. 2000)

The National Education Association-Topeka (NEA-T) was recognized as the bargaining representative for the professional employees of Unified School District No. 501 (the District). NEA-T and the District regularly entered into Professional

Agreements (PA's) which set forth the terms and conditions of professional employment. This dispute was over entitlement to a health insurance premium "divisible surplus" which had been refunded to the District by Blue Cross Blue Shield of Kansas (BCBS). At issue were the PA's for the 1993-94 and 1995-96 school years. Article 41 of the PA's dealt with the establishment of a fringe benefit program (the Cafeteria Plan) which provided that any professional employee who was employed at least the equivalent of a half-time position would be eligible to participate in the Defined Health Insurance and Cafeteria Plan. It further discussed the Board's contribution of $166.68 per month towards these benefits. The contract also had a "divisible surplus rider" (Rider) which governed the distribution of any surplus held by BCBS at the end of a plan year. A surplus accumulated during the policy period of August 1, 1993, to July 31, 1994, and August 1, 1995, to July 31, 1996. In 1994, BCBS refunded the District $731,046.47 as divisible surplus. The District distributed half of this amount to the plan participants and placed the rest in a premium stabilization fund to adjust future premiums. In 1996, the refund to the District was $1,007,678. The District kept $395,000 for an employee wellness program and to adjust future premiums. The remainder went to the policyholders. Before making its decision on how to distribute the surpluses, the District alerted its employees and discussed how to disperse the surplus at length with its insurance committee. NEA-T representatives were participants on the insurance committee and all of the District's decisions were made in public meetings. NEA-T and three representative teachers brought suit against the District and BCBS for declaratory relief contending that

teachers were entitled to the entire divisible surplus. The district court first dismissed all claims against BCBS because it did not find that BCBS had breached any contractual duty by giving the divisible surplus to the District. Next, the court held that the dispute involved an interpretation of the PA and arbitration would be the proper place for the dispute. However, as the plaintiffs had failed to file a grievance in a timely manner as required by Article 9 of the PA, arbitration was no longer an option. Thus, the district court granted the District's motion for summary judgment. The plaintiffs appealed this decision. The case was transferred from the Court of Appeals to the Supreme Court of Kansas.

NEA-T argued that the insured's were entitled to the entire surplus and initially based its claims on the PA. However, when the District raised the issue of the PA's grievance procedures, NEA-T amended its position and claimed the language in the Rider entitled the insured's to the refund. On appeal, NEA-T maintained that the Rider created the obligation to refund the divisible surplus, not the PA. The District claimed that the Rider determined who was entitled to the divisible surplus and if the Rider entitled the District to the surplus, then the District was only required to pay the surplus to its employees if it had agreed to do so by contract. Thus, any right to the surplus would come from the PA. As each party's argument dealt with the Rider, the court addressed this issue by examining the wording found within it. The Rider stated in relevant part that the divisible surplus would be "...paid in cash to the Contract Holder or upon written request applied as an adjustment of future premiums." The Rider at issue in this case was identical to the Rider in *NEA*-

Coffeyville v. U.S.D. No. 445, 268 Kan. 384, 996 P.2d 821 (2000). *NEA-Coffeyville* also dealt with a school district/BCBS divisible surplus issue and the decision from that case applied to certain aspects of the case at hand. The trial court here ruled that the District was the "Contract Holder" and NEA-T did not appeal that ruling. For that reason, the Supreme Court held that because the District was the Contract Holder, "it was proper for BCBS to refund the divisible surplus to the District" (p. 1181). The Rider did not entitle NEA-T to the surplus, thus, if an entitlement existed it had to come from some other source. Although NEA-T argued that the source was the cafeteria plan, the court found that the cafeteria plan specifically referred to the PA. Therefore, the employees' rights under the cafeteria plan were contingent on how those rights were defined in the PA. If any written instrument obligated the District to pay any of the divisible surplus to its employees, it would have been the PA. Articles 9 and 10 of the PA governed the grievance procedure for resolution of any problems concerning the interpretation and application of the PA. According to Article 9, the plaintiffs had 15 school days after the questionable act to file their complaint with the Assistant Superintendent of Personnel Services. Grievances that were not settled could be submitted for arbitration under Article 10 of the PA. The trial court had found that NEA-T failed to act in a timely manner under Article 9, and so arbitration was no longer an option. NEA-T argued that under the PA, issues of timeliness had to be submitted to the arbitrator. The Supreme Court found that although this was correct, the NEA-T could not even ask to submit the dispute to an arbitrator because it had failed to initiate the mandatory two-step process in Article 9.

"Compliance with Article 9 was a mandatory prerequisite to arbitration" (p. 1183). The decision of the district court was affirmed.

312 Education Association v. U.S.D. No. 312
47 P.3d. 383 (Kan. 2002)

During contract negotiations between the 312 Education Association (312 E.A.) and the District, 312 E.A. filed grievances against the District for improperly placing a beginning teacher on the second rather than first step of the pay scale. The first level 2 grievance was filed in June of 2000 with the Superintendent of Schools and contended that Article IV(B)(2) of the negotiated agreement had been violated. In it, 312 E.A. requested, "all teachers new to the district be placed on the salary schedule according to the terms of the contract." The Superintendent denied the grievance. He pointed out in part that, (1) both parties were currently discussing the step placement issue, (2) the agreement only allowed teachers, not 312 E.A., to file grievances, and (3) the agreement had not been violated because the person hired had relevant educational experience. The Superintendent also proposed a time for the parties to meet for further discussion if needed. On September 29, 2000, 312 E.A. filed a level 3 grievance with the District. The October 10 response from the superintendent reiterated that the complaint had not been filed by a teacher or within the time specified in the contract. The Board agreed to formally hear the complaint on October 16, 2000 but concluded their response by saying that "it must be clearly understood that the Board's decision to hear this complaint, which does not comply

with negotiated agreement procedures, may not be construed as a waiver of the Board's right to insist upon compliance with the negotiated contract's provisions in the future" (p. 385). The Board considered the grievance and affirmed the placement of the teacher on the salary schedule finding it was in accordance with the negotiated agreement. On November 3, 2000, 312 E.A. filed a complaint with the Kansas Department of Human Resources (Labor Relations Section) and alleged that USD 312 had engaged in prohibited practices within the meaning of K.S.A. 72-5430(b)(5) in its refusal to negotiate in good faith by the placement of the teacher in step 2 instead of step 1 as required by contract. On November 21, 2000, 312 E.A. filed an appeal in district court pursuant to K.S.A. 60-2101(d) from the Board's rejection of its September 29 grievance. The District filed a motion to dismiss. It contended that 312 E.A. lacked standing to pursue the grievance, the grievance procedures under the negotiated agreement were available to individual teachers and not to 312 E.A., the appeal constituted an attempt to interfere with pending contract negotiations, and the 312 E.A. had failed to exhaust its administrative remedies when it filed a complaint with the Kansas Department of Human Resources requesting the same relief it had asked for in the grievance filing. In their response, 312 E.A. argued that (1) the District's improper placement of a teacher on the salary schedule allowed them, as the professional employees' organization, the right to file a grievance, (2) by its acceptance of, and agreement to hear the grievance, the District had waived any claim of procedural defects, (3) the negotiation process was not an issue as it involved a yet to be agreed upon agreement, and (4) it did not have to exhaust administrative

remedies, as a prohibited practice allegation under K.S.A. 72-5430 differed from an appeal mandated under K.S.A. 60-2101(d). The trial court granted the motion to dismiss and stated in part that (1) 312 E.A. was the exclusive representative of *all* teachers for the purposes of professional negotiations, (2) Article V Section B of the negotiated agreement only mentions the right of a teacher to file a grievance, not the professional association, (3) 312 E.A. did not have standing under the three-pronged test in *Hunt v. Washington Apple Advertising Comm'n,* 432 U.S. 333, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), and (4) 312 E.A. had a conflict of interest in this case because it had "a contractual duty to represent the interests of *all* teachers and at least one teacher's interests would be adverse to the stated purpose of the lawsuit" (p. 387). 312 E.A. appealed this decision.

In *Hunt*, the Supreme Court held that" an association has standing to sue on behalf of its members when: (1) the members have standing to sue individually; (2) the interests the association seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested require participation of individual members." 268 Kan. at 387. Both parties agreed that the first two prongs are met. In examining the third prong, the court reviewed previous court decisions, such as *Hunt*, and determined that there was "no question but that the teacher who it is contended was improperly placed on the wrong salary step would be individually involved as U.S.D. 312's defense to the claim" (p. 389). The court also believed that it would be necessary to involve beginning teachers in order to determine their experience level to see if they had been placed appropriately on the

salary schedule. Thus, to "properly litigate" the claims by 312 E.A., the participation of individual members would be required. This would violate the third prong of the *Hunt* test. The court also found that after an examination of the negotiated agreement, 312 E.A. would not have standing to make a claim. The court found "neither exclusion nor inclusion of 312 E.A. in the grievance procedure" (p. 391). The language of the policy indicated that a *teacher* could present a grievance, which led to the conclusion that 312 E.A. was not to be a party to any grievance proceedings. The appellate court agreed with the trial court's decision that standing did not exist. However, this did not resolve the case because 312 E.A. had a claim of waiver that had to be considered. The question that needed to be answered was whether the District had waived the standing defense by its actions and the language of its letters when it agreed to hear the complaint. The appellate court held that this was an issue for the trial court to determine. Other issues the trial court would need to consider were the status of the 312 E.A. claim to the Department of Human Resources and whether the teacher placed on step 2 was improperly placed. If a breach in the contract was found, the trial court may also have to examine the experience of beginning teachers to find out if they had properly asserted a claim. The trial court decision was reversed and remanded with directions.

Unified School District No. 233 Johnson County v. Kansas Association of American Educators
64 P.3d 372 (Kan. 2003)

The Olathe National Education Association (ONEA) had been recognized by the Olathe School District and the State of Kansas as the exclusive collective bargaining representative for the school district's teachers since 1970. In the mid-1990's, several of the district's teachers became members of the Association of American Educators (AAE), an alternative to the NEA. In February of 1996, the new AAE members contacted school board members and asked about potential AAE membership on the Professional Council and use of the District's internal mail system to distribute their recruiting materials. The school district denied this request, citing its collective bargaining/negotiated agreement with ONEA as the basis for its refusal. More than two years later, Douglas Barnett, who had been an early member of the AAE and was now the president of the Kansas Association of American Educators (KANAAE), asked the school district's superintendent for permission to use the school mail system to distribute his newly incorporated organization's membership brochure. This brochure encouraged ONEA members to drop their membership and join KANAAE. The school district refused this request, again citing its negotiated agreement with ONEA. In January of 1999 and again on May 27, 1999, Barnett accessed the district's electronic mail system to solicit the entire district staff to join KANAAE. On May 5, 2000, Vince Snowbarger, Executive Director of KANAAE, made another request for use of the internal mail system to distribute a revised

membership brochure. This brochure again encouraged teachers to join KANAAE but it also stated that the KANAAE had agreed not to engage in professional negotiations. The school district consulted with the president of the ONEA and again refused the request to utilize the district mail system in spite of KANAAE's recent resolution. As a result of this refusal, the district was faced with KANAAE's allegations that its member's rights to free speech and association were being violated. However, the district was also faced with ONEA's allegations that allowing such distributions would be prohibited practice under the Negotiations Act. On June 2, 2000, the school district filed a petition for declaratory judgment in the Johnson County District Court. During testimony, representatives for KANAAE explained that their organization was interested in enhancing teachers' compensation but did not intend to negotiate with the district. However, it was acknowledged that a future board of directors could void the recent "no negotiations" resolution and seek to negotiate. After two days of hearings, the district court found in favor of the school district and ONEA and held that the school district would not be in violation of Kansas law if it declined to distribute the KANAAE brochure through the school's internal mail system. The KANAAE appealed this decision.

In its analysis of this case, the appellate court sought to answer three questions: (1) was KANAAE a professional employees' organization under the negotiations? (2) did the school district properly deny KANAAE use of the internal mail system? and (3) did the school district's denial of access to the mail system violate KANAAE members' First Amendment right of association? In order to

answer the first question, the court examined the provisions of the Negotiations Act. This act grants the right of certified teachers to form, join, or assist professional employees' organizations (PEO). While the act allows more than one PEO per district, a particular PEO becomes the exclusive negotiations representative when a majority of the professional employees so designate. ONEA was the exclusive bargaining representative for the Olathe school district. K.S.A. 5413(e) defines a PEO as an organization or group of any kind (1) in which professional employees participate, and (2) which exist for the purpose, in whole or part, of engaging in professional negotiations with boards of education. KANAAE admitted that 80 to 90% of its members were professional employees, thus it met the first element of a PEO. In reviewing the record, the appellate court found substantial evidence demonstrating that KANAAE existed for a negotiating purpose. One of the brochures KANAAE wanted to distribute stated that the organization sought "to enhance the compensation of educators." A flyer titled "10 Reasons to Dump the Union and Join KANAAE" discussed the lower cost of joining KANAAE with "the same benefits that the teacher union provides…" The information contained in the flyers was proof to the court that KANAAE had concerns about professional employees' compensation, a mandatory topic of negotiation under the Negotiations Act. The record also showed KANAAE's attempts to expand its membership by encouraging ONEA members to leave that organization. If enough members left ONEA and joined KANAAE, KANAAE could then attempt to decertify ONEA as the exclusive bargaining representative in the district by filing a petition with the Secretary of the

Kansas Department of Human Resources. This was enough evidence in the eyes of the appellate court to hold that the district court was correct in finding that KANAAE was a "professional employees' organization" as defined by the Negotiations Act. Next, the court turned to the question of whether the district properly denied KANAAE the use of the internal mail system to distribute its materials. K.S.A. 72-5415(a) provides that when a majority of professional employees selects a representative for the purpose of negotiation, "such representative shall be the exclusive representative of all the professional employees in the unit for such purpose." Individual members may still present their positions or proposals to the board, but the right to negotiate remains exclusively with the bargaining unit. K.S.A. 72-5413(l) establishes the "terms and conditions of professional service." Included is the privilege granted to the PEO to disseminate information "regarding the professional negotiation process and related matters to members of the bargaining unit on school premises…and the use of the school mail system to the extent permitted by law." ONEA was granted the privilege of disseminating information through the district's mail system, which meant the school district was statutorily prohibited from granting the privilege to any other PEO. If the school district allowed another PEO to distribute membership materials, it could be accused of committing a prohibited practice and would be evidence of the district's bad faith in negotiations. KANAAE argued that the materials it wanted to distribute had nothing to do with the professional negotiations process. The court disagreed, finding that "few matters are more related to the professional negotiation process than the

KANAAE's brochures that openly encourage the dropping of membership in the recognized exclusive bargaining representative to increase the membership in an alternative organization" (p. 380). Therefore, the appellate court held that the district court was correct in finding the school district properly denied KANAAE access to the school mail system. Finally, the appellate court addressed KANAAE's argument that denial of access to the school district's mail system was a violation of its members' right to freedom of association under the First Amendment. The Supreme Court, in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983), dealt with a similar issue. In *Perry*, the court considered whether the Constitution had been violated when a union serving as the elected bargaining unit for teachers was granted access to the school mail, while a rival union was denied such access. The Supreme Court determined that while constitutional interests were implicated, there were no violations of the rival union's First Amendment rights. The Court further noted that the differential access was reasonable because it was "wholly consistent with the district's legitimate interest in preserving the property for the use to which it was lawfully dedicated." 460 U.S. at 54. As the exclusive representative, the recognized union has a responsibility to keep its constituents informed and the school mail system is a way to get information disseminated. A rival union has no official responsibility and "does not need to be entitled to the same rights of access to school mailboxes." 460 U.S. at 51. The appellate court further concluded that even if KANAAE were not a PEO, it failed to establish that the school district mail system was used by the general public, which

would qualify it as a "public forum." No constitutional rights of KANAAE members were violated. The judgment of the district court was affirmed.

Chapter 8

Torts

A tort is a civil wrong independent of contract. It may be malicious and intentional, or it may be the result of negligence and disregard for others. Tort law "provides a way to sue for compensation for wrongful harm to, among others, one's body, property, or reputation" (Imber & Van Geel, 2004, p. 486). An intentional tort is typically anticipated and intended. A more common type of tort, especially in education law, is negligence. Negligent acts are neither expected nor intended. The courts will use the measure of reasonableness when deciding claims of negligence. For negligence to be present, a person must sustain an injury resulting from the unreasonable risk taken by another person. Accidents that could not have been prevented by reasonable care do not constitute negligence.

In the Kansas courts, very few public school employees have filed for negligence claims. Of the two cases that reached the courts since 1980, both dealt with workers compensation issues. K.S.A. 44-501(b) is the Workers Compensation Act. It includes the "exclusive remedy" provision utilized in each of the following cases. In order to state a claim for workers compensation the injury must arise out of and in the course of employment. In order to be compensable, the injury must be caused by risks associated with the job and not the result of a personal or neutral activity.

Martin v. Unified School District No. 233
615 P.2d 168 (Kan. App. 1980)

Franklin Martin was a custodian for U.S.D. No. 233. He had experienced lower back problems for several years. On May 28, 1976, Martin parked his truck in the parking lot of Fairview School. As he was getting out, he twisted to unlock the door and felt a sharp pain in his back. Martin left school and went to the doctor later that day. On June 4, 1976, Martin had a disc in his lower back surgically removed. The examiner and director found that the injury arose out of and in the course of Martin's employment. The school district appealed and the district court found that "the injury was not compensable." Martin appealed.

The court turned to K.S.A. 44-501 and determined that the two phrases, "arising out of" and "in the course of" employment had separate and distinct meanings. In order for an employee to receive worker's compensation, both conditions must exist. In this case, the injury did occur in the course of Martin's employment. The question that needed to be addressed was whether Martin's injury arose out of his employment. In *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979), the Kansas Supreme Court found that workplace hazards could be analyzed by using three general categories of risk: (1) those associated with the job; (2) those that are personal to the employee; and (3) those that are neutral risks which have no particular employment or personal character. Only risks that fall within the first category are compensable. If the risk is incidental to the work, the injury can be said to arise out of employment. In order to be incidental, the risk must be connected

to what the employee is required to do in fulfilling his duties. In this case, Martin did not injure himself in the fulfillment of his duties. Neither the vehicle nor conditions at the school had anything to do with his injury. Martin's own actions in getting out of the truck caused him to injure his back. The court noted that with Martin's history of back problems, "almost any everyday activity would have a tendency to aggravate his condition" (p. 170). The court determined that this was a personal risk, not an incidental risk, and therefore was not compensable. The decision of the trial court was affirmed.

Wiseman v. U.S.D. No. 348
44 P.3d 490 (Kan. App. 2002)

Linda Wiseman was a special education teacher for the East Central Kansas Cooperative in Education (Cooperative) located in Baldwin City, Kansas. On December 1, 1998, Wiseman was loading special education students into the district's vehicle when a school bus backed in to the car knocking Wiseman to the pavement. Wiseman suffered injuries to her back as a result of the fall. Wiseman brought a negligence suit against the school district. The district moved for summary judgment arguing that Wiseman's only course of action was to file under the Workers Compensation Act (Act). The trial court granted summary judgment for the school district holding that Wiseman was a statutory employee under the Act and was therefore barred from bringing a tort action against the district. Wiseman appealed

this decision arguing that she had been performing "abnormal work" at the time she was injured and so she was not a statutory employee within the terms of the Act.

Under the exclusive remedy provision of the Act, K.S.A. 44-501(b), an employee is barred from bringing a negligence suit against their employer if they can recover workers compensation for an injury. *Hanna v. CRA, Inc.*, 196 Kan. 156, 159-60, 409 P.2d 786 (1966) provides the two part test to determine whether the work which gave rise to the injury was a necessary and integral part of a person's employment under K.S.A. 44503(a). That test is: (1) is the work being performed by the independent contractor and the injured employee necessarily inherent in and an integral part of the principal's trade or business. In addition (2) is the work being performed by the independent contractor and the injured employee such as would ordinarily have been done by the employees of the principal. If either question is answered in the affirmative, the work being done will be considered part of the "principal's trade or business," and the only remedy for an injured employee against the principal is under the Act. Wiseman argued that she was employed by Cooperative to teach preschool students with disabilities. She claimed that U.S.D. 348 personnel were not trained and did not engage in such activities as loading students into an automobile. Wiseman also noted that neither the bus driver nor the driver of the car was her co-employee. The appellate court noted that the evidence showed: Wiseman was an employee of the Cooperative, which had a contract with U.S.D. 348; U.S.D. 348 was responsible for the transportation of the children to the attendance center; and Wiseman was injured while loading her students onto the

school vehicle on school property. The court concluded that helping students get into the district car, which was driven by the school district driver, was not "abnormal work." The work performed in this case was inherent and integral to the trade and business of U.S.D. 348. Thus, Wiseman's only remedy against the school district was under the Act. The decision of the trial court was affirmed.

Part III

Suits by Outsiders

Chapter 9

Contract Issues

The sixteen cases in this chapter were brought either by outsiders filing claims based on contracts or by school districts filing claims against outside groups over contractual matters. A majority of the cases brought by outsiders over contract issues in Kansas over the past thirty years have involved either construction companies or building materials. Chapter 72, Article 67 of the Kansas Statutes deals with school unification acts. Within these articles can be found information on the procedures for bidding, acceptance of those bids and procedures for construction. K.S.A. 72-6760 applies to bids and provides that in general, "no expenditure involving an amount greater than $20,000 for construction, reconstruction or remodeling or for the purchase of materials, goods or wares shall be made by the board of education of any school district except upon sealed proposals, and to the lowest responsible bidder." Chapter 84 provides information on the Uniform Commercial Code and encompasses things such as general construction, warranties and breach of contract.

Another topic found in Kansas courts is that of the right to property. School districts sometimes have the need to condemn property for their purposes. Districts may also wish to sell property that was purchased many years past from a landowner whose relatives believe they have rights to the property once the school no longer has a need for it. The relevant statute for this type of situation if K.S.A. 72-8212a, which provides the power and procedures for the acquisition of property under eminent

domain. K.S.A. 72-8212a clearly outlines what a school district must do if they need to acquire a property interest.

Board of Education, Unified School District No. 512 v. Vic Regnier Builders, Inc.
648 P. 2d 1143 (Kan. 1982)

USD 512 brought action against Vic Regnier Builders, Inc and two other former owners of real estate on which a school building was located. The district had gotten the land as a result of eminent domain proceedings in 1956 and 1959. The district built an elementary school on the site that was closed in 1978 due to decreasing enrollment. The school board was seeking clear title to the property so that it could be sold. The defendants claimed that the title should revert to the original owners because the land was acquired as a site for school buildings and since it was no longer being used for that purpose, it should be returned to the former owners. The district court held that the school district acquired fee title and that their title should be quieted against the claims of the defendants. The defendants appealed to the Court of Appeals, which reversed the district court. The Supreme Court then granted USD 512's petition for review.

At issue was whether the school district acquired the fee title to the real estate in question in the 1956 and 1959 condemnation proceedings. The only two Kansas cases that involved this issue had determined that a school district acquires the fee title through eminent domain proceedings. *Buckwalter v. School District,* 65 Kan.

603, 70 P 605 (1902) relied upon Section 6131 of the General Statutes of Kansas of 1901 which stated that after the county treasurer received payment for condemned land "the title to such site... shall vest in such school district." The court in *Devena v. Common School District,* 186 Kan. 166, 348 P 2d 827 (1960), found that a school district was vested in the fee simple title to the land that had been taken through the power of eminent domain. Numerous statutory changes involving the power of school districts occurred over the years and many of the old sections of the Laws were placed in other statutes. The changes that brought about this lawsuit were the result of the legislative session in 1951. During that session, the right to eminent domain was placed in Section 72-4701 and in this new legislation, the word "title" was no longer mentioned. The issue addressed by the court in this case was whether the removal of the word "title" had the effect of taking from school boards the power to acquire fee title to land that had been condemned for school sites. The language in 72-4701 makes reference to the old statutes and "acts amendatory thereof" which is known as "legislation by reference." Statutes that refer to other statutes and make them applicable to the new legislation are known as "reference statutes." *Johnson v. Killian*, 178 Kan. 154, 283 P. 2d 433 (1955) states that "the adoption of an earlier statute by reference makes it as much a part of the later act as thought it had been incorporated at full length." In applying the findings of *Johnson* to the new 72-4701, the court found that the eminent domain procedure section that had been contained in the old Articles would be considered a part of 72-4701 as if it were "set forth therein in full" (p. 1152). After considering the statues and the decisions in *Buckwalter* and

Devena, the court concluded that the school board in this case did indeed acquire fee title to the land that had been condemned in 1956 and 1959. The decision of the district court was affirmed and that of the Court of Appeals was reversed.

This court looked closely at public policy and the legislative history of Kansas over the past one hundred years. In doing so, they could find no language that would cause them to believe the legislature had intended to change the established principle of law that provided a school district that had condemned land for a school building site with the fee title to the property that they had taken over.

Haysville U.S.D. 261 v. GAF Corporation v. Carmichael-Wheatcroft & Associates, P.A.
666 P.2d 192 (Kan. 1983)

In 1974, the Haysville school district's two elementary schools needed reroofing. The district retained architects from Carmichael-Wheatcroft & Associates, P.A. to determine the repairs that would be required. The architects prepared the specifications which included the use of products from W.R. Grace & Company and GAF Corporation and a requirement that GAF provide a 10-year inspection and service guarantee program. On December 3, 1974, just before the reroofing was completed, the school district and GAF entered into two "Inspection and Service Guarantees." After the roofs were installed, cracks appeared and leaks occurred which caused interior water damage. The district alleged that the cracks were caused by defective materials provided by GAF. They requested repairs to both roofs. GAF denied liability under the contract with the school district. In May 1980, the school

district sued GAF on several fault-based theories, which included breach of warranties under the Uniform Commercial Code, negligence, fraud, and breach of the inspection and service guarantees between it and GAF. GAF joined as third-party defendants the architects, the roofing contractor and the manufacturer of the insulating material upon which the roof had been placed. GAF alleged it was the third-party defendants who were responsible for the damages. The third-party defendants filed a motion for summary judgment based on the inspection and services guarantees. The district court granted the motions for summary judgment and found that the guarantees had not created a legal relationship between GAF and the third-party defendants. The court also found that "any liability GAF might have to the plaintiff under the inspection and services contract is not for conduct claimed to have been done by any of the third-party defendants" (p. 197). GAF appealed and the case was transferred from the Court of Appeals to the Kansas Supreme Court.

The school district sued GAF under two theories: (1) fault-based and (2) contract. Under the fault theory, the district sued GAF who answered the petition and joined the architect and roofing contractor as third-party defendants. The school district did not amend its petition to include a claim against the added defendants and allowed the statute of limitations on the fault-theory (tort) against the third-party defendants to expire. By suing only one defendant, the school district could only recover the percentage of damages for which GAF was responsible. The second theory of recovery was for a breach of the inspection and services guarantees (contract) that the school district had entered into with GAF. The district court found

that "the relationship between GAF and the school district was contractual and the third-party defendants were not parties to the contracts..."(p. 198). The court also held that implied comparative indemnity was not applicable in a contract action. K.S.A. 60-258(a), the Kansas comparative negligence statute, allows a party in a civil action to recover damages for negligence resulting in death, personal injury or physical damage to property. The amount of damages awarded is lessened in proportion to the amount of negligence attributed to the party. When comparative negligence is an issue, the courts will deal with percentages of causal responsibility. The question for the Supreme Court to answer was whether GAF's guarantee to the school district created implied liability on the third-party defendants, which would require that they pay a percentage of any damages awarded to the school district. The Supreme Court reviewed the language of K.S.A. 60-258(a) and discussed several comparative negligence cases. In citing *Heubert v. Federal Pacific Electric Co., Inc.,* 208 Kan. 720, 494 P.2d 1210 (1972), the court noted that contributory negligence was "not a defense to an action based on breach of an express warranty" (p. 201). GAF had entered into the inspection and services guarantees after they had inspected the nearly completed reroofing of the two schools. The contract covered the roofs for ten years and guaranteed to repair leaks without any cost to the owner. By its attempt to require a third party to be held liable for damages, GAF was applying comparative negligence and implied comparative indemnity, which are tort-based theories, to contract law. The Supreme Court noted that the difference between contract law and a tort was that "a breach of contract is a failure of performance of a duty arising under

or imposed by an agreement, whereas a tort is a violation of a duty imposed by law" (p. 201). In the case of a tort, a party is allowed to join all wrongdoers and require them to pay their share of damages. The third-party defendants were not parties to the contracts between GAF and the school district and could not be held liable under the comparative negligence statute. If GAF was required to pay damages to the school district under the terms of the agreement, it would then have the "right of subrogation against whose fault actually caused the damage to the roof in a separate action" (p. 202). Legal subrogation would allow GAF to file suit against the roofing contractor and manufacturer of the roofing materials, but only after first paying any damages owed to the school district. The Supreme Court held that GAF had "no claim against the noncontracting parties until it pays or is required to pay the school district under the contracts" (p. 203). The decision of the district court was affirmed.

Johns Const. Co., Inc. v. Unified School District No. 210, Hugoton
664 P.2d 821 (Kan. 1983)

A dispute arose between U.S.D. 210 and Johns Construction Company as to whether the construction company was entitled to extra compensation due to change orders. The District claimed offsets for defects and delays in job completion. The construction contract specified that any disputes arising would be decided by arbitration "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association unless the parties mutually agreed otherwise" (p. 822). The dispute was submitted to a panel of three arbitrators who found some

points in favor of the contractor and some in favor of the District. The contractor filed a motion in district court to confirm the award, but the school board moved to vacate the award. The district court confirmed the decision of the arbitrators. The school district appealed.

The District first argued that closing the hearing to the public by the arbitrators violated the Kansas Open Meetings Act. This Act found in K.S.A. 1982 Supp. 75-4318 provides in part that all meetings for the "conduct of affairs of, and transaction of business by, all legislative and administrative bodies and agencies of the state and political and taxing subdivisions thereof, ...receiving or expending and supported in whole or in part by public funds...shall be open to the public." The court did not find this statute applicable to this case because the arbitration board was not a public agency as deemed by the statute. The arbitration board, created out of a contract dispute between a private contractor and the school district, was not subject to the provisions of the Open Meetings Act. Next, the District argued that they were denied a fair hearing because the arbitrators excluded all witnesses from the hearing, including the Board's architect and construction manager. The court found "no merit" in this claim because the terms of the construction contract stated that arbitration hearings were to be conducted "in accordance with the Construction Industry Arbitration Rules" which were in effect at the time the contract was signed. These rules gave the arbitrators the discretion to determine the attendance of witnesses and in this case, they excluded witnesses from both sides. The same rule of exclusion was applied to the contractor and the school board. For these reasons, the court found no

improper conduct or abuse of discretion by the arbitrators. After considering all of the points raised by the school board, the court affirmed the decision of the district court.

Donner v. Kansas Department of Human Resources
691 P. 2d 21 (Kan. 1984)

Before 1978, the Kansas Department of Human Resources (KDHR) was designated as the agency to administer federal funds received under the Comprehensive Employment and Training Act (CETA). CETA funds were to be used for the payment of costs that resulted from the administration of a job-training program for disadvantaged people. In order to receive CETA funds, USD 270 created staff positions whose salaries were paid with CETA dollars. In 1979, employees of the school district sought a pay raise. The district agreed to pay their salaries as well as their employee contributions to the Kansas Public Employees Retirement System (KPERS). Contracts that provided for CETA funds to be used for KPERS contributions were submitted by the school district to KDHR in 1979, 1980, and 1981. Each of these contracts was approved by school district representative and by the CETA administrator of KDHR. Two audits done by KDHR approved several of these contracts, but a later audit held that the payment of the KPERS contributions were illegal. The basis for the auditor's conclusion that the payment of KPERS contributions as "fringe benefits" was illegal was a provision found in K.S.A. 1983 Supp. 74-4919. This provision provided in part that each participating employer

"shall deduct from the compensation of each member 4% of the member's compensation as employee contributions" for deposit in the KPERS fund. The auditor also relied on an opinion by an assistant attorney general who quoted K.S.A. 74-4919 and then concluded in part that once employee compensation is determined, the amount of employee contributions for retirement purposes must be deducted and remitted to the retirement system. The opinion further stated that there was "no authority for the employer to make such a payment on behalf of the employee in addition to the compensation received by the employee" and any such payment would be "contrary to law" (p. 23). As a result of this third audit, the employee contracts were modified and, after 1981, the provision that had been objected to was removed. KDHR decided to try to recover the funds previously paid. A formal hearing was held and the hearing officer, who relied solely on K.S.A. 74-4919 and the assistant attorney general's opinion, determined that the payments to KPERS had been contrary to law. The hearing officer found that each of the employees owed a debt to the state of Kansas which would be set off against the future earnings of the various employees. All of the employees appealed to the district court.

In district court, the employees presented three basic arguments: (1) The employment contract was not illegal under K.S.A. 74-4919 which does not prohibit contracts in which an employer pays KPERS contributions as a fringe benefit; (2) If there was a debt, it was not owed by the employees. Rather, it was a debt of USD 270 which entered into the contracts directly with KDHR; and (3) The state, acting through its CETA administrator, approved the payment of KPERS benefits directly

by the school district. The only contracting parties for the payment of the CETA funds were the state, acting through KDHR and the school district. The district court interpreted K.S.A. 74-4919 to mean that the 4% KPERS contribution *must* be deducted from the employees' compensation. In this case, they had been paid by the school district using CETA funds. The district court also determined that the debt was owed by the school district, not the individual employees. Finally, the court entered judgment setting aside the hearing officer's decision and found in favor of the employees. KDHR appealed to the Kansas Supreme Court. The employees filed a cross-appeal that attacked the finding by the district court that a school district could not legally enter into a contract with its employees providing that the 4% KPERS deductions be paid by the employer as a "fringe benefit."

The issue for the appellate court to decide was whether the contractual provision that provided for the 4% KPERS payments to be paid as a "fringe benefit" was illegal and unenforceable under K.S.A. Supp. 74-4919. To make this determination the court examined the provisions of the Kansas Public Employees Retirement Act (K.S.A. 74-4901 *et seq.*). It found that the provisions of this act established the Kansas public employees retirement system as a "body corporate and as an instrumentality of the state of Kansas." The legislative purpose of the statutes which created this system was to enable employees to "accumulate reserves for themselves and their dependents on retirement and to insure a fiscally solvent retirement system" (p. 25). The court determined that K.S.A. 74-4919's requirement of a 4% deduction from each member's compensation served the purpose of making

KPERS financially sound so that money would be available to pay retirement benefits. It was the judgment of the court that K.S.A. 74-4919 did not render an employment contract that provided for the payment of KPERS contributions by an employer to be illegal because the statue did not contain any language that prohibited such an act. The court further held that the contract between USD 270 and its employees in which the KPERS benefit was payed as a "fringe benefit" was not invalid. The court did point out that the sums paid by the school district as KPERS contributions should be considered as a part of each employees' compensation for income tax purposes and for purposes of calculating the amount which would constitute a proper 4% KPERS contribution. The judgment of the district court in favor of the employees was affirmed.

Board of Education, Unified School District No. 464 v. Porter
676 P. 2d 84 (Kan. 1984)

In 1979, USD 464 condemned a plot of land belonging to Alvin Shilling for school expansion. The Porter land, which bordered the Shilling land, was considered unsafe because it was the site of a propane facility. On April 10, 1980, the superintendent spoke to Mrs. Porter on the phone about the possibility of purchasing the property. The Porters did not respond, and so on April 11 the school board authorized immediate condemnation of the property. The Porters were notified by phone on April 11 of this action, on April 14 the condemnation action was filed, and on April 23, the Porters were personally served with process. In the meantime, the

Porters had entered into a contract to erect a metal building on the site. On April 10, the site was surveyed and cement foundation piers were poured in spite of the school board's notice. The Porters contend that they were not aware of the district's intentions until they were received the summons on April 23. In May, the court approved condemnation and appointed appraisers at which time the construction stopped. The school district filed for, and was granted, a motion asking that the appraisers omit the partially completed building, storage tank, and equipment from their appraisal of the property. Appraisers filed their report and the Porters appealed from the award. In response to the school district's motion in limine, the trial court again excluded all evidence at trial relating to the partially completed building and other equipment found on the site when it determined the value of taking. They ruled that the partially completed building, storage tank, and equipment were personal property and therefore not relevant in determining the value of the condemned property. At trial, the remaining real estate was valued at $27,150 and the court entered judgment for that amount in favor of the Porters. The Porters appealed the award arguing that the trial court erred when it granted the school district's motion in limine to exclude evidence of the value of the partially completed building and other equipment.

A motion in limine is a proper method of excluding evidence not at issue in a trial. The trial court had determined the partially completed building and storage tank were not attached to the property and should not be included in the appraisal. As a trial court has "broad discretion in determining what evidence will be allowed" the

appeals court did not find an error in the sustaining of the motion in limine. *Water Co. v. Irrigation Co.*, 64 Kan. 247 (1902) provided three tests to apply when determining whether personal property had become a fixture and should be considered a part of the real estate: (1) annexation to the reality; (2) adaption to the use of that part of the realty with which it is connected; and (3) the intention of the party making the annexation to make the article a permanent annexation to the freehold. In this case, the storage tank was not a permanent fixture as it was easily movable and thus not to be considered part of the real estate. The partially completed storage building was not considered in the landowners' award because the owner had knowledge of the condemnation and acted in bad faith by continuing construction in spite of this knowledge. At the very latest, the Porters had knowledge of the condemnation action on April 23, yet construction was not halted until May 7. The court stated that in such cases, the "value of such a building should not be considered in determining the value of the taking" (p. 89). The judgment of the trial court was affirmed.

The court used the fact that construction on the storage building continued after the appellants had knowledge of the impending condemnation of their property to determine that the purpose was to enhance the damages they would receive upon appraisal. The court saw this as an act of bad faith and so the Porters were only awarded the value of the land.

Board of Education, Unified School District No. 215 v. L.R. Foy Construction Company
697 P. 2d 456 (Kan. 1985)

USD 215 and Foy Construction Company entered into a contract in 1978 in which Foy agreed to remodel a school building. The two parties had a dispute, the specifics of which were not provided, and Foy sought arbitration to resolve the matter. The school board filed action in district court to stop arbitration proceedings. However, the district court ordered arbitration and the dispute was presented to a panel of three arbitrators. After hearing the evidence, the arbitrators made their award on January 20, 1982, finding that the Board was entitled to $56,700.82 in damages. Foy appealed this decision. Foy's main contentions were that (1) the arbitrators award was vague as they did not specifically address each of the issues set forth by Foy in its proposed findings of fact; (2) the arbitrators exceeded their authority by considering the Board's counterclaim because the counterclaim was not in writing; (3) the arbitrators exceeded their authority by rendering an award more than thirty days after the close of the hearing; and (4) the district court was in error when it granted a rehearing after initially holding in favor of Foy. The Board countered Foy's arguments by pointing out that (1) Foy proceeded with the arbitration and never objected to the fact that the counterclaim was not in writing; (2) the American Arbitration Association (AAA) rules provide that claims not originally submitted may later be submitted with permission from the arbitrators; and (3) a rehearing was necessary because when, at the initial trial, the trial court refused to

consider authorities cited by the Board the court had not given the Board an opportunity to present all of its evidence.

The Court of Appeals, in *Rural Water Dist. No. 6 v. Ziegler Corp.*, 9 Kan.App.2d 305, 677 P.2d 573 (1984), stated: "To be valid, an arbitration award must be a full and final disposition on all points submitted" and the "award is final when it conclusively determines the matter submitted, leaving nothing to be done but to execute and carry out the terms of the award." The arbitrators did not specifically set out their ruling on each of the items mentioned by Foy. However, the final decision made by the arbitrators was an attempt to resolve all of the issues between both parties, which resulted in an award to the Board. The court here found that "the award, while not detailed, is not vague" (p. 457). When considering the issue of the counterclaim, the court again turned to *Rural Water Dist. No. 6* and found that in arbitration proceedings, it is the "duty of an appellant to designate an adequate record on appeal to substantiate claims of error." The court found nothing in the record indicating the arbitrators erred in considering the counterclaim as neither party objected to the fact that it was not in writing. Next the court turned to Foy's claim that the award was rendered too late for it to be valid. Both parties agreed that AAA rules set a thirty-day time limit and that more than thirty days had passed at the time the award was made. There was nothing to indicate that the record was formally closed or that Foy had objected before the award was made. In fact, Foy had filed an application with the arbitrators seeking clarification of the award. By applying for clarification pursuant to K.S.A. 5-409, the court found that Foy was acknowledging

the validity of the award. It was not necessary to determine if the thirty-day rule found in the AAA rules was mandatory because Foy waived his right to object the award by first moving to have the award clarified. Finally, the court addressed Foy's claim that the district court erred when it permitted a rehearing. K.S.A. 60-259 provides for the granting of a new trial to any of the parties involved if it appears that the rights of one party has been affected because of "abuse of discretion of the court" or for any cause in which the party has not been afforded an opportunity to present evidence. The board had not been permitted to present all of its evidence at the first arbitration hearing, and so had not been afforded this opportunity. The fact that this was an arbitration hearing did not matter in the eyes of the court as they found K.S.A. 60-201 *et seq*., which is the code of civil procedure, applied in this case. The district court could grant a rehearing for arbitration proceedings just as they could for any other civil case. Judgment of the district court was affirmed.

D-1 Constructors, Ltd. v. Unified School District No. 229, Johnson County
788 P. 2d 289 (Kan. App. 1990)

Seventeen general contractors filed claims against USD 229 on the grounds that they had not solicited sealed bids before they awarded a services contract to a construction manager. Unified School District 229 had awarded a "construction management services" contract to J.E. Dunn Construction Company without soliciting bids from other general contractors. A group of other general contractors filed seeking (1) declaratory judgment that K.S.A. 1988 Supp. 72-6760 required that

school districts get sealed bids; (2) a restraining order and injunction barring the school board from approving the contract with J.E. Dunn until sealed bids were accepted and reviewed; and (3) a writ of mandamus ordering the school board to cancel the contract with J.E. Dunn and re-let the contract using the competitive bidding process. The trial court denied the restraining order and dismissed all three counts on the grounds that the plaintiffs lacked standing. The contractors appealed.

K.S.A. 1988 Supp. 72-6760 requires sealed bids for construction or for the purchase of materials, goods, or wares. It states in part that "no expenditure involving an amount greater than $10,000 for construction, reconstruction or remodeling, or for the purchase of materials, goods or wares shall be made by any school district except upon sealed proposals…" The contract at issue is based on a Standard Form of Agreement Between Owner and Construction Manager that was developed by the American Institute of Architects. The contract required Dunn to develop construction plans, schedules, and cost analyses. Dunn would also be required to establish bidding qualifications, to solicit bids, and to make recommendations for the award of a construction contract. Dunn would not be allowed to bid on this project. Once construction was underway, Dunn would be required to supervise and coordinate the various contractors. Upon completion of the project, Dunn would conduct inspections and make recommendations to the architect regarding final inspection. The management services provided by Dunn were not covered by K.S.A. 1988 Supp. 72-6760, as it makes no provision for "services." Plaintiffs argued that the public policy underlying K.S.A. 1988 Supp. 72-6760

required the court to read into the statute the type of services that Dunn would be providing. The court held that it was "not at liberty to read into the statute a provision requiring sealed, competitive bidding for contracts for services" (p. 291). The decision of the trial court was affirmed.

School districts are required to solicit sealed bids for construction exceeding $10,000 or for purchases of goods, materials, or wares exceeding this amount. They are not required to solicit sealed bids for the rendering of services.

Unified School District No. 500 v. United States Gypsum Company
788 F. Supp. 1173 (D. Kan. 1992)

This case is a products liability action in which the school district sought damages from the defendants for the removal and replacement of asbestos-containing building materials. The defendants manufactured various asbestos-containing materials that were installed in buildings constructed from the late 1930's until the 1960's. In late 1979 and early 1980, the school district discovered that several school buildings were contaminated with asbestos. In 1987, the district learned the identities of the manufacturers of the asbestos-containing products and sent them notice of the contamination. On January 12, 1988, the school district filed suit to recover removal and replacement costs from the defendants. The district's claims were based on theories of restitution, strict liability, negligence, breach of implied and express warranties, and fraudulent misrepresentation. U.S. Gypsum argued that it was

entitled to summary judgment on all of the school district's claims except those under theories of strict liability and negligence.

The school district claimed its restitution cause of action came out of the emergency assistance doctrine set forth in the Restatement (Second) of Restitution Section 115. Section 115 provides in relevant part that a person, who has supplied things or services, although acting without the other's knowledge or consent, is entitled to restitution from the other if the things or services were "immediately necessary to satisfy the requirements of public decency, health or safety." The district argued that because U.S. Gypsum had put defective and dangerous products on the market, which were then installed in public buildings, they should be made to pay for the removal and replacement of those products. The court held that based on Kansas' view of restitution, there was an implied promise on the part of the defendants to abate the asbestos contamination they created. Thus, summary judgment was denied to U.S. Gypsum on the claim of restitution. Summary judgment was also denied on the fraudulent misrepresentation claim. In an action for fraudulent misrepresentation, plaintiffs must prove the following elements: an untrue statement of material fact, known to be untrue by the party making it, made with the intent to deceive or made with reckless disregard for the truth, where another party justifiably relies on the statement and acts to his detriment. The district court believed that the record presented questions of fact concerning those elements, which precluded the entry of summary judgment in favor of the defendants. Finally, the court addressed the claims of a breach of implied and express warranties. U.S. Gypsum argued that the school

district had failed to provide them with adequate notice of any alleged breach. K.S.A. 84-2-607(3)(a) provides that where a tender has been accepted, the buyer must notify the seller of any breach within a reasonable time after he discovers such breach or be barred from any remedy. The district court concluded that there was a question of fact concerning whether the school district notified U.S. Gypsum of the alleged breach within a reasonable time, thus the motion for summary judgment was denied on this claim. U.S. Gypsum also claimed that the school district failed to state a claim of breach of the implied warranty for a particular purpose because the asbestos-containing products in question were used for their ordinary purpose. K.S.A. 84-2-315 provides in part that where the seller has reason to know any particular purpose for which the goods are required and the buyer is relying on the seller's judgment to select or furnish suitable goods, there is an implied warranty that the goods will be fit for such purpose. A "particular purpose" under this statute means an unusual purpose. When goods are purchased for the ordinary purposes for which they are used, no implied warranty of fitness for a particular purpose arises. The asbestos-containing materials in this case were sold to the school district and installed in their buildings as acoustical plasters, fireproofing materials, and ceiling tiles. These were all considered ordinary purposes for those products. Accordingly, the court concluded that no implied warranty for fitness for a particular purpose applied to the sale of the asbestos-containing products. The court granted U.S. Gypsum's motion for summary judgment on this claim. Although the school district could not prove that they had any promise from U.S. Gypsum regarding its products, the court found this was not

needed to state a claim for breach of an express warranty. Under Kansas law, an express warranty is contractual and reliance on the express warranty need not be shown. Therefore, the motion for summary judgment on that ground was denied. U.S. Gypsum's motion for partial summary judgment was granted in part and denied in part.

Unified School District No. 500 v. United Stated Gypsum Company
788 F. Supp. 1178 (D. Kan. 1992)

U.S.D. No. 500 brought action seeking damages against defendants W.R. Grace & Co., United Gypsum Company, National Gypsum Company, and The Celotex Corporation for the removal and replacement of asbestos-containing building materials. In a previous case, *Unified School Dist. No. 500 v. U.S. Gypsum,* 788 F. Supp. 1173 (D. Kan. 1992), the district court denied defendant Grace's co-defendant U.S. Gypsum's motion for summary judgment. In this case, the court addresses the school district's claims against Grace. These claims were based on theories of restitution, strict liability, negligence, fraudulent misrepresentation, and breach of implied and express warranties. Defendant Grace contended it was entitled to summary judgment on all claims, except those under the theory of fraudulent misrepresentation.

Under Kansas law, a party may not recover damages for simple economic loss under theories of strict liability and negligence. Grace argued that for this reason, the school district's claims failed. However, the district court held that the school district

was able to show there was a question of fact as to whether they suffered property damage as well as economic loss. Therefore, the motion for summary judgment was denied on those claims. The court used the same rationale as in the first *Gypsum* case to deny summary judgment to Grace on the breach of express and implied warranties and restitution claims. Finally, the court addressed Graces' claim that it was entitled to summary judgment on any claim for removal and replacement of asbestos-containing materials found in the Administrative Building. Grace argued that the school district did not own that building and so lacked standing to recover damages for any alleged contamination. The district court rejected this argument because it found a question of fact existed as to whether U.S.D. 500 owned the Administrative Building. Accordingly, the district court denied the motion of W.R. Grace & Co. for partial summary judgment.

Unified School District No. 207 v. Northland National Bank
887 P.2d 1138 (Kan. App. 1994)

U.S.D. 207 and U.S.D. 453 entered into similar lease-purchase agreements in 1992 with Century Office Products, Inc. (C.O.P.I.) for photocopying machines and sorters. C.O.P.I. assigned its interests to Mid Continent Leasing, which assigned its interests to Northland. Each agreement contained language that required the districts to make monthly payments over a 60-month period. The agreements also contained a default provision enforceable "to the extent permitted by applicable law…to declare the entire amount of unpaid total monies for the balance of the contract due and

payable." In 1993, both school districts sued to cancel the lease-purchase agreements after they had problems getting their machines serviced when C.O.P.I. suffered financial problems. The trial court granted the school districts' motions for summary judgment on the grounds that the lease-purchase agreements were void because they violated the Kansas cash-basis law. The agreements did not specifically include required provisions of K.S.A. 10-1116b and K.S.A. 10-1116c. Northland appealed this decision.

The Kansas cash-basis law was enacted in 1933 to require governmental units to operate on a cash basis and not spend money they did not have, thus preventing outstanding debt. Statutes require municipalities, such as school districts, to contract all indebtedness in conformity with the act. K.S.A. 10-1112 provides that with few exceptions provided for in the act, it is illegal for a municipality to create any debt "in excess of the funds actually on hand in the treasury of such municipality…" One specific provision of the act found in K.S.A. 10-1119 states that any contract "which violates the provisions of this act, shall be void." Statutes do provide a few exceptions to the cash-basis rule. For example, school districts can issue cancelable purchase orders for equipment and other materials in anticipation of funds becoming available in an upcoming budget. They can also exceed the limitation on indebtedness by a vote of municipality electors. In 1980, the Kansas Legislature added K.S.A. 10-1116b, which listed the circumstances in which municipalities can enter into lease-purchase agreements. Lease-purchase agreements are permissible if they "state that the municipality is obligated only to pay periodic payments or

monthly installments under the agreement as may be made from (a) funds budgeted and appropriated for that purpose during the current budget year or (b) funds made available from any lawfully operated revenue producing source." The purpose of K.S.A. 10-1116b was to provide clarification for when municipalities could enter into lease-purchase agreements without violating the cash-basis law. In 1990, conditions were added to permissible lease-purchase agreements. K.S.A. 10-1116c provided that if the proposed lease-purchase agreement was for a term exceeding the current fiscal year, the agreement had to specify the amount required to purchase the item if it were paid for in cash, the annual interest costs, and the amount included in the payments for service, maintenance or other charges. The lease-purchase agreement in this case created indebtedness to both school districts payable in the current year and in future installments. The agreement also provided the districts with the option to return the equipment and cancel the lease-purchase contract if they could not make payments. However, the agreement imposed the obligation on the districts to purchase or lease equipment from C.O.P.I. if funds became available subsequent to early cancellation. This obligation was in violation of K.S.A. 10-1116b which prohibits a lease-purchase agreement from creating any binding obligation on a municipality in future years. The C.O.P.I. agreement obligated the school districts to pay amounts in future years that were not a part of their current budgets. The school districts would remain liable if there were any funds available to pay on the contract, even if those funds were not budgeted for the lease-purchase agreement. In effect, the provisions within the contract gave C.O.P.I. the right to declare the entire amount of the unpaid monies due.

The appellate court found that the lease-purchase agreements offended the wording of K.S.A. 10-1116b and violated the provisions of K.S.A. 10-1112, which therefore voided the agreements. The lease-purchase agreements also violated K.S.A. 10-1116c because they failed to include any of the cost amounts required by that statute. Lease-purchase agreements will only be permitted if they make the specific public disclosures required by statute. None of the documents for either school district came close to filling the public notice requirement of K.S.A. 10-1116c. The appellate court found that entering into the lease-purchase agreements without complying with the cash-basis act was illegal. Thus, the lease-purchase agreements were deemed to be void. The court also held that the provisions of the Kansas Uniform Commercial Code did not control over the specific requirements of the Kansas cash-basis law. The decision of the trial court was affirmed.

Unified School District No. 259 v. Sloan
871 P.2d 861 (Kan. App. 1994)

Sharon Sloan was an employee of the school district and participated in its group health plan. Sloan's husband became ill and died. While he was sick, his health plan paid $32,570 in benefits. Sloan filed a wrongful death suit against various chemical manufacturers asking for $1.95 million in damages and received $427,500 as settlement. The school district was not a party to the lawsuit, did not intervene in the suit, and did not receive notice of the settlement negotiations. The school district brought suit against Sloan for breach of the insurance contract. Paragraph XIV.B of

the group health plan stated that the insurance plan was allowed to recover from the employee any benefits that had been paid for an injury or illness caused by a third party as the result of their negligence if the employee recovered a settlement from the third party for charges that were allowed by the group insurance plan. The district court found that Sloan was liable to reimburse her insurer for the health care benefits paid on behalf of her husband out of the settlement money she received from the chemical companies. Sloan appealed the decision.

Sloan argued that because the amount of money she received as compensation was unresolved and did not specify the amounts that were attributable to certain expenses, she should not have to pay the insurance company. Sloan's suit against the chemical companies was for $1.95 million, which included $55,000 for medical and funeral expenses. The school district's group insurance plan had paid Sloan $32,570 in benefits. She settled for a total sum of $427,500. The settlement agreements she signed obligated her to be "responsible for the payment of all expenses, including but not limited to medical and hospital charges…to any person or entity so entitled by contract" (p. 863). The appellate court, citing several cases both in and out of the state, determined that medical expenses had been included in the settlement Sloan received and that was the type of recovery found in the contractual language in paragraph XIV.B of the insurance contract. The reimbursement provision found in the insurance contract was "clear and unambiguous." In the mind of the court, there was no doubt that in this situation Sloan was required to reimburse the school district's insurer for the benefits that had been paid to her. The final question

addressed by the court was whether U.S.D. 259 should be prohibited from enforcing the reimbursement policy because public policy does not permit such reimbursement. K.A.R. 40-1-20 provides that "an insurance company shall not issue contracts of insurance in Kansas containing a 'subrogation' clause applicable to coverage providing for reimbursement of medical, surgical, hospital or funeral expenses." K.A.R. 40-202 exempts certain "lodges, societies, persons, and associations from coverage under the state insurance code…" Coverage under the school district's group plan was only provided to employees of the district and their eligible dependents. The school district's plan did not operate for profit. Accordingly, the court concluded that the group insurance plan was exempt from the jurisdiction and regulation of the Kansas Insurance Department, which meant K.A.R. 40-1-20 was not applicable to the reimbursement provision. The judgment of the district court was affirmed.

Board of Education of Unified School District No. 443, Ford County v.
Kansas State Board of Education
966 P. 2d 68 (Kan. 1998)

In the late 1970's, USD 443 formed an interlocal with several other districts in order to provide special education services for the exceptional children in their districts. School districts in Kansas may provide special education services in one of three ways: (1) they may provide a "stand alone" program whereby a district provides services to its own students; (2) through a cooperative, which is one district serving as a sponsoring district with other districts sharing the costs; and (3) through an

interlocal agreement, which is an independent entity that provides services to all member districts. Both a cooperative and interlocal are created with contractual agreements among all member districts. Originally, the law required that the interlocal agreements be limited to not less than three years or more than five. In 1986, an agreement was signed between USD 443 and the other districts from the Southwest Kansas Area Cooperative District (SKACD) that was to expire in 1989. However, in 1987 the legislature amended K.S.A. 72-8230(a) to state that the interlocal agreements signed between districts "shall be perpetual unless the agreement is partially or completely terminated in accordance with this provision." The legislature applied to every interlocal agreement entered into prior to the date of the new legislation as well as to those following the effective date. The amendment also provided that interlocal agreements could only be terminated by approval of the State Board of Education. Thus, school districts were statutorily prohibited from unilaterally withdrawing from their interlocal agreements by virtue of this amended legislation. In 1995, USD 443 attempted to negotiate some changes in the interlocal agreement, and when those negotiations failed, it attempted to withdraw from SKACD. The request to withdraw was denied. USD 443 appealed to the State Board as authorized by K.S.A. 72-8230(a)(6)(B). The appeal was heard by a three-person panel. The issues presented were whether the approval or disapproval of UDS 443's request was (1) in the best interests of the involved school districts, and (2) in the best interests of the state as a whole in providing services for exceptional children. USD 443 also brought up the concern that the amendment interfered with contractual rights

and was thus contrary to both state and federal Constitutions. The State Board, as an administrative agency, could not rule upon the issue of contractual rights. The hearing panel recommended denial of USD 443's request and the State Board adopted this recommendation finding it would not be in the best interests of the involved school districts or of the State to grant the requested withdrawal. USD 443 appealed to the District Court, which upheld the State Board's decision. The school district appealed this decision.

In *Federal Land Bank of Wichita v. Bott*, 240 Kan. 624, 732 P. 2d, 710 (1987) the court set out criteria for determining if a state law violates the contract clause of Article 1, Section 10 of the United States Constitution. The three part test found in *Bott* is whether (1) the state law has created a "substantial impairment of a contractual relationship"; (2) there is a significant and legitimate purpose to the legislation; and (3) the "adjustment of the contracting parties' rights and responsibilities is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the legislation's adoption." The *Bott* court further stated that the legislation may be upheld as constitutional when there is a substantial impairment finding if there is a "significant and legitimate public purpose behind the legislation." In looking at the 1987 amendment, the court found the statute to be reasonable in that it did not prohibit a school district from withdrawing from an interlocal; it simply required approval from the State Board. The court also found a valid public purpose in restricting school districts from withdrawing from interlocal agreements stating that the amendment was a "reasonable method to attain the

legitimate State objective of providing the best special education services at the most economical cost to the State, the school districts, and the taxpayers" (p. 79). Thus, the 1987 amendment passes the *Bott* test in that it is reasonable and serves a legitimate public purpose. In looking at the language of the school districts' contract the court found a condition stating that the "agreement is subject to change or termination by the Legislature." Both the Kansas Constitution and the statute provided for continuous legislative modification or termination. The legislature had the right to amend K.S.A. 72-8230 and USD 443 had notice within its contract of this legislative right. The court concluded that there was no violation of Article 1, Section 10 of the United States Constitution. The second issue addressed by the court was USD 443's argument that the amendment to K.S.A. 72-8230 denied it substantive due process and equal protection because "freedom of contract is a right protected under the Fifth and Fourteenth Amendments" and that the court should use the strict scrutiny test to analyze the constitutionality of the 1987 amendment. The court used *Manhattan Buildings, Inc. v. Hurley*, 231 Kan. 20, 643 P. 2d 87 (1987) in pointing out that while freedom of contract is a protected right, it is not an absolute right. Therefore, the appropriate test of whether the 1987 amendment interferes with the districts freedom of contract would be that of rational basis. In looking over testimony regarding the justification for the passage of the 1987 amendment, the court found its passage to be rationally related to the State's interests in providing services for exceptional children at a reasonable cost to districts. The court also found that the 1987 amendment is "reasonably related to the State's compelling

interests in education because it does not categorically prevent a school district from withdrawing from an interlocal, but mandates that before a school district may withdraw, the State Board must find that such a withdrawal is in the best interests of the cooperating school districts as well as the State as a whole in providing special education services." Finally, the appeals court pointed out that Article 6, Section 5 of the Kansas Constitution provides for school boards to enter into agreements with other districts for the provision of educational services under general supervision of the state board of education. USD 443 had no vested right to enter or withdraw from its interlocal agreement because the constitutional provision specifically stated that "such agreements shall be subject to limitation, change or termination by the legislature." A right is not vested if it can be changed or terminated at any time. The decision of the district court was affirmed.

Topeka Public Schools, Unified School District No. 501 v. American Home Life Insurance Company
971 P.2d 1210 (Kan. App. 1999)

Ben Bobbett began working for U.S.D. 501 as a full-time custodian in 1966. In 1980, Bobbett started doing part-time work for the American Home Life Insurance Company. In 1993, Bobbett was diagnosed with carpal tunnel syndrome and had surgery. He subsequently filed a worker's compensation claim against the school district. In January of 1994, the District sent American a letter stating it believed that American should pay for part of Bobbett's treatment costs. American refused to pay for any costs because Bobbett had been an independent contractor and not one of its

employees. The District, which believed workers compensation would apply in Bobbett's situation with American, asked for the identity of American's carrier in order for the District to review the policy and file for participation and recovery. The school district paid Bobbett's medical bills and all costs associated with Bobbett's workers compensation claim. On December 15, 1995, the District filed a petition for declaratory judgment in district court alleging that American was also liable for Bobbett's injuries and should pay for part of his workers compensation claims. American filed a motion for summary judgment arguing that (1) there was no right of contribution among multiple employers under the Workers Compensation Act (Act); (2) the District waived any ability to share liability between employers when it settled Bobbett's entire claim; and (3) there was no evidence proving that Bobbett's injury was related to his work for American. The district court granted summary judgment to American finding that U.S.D. 501 had waived any potential claim it may have had against American by not raising the issue of cost distribution between multiple employers as a defense in the workers compensation proceedings and by settling the entire claim with Bobbett. The school district appealed this decision.

At issue for the appellate court was whether the district court had properly granted summary judgment to American or whether the school district was correct in its assumption that the district court was the appropriate place to determine liability between insurance carriers. To make its determination, the appellate court relied on *American States Ins. Co. v. Hanover Ins. Co.*, 14 Kan.App.2d 492, 794 P.2d 662 (1990). In *American States*, the court reviewed several Kansas cases dealing with

workers compensation and found that when a worker's interests are not at stake, insurance companies may litigate their relative liabilities only where allowed under the Act. The court in *American States* "plainly stated" that insurance companies have standing to litigate among themselves in district court their liability of a worker's compensation award. In the case at hand, Bobbett was entitled to workers compensation for his work-related injury. The question of how much, if any, American should have paid towards his claims was a dispute between the two insurance carriers. The appellate court found that U.S.D. 501 had followed proper procedure when it filed a separate action in district court. There was no basis in statute or case history for the district court's finding that U.S.D. 501 waived its ability to have part of Bobbett's workers compensation claim apportioned to American. The judgment of the district court was reversed and the case was remanded to the district court for further proceedings to determine if any liability was owed by American.

Belot v. Unified School District No. 497, Douglas County
4 P. 3d 626 (Kan. 2000)

Alan Belot was selected as the architect for a project at Central Junior High School. He was to be paid a lump sum after completion of the final phase of a five-phase renovation project that was to be finished by October 17, 1994. Midwest Titan, the contractor, was not able to meet the completion deadline. Belot claimed that the delay had required him to perform “contingent additional services” which were beyond those listed in the contract for a longer period of time than had been agreed.

He contacted the school district to discuss a fee increase for his additional time and services. In August 1995, Belot filed a petition against the district alleging that they had breached their contractual duties. He asked to be compensated for each day after October 17, 1994 at the rate of $317.65 per day, which totaled $91,165.55. The trial court found that while "Belot performed contingent additional services under paragraph 3.3.6 of the contract" he had not met his burden of proof on damages and denied his claim. The court determined that it was "impossible to differentiate between his performance of basic services" that had simply been performed at a later date and "contingent additional services" (p. 628). Belot appealed the denial of his claim. The school district cross-appealed the finding that Belot had performed contingent additional services, arguing that he had only performed basic services for the contract term of 60 months.

The issue before the court was whether Belot had performed services that were not a part of his basic services. The interpretation of two contract paragraphs was critical in the decision. Paragraph 2.6.1 obligated Belot to "provide basic services until final payment or 60 days after substantial completion of the work. Paragraph 3.3.6 entitled Belot to "recover for additional services made necessary by Titan's failure to perform." Midwest Titan had been found in default at a previous arbitration hearing and the district was awarded over $40,000 in damages. This would satisfy the provision in paragraph 3.3.6 which said that Belot would receive additional compensation if Titan was found to be in default or if there were serious problems with Titan's performance necessitating Belot perform additional duties.

Belot specified certain additional services, such as responding to questions from subcontractors and dissatisfied teachers, which were not a part of his basic services. The next problem the court faced was how to reconcile that finding with the language in paragraph 2.6.1 which required Belot to perform basic services until final payment was made by the District with paragraph 3.3.6 which authorized an award of additional fees for "contingent additional services if certain conditions are met." The evidence showed that Belot had been required to perform contingent additional services, beyond his basic services, due to Titan's failure to perform. Therefore, the District's cross-appeal was denied.

Next, the court turned to the issue of the amount of compensation due Belot. He claimed he was entitled to compensation for *all* services provided after Titan defaulted with the District. The contract only provided for compensation for contingent additional services. Belot did not keep daily time records of the tasks he performed, nor did he have record of his time spent on contingent additional services. The District had never agreed to an hourly rate schedule for Belot and the contract contained no per diem amount. As Belot could not show how much time had been spent on contingent additional services, there was no way to determine how many hours had been dedicated to services that were beyond the basic services he was required to provide. The burden of proving damages rests on the plaintiff and Belot could not meet this burden. The decision of the trial court was affirmed.

Orr v. Heiman
12 P.3d 387 (Kan. 2000)

Curtis Orr was an employee of U.S.D. 281 for 23 years when he retired due to poor health on July 1, 1995. As an employee, Orr had been a member of the Kansas Public Employees Retirement System (KPERS). This membership included a $15,000 life insurance benefit. Orr also had an additional employee benefit of health insurance that included a life insurance benefit rider for $15,000. When he retired, Orr had the right to convert both of the group life insurance policies to individual policies. This right was noted in riders and was clearly marked "conversion privilege," on the policies that had been provided to Orr. No other written notice of the conversion policies was given to Orr when he retired. Orr did convert a separate health insurance policy that he held, but he did not convert either of the two life insurance policies within the time allotted. Orr died on October 2, 1996. After his wife was denied coverage from both life insurance companies, Mrs. Orr's legal counsel sent demand letters to the superintendent of U.S.D. 281, Tom Heiman. In July of 1997, Mrs. Orr filed suit against the superintendent, the clerk, and the members of the school board. The trial court granted the defendants' motion for summary judgment, finding (1) the notice of claim was sufficient under K.S.A. 1999 Supp. 12-105(b), and (2) the employer/group policyholder was not required by K.S.A. 1999 Supp. 40-435 to give any additional notice of conversion rights at the time of an employees retirement beyond what was provided in riders to the insurance policies that had been previously furnished to the employee. Mrs. Orr appealed this decision

and the district cross-appealed the decision that the notice of claim delivered was sufficient under K.S.A. 12-105b.

K.S.A. 12-105b(d) states in part that if a person has a claim against any municipality which could give rise to an action in court, written notice must be filed with the clerk or governing body of the municipality. U.S.D. 281 argued that because the written notice from Mrs. Orr's legal counsel was mailed to the superintendent and not the school board, it failed to meet the requirements set out by 12-105b(d). After reviewing case law, the appellate court agreed with the trial court's finding that notice to the superintendent was sufficient. The court held that "while it obviously would have been better practice to mail the letter to the clerk,...by sending notice to the superintendent of schools, who is statutorily recognized to have charge and control of the public schools, substantial compliance with 12-105b(d) was met" (p. 390). Next, the court addressed the issue of whether a common-law duty existed on behalf of an employer/group life insurance policyholder to notify and employee/insured of his conversion rights at the time employment is terminated. The Orr's had received certificates and policies which contained notices of the conversion privilege, had been through the conversion process with a separate health insurance policy, and knew they were not paying premiums on the life insurance policies after Mr. Orr retired. The appellate court looked at the specific wording of K.S.A. 1999 Supp. 40-435 and found nothing to indicate that an employer was required to notify an employee of his conversion rights upon retirement or termination of employment. The court found it "was clear that the wording of both riders was designed to comply with and follow

the requirements of K.S.A. 40-435 as well as K.S.A. 40-434(8), (9), (10)" (p. 391). Neither statute required notice beyond that which was found in the conversion privilege riders. The decision of the trial court was affirmed.

Young Partners, LLC v. Board of Education, Unified School District No. 214
160 P.3d 830 (Kan. 2007)

In 1947, Richard and Virginia Wilks transferred a tract of land to School District No. 43, the predecessor of U.S.D. 214. The deed contained a reversionary clause, providing that the transferred property was "to be used for school purposes only, and if therefore abandoned at any time, to revert back to the owner or owners" of the tract of land. Over the years, the school district constructed a school building, a gymnasium with additional classroom space, and a house and garage on the property. At the time of this case, the school district was not using the school building for classroom instruction, but it was used for other school programs and educational consultants. The school district maintained all facilities on the property. Young Partners, LLC (Young) acquired the Wilks' property in 1997, making it the successor in interest to the grantors in the original warranty deed. In August of 2005, the school district initiated condemnation proceedings against Young pursuant to K.S.A. 72-8212a in order to obtain by eminent domain Young's reversionary interest. Young filed action in district court to enjoin the eminent domain proceedings. Young claimed that the school district's eminent domain action was not done for a public purpose and further alleged that K.S.A. 72-8212a(b) was overbroad in that it allowed

a taking of property without a finding of public purpose. In July of 2006, the district court granted an injunction against the school district prohibiting it from pursuing eminent domain proceedings. The district court rejected Young's claim that the district had failed to demonstrate it was taking action without a valid public purpose. Instead, the district court found that the school district's eminent domain proceedings would be an unconstitutional taking pursuant to Article 1, Section 10 of the United States Constitution in the Contract Clause. The district court reached this conclusion by determining that because the original deed was executed in 1947 and K.S.A. 72-8212a was not enacted until 1982, the statute was unconstitutional in that it interfered with "prior contractual rights" (p. 835). Young agreed with this conclusion and further argued that K.S.A. 72-8212a was constitutional because it allowed a school district to condemn public property "for any purpose whatsoever." The school district appealed the district court decision.

Article I, Section 10 of the Constitution provides that, "No State shall…pass any…Law impairing the Obligation of Contracts…" However, courts have held that contract rights are not absolute rights. *United States Trust Co. v. New Jersey*, 431 U.S. 1, 97 S.Ct. 1505, 52 L.Ed.2d 92 (1977) explained that the strictures of the Contract Clause of the Constitution had to be reconciled with the "essential attributes of sovereign power reserved by the states." This restriction is known as the "reserved-powers doctrine." *Id.* at 21. The doctrine provides that the "Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." 431 U.S. at 23, 97 S.Ct. 1505. The states' power of

eminent domain is one of the "essential attributes of sovereignty" that is not subject to the Contract Clause. Although K.S.A. 72-8212a was not enacted until 1982, the State possessed the power of eminent domain before that time – and before the 1947 deed was signed in this case. The school district's predecessor, as a State entity, could not enter into a contract that limited the State's exercise of the power of eminent domain. Accordingly, the court held that K.S.A. 72-8212a was not an unconstitutional impairment of contract rights and did not violate the Contract Clause of the US Constitution. Next, the court addressed Young's argument that the provisions of K.S.A. 72-8212a are overbroad and unconstitutional because the statute permits a school district to condemn property "for any purpose whatsoever" (p. 838). K.S.A. 72-8212a(b) provides that a school district "may require condemnation, for any purpose whatsoever, any reversionary interest held by others in real property…if: (1) the district has constructed substantial improvements on the property; and (2) the school district has held an interest in the property for at least 20 years." The taking of reversionary interest is only allowed if a district has met the two stipulations found in 72-8212 a(b). According to the court, these two requirements indentify the public purpose underlying the taking of the reversionary interest. Once improvements have been made on a property with public funds and once the school district has had the property for at least 20 years, the district would have the public purpose of preserving the investment of public funds in the property. K.S.A. 72-8212a(c) further provides for the procedures a school district must follow when condemning a property interest. Subsection (c) states that the board of education "shall declare the necessity by

resolution" and this resolution will "set forth…the purpose for which the property is and will be used." K.S.A. 72-8212a(b) does not authorize an arbitrary authority for school districts to condemn property for whatever reason they choose, because school districts are required by that statute to provide the reasons for the taking in the board's resolution. Subsection (c) of the statute further mandates that the "board of education…shall proceed to exercise the power of eminent domain in the manner provided by article 5 of chapter 26 and the Kansas Statutes Annotated." This language requires any eminent domain proceedings be done as provided for in the Eminent Domain Procedures Act (EDPA). Under the EDPA, the district court is required to determine if the taking is necessary and lawful. The appellate court noted that the legislature had incorporated protections against arbitrary condemnation of private property by providing the following safeguards: (1) K.S.A. 72-8212a(b) established two requirements relating to the improvements to property and the duration of ownership; (2) K.S.A. 72-8212a(c) requires the board of education to state the purpose of the taking; and (3) under K.S.A. 26-504, a district court must find that the taking is lawful. In the case at hand, the school district had used and maintained the property for over 50 years. The property had recently been appraised at $500 per acre, but the improvements were valued at over $100,000. Under these circumstances, the legislature has deemed it in the public interest for the school district to protect its public investment against a reversionary interest. The appellate court concluded that the provisions of K.S.A. 72-8212a were not unconstitutional and that a public purpose

existed for the eminent domain action filed by the school district. The decision of the district court was reversed.

Chapter 10

Fiscal Issues

Other than a few cases dealing with local taxes, the majority of Kansas public education finance cases in the past thirty years have addressed challenges to the state funding formula. Of the twelve cases in this chapter, eight deal with funding formula concerns. State constitutional provisions empower the legislature with the authority to tax and distribute funds for public schools. Article 6, Section 1 of the Constitution of the State of Kansas states that "the legislature shall provide for intellectual, educational, vocational and scientific improvement by establishing and maintaining public schools, educational institutions and related activities…" In Kansas, the legislature sets an amount for the Base State Aid per Pupil (BSAPP). The amount of BSAPP a school receives is determined by its enrollment. The BSAPP can then be adjusted by various weighting provisions, such as low-enrollment or the number of at-risk students. These weightings are often challenged by school districts claiming they create a disparate impact.

Concerns with the Local Option Budget (LOB) are also frequently mentioned in court cases. K.S.A. 72-6433 sets the state prescribed percentage that school districts may adopt. This statute also provides definitions, information on the authorization to adopt, conditions and limitations of a LOB. The original purpose of the LOB was to allow schools to raise money to fund extra expenses for things not paid for out of the general fund. However, schools today are often using their LOB

money to supplement the amount received by the state to keep their buildings operating. Low wealth school districts have challenged the LOB because they typically cannot raise as much money as can higher wealth districts. Because low wealth districts often have higher numbers of minority and special education students, the LOB and other parts of the state funding formula, have faced claims of violations to the Fourteenth Amendment's Equal Protection Clause.

Article 6, Section 6(b) of the Kansas Constitution provides that "the legislature shall make suitable provision for finance of the educational interests of the state." This particular article is often cited in finance litigation in the state. The courts have found it difficult to define "suitable" and will often turn to another state's legislation for guidance. Challenges to the state's funding formula will likely persist as budget cuts in Kansas continue to impact funding to schools. Currently, the BSAPP is below levels prescribed by the courts in *Montoy v. State.* This noncompliance to a mandate from the court will most certainly bring about further lawsuits from underfunded school districts across the state.

Application of Unified School Dist. No. 437
757 P.2d 314 (Kan. 1988)

In 1985, Gary Smith, Shawnee County appraiser, discovered personal property owned by Frito Lay had been assigned to the wrong taxing district. Smith reported the error to the county clerk who requested the county commission to issue a correction order. The county commission removed the property from Unified School

District No. 501's district and reassigned it to U.S.D. No. 437's district. They approved change orders for tax years 1983, 1984, and 1985. Under these change orders, taxes paid to U.S.D. 501 would decrease by $631,053.08 and the taxes paid to U.S.D. 437 would increase by $568,941.08. This resulted in a net refund to Frito Lay of $62,112.00, due to a lower mill levy in U.S.D.437. The county treasurer ordered the refund be made from the current collection in back tax refunds of U.S.D. 501 held by Shawnee County. U.S.D. No. 501, to which the personal property had been incorrectly assigned, filed a grievance following the order to reassign the property to the correct district and to provide a tax refund to Frito Lay. U.S.D. 437, to whom the property had been reassigned, also filed a grievance to recover taxes for all the years in which the error had occurred. The Board of Tax Appeals (BOTA) granted an extra year of taxation to U.S.D. 437, above the three years originally granted by the county commission, and dismissed the complaint of U.S.D. 501. District 501 appealed to the District Court, which affirmed the decision of BOTA. The district next took its case to the Supreme Court of Kansas.

The court turned to K.S.A.1987 Supp. 79-1701 to determine whether the assignment of personal property to the wrong taxing district is a clerical error that can be corrected by the county clerk. District 501 argued that the county's mistake could not be deemed a clerical error because once the error was found, the county had to use discretion to determine if the property was correctly assigned. The court found that K.S.A. 1987 Supp. 79-1701(g) "clearly and unambiguously makes the assigning of property to the wrong taxing district a clerical error correctable by the county

clerk" (p. 317). The next question was whether the county and BOTA were able to issue the correction orders. While K.S.A. 1987 Supp. 79-1701a grants the board of county commissioners the power to issue orders correcting clerical errors, District 501 cited *In re Order of Board of Tax Appeals,* 236 Kan. 406 (1984) when it argued that because Frito Lay did not complain, the county did not have the authority to issue correction orders. The court found *In re Order of Board of Tax Appeals* inapplicable to this case because it pertained to a situation where a taxing district made errors in property valuation in favor of taxpayer corporations. In this case, the corporation property was assigned to the wrong taxing district. This was not an error in favor of the corporation. The court also pointed out that the legislature, in response to *In re*, had added language to 79-1701a which clarified legislative intent that, "in the event of an understatement of taxes as a result of a clerical error, the commissioners have the authority to order an additional tax bill." Thus, the Supreme Court affirmed the findings of the District Court.

The purpose of tax statutes is to create a uniform an equal plan of taxation. The county had a duty to correct the error upon discovery and to collect taxes on property that had escaped taxation. U.S.D. 501 had no right to taxes from property that was located in another taxing district, and so was required to comply with the correction order.

Unified School District No. 229 v. State
885 P.2d 1170 (Kan. 1994)

These were four consolidated actions between 97 plaintiffs, four unified school districts, taxpayers and students challenging the constitutionality of the School District Finance and Quality Performance Act (Act). The Shawnee District Court upheld the Act against the challenges of unconstitutionality in regards to the claims that it violated: (1) Article 6, Section 5 of the Kansas Constitution by infringing upon the authority granted to local school boards to maintain and operate local public schools; (2) Article 6, Section 6(b) of the Kansas Constitution in that it did not contain "suitable provisions for finance of the educational interests of the state"; (3) Section 1 of the Bill of Rights of the Kansas Constitution concerning equal protection (except for low enrollment weighting); (4) Article 2, Section 16 of the Kansas Constitution as containing more than one subject; (5) the Fifth and Fourteenth Amendments to the United States Constitution and Sections 1 and 2 of the Bill of Rights of the Kansas Constitution on the claim that the recapture funds provisions of K.S.A. 72-6431(d) constitute an excessive taking of property; and (6) Article 2, Section 17 of the Kansas Constitution as a law of general nature which does not operate uniformly throughout the state. In regards to the low enrollment weighting factor, the district court held that there was no rational basis for distinguishing between school districts with less than 1,899 students and those with more. Because this part of the Act could not be removed, the Act was considered unconstitutional.

Interlocutory appeals were taken and the case was transferred to the Supreme Court of Kansas.

Under the Act, the school board of each school district must levy an ad valorem tax upon the taxable tangible property of the district. On June 1 of each year, the school district remits to the Kansas State Treasurer those revenues from the districts "local effort" which exceeded the district's "state financial aid." K.S.A. 72-6431(d). These remitted funds are also called "recapture" funds. The district's state financial aid is determined by a formula of the legislatively designated Base State Aid per Pupil (BSAPP) multiplied by the district's adjusted or weighted enrollment. The adjusted or weighted enrollment is based upon a school district's full time enrollment adjusted by certain weighting factors that account for student populations to whom higher costs are associated, such as bilingual students, at-risk students, and students in low enrollment districts. Once each of the weighting factors is determined, the amounts are added to the BSAPP multiplied by the total enrollment. That is the amount available to the district, unless the district was affected by the cap imposed by the "transitional state financial aid" provision of K.S.A. 72-6410(c) or unless the school district adopted a local option budget. To fund the local option budget, school districts may levy local property taxes. Districts may also receive supplemental general state aid if the assessed valuation per pupil (AVPP) is at or below the 75th percentile of the AVPP across the state.

Article 6, Section 5 of the Kansas Constitution provides in part that "local public schools under the general supervision of the state board of education, shall be

maintained, developed and operated by locally elected boards." Plaintiffs in this case argued that the Act violates this constitutional article because the imposition of the statewide tax levy and the restriction on the local option budget infringes on the local control provision. The Supreme Court did not agree with this argument. The court pointed out that Article 6, Section 6 provides that "the legislature shall make suitable provision for finance of the educational interests of the state." Article 6, Section 1 further places the responsibility of establishing and maintaining a public school system on the State. These articles show that Kansas school districts have no inherent power of taxation. Schools have always been funded through legislation. The court drew upon its decision in *U.S.D. No. 380 v. McMillen*, 252 Kan. 451, 845 P.2d 676 (1993) where it stated that "the local school board's duties under Section 5 of Article 6 are not self-executing but are dependent upon statutory enactments of the legislature." *Id.* at 464. Accordingly, the court in this case concluded that the Act did not violate Article 6, Section 5 of the Kansas Constitution.

Next, the court addressed the challenge that the Act violated Article 6, Section 6(b). This article provides in part that the "legislature shall make suitable provision for finance of the educational interests of the state." In the case at hand, it was alleged that the Act failed to make suitable provision because the financing provisions of the Act infringed upon local control. At trial, school districts who had their funding reduced by the Act presented evidence of how they had to cut programs and personnel. They argued that funding is not "suitable" when it results in the cutting of programs deemed necessary by local school boards. The issue for the court to decide

was whether financing was suitable, not whether it was optimal. The district court in its previous decision, and the Supreme Court in this one, considered decisions from other states and then analyzed Kansas law. The standard found to be most comparable to the Kansas requirement of "suitable" funding was the requirement of "adequacy" found in several state constitutions. The court here held that after looking at the evidence presented, there was nothing to compel a determination that the financing was not "suitable." Thus, the Supreme Court agreed with the district court's conclusion that the Act did not violate the provisions of Article 6, Section 6(b).

The third issue addressed by the court, was that of equal protection. The plaintiffs from Blue Valley alleged that certain provisions of the Act violated the right of equal protection contained in Section 1 of the Kansas Constitution which provides "all men are possessed of equal and inalienable rights, among which are life, liberty, and the pursuit of happiness." The Supreme Court first determined that the appropriate level of scrutiny with which to determine this issue was that of rational basis. Rational basis is the lowest level of scrutiny. This meant the State simply had to show there was a rational relationship between its funding provisions and a legitimate legislative purpose. The specific provisions of the Act being challenged on equal protection grounds were: the BSAPP of $3,600; the bilingual education weighting factor of .2; the vocational education weighting factor of .5; the low enrollment weighting factor; the at-risk weighting factor of .05; the LOB provisions; and the Supplemental General State Aid (SGSA) provisions. The Kansas Constitution mandates that the legislature establishes and maintain schools and

provide suitable financing. Blue Valley's complaint was not with the legislature's authority to draw lines in these categories to determine funding amounts; rather, Blue Valley's claim was that there was no rational basis for where the lines were drawn. The court held that in order to make "suitable financing" available for school, the legislature had to make rules and draw lines in establishing adequate levels of funding. Sole reliance on local property taxes levies would not provide necessary funding for smaller and/or poorer school districts that depend upon state aid. Schools with students and circumstances provided for in the provisions at question require more funding to meet the needs of their students. After examining the testimony and the claims made, the Supreme Court held that there was a rational basis for each provision, including the low enrollment weighting factor. The district court had determined there was no rational basis for the low enrollment provision and held the entire Act as constitutionally impermissible. Unlike the other weighting factors, the low enrollment weighting factor is applied to all students in the district as opposed to a certain number of students having the characteristics necessary for a particular weighting factor. Evidence provided showed the rationale for providing extra funding to districts with low student numbers. Under the Act, weighting factors are applied to school districts having less than 100 students, 100-299 students, and 300-1,899 students. Blue Valley's complaint was that the 1,899 line was too high, not supported by data, and had no rational basis. The district court agreed with this argument, but the Supreme Court did not. Instead, the court held that there was a rational relationship between the legislature's legitimate purpose of more suitably

funding public schools and the classifications created in the low enrollment weighting factor. The absence of scientific data approving the 1,899 line was not considered by the court to be a valid reason for concluding there was not a rational basis for the legislature drawing the line where it did.

Next, the court turned to the contention by some of the plaintiff school districts that the Act violated Article 2, Section 16 of the Kansas Constitution, which provides in part that "no bill shall contain more than one subject..." The court disagreed, holding that everything in the Act related to public education and there was nothing wrong with tying expenditures and the means of raising extra revenue together. This, in the court's opinion, would allow the legislature to see where revenue will come from before voting on its expenditure. The fifth issue addressed by the court was that of the claim that the Act's recapture provision constituted a "taking" which violated the Fifth and Fourteenth Amendments of the United States Constitution, as well as Sections 1 and 2 of the Kansas Constitution. Funds collected through the recapture provision are remitted to those school districts that do not have sufficient local effort. The Takings Clause of the Fifth Amendment of the United States Constitution provides, "Nor shall private property be taken for public use, without just compensation." At issue was whether taxpayers in the recapture districts receive a benefit for the taxes that educate students in other school districts or whether the mill levy imposed in those districts imposed such an unfair inequality between the burden imposed and the benefit received that it constituted a "taking" in violation of the Fourteenth Amendment. The court held that establishing a uniform

mill rate across the state to fund public education was not an excessive taking. The excess raised was used to help fund less fortunate district and all would benefit from a better quality of education for students in other state school districts. The judgment of the district court was affirmed in part and reversed in part. Because the issue was before the court on interlocutory appeals, the case was remanded to the district court for entry of the judgment.

Kansas City, Kansas, Unified School District No. 500 v. Womack
890 P.2d 1233 (Kan. App. 1995)

Andrea Womack, Yolanda Stewart, and Mary Bryant (claimants) were all employed part-time by U.S.D. 500. Womack was a substitute teacher, Stewart a substitute paraprofessional, and Bryant was a substitute secretary and teacher's aide. All three filed applications for unemployment benefits. The school district was notified that its experience rating account could be charged for a portion of the claimants' unemployment benefits. The District requested the examiner reconsider the rating charge pursuant to K.S.A. 44-710(c)(2)(F)(iii). In all three cases, the examiner stated that the "appropriate pro rata share of benefits paid would be charged to U.S.D.500's rating account" (p. 1234). The District appealed the examiner's decision and hearings were held in all three cases. One referee heard the Stewart and Womack cases and found that they had been temporarily laid off because no work was available. Another referee heard Bryant's case and found that because there was no evidence that she had been discharged for misconduct or left work voluntarily

without good cause, the District's account should be charged. Both referees affirmed the examiners' decision. U.S.D. 500 appealed the referees' decisions to the Kansas Employment Security Board (KESB) and KESB affirmed the referees' decisions. The school district next appealed to the district court. In the Womack and Stewart cases, the court ruled that the agency had misinterpreted the law and U.S.D. 500's rating account should not be charged because the employees were not unemployed at the time they applied for benefits. In Bryant's case, the court found that the District's rating account should not be charged because Bryant was employed by an educational institution and was not entitled to benefits because she had a reasonable assurance that she would be employed the following year. KESB appealed the district court's decision.

KESB first argued that the district court should not have decided whether the claimants were eligible for benefits because the only issue determined by the referees was whether the District's rating account should be charged for its pro rata share of any benefits received by the claimants. However, when reviewing the record it was found that when U.S.D. 500 was notified that it might be charged for benefits, it noted that the claimants had not been terminated and that work was available. In all three cases heard by the referees, the school district presented evidence which showed the claimants were either still employed or had not left their employment due to lack of work. The referees limited the scope of their decision to whether the school district's account should be charged. Typically, a party cannot raise an issue to the district court which had not been raised at the administrative level. In this case,

although the referee sought to limit the scope of the decision, the school district did raise the issue and presented sufficient evidence to warrant a review by the court. Next, the court turned to the issue of whether the district court erred in finding U.S.D. 500's account should not be charged. In making this decision, the appellate court reviewed Kansas statutes dealing with unemployment. K.S.A. 44-706 reads in part that a person will be disqualified for unemployment benefits if they "(a)...left work voluntarily without good cause attributable to the work or the employer..." and "(i) For any week of unemployment on the basis of service in an instructional, research, or principal administrative capacity for an educational institution...if such week begins during the period between two successive academic years or, ... if the individual performs such services in the first of such academic year and there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years." In terms of part-time employees, the court discussed K.S.A. 44-710(c)(2)(B) which states in relevant part that "where base wage credits of a contributing employer represent part-time employment and the claimant continues in that part-time employment with the employer during the period for which benefits are paid, then that employers' account shall not be charged with any part of the benefits paid..." In determining Womack and Stewart's cases the appellate court cited *Manpower, Inc. v. Kansas Employment Security Bd. of Review,* 11 Kan.App.2d 382, 724 P.2d 690, *rev. denied* 240 Kan. 804 (1986). In *Manpower,* the court held that in the case of a temporary employment agency, "the completion of one work assignment did not

amount to termination of the claimant's employment and failure to report for further work assignments constituted voluntarily leaving work without good cause." 11 Kan.App.2d at 389. The court found this to be "almost identical" to the case at hand. The claimant substitute teachers accepted employment with the school district with the understanding that full-time work was not available but that work would be available. At the time they applied for benefits, Womack and Stewart's names were on the substitute teachers list and work was available. In fact, both Womack and Stewart had refused some assignments offered to them. The appellate court determined that the district court was correct when it found that neither Womack nor Stewart were unemployed as defined by Kansas employment security law. The referee's finding that a substitute teacher's employment "begins and ends with each assignment is analogous to, and is as untenable as, the premise that was rejected in *Manpower*" (p. 1241). Although the facts in Bryant's case were slightly different in terms of when she filed for benefits, the appellate court found that the district court's judgment in her case was also correct. KESB's position that it could determine if the employer's account was chargeable prior to or separate from a determination of whether the claimant was eligible for benefits was found to be flawed. The district court held, and the appellate court agreed, that there must be a "valid entitlement to benefits prior to making the determination that the employer's account should be charged" (p. 1242). The district court decision was affirmed.

Reed v. Seeman
990 P.2d 1238 (Kan. App. 1999)

Unified School District No. 315 passed a tax levy resolution on December 15, 1997. The resolution was published in the local newspaper on Thursday, December 18, and Monday, December 22. The plaintiffs, who were residents of the school district, circulated a petition that was opposed to the resolution. The petition was filed with the Thomas County Clerk and Election Officer, defendant Rosalie Seeman. Seeman initially notified the plaintiffs that the petition contained enough signatures to submit the resolution to a vote. She later informed them that the petitions were not valid because they had not been submitted to the Thomas County Attorney for review prior to circulation. The plaintiffs filed suit claiming, among other things, that the petitions opposed to the tax levy resolution were valid under K.S.A. 72-8801 and that the publication of the resolution by the school board was void. The district court found in favor of the defendants on both issues and the plaintiffs appealed.

K.S.A. 72-8801 provides in part that a tax levy resolution must be published "once a week for two consecutive weeks in a newspaper having general circulation in the school district." The district court found that the school district had complied with this statute. However, the plaintiffs argued that K.S.A. 62-102 had to be read in conjunction with 72-8801 in order to find the meaning of "once a week for two consecutive weeks." K.S.A. 62-102 provides in relevant part that the public notifications had to be published at least once a week "on the same day of the week except that when there is no issue of the newspaper published on such day that it may

be made on the proceeding or following day..." The appellate court found that the statutes did not conflict with one another and had to be "read together and harmonized." Publication notices had to be published once in each period of seven days. The school district had published its notification twice within four days, which did not constitute "once a week for two consecutive weeks." The court concluded that the publication of the tax levy failed to meet the requirements of K.S.A. 72-8801 and was invalid. The court next addressed the issue of whether the petitions in opposition to the tax levy were invalid because the plaintiffs failed to get the opinion of the county attorney as required in K.S.A. 25-3601. K.S.A. 25-3601 clearly states that before a petition could be circulated "a copy thereof containing the question to be submitted shall be filed in the office of the county attorney..." The court concluded that this statute was applicable and held that the petitions were invalid. The judgment of the district court was affirmed in part and reversed in part.

Robinson v. Kansas
117 F. Supp. 2d 1124 (D. Kan. 2000)

Plaintiffs brought suit on behalf of minority, foreign, and disabled students attending large, non-affluent Kansas school districts in Dodge City and Salina, Kansas. They filed a multi-count complaint against the State of Kansas, its governor, Bill Graves, and two education officers, Linda Holloway and Andy Tompkins. In their complaint, the plaintiffs alleged that two provisions of the State School District Finance and Quality Performance Act, K.S.A. 72-6405 *et seq*., created a disparate

impact against minority students, foreign students, and students with disabilities. Under the statutory funding formula, each school district receives a set amount of money per student enrolled in the district. The statutory base rate per pupil can then be adjusted by several provisions. At issue were the provisions for low enrollment weighting and local option budgets. Low enrollment weighting provides extra funds for school districts with fewer than 1725 students. School districts can also pass local option budgets to supplement state funding by levying additional taxes. Plaintiffs claimed that these provisions resulted in less funding per pupil in schools that had higher percentages of minority, foreign and disabled students because these students are disproportionately enrolled in comparatively low wealth districts that are also ineligible for low enrollment weighting. In their opinion, these provisions violated Title VI, 42 U.S.C. Section 2000d, the Rehabilitation Act of 1973, 29 U.S.C. Section703 *et seq*., and the plaintiffs' rights to Due Process and Equal Protection under the Fourteenth Amendment. Plaintiffs sought injunctive relief, specifically requesting that the court order the defendants to revise the school finance law. Defendants moved to dismiss plaintiffs' complaint.

The court first addressed the defendants' argument that the Eleventh Amendment of the United States Constitution provided immunity from the plaintiffs' suit. The Eleventh Amendment provides that "the judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State…" Exceptions to Eleventh Amendment immunity occur when (1) Congress has properly

abrogated state immunity, (2) the state has waived immunity by consenting to suit in federal court, or (3) a private party sues a state officer for prospective declaratory or injunctive relief from an ongoing violation of Constitution or federal laws. A state can waive this immunity from suit by accepting gifts or gratuity from the federal government pursuant to statute that manifests clear intent that a condition of the receipt of these funds is waiver from immunity. 42 U.S.C. Section 2000d-7 provides in relevant part that a state will not be immune under the Eleventh Amendment from suits in Federal court for various violations prohibiting discrimination if they are the "recipients of Federal financial assistance." The court here determined that by agreeing to accept federal education funds under Title IV, the State had effectively waived its Eleventh Amendment immunity. The defendants further argued that Governor Bill Graves should have been dismissed from suit because as an individual he was not the proper person to bring about the plaintiffs' requested relief. The court disagreed finding that the Governor of Kansas was the appropriate defendant in the lawsuit because the state Constitution made him responsible for the enforcement of state laws.

The court next addressed the plaintiffs' disparate impact claim under Title VI. Section 601 of Title VI of the Civil Rights Act of 1964 provides in part that no person "shall, on the ground of race, color, or national origin, be…denied the benefits of, or be subjected to discrimination under any program…receiving Federal financial assistance." The court here noted that the Supreme Court has held that agencies providing federal financial assistance have the authority to establish regulations that

prohibit the recipients of such funding from taking any action that results in a disparate impact or produces discriminatory effects on the basis of race, color, or national origin. The defendants argued that the Title VI claim should be dismissed because non-minority students also attended the school districts in which the plaintiffs were enrolled and they received the same funding as the non-minority students in those schools. To survive a motion to dismiss, plaintiffs need only plead that a "facially neutral" practice's adverse effect falls disproportionately on a group that is protected by Title VI. In this case, the plaintiffs pled that public school districts with fewer than 1725 students receive additional funds per student yet minority students are disproportionately enrolled in mid-size and large school districts that do not qualify for low enrollment weighting, thus resulting in less money per student. They further pled that the Act permits school districts to pass local option budgets to supplement state funding and there is a direct correlation between the median income and property values in a school district and that district's ability to raise funds through an LOB. As minority students are disproportionately enrolled in school districts with low incomes and property values, those districts collect less money through LOBs and thus provide less funding per pupil than districts that enroll higher numbers of white students. The court concluded that it did not make sense to compare the plaintiffs to non-minority students in the same school district. The comparison had to be made to other districts across the state. When that comparison was made, the court found that the plaintiffs had successfully pled their disparate impact claim.

The court next turned its attention to the claims of the disabled plaintiffs. The defendants argued that the claims of these plaintiffs should be dismissed because they did not exhaust their administrative remedies under IDEA. Under the IDEA, states must provide the parents of a disabled student the right to seek review of any decision concerning their child's education. Parents are first entitled to an impartial due process hearing conducted by a state or local educational agency. Once the hearing is conducted, the parents are entitled to an appeal to the state educational agency. Only after exhausting these two review procedures may the parent seek action in court. The disabled plaintiffs had not gone through either review process before bringing their claim to court. The Tenth Circuit allowed for three exceptions to IDEA's exhaustion requirement: (1) when administrative exhaustion would be futile, (2) when administrative exhaustion would fail to provide adequate relief, and (3) when an agency has adopted a policy or pursued a practice of general applicability that is contrary to the law. The disabled plaintiffs in this case were not challenging a state education department's policy or a school district's development of a specific IEP. They were seeking to have a state statute held in violation of federal law. Following the administrative procedures under the IDEA would not address these concerns. Accordingly, the court found that administrative exhaustion would have been futile and the requirement was excused.

Count III of the plaintiffs' complaint alleged that the school funding act had a disproportionate adverse impact on disabled students in violation of the Rehabilitation Act of 1973, 29 U.S.C. Section 701 *et seq.* The plaintiffs claimed that greater

numbers of disabled students were enrolled in school districts having low local option budgets and receiving less money per pupil from the state. This disparate impact, according to the plaintiffs, caused disabled students to have inferior access to educational programs that are disproportionately available to non-disabled students. The defendants moved to dismiss on the grounds that (1) the alleged inequities in school districts do not occur solely on account of the plaintiffs' disabilities, and (2) the plaintiffs failed to allege the defendants acted in bad faith or with gross misjudgment. The court rejected these arguments because neither was supported by any Tenth Circuit precedent. The court also held that a finding of bad faith was not required because the plaintiffs did not ask for any compensatory damages. The absence of any support for these claims by the defense caused the court to deny the request for dismissal.

Finally, the court addressed the plaintiffs' claims that the school funding act violated their Fourteenth Amendment rights to Equal Protection and Due Process. Their complaint attacked two specific provisions of the Act; low enrollment weighting and the LOB. The plaintiffs alleged that their equal protection rights were violated because the act, through these provisions, treated similarly situated students differently based on the number of students enrolled and the relative wealth of school districts. They further claimed the defendants had no rational basis for setting the low enrollment weighting at 1725 or for the provision of the local option budget. Because the two provisions were different, the court treated each separately. Two Supreme Court cases were used to aid in the court's decision in this case. *Papasan v. Allain*,

478 U.S. 265, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986) governed the question regarding low enrollment weighting while *San Antonio Ind. Sch. Dist. V. Rodriguez*, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973) controlled the decision over the local option budget. The court held that the low enrollment weighting was a disbursement of funds from the State to school districts. The claim that the State was distributing these funds in unequal amounts was similar to Mississippi's unequal disbursement of funds in *Papasan*. Thus, the court refused to dismiss the equal protection challenge to low enrollment weighting provision of the Kansas school funding act. However, the local option budget challenge was similar enough to the challenges discussed in *Rodriguez* to cause the court to dismiss the claim. The alleged disparity created by the LOB was attributed to varying wealth of the different school districts. The court held that dismissal was warranted because it was not "the constitutional prerogative of the federal courts to nullify statewide measures for financing public services merely because the burdens or benefits thereof fall unevenly depending upon the relative wealth of the political subdivisions in which citizens live." *Rodriguez*, 411 U.S. at 54.

The court concluded that the defendants had failed to present any argument warranting the dismissal of the plaintiffs' claims, with the exception of the Fourteenth Amendment challenge to the local option budget. They held that litigation could proceed once the plaintiffs filed a motion to amend their complaint in accordance with the court's opinion. Accordingly, the defendants' motions to dismiss were granted in part and denied in part.

Robinson v. Kansas
295 F.3d 1183 (10th Cir. 2002)

Earnestine Robinson, on behalf of her minor children, along with several other plaintiffs, filed suit against the State of Kansas, its governor, and two state education officials challenging the school funding formula. The district court in *Robinson v. Kansas*, 117 F.Supp.2d 1124 (D.Kan.2000) denied the defendants' motion to dismiss holding, among other things, that the defendants did not fall under Eleventh Amendment immunity requirements. The defendants filed an appeal on the Eleventh Amendment issue. The defendants argued that the Eleventh Amendment of the United States Constitution barred the plaintiffs' suit. They maintained that Congress had not abrogated their Eleventh Amendment immunity, that they did not waive their immunity, and that the actions against state officials did not fall under the *Ex Parte Young* doctrine.

The Supreme Court of the United States interprets the Eleventh Amendment as being prohibitive of lawsuits brought in federal court against an unconsenting state by its own citizens. However, this rule of state sovereignty is not absolute and congress can abrogate this immunity in order to enforce the Fourteenth Amendment. In addition, according to *Ex Parte Young*, 209 U.S. 123, 159-60, 28 S.Ct. 441, 52 L.Ed. 714 (1908) whenever a private party sues a sate officer for prospective injunctive relief or declaratory relief from an ongoing violation of the Constitution, the suit is not considered to be against the state itself and the Eleventh Amendment

does not apply. States can waive their sovereign immunity in a variety of ways, one of them being the state's participation in certain federal programs. 42 U.S.C. Section 2000d-7(a)(1) provides in part that states "shall not be immune under the Eleventh Amendment of the Constitution" from suit in Federal Court for violations of section 504 of the Rehabilitation Act, title IX of the Education Amendments, the Age Discrimination Act, title VI of the Civil Rights Act of 1964, or "the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance." Therefore, the court held that by accepting federal financial assistance, states and state entities waive their sovereign immunity from suit. The *Ex Parte Young* doctrine further permits suits seeking injunctive relief against state officials. To determine whether the *Ex Parte Young* doctrine applied in this case, the court applied a four-part framework. First, the court had to determine whether the action was against state officials or the state itself. Second, the court looked at whether the alleged conduct of the state officials constituted a violation of federal law. Third, the court assessed whether the relief sought by the plaintiffs was permissible prospective relief. Finally, the court had to analyze whether the suit rose to the level of implicating special sovereign interests of the state. In applying the facts of this case to the *Ex Parte Young* doctrine, the court first found that the action was against state officials acting in their official capacity. The court found that the alleged conduct of the state officials violated the Fourteenth Amendment and, possibly, Title VI, thus meeting the second prong of the test. Thirdly, the court held that the relief sought by the plaintiffs was permissible prospective relief; an injunction barring state officials

from enforcing the School District Finance and Quality Performance Act (SDFQPA) in a manner that violated federal law. Finally, the court found that the defendants in this case could present no arguments showing how the special sovereign interests of the state would be implicated if the legislature was required to revise their education funding laws. Thus, the *Ex Parte Young* doctrine did apply and the state officials were not protected by the Eleventh Amendment. The judgment of the district court was affirmed and the defendants' motion to dismiss based on their Eleventh Amendment immunity was denied.

Montoy v. State
62 P.3d 228 (Kan. 2003)

This case is a constitutional challenge to Kansas' system of public school financing. The case was brought to the district court by students representing African-American, Hispanic, and disabled groups, along with two large school districts. The plaintiffs sued the State of Kansas, the Governor, the chairperson of the Kansas State Board of Education (State Board), and the Commissioner of the Kansas State Department of Education on three separate counts. These counts alleged (1) a violation the requirement that the state legislature provide for the suitable finance of the educational interests of the State under Kansas Constitution Article 6, Section6(b); (2) a violation of equal rights protection under the Kansas Constitution; and (3) a violation of substantive due process rights under the Kansas Constitution. The district court *sua sponte* granted judgment to the defendants, concluding that the

plaintiffs had failed to present legally sufficient claims. The plaintiffs appealed the district court's decision. They claimed that the district court had erred when it excluded certain claims on the grounds that they were outside the pleadings; that the court had erred when it failed to treat the dismissal of their case as a dismissal based upon a motion for summary judgment; and that their claims were legally sufficient.

The appeal was heard by the Kansas Supreme Court which first addressed whether the district court had erred when it excluded consideration of certain claims by the plaintiffs. The district court had relied upon *Missionary Baptist, Convention v. Wimberly Chapel Baptist Church*, 170 Kan. 684, 228 P.2d 540 (1951), to make its finding that, because the plaintiffs had raised issues that had not been contained in their original pleadings, those issues would not be considered by the court. The Supreme Court noted that the holding in *Missionary Baptist* was not appropriate for this case because in *Missionary Baptist* the excluded constitutional issues surfaced for the first time before the appellate court, not the district court. Thus, the decision in *Missionary Baptist* did not provide authority for excluding consideration of the plaintiffs' additional challenges. Count 1 of the plaintiffs' petition alleged a violation of Kansas Constitution Article 6, Section 6(b), which requires the legislature to "make suitable provision for finance of the educational interests of the state." The district court believed that the petition made the constitutionality of the School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq*, the issue. They rejected the plaintiffs' three additional claims of capital outlay provisions, special education excess cost provisions, and the encroachment on the general

supervision responsibility of the State Board on the basis that those matters had not been specifically pled. Kansas courts are to follow the rules of notice pleading. K.S.A. 60-208(a)(1) requires a "short and plain statement of the claim showing that the pleader is entitled to relief." A rule of liberal construction applies when judging whether a claim has been stated and the period of discovery will fill any gaps. In this case, discovery had not yet been completed when the plaintiffs brought the three additional items for the district court to consider. Although the petition focused on the SDFQPA, it had alleged a violation of the suitability requirement. For these reasons, the Supreme Court held that "under the liberal interpretation of the pleadings required by our rules of notice pleading, we conclude that the trial court erred in refusing to consider the three excluded issues" (p. 232). The plaintiffs next alleged that the order entered by the district court was a summary judgment without any of the procedural safeguards set forth in K.S.A. 60-256. The district court noted that their decision had not been based on a motion for summary judgment, but on the submitted briefs that had been brought to the court to determine whether the plaintiffs' claims were legally sufficient as a matter of law. For that reason, the district court did not believe it needed to follow the rules set forth for summary judgment. The Supreme Court found that the order by the district court disposing of the case was a judgment within the definition of K.S.A. 60-254 as a final determination of the rights of the parties in the case. A trial court has an inherent power to dispose of litigation on its own motion as a matter of law as long as discovery has been completed, a thorough pretrial conference has been held, and all of the basic facts have been

developed. If after these things are done and no genuine issue of material fact remains, then a judgment may be made. In this case, however, the judgment made failed to address the factual allegations of the plaintiffs except to say that all of their allegations were without merit and resolved by the decision in *U.S.D. 229 v. State,* 256 Kan. 232, 885 P.2d 1170 (1994). The Supreme Court found that the decision in *U.S.D. 229* was no longer applicable because the ten goals quoted in that case were no longer part of state statute. In Count 1 of the plaintiffs' claims involving the suitability of school finance, the plaintiffs asserted that state law no longer contains educational goals or standards. The statutory requirement in K.S.A.2001 Supp. 72-6439(a) was now that of an accreditation system "based upon improvements in performance that reflects higher academic standards and is measurable." Because of this, and other assertions made by the plaintiffs, the court concluded that there remained a "genuine issue of material fact not shown to be a sham, frivolous, or so unsubstantial that it would be futile to try the case" (p. 234). The decision of the district court contained no findings of fact to support its *sua sponte* judgment for the defendants. The Supreme Court rejected the district court's legal conclusion that *U.S.D. 229* alone supported its judgment. The district court was required to make a determination based on uncontroverted facts as to whether the school financing provisions were constitutional. The plaintiffs should have been given an opportunity to substantiate their claims before the district court determined that the legislature had provided suitable provisions for financing the educational interests of the State. In Count II, which involved a violation of equal rights protection, the plaintiffs advanced

a number of allegations. These included the claim that the number of minority students in the plaintiff school districts had increased, that there was a substantial performance gap between minorities and whites, and that there was a substantial performance gap between students in the free and reduced lunch programs and those not in those programs. The Supreme Court held that those allegations, as well as those in Count III, had to be addressed by the district court before they could make a final judgment on the case. When the court considered the record presented in this case, they concluded that there were genuine issues of material fact which remained in dispute. Thus, the decision of the district court was reversed and remanded for further proceedings.

Bonner Springs Unified School District No. 204 v. Blue Valley Unified School District No. 229
95 P. 3d 655 (Kan. App. 2004)

In June 2002, four Johnson County school districts enacted resolutions requesting the Johnson County Board of County Commissioners (BOCC) to submit to a vote a countywide retailers' sales tax with a percentage of the revenues to be distributed to public school districts located within Johnson County, Kansas. The issue was approved by voters and the new local sales tax went into effect in January 2003. In March 2003, four Wyandotte County school districts and ten individual parents of Wyandotte County students filed an action in district court against the Johnson County districts, the BOCC, and the State Treasurer seeking declaratory and injunctive relief to suspend the distribution of funds from the new sales tax to the

Johnson County schools. The plaintiffs alleged that the use of the new sales tax revenues for public education was contrary to K.S.A. 72-6405 *et seq.*, violated Article 6 Sections 1, 6 of the Kansas Constitution, and violated Section 1 of the Bill of Rights of the Kansas Constitution. The plaintiffs also wanted the sales tax revenues to be declared "local effort" for purposes of K.S.A. 72-6410(c) which would affect the Johnson County districts' entitlement to state financial aid pursuant to K.S.A. 72-6416. At the same time they filed their petition, the plaintiffs also filed a motion for temporary injunction, requesting that the sales tax revenue not be paid to the Johnson County schools. The defendants argued that the plaintiffs had not met the standards for temporary injunctive relief and had no standing upon which to maintain this action. The district court declined to grant a temporary injunction. The court also chose not to address the issue of standing because it was "not directly related to the issuance of a temporary injunction" (p. 658). The plaintiffs appealed this decision.

Two issues addressed by the Court of Appeals were whether the plaintiffs had standing to challenge the distribution of the Johnson County sales tax and if the district court abused its discretion in denying the plaintiffs a temporary injunction. Although the district court did not make a determination on standing, the Appeals Court needed to do so in order to decide whether or not the plaintiffs had "sufficient stake in the outcome of this controversy..." (p. 659). First, the plaintiffs claimed they had standing because they shop in Johnson County and would have to pay the tax. The court found this failed as a matter of law because (1) the plaintiffs are under no compulsion to shop in Johnson County, (2) *anyone* who shops in Johnson County

would pay the tax and therefore suffer the same injury, and (3) it is not the *collection* of the tax that is the subject of the alleged injury but the *distribution* of the revenues. The second claim brought by the plaintiffs was that they had standing because the additional revenues to the Johnson County schools would put Wyandotte County schools at a competitive disadvantage for things such as attracting and retaining quality teachers. The court determined that this claim did not fail as a matter of law. Because they did not have the complete facts, the court remanded the issue to the district court for a "complete evidentiary hearing and legal determination of plaintiffs' claims of standing based on competitive disadvantage..." (p. 661). Next, the court turned to the issue of the denial of the plaintiffs request for a temporary injunction. *Wichita Wire, Inc. v. Lenox*, 11 Kan. App. 2d 459, 462, 726, P. 2d 287 (1986) adopted a four-part test for temporary injunction. It required that any party seeking temporary injunctive relief must show (1) a substantial likelihood that the party making the motion will prevail; (2) the party making the motion will suffer "irreparable injury" unless the injunction is approved; (3) the threatened injury to the party making the motion would be greater than the damage the proposed injunction might cause the opposing parties; and (4) the injunction would not be adverse to the public interest. These four factors were used by the court to make its determination. After reviewing K.S.A. 12-187, K.S.A. 19-4101 through 4103, and K.S.A. 72-8210 the court found no evidence that the plaintiffs' claim had a substantial likelihood of success. In regards to the second factor, the plaintiffs argued that they would suffer irreparable injury due to the competitive disadvantage that would result from the extra funding to the

Johnson County schools. They claimed that if the Johnson County schools received the sales tax revenues for the duration of the case, the Wyandotte County schools could potentially be at a disadvantage for several years. The Court of Appeals determined that the plaintiffs would have an opportunity to present their competitive disadvantage claims on remand for the purpose of standing. They also pointed out that K.S.A. 72-6418 provides a mechanism for repayment should the plaintiffs succeed on the merits. If the plaintiffs in this case were able to show irreparable harm, K.S.A. 72-6418(a) provides "In the event any district is paid more than it is entitled to receive under any distribution made under this act or under any statute repealed by this act, the state board shall notify the district of the amount of such overpayment, and such district shall remit the same to the state board." Because of this, the court did not find substantiation for the claim of irreparable injury. Potential injury was found to be equal for the plaintiffs and the defendants if a temporary injunction was granted. Therefore, the claim failed the third factor of the test. Finally, the court determined temporary injunctive relief would be adverse to the public interest because of the need to "uphold public elections and defer to legislative determinations" (p. 664). After applying the four factors, the Court of Appeals determined that the district court did not abuse its discretion in denying temporary injunction. Thus, the lower court's decision was affirmed in part and remanded with directions.

Montoy v. State
102 P.3d 1158 (Kan. 2005)

On December 18, 2003, a citizen's group filed a motion to intervene in *Montoy v. State*, which was pending. The group, Kansas for the Separation of School and State, sought to intervene based the grounds that they had "an interest relating to the property or transaction that was the subject of the action" (p. 1159). The group believed that the state of Kansas favored a tax increase to finance schools, while they were opposed. On February 13, 2009, the trial court denied intervention. In its decision, the district court cited the three factors necessary to allow intervention which had been set forth by the Kansas Supreme Court in *Memorial Hospital Ass'n, Inc. v. Knutson,* 239 Kan. 663, 722 P.2d 1093 (1986). These factors were: (1) timely application; (2) a substantial interest in the subject matter; and (3) lack of adequate representation of the intervener's interest. The action had been pending in the *Montoy v. State* trial for nearly five years, the facts had already been heard and determined in the action, and a preliminary interim order had been entered on December 2, 2003. The citizen's group did not file their motion until December 18, 2003. The motion was denied on the grounds that the appeal was not filed in a timely manner and, as the Court's preliminary order contained no directive that the Legislature raise property taxes statewide, there was no property or transaction that was the subject of their motion. The citizen's group appealed this decision.

The only issue that needed to be addressed was whether the district court abused its discretion when it denied the motion to intervene. Judicial discretion is

only abused when no reasonable person would take the view adopted by the court. The provisions for intervention in a court action are found in K.S.A. 60-224(a) which states, in relevant part, "upon timely application anyone shall be permitted to intervene in an action...when the applicant claims an interest relating to the property or transaction which is the subject of the action..." In *Hukle v. City of Kansas City*, 212 Kan. 627, 512 P.2d 457 (1973), the court held that "the requirement for 'timely application' to intervene in an action as that term is used in K.S.A. 60-224(a) has no application until such time as adequate representation ceases." The appellants argued that they had no adequate representation because the State would benefit from a tax increase to fund public education, and so would support one. The Supreme Court disagreed, pointing out that the legislature's recent rejection of all proposals for tax increases to finance schools demonstrated that "the appellant's position was adequately represented by the State" (p. 1160). In *Hukle*, the court determined that the right to intervene depended upon the concurrence of all three factors. Without a showing of inadequate representation, there could be no concurrence. Although the trial court did not address the issue, the Supreme Court held that, because the citizen's group had failed to show a lack of adequate representation of its interest, the motion to intervene was not timely. The decision of the trial court was affirmed.

Montoy v. State
120 P.3d 306 (Kan. 2005)

In *Montoy v. State*, 275 Kan. 145, 62 P.3d 228 (2003) (*Montoy I*), the Kansas Supreme Court reversed and remanded the district court's decision that the plaintiffs, two school districts and numerous individual students had failed to present legally sufficient claims to the state funding formula. The case was remanded, in part, because the higher court held that the issue of suitability had not been resolved by *U.S.D. No. 229 v. State*, 256 Kan. 232, 885 P.2d 1170 (1994) which was the case the district court relied upon for its decision. The Supreme Court found that when the decision had been made in U.S.D. *No. 229*, the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et seq.*, as it was originally adopted in 1993, made suitable provision for the finance of public education. However, as changes had been made to the financing formula since that time, the district court was directed to determine on the basis of uncontroverted facts whether the school financing provisions were constitutional.

As it had been directed, the district court held a bench trial in which witnesses who were considered to be experts in the fields of primary and secondary education provided testimony. After the trial, the district court made findings regarding the statutory and societal changes that occurred after the decision in *U.S.D. No. 229* that affected school funding. In terms of societal changes, the district court found that 36% of Kansas public school students qualified for free or reduced lunches, the number of students with limited English proficiency had increased dramatically, and

state institutions of higher learning were using more rigorous admission standards. The district court also found a number of statutory changes that impacted school funding, such as the fact that the goals that had been set out in K.S.A. 72-6439(a) were removed, the SDFQPA's provision requiring an oversight committee to ensure fair funding had been allowed to expire, at-risk pupil weighting had been changed, the mill levy had decreased from 35 mills to 20 mills, the cap on capital outlay had been removed, and special education funds were added to the calculation to increase the base on which local option budget funding was calculated. As a result, the district court ruled that the SDFQPA was unconstitutional. It held that: (1) the SDFQPA's financing formula was a violation of equal protection; (2) the SDFQPA financing formula had an unconstitutional disparate impact on minorities; and (3) the legislature had failed to meet its burden as imposed in Article 6, Section 6 of the Kansas Constitution to "make suitable provision for finance" of the public schools. The State of Kansas and the State Board of Education appealed this decision.

At issue in this appeal, was the constitutionality of the statutory scheme for funding Kansas public schools. The Kansas Supreme Court first attempted to determine if the district court's findings of fact regarding the societal and legislative changes were supported by substantial, competent evidence. To do this, they examined the standard for determining whether the current version of the SDFQPA made suitable provision for the finance of public schools. The court noted that the concept of "suitable provision for finance" had to reflect a level of funding that met the constitutional requirement that "the legislature shall provide for intellectual,

educational, vocational and scientific improvement by establishing and maintaining public schools..." Kan. Const. Art. 6, Section 1. This imposes a mandate that the public schools must show improvement. In recognition of this concept, the legislature in K.S.A. 72-6439(a) includes a provision that requires the State Board of Education to "design and adopt a school performance accreditation system based upon improvement in performance that reflects high academic standards and is measurable." These provisions have imposed the criteria for determining whether the legislature has made suitable provision for the finance of education. If schools are meeting the accreditation requirements and if students are achieving an "improvement in performance that reflects high academic standards and is measurable" than the criteria will have been meet. In 2001, the legislature directed that a professional evaluation be performed to determine the cost of a suitable education in Kansas. The Legislative Education Planning Committee (LEPC) was given the task of overseeing the study and determined which performance measures would be utilized in determining if Kansas students were receiving a suitable education. The evaluation was done by Augenblick and Myers. The study concluded that both the formula and funding levels were inadequate to provide what the legislature had defined as a suitable education. In looking at the record, the Supreme Court determined that there was substantial, competent evidence showing that a suitable education, as defined by the legislature, was not being provided. The court noted additional evidence of funding inadequacies in that while the original intent of the local option budget was to fund "extra" expenses, some districts had been forced to use local option budgets to

finance general education. Another factor taken into consideration by the Supreme Court was the district court's finding that the financing formula was "not based upon actual costs to educate children but was instead based on former spending levels and political compromise" (p. 310). The failure to do any cost analysis distorted the low enrollment, special education, bilingual education, and at-risk student weighting factors. Thus, the Supreme Court held that the legislature had failed to "make suitable provisions for finance" of the public school system as required by Art. 6, Section 6 of the Kansas Constitution. The court reversed the district court holding that the SDFQPA's financing formula was a violation of equal protection because it found that all of the funding differentials provided by the SDFQPA were rationally related to a legitimate legislative purpose. The court also reversed the district court's holding that the SDFQPA financing formula had an unconstitutional disparate impact on minorities and/or other classes. In order to establish an equal protection violation on this basis, "one must show not only that there is a disparate impact, but also that the impact can be traced to a discriminatory purpose" (p. 308). The Supreme Court did not believe that any discriminatory purpose had been shown by the plaintiffs. The court affirmed the district court's holding that the legislature had failed to meet its burden as imposed by Article 6, Section 6 of the Kansas Constitution. The court determined that the legislature had a "constitutional duty" to alter the financing formula so that it would comply with Art. 6, Section 6. The court left it up to the legislature to decide how this would be done. The court did state that it was "clear increased funding will be required..." (p. 310). The Supreme Court did not remand

the case to the district court, but instead retained jurisdiction and stayed all further proceedings to allow the legislature a reasonable time to correct the "constitutional infirmity in the present financing formula." The court further stated that if the legislature failed make the necessary corrections to the formula, the court would direct that action be taken. To ensure that the legislature complied with its decision, the court decided to withhold its formal opinion and stay the issuance of a mandate until corrective legislation was enacted, or April 12, 2005, whichever came first.

Montoy v. State
112 P.3d 923 (Kan. 2005)

This case required the Supreme Court of Kansas to review school finance legislation to determine if it complied with the court's January 3, 2005, opinion. In January, the court found in *Montoy v. State*, 278 Kan. 769, 102 P.3d 1160 (2005) (*Montoy II*), that the state's school financing formula was not in compliance with Article 6, Section 6 of the Kansas Constitution. The court held that the legislature had failed to make suitable provision for finance of the public school system and directed them to alter the formula before April 12, 2005. The legislature responded by enacting 2005 House Bill 2247 on March 30, 2005, which was modified by 2005 Senate Bill 43 (collectively H.B. 2247). The new legislation was delivered to the court. On April 15, 2005, the court issued an order directing the parties to file briefs "addressing whether the financing formula, as amended by H.B. 2247, met the legislature's constitutional burden to 'make suitable provision for finance' of the

public schools" (p. 926). The parties were instructed to address: (1) whether the actual costs of providing a suitable education were considered and whether H.B. 2247 exacerbated and/or created funding disparities among school districts; (2) whether additional fact-finding would be necessary; and (3) what remedial action should be ordered and on what timetable, in the event the court concluded that the financing formula as amended was still unconstitutional. All parties were ordered to appear before court on May 11, 2005, to show cause as to why the court should or should not find that H.B. 2247 complied with the court's January opinion. The defendants, State of Kansas (State), and the State Board of Education and Commissioner of Education (Board), filed separate briefs. The plaintiffs filed a response brief. Ten *amici curiae* briefs were filed and oral arguments were heard on May 11, 2005.

The court first identified the changes H.B. 2247 made to the School District Finance and Quality Performance Act (SDFQPA). H.B. 2247 modified the school finance system in several ways. First, H.B. 2247 altered the Base State Aid Per Pupil (BSAPP) and several of the weightings and other factors that affect the formula. It increased bilingual and at-risk weightings; it eliminated correlation weighting; it provided for phased-in increases in special education funding; and it provided for increases in general state aid based on the Consumer Price Index-Urban (CIP-U). Second, the bill gave certain districts the authority to raise additional revenue through local ad valorem taxes upon property within the district through increases in the Local Option Budget (LOB) cap. Before H.B. 2247, a school district could enact a LOB that was as much as 25 percent of its state financial aid. H.B. 2247 would allow for

yearly incremental increases in the LOB. It also authorized districts with high housing costs to levy additional ad valorem taxes in order to raise funds to pay enhanced teacher salaries. Districts with extraordinary declining enrollments would be allowed to apply to the Board of Tax Appeals (BOTA) for permission to levy an ad valorem tax on the tangible property of the district in the amount authorized by BOTA. Third, H.B. 2247 provided for statutorily mandated areas of instruction; established an 11-member "2010 Commission" to provide legislative oversight of the school finance system; and provided for a study by the Legislative Division of Post Audit to "determine the costs of delivering the kindergarten and grades one through 12 curriculum, related services and other programs mandated by state statute" (p. 927). Fourth, it limited all new local capital outlay mill levies to eight mills. SDFQPA originally capped this at four mills, but the cap had been completely removed in 1999. The estimated grand total for H.B. 2247's fiscal impact was approximately $142 million in additional state funding for the 2005-06 school year.

The court next provided a discussion and analysis of the case as it was presented. In its oral argument, the State claimed that the constitutionality of the school financing formula as amended by H.B. 2247 was not properly before the Supreme Court of Kansas because in its opinion the court could only address the *former* financing formula, which no longer existed. The State repeatedly claimed that the court's focus should be limited to whether the legislature had the authority to pass school finance legislation and any further intervention by the court would "offend the separation of powers doctrine...among our three branches of government" (p. 927). In

support of its argument, the State relied on *Knowles v. State Board of Education*, 219 Kan. 271, 547 P.2d 699 (1976). The court held that reliance upon *Knowles* was "misplaced" because that case was before the court "on an entirely different procedural posture." In *Knowles*, the statutory amendments at issue were made in response to the district court's declaratory judgment while it still had jurisdiction over the case. In the case at hand, H.B. 2247 was a remedy in response to a specific order from the Supreme Court while it retained jurisdiction. The fact that the court retained jurisdiction allowed a review to determine if H.B. 2247 was in compliance with their opinion. The court also rejected the State's argument that the doctrine of separation of powers limited its review of this case. The final decision as to the constitutionality of any legislation "rests exclusively with the courts" (p. 930). Similar arguments had been raised in other states and those states also consistently reaffirmed the authority and duty of the state courts "to engage in judicial review and, when necessary, compel the legislature and executive branches to conform their actions to that which the constitution requires" (p. 930).

In contrast, the Board argued that the issue before the court was whether the State complied with the January opinion. The Board argued that the changes to H.B. 2247 were not based on the actual costs of providing a suitable education. It strongly disagreed with the provisions that allowed increased funding authority based solely on local ad valorem property taxes because it believed those provisions would worsen the funding inequities based on the wealth of a school district. The Board wanted the court to order additional fact-finding to determine the future costs of providing a

suitable education. Since the legislation had commissioned a cost study in its proposal, the Board asserted that the court should uphold H.B. 2247's modifications to the financing formula as an "adequate first step in a multi-year remedial response" (p. 928). The plaintiffs argued that the increases in funding provided in S.B. 2247 fell short of what was actually necessary to provide a suitable education. They agreed with the Board that actual costs had not been considered and alleged that the new legislation was "the result of political compromise and what the majority of the legislation believed it could provide without raising taxes" (p. 928).

Next, the court addressed its specific concerns about whether the actual costs of providing an adequate education were considered in each of the formula components and the statutory formula as a whole, and whether any unjustified funding disparities had been exacerbated by H.B. 2247. To make this determination, the court used the 2001 Augenblick & Myers (A&M) study in spite of the State's criticism of it and the fact that it was dated. The court relied on this study because it was "competent evidence admitted at trial" (p. 931) and was part of the record in this appeal. See *Montoy II*, 278 Kan. at 774, 102 P.3d 1160. The A&M study was also used because it had been commissioned by the legislature to study to actual costs to suitably and equitably fund public schools; it was the only analysis resembling a cost study before the court or the legislature; and both the Board and the State Department of Education had recommended that the study's findings be adopted when the study was completed. Using the A&M study, the court examined the provisions of H.B.

2247 in light of the actual costs of providing a constitutionally adequate education and funding equity.

State financial aid to schools is determined by multiplying the BSAPP by each districts weighted enrollment. When the SDFQPA was first implemented in 1992, BSAPP was set at $3,600. Small increases in the BSAPP were funded each year until the 2002-03 school year. From 2002 until 2005, the statute allowed for a BSAPP of $3,890; however, only $3,863 was funded. The A&M study recommended increasing the BSAPP to $4,650 in 2001, which would have resulted in $623.3 million in additional funding. H.B. 2247 increased the BSAPP from $3,890 to $4,222. This increase substantially varied from any cost information in court records and from any recommendation of the Board or State Department of Education. H.B. 2247 increased funding for at-risk students from .10 of the BSAPP to .145. This increased weighting would result in an increase of $26 million targeted to at-risk students. The A&M study recommended a weight of .20 to .60 depending upon the size of the district. Neither the State nor the Board contended that the actual costs of educating at-risk students had been considered. Weighting for bilingual programs was increased from .2 to .395 for the 2005-06 school year. A&M recommended that the bilingual weighting be based on student enrollment and that it range from .15 to .97. The court noted that although the increase in this weighting was significant, it was still substantially different from the cost information on record. In addressing special education, H.B. 2247 provided for a multi-year phased-in increase in state reimbursement from 85 percent in 2005-06 to 91 percent in 2007-08. The State had

been funding only 85 percent of the excess costs of special education; however, for the fiscal year 2005 only 81.7 percent of those costs had been funded. Reimbursement at 85 percent would result in a funding increase of $17.7 million for the upcoming year. The A&M study recommended a range, based on student enrollment, of weights from .90 to 1.50, resulting in nearly $102.9 million; a huge difference from the $17.7 million provided by H.B. 2247. Another of H.B. 2247's provisions was that the LOB cap of 25 percent would be raised to 27 percent in the 2005-06 school year and 30 percent in the 2007-08 school year. The original intent and purpose of the LOB was to allow school districts to levy additional property taxes to fund enhancements to the constitutionally adequate education provided and financed under the legislative financing formula. In *Montoy II*, the evidence showed that many school districts had been forced to use the LOB to fund what was the State's obligation to provide an adequate education rather than on enhancements. The court here agreed with the Board and the plaintiffs that the legislation's increase in the LOB cap worsened the wealth-based disparities between districts. Districts with higher assessed property values could reach the maximum LOB revenues with far less tax effort than those districts with lower property values and lower family incomes. This would permit the wealthier districts to "generate more funds for elements of a constitutionally adequate education that the State has failed to fund" (p. 934). H.B. 2247 also allowed for a new local property tax levy for cost-of-living weighting. Its original purpose was to fund teacher salary enhancements, but that limiting provision was removed and no purpose for the additional funding was stated in the law. The

court noted that this weighting, like the LOB cap, further demonstrated that the State was not meeting its obligation to provide suitable financing. In addition, as with other property-tax based provisions, it had the potential effect of creating inequities based on assessed property values. Low-enrollment weighting provides adjustments for districts with fewer than 1,750 students; as enrollment decreases, the size of the adjustment increases. H.B. 2247 did not substantially change the low-enrollment weighting. In their January opinion and April order, the court had requested cost justifications for the low-enrollment weighting. In their oral arguments, the State could not provide any cost-based reason for using the 1,750 figure or for the weight's percentage. The court also found the extraordinary declining enrollment provisions of S.B. 2247 to be troublesome as they had the "potential to be extremely disequalizing because they are unlimited and have been designed to benefit a very small number of school districts" (p. 936). In support of its provision for the capital outlay cap in H.B. 2247, the State relied on the affidavit of a Representative who stated that the legislation had decided to set the cap at 8 mills after reviewing data from the Department of Education and hearing from various school districts. Because the provision was based on local property tax authority, the amount of revenue a district could raise would be tied to property value and median family income. This would not provide any equalization to those districts that would not be able to access this funding.

With regard to the financing formula as a whole, the court concluded that, "a continuing lack of constitutionally adequate funding, together with the inequity-

producing local property tax measures mean the school financing formula, as altered by H.B. 2247, still falls short of the standard set by Article 6, Section 6 of the Kansas Constitution" (p. 937). While H.B. 2247 provided for a Legislative Post Audit (LPA) cost analysis study, the court felt it was deficient because it would only examine what the cost of delivering kindergarten through grade 12 curriculum, related services, and other programs mandated by state statute. The court expressed that simply measuring the cost of "inputs" would not take into consideration the cost of "outputs"- achievement of measurable standards of student proficiency. In fact, nowhere in H.B. 2247 was there a reference to K.S.A. 72-6439(a) or (c), which provided the criteria used by the court in their January 2005 opinion to evaluate whether the school financing formula provided a constitutionally adequate education. Therefore, the court determined that as part of an appropriate remedy, the post audit study had to incorporate the consideration of outputs and Board statutory and regulatory standards, in addition to statutorily mandated inputs. The post audit report to the legislature also needed to demonstrate how this was measured. Due to the failure of the legislature to meet the requirements set out in its January decision, the court was faced with the need to order remedial action. The court expressed that "time was running out" for school districts to get their budgets ready for the 2005-06 school year. It concluded that additional funding must be made available for the 2005-06 school year to help meet the needs of school districts. The court decided not to wait for the results of the post audit study to determine the amount required, as it would not be completed until after the 2005-06 school year. Therefore, by utilizing the results of the A&M study,

the court held that the legislature would implement a minimum increase of $285 million above the funding level for the 2004-05 school year. This included the $142 million provided in H.B. 2247. The implementation beyond 2005-06 would be contingent upon the results of the study directed by H.B. 2247 and the opinion of the court. The court also held that, if (1) the post audit study was not completed or submitted in time for the legislature to act upon it during their 2006 session, (2) the post audit study was judicially or legislatively determined not to be a valid cost study, or (3) legislation was not enacted based upon actual costs of providing a suitable system of finance that would equitably distribute funding, the court would consider ordering that, at a minimum, $568 million in increased funding would be implemented for the 2006-07 school year. In addition, the court ordered that the new funding authorized by H.B. 2247's provisions regarding the increased LOB, the cost-of-living weighting, and the declining enrollment provisions were stayed. The remainder of H.B. 2247, as amended by the legislature in compliance with the court's opinion, would remain in effect for the 2005-06 school year. The court retained jurisdiction of the appeal and noted that it would take further action if necessary to ensure compliance with its opinion.

Montoy v. State
138 P.3d 755 (Kan. 2006)

This was the fifth time this case had been before the Supreme Court of Kansas since the district court *sua sponte* dismissed the case in November of 2001. In the

first appeal by the plaintiffs, the Supreme Court reversed the district court and remanded for further proceedings in *Montoy v. State,* 275 Kan. 145, 62 P.3d 228 (2003) (*Montoy I*). On remand, the district court held that the Kansas School District Finance and Quality Performance Act (SDFQPA), K.S.A. 72-6405 *et. seq,* was unconstitutional. The defendants appealed, and the Supreme Court affirmed the district court in part, concluding that the legislature had failed to make suitable provision for the finance of the public schools as required by Article 6, Section 6 of the Kansas Constitution. *Montoy v. State,* 278 Kan. 769, 120 P.3d 306 (2005) (*Montoy II*). The court set a deadline of April 12, 2005, for the legislature to correct the school finance formula. The legislature enacted changes to the formula under H.B. 2247. In *Montoy v. State*, 279 Kan. 817, 112 P.3d 923 (2005) (*Montoy III*), the court reviewed these legislative changes and found that H.B. 2247 "failed to provide a significant funding increase, it still failed to provide constitutionally suitable funding for public education..." The court used the results of the Augenblick & Meyers (A&M) study as a means to determine the cost of adequately funding a public education and ordered the legislature to implement for the 2005-06 school year a minimum funding increase of $285 million above the 2004-05 funding level. This amount represented one-third of the $853 million estimated cost found in A&M's recommendations. The court retained jurisdiction and stated that it would take further action if the legislature did not comply with its opinion. One option the court would consider would be to order an increase in funding the remaining two-thirds of A&M's recommendation, which would amount to $558 million for the2006-07 school year.

The governor called the legislature into special session, but by July 3, 2005, the legislature had still failed to comply with the court's opinion. The court then issued an order directing the parties to appear on July 8, 2005, to show why the court should not enter an order enjoining the expenditure and distribution of any funds for the operation of Kansas schools pending the legislature's compliance with the court's June ruling. On July 6, 2005, the legislature enacted S.B. 3 which provided a funding increase of $289 million. Among other things, S.B. 3 increased the BSAPP; increased the at-risk weighting; increased funding for special education; lowered the enrollment cut-off for low enrollment weighting and amended the cost study provision to require the Legislative Post Audit (LPA) to conduct two cost studies. One study would look at the cost of inputs, and the other would estimate the cost of meeting student performance outcome standards adopted by the State Board of Education. The parties appeared before the court on July 8, 2005, and all agreed that S.B. 3 complied with the court's June 3 order. The court approved the school finance formula, as amended by S.B. 2247 and S.B. 3, "for interim purposes." *Montoy*, Order of July 8, 2005. The court retained jurisdiction to review any further legislative action that modified or made permanent the temporary solution found in S.B. 3. On January 9, 2006, LPA completed its cost study and submitted it to the legislature. The legislature referred to the report throughout its 2006 session and sought further input and explanation as needed from LPA. Using the information in the study, the legislature enacted changes to the school finance formula in S.B. 549, which was signed by the governor in May of 2006. On May 22, 2006, the court ordered all

parties to brief and argue the issue of whether S.B. 549 satisfied the court's prior orders.

S.B. 549 adopted a three-year funding scheme for kindergarten through grade twelve public education. Rather than simply modifying the provisions that had been found in S.B. 2247 and S.B. 3, the legislature fundamentally changed the way K-12 was funded in Kansas. It created two additional at-risk weightings: the high-density at-risk weighting, which would provide additional at-risk funding for districts with high percentages of at-risk students; and the nonproficient at-risk weighting, which would provide $10 million in additional funding in 2006-07 for students who were not proficient in math or reading. S.B. 549 would also provide flexibility to local districts to spend the money they received for at-risk, preschool at-risk, and bilingual education programs interchangeably. S.B. 549 also made significant changes in the LOB. The original formula provided a feature designed to equalize the ability of districts with lower property wealth to raise money through the use of the LOB. Districts with an assessed valuation per pupil (AVPP) below the 75th percentile would receive supplemental aid in an amount that would bring them up to par with a district at the 75th percentile. Districts with an AVPP above the 75th percentile would not receive this aid. The new legislation increased the LOB threshold from the 75th percentile to the 81.2 percentile of AVPP. The LOB cap on supplemental general state aid was raised to 30 percent for the 2006-07 school year and 31 percent for 2007-08, with an election required to adopt an LOB above 31 percent. S.B. 549 further required that such supplemental state aid be used to meet accreditation

standards and improve student performance. While the original purpose of the LOB was to allow individual districts to fund enhancements to a constitutionally adequate education, S.B. 549 would require that school districts use LOB state aid moneys to fund basic educational expenses. In addition to those changes, S.B. 549 increased the BSAPP; lowered the low enrollment weighting adjustment; increased at-risk weighting; and increased the reimbursement for special education excess costs to 92 percent. S.B. 549 would provide a total funding increase of $466.2 million.

The court determined that the constitutionality of S.B. 549 was not before the court. It was new legislation, and if it were challenged, it would have to be litigated in a new action filed in the district court. The school finance system that the court found to be unconstitutional in *Montoy II* and *Montoy III* had been completely altered by S.B. 549. The only issue for the court to determine in this case was whether the legislation passed in 2005 and in S.B. 549 complied with the previous orders of the court. The court first held that there was "no question that the legislation had substantially responded" (p. 763) to their concerns that the funding formula failed to provide adequate funding for school districts that had a high proportion of minority and/or at-risk and special education students as almost one-third of the increased funding was directed towards at-risk students. The court believed that the legislature had also responded to their concerns about the equitable distribution of funding. In the court's opinion, their concerns about low enrollment weighting, at-risk funding, and wealth-based disparities inherent in the LOB had been addressed. The court concluded that the "legislature's efforts in 2005 and in S.B. 549 constitute substantial

compliance" (p. 765) with their prior orders. While the court recognized that it could remand the case to the district court to allow the plaintiffs to amend their pleading to challenge the new school funding formula, it elected not to do so. The changes made in S.B. 549 had so altered the formula that the court determined the school finance formula that had been the issue in the case no longer existed. There were no facts in the record from which the court could determine how the formula would operate over the next three years. The Supreme Court dismissed the appeal and remanded the case to the district court with directions to dismiss the pending case.

Judges Beier and Luckert concurred with most of the majority's opinion. However, they disagreed with the decision to dismiss the action. Both believed that the more appropriate way to respond was to retain jurisdiction, acknowledge the factual deficiencies in the record, and remand to the district court for further proceedings focused on the constitutionality of the finance system found in S.B. 549. While they agreed that the legislature had made substantial efforts to improve the school finance system, they believed the new legislation needed to be studied further to determine if there was a need for further remedial action.

Chapter 11

Negligence

Suits by outsiders filing claims for negligence against school districts were fairly rare in the time frame studied. This chapter contains only two cases filed by outsiders claiming negligence on the part of a school district. One involves an accident involving a school bus and the other was filed by a parent injured as he was leaving a school gymnasium. As with previous negligence cases, the Kansas Tort Claims Act (KTCA) was utilized by the court in making their decision in the case brought by the parent. In order to avoid liability, a school district must prove that it falls within one of the exceptions found in K.S.A. 75-6104. One exception to liability is the recreational use exception found in K.S.A. 75-6104(o). Injuries occurring on public property used for recreation of any kind are typically not compensatory unless the school district is guilty of "gross and wanton" negligence. Ordinary negligence on property used for recreation is held immune from claims in the state of Kansas.

Felix v. Unified School District No. 202
923 P.2d 1056 (Kan. App. 1996)

Robert Felix brought a negligence suit against Turner Unified School District No. 202 following an accident involving his car and a school bus. On May 25, 1994, Robert Felix's son was driving his car when he encountered a Turner school bus on an "S" curve and hit a guardrail. Turner stipulated to ownership of the school bus and

the damage estimate for Felix's car. At the close of Felix's case, Turner "moved for judgment" and argued that Felix had failed to show that the school bus driver was Turner's agent. The district court denied the motion and awarded Felix damages, costs, and attorney fees pursuant to K.S.A. 60-2006. Turner appealed the decision and argued that the district court had erred in denying its directed verdict motion.

The standard for granting and reviewing a directed verdict was established in *Hurlbut v. Conoco, Inc.*, 253 Kan. 515, 856 P.2d 1313 (1993). The court in *Hurlbut* found that when ruling on a motion for a directed verdict pursuant to K.S.A. 1992 Supp. 60-250 "the court is required to resolve all facts and inferences reasonably to be drawn from the evidence in favor of the party against whom the ruling is sought and, where reasonable minds could reach different conclusions based on the evidence, the motion must be denied and the matter submitted to the jury." 253 Kan. at 524. Felix argued that Turner had admitted to the agency relationship. The court, however, found this to be contrary to the pleadings and evidence they had before them. Paragraph 1 of Turners response to Felix's petition stated that "all allegations of fact and conclusions of law in plaintiffs' petition are denied except those admitted herein." Turner did not admit to an agency relationship with the driver of the school bus. Turner relied on the rule cited in *Alcaraz v. Welch*, 205 Kan. 163, 468 P.2d 185 (1970) in which the court held that "mere ownership of an automobile will not support an agency, and will not support liability." *Id.* at 167. Turner had stipulated to ownership of the school bus, but Felix had failed to prove that the bus driver was an agent or employee of the Turner school district. *Tice v. Crowder*, 119 Kan. 494, 240

P. 964 (1925) also discussed the relationship between ownership of a vehicle and respondeat superior. In Kansas, ownership of an automobile alone is not "sufficient to impute the negligence of the driver to the owner" (p. 1059). The court pointed out that the bus driver could have been an independent contractor or employed by an independent contracting company. Turner denied the driver's employment, agency, and negligence. Felix did not prove that the driver was an employee or agent of Turner. Therefore, the court found that he had failed to establish his case. The decision of the district court was reversed.

Poston v. Unified School District No. 387, Altoona-Midway, Wilson County
189 P.3d 517 (Kan. 2008)

On January 6, 2003, Kevin Poston went to the middle school to pick up his stepson from basketball practice. He entered the south doors of the school, which led into a commons area that was connected to the gym. Poston walked through the commons to a set of gym doors to let his stepson know he was there to pick him up. As he was leaving the school through the south doors, one of the door brackets came loose and fell on his head. Poston filed suit in which he claimed U.S.D. No. 387 was negligent for allowing the door hinge to become loose and failing to warn him of the danger. U.S.D. No. 387 responded by filing a motion for summary judgment arguing that the school district was immune from liability under the recreational use exception to the Kansas Tort Claims Act (KTCA). The District claimed that Poston's injury resulted from using public property that was intended or permitted for use as an "open

area" for purposes of recreational use immunity. Poston argued that the commons was not a recreational area; instead, it was used as a cafeteria and as an access point to much of the school. The district court found in favor of the school district, holding that the commons was a "transitional area" from outside the school into the gym. This made the commons an "appendage to, and therefore a part of, the gymnasium which is a recognized recreational use area" (p. 519). Poston appealed this decision. The Court of Appeals affirmed the district court's decision in *Poston v. U.S.D. No. 387*, 37 Kan.App.2d 694, 156 P.3d 685 (2007). Poston appealed, and the Supreme Court of Kansas reviewed the case. On review, Poston argued that in its affirmation of the district court's decision, the Court of Appeals expanded K.S.A.2007 Supp. 75-6104(o) beyond the application intended by the legislation. U.S.D. No. 387 countered this argument by claiming that because the commons provided access to the gym, and sometimes hosted recreational activities such as snack concessions and wedding receptions, it should fall under the recreational use exception.

In order to avoid liability, a governmental entity must prove that it falls within one of the exceptions found in K.S.A. 75-6104. One of these exceptions to liability is the recreational use exception found in K.S.A. 75-6104(o). This statute provides immunity to "a governmental entity when it normally might be liable for damages which are the result of ordinary negligence." The purpose of the recreational use exception is to encourage governmental entities to build facilities that benefit the public without fear of the high cost of litigation. The statute further provides that a governmental entity or employee would not be liable for damages "from any claim

for injuries resulting from the use of any public property intended or permitted to be used as a park, playground or open area for recreational purposes, unless the governmental entity or employee is guilty of gross and wanton negligence..." To establish that the exception applies in this case, U.S.D. No. 387 had to show that: (1) Poston claimed ordinary negligence; (2) Poston claimed the negligence was the proximate cause of his injuries; and (3) Poston's injuries resulted from the use of a qualifying property. It had been established in the previous trial that Poston's injuries were the result of ordinary negligence that caused his injuries. Thus, the only dispute for the court to determine was whether the commons was a "qualifying property." To qualify, the commons had to be (a) public and (b) intended or permitted to be used as a park, playground, or open area for recreational purposes. The commons met the first prong of the test, as it was public property. The argument in this case related on the second prong. Had Poston been injured in the gym, there would be no issue regarding that requirement because a school gym had been found to be qualified "public property" for the purposes of K.S.A. 75-6104(o) in *Jackson v. U.S.D. No. 259*, 29 Kan.App.2d 826, 31 P.3d 989 (2001). In making its decision in the case at hand, the district court relied on two Kansas cases, *Robison v. State*, 30 Kan.App.2d 476, 43 P.3d 821, and *Wilson v. Kansas State University*, 273 Kan. 584, 44 P.3d 454 (2002). In *Robison*, the plaintiff was injured when he slipped and fell in a wet hallway between the swimming pool at a community college and the locker room. The plaintiff in that case argued that because his injury occurred in a hallway, the defendants were liable. The court rejected that argument citing *Nichols v. U.S.D. No.*

400, 246 Kan. 93, 785 P.2d 986 (1990). In *Nichols*, a football player was injured as he left the football field and crossed a "grassy swale or waterway" between the field and the locker room. The court in *Nichols* had not focused on whether immunity applied when the injury occurred *between* the football field and locker room rather than *on* the field. Subsequent cases have interpreted *Nichols* as meaning that school districts are not liable for injuries occurring on or near a football field. The interpretation of *Nichols* was reaffirmed in *Wilson*. In *Wilson*, the Supreme Court of Kansas found the university to be immune from liability arising when a patron was injured while in a football stadium restroom. The court in *Wilson* held that although the restroom by itself had no recreational purpose, it was an "integral part of a football stadium." 273 Kan. at 589. The restrooms allowed patrons to enjoy the recreational purpose of the football games at the stadium without leaving. When the court applied *Wilson* to the facts of this case, it led to a similar conclusion. Although the commons was not used exclusively for recreation, it was an integral part of the use of the gym. Like the restrooms, the use of the commons to serve concessions allowed the public to enjoy the recreational events held in the gym. In addition, the commons was connected to the gymnasium and was a principal means for the public to gain access to the gym. The commons was more than just a cafeteria. It was used as a multipurpose room and some of those uses were integral to the recreational purposes of the gym. Therefore, the court found U.S.D. No. 387 to be immune from liability under the recreational use exception of K.S.A. 75-6104(o) for Poston's injury. The judgments of the Court of Appeals and District Court were affirmed.

Part IV

Miscellaneous Suits

Chapter 12

Miscellaneous

The eight cases within this chapter did not quite fit into any of the preceding classifications for education litigation. Six cases would most likely fall under the heading of "school organization" as they deal with such issues as consolidation, transportation, and school board matters. One case addresses a claim regarding the overtime pay of classified employees and another deals with the use of public school facilities by religious groups.

School districts create a "public forum" when they open their buildings to use by the school district community for meetings and discussions during nonschool hours. Once this public forum is created, a school district may not prohibit groups from using the facilities simply based on content of the group's intended speech. The Establishment Clause required schools to be neutral in their relationships with religious groups. So long as the policy of allowing equal access of both religious and non-religious groups passes the three-prong *Lemon* test, there will be no violation of the Establishment Clause.

The cases dealing with consolidation issues all occurred in the early 1980's. Kansas schools underwent major consolidations in the early 1960's. In his research of consolidation in the state of Kansas, Weeks (2010) found that the number of school districts decreased significantly, from 2,794 school districts in 1958 to 311 in 1969. Today there are 296 districts. One major contributor to this consolidation was a piece of 1963 legislation, which divided the state into 106 planning units, one for each

county with one additional unit in Johnson County. The lack of court cases in this area may well be due to the fact that little consolidation has taken place since the early 60's.

Matters with school board members are another topic within this chapter. K.S.A. 72-8205 governs the number of board members it takes to pass a vote during a school board meeting. No matter how many board members are present, four votes are required for an issue to pass. A simple majority will not suffice. Procedures for executive sessions during board meetings are defined in the Kansas Open Meetings Act, K.S.A. 75-4319. In general, the school board business should be discussed in public unless it deals with personnel matters.

The question of whether a teacher may serve on a school board was answered in *U.S.D. 501 v. Baker*. There is no legislation that specifically forbids teachers to serve as board members so the court had to analyze the issue under the common-law doctrine of incompatibility of office. Finding the position of a school board member to be in conflict with that of a teacher, the court determined that teachers who are still under contract with a district may not serve as school board members.

Hobart v. Board of Education of Unified School District No. 309
634 P.2d 1088 (Kan. 1981)

An action was brought to the court to enjoin the school board of USD 309 from holding an election to determine whether it had the authority to reduce the grade levels within one of its elementary schools from six elementary grades to two grades.

Prior to 1965, Mitchell Grade School had been operated by Grade School District #2C. In 1965, the territory of Grade School District #2C became incorporated into USD 309 as a part of the Kansas Unification Act. In 1980-81, Mitchell Grade School was comprised of grades K-5. At a school board meeting on May 11, 1981, the Board unanimously voted to conduct an election of the resident voters of the Disorganized School District 2C who lived in USD 309 to determine if the Board would be granted the authority to change the use of the school building to permit its use by less than six elementary school grades in compliance with K.S.A. 72-8213. It was further proposed that if the election passed, Mitchell Grade School would be reorganized to hold grades one and two. Nelson Hobart, a resident of Disorganized School District # 2C, requested an injunction against the school board's action. Hobart contended that the Board had no authority under K.S.A. 72-8313 to call an election for the purpose of reducing the number of grades from six to two. He further argued that K.S.A. 72-8313(e) established the number of grades that had to be offered to keep any attendance facility open and a school board has no legal authority to reduce the number of grades offered. The Board countered by arguing that boards of education are "endowed with general authority to organize and maintain schools, to include the authority to control and change grade configuration at attendance facilities" (p. 1091). After considering the facts, the district court denied Hobart's request and held that an election was not only permissible in this case, but required under K.S.A. 72-8213. Hobart appealed to the Court of Appeals, and the case was transferred to the Kansas Supreme Court for a decision.

At issue was whether the Board of Education had the authority to call an election to change and reduce the grade usage at Mitchell Grade School. The Supreme Court turned to state statute, case law, and regulations adopted by the Kansas Department of Education to make its determination. K.S.A. 72-8313(e) stated that nothing in that statute could be deemed to limit the authority of a school board to change the use of any attendance facility, "so long as at least three (3) high-school grades, three (3) junior high-school grades, or six (6) elementary school grades are offered in such attendance facility." An attendance facility was defined as a school building that had been the property of a disorganized school district, but was owned by the unified district. The court found no statutory provision other than subsection (e) which set a minimum grade usage in any attendance facility. Because the legislature had not set requirements for minimum grades other than ones set for the disorganized districts, the court looked to regulations adopted by the Kansas Department of Education. The court found no provision in these regulations setting a minimum number of grades to be maintained at an attendance facility. In fact, K.A.R. 1981 Supp. 91-30-14(a) provided that an "an accredited elementary school shall be organized to include any combination of grades kindergarten through nine (9)." When the court considered this regulation along with K.S.A. 72-8313(e), which restricted the authority of the board to reduce grade usage in an attendance facility, it concluded that the statutory limitation in K.S.A. 72-8313(e) merely drew the line where consent or an election would be required if a unified board wanted to close schools or reduce grade usage below the levels required at an attendance facility in a

disorganized district. The Supreme Court did not believe that subsection (e) was intended to set a minimum grade usage in Kansas schools. Under subsection (e), no election was required to reduce grade usage as long as the minimum levels prescribed were followed. However, if a unified district wanted to reduce grade usage of a building in a disorganized district to levels below the minimum of three high-school grades, three junior high-school grades, or six elementary grades, it would be required to gain consent from the constituents of the disorganized district to do so. Thus, the school board in this case was well within its authority to propose an election to determine if it could reduce the grade usage in Mitchell Grade School. The judgment of the district court was affirmed.

Provance v. Shawnee Mission Unified School District No. 512
648 P.2d 710 (Kan. 1982)

Pursuant to K.S.A. 72-8136a, the Shawnee Mission School District was divided into five geographical areas, or member districts. Antioch Elementary School was located in the North member district. Before unification in 1969, Antioch School was owed and operated by the Common School District No. 61. Those residents living within the boundaries of old school district No. 61 were still subject to a property tax levy, which was used to help retire the bond indebtedness of District No. 61. On September 22, 1980, the superintendent of Shawnee Mission recommended that Antioch Elementary be closed at the end of the 1980-81 school year. Subsequently, the Board adopted a resolution stating its tentative intention to close

the school. On December 17, 1980, after a public hearing, the Board made a final decision to close the school at the end of the 1980-81 year. A petition was submitted to the Johnson County Election Commissioner demanding that a referendum election be held on the issue of the Antioch closing. The election was held on April 7, 1981, and a small majority of voters voted in favor of keeping the school open. In deciding who could vote in the election, the school district followed K.S.A. 72-8136e(b) and (c) which provided in part that all of the registered voters living within the member district of the unified school district in which the affected school was located could vote at the election. The majority vote would then determine whether the facility would remain open. D. William Provance, who lived in the northwest area of the school district, approximately 2.7 miles from Antioch Elementary School, was not allowed to vote in the referendum election. Before the election, he filed a petition seeking a declaratory judgment finding the school district closing statutes to be unconstitutional because they limited participation in the referendum. He also sought an injunction prohibiting the continued operation of Antioch School and a writ of mandamus directing the Board to conduct all elections held pursuant to K.S.A. 8136e on a district-wide basis. After the trial, the district court held K.S.A. 72-8136e unconstitutional in part as violative of the 14th Amendment. An appeal was filed.

The main issue for the appellate court to determine was whether the Shawnee Mission School District, under the direction of a state statute, violated Provance's 14th Amendment right to equal protection by not allowing him to vote on the closing of Antioch Elementary. When ruling on the constitutionality of a state statute, "all

doubts must be resolved in favor of the statute's validity, and before it may be stricken down it must be clearly shown it violates the constitution" (p. 714). The court's duty is to uphold, rather than defeat, a statute whenever possible. Pursuant to K.S.A. 72-8136e, the school district created a classification. In one group were those registered voters living in the North member district, in the other group were all of the other registered voters living in the rest of the school district. The two classed were treated differently because one group was allowed to vote in the Antioch school referendum, while the other was not. The question for the court was whether the unequal treatment amounted to a denial of equal protection. When a special interest election is involved, it must be shown that the classifications bear some rational relationship to a legitimate state end, or "compelling state interest." The only way an Equal Protection Clause violation will be found is if the classifications are based on reasons that are totally unrelated to the pursuit of that state goal. In researching the history of K.S.A. 72-8136e(b) and (c), the court found it to be a statute of compromise. During the 1977 legislative session, House Bill 2320 was offered as a response to declining enrollment in the Shawnee Mission school district. It gave the Board the sole authority to close schools within the district. There was opposition to H.B. 2320 from patrons who wanted some say in the decision to close schools. During consideration by the Senate Education Committee, a senator offered "compromise amendments" that formed the basis for K.S.A. 72-8136e(b) and (c). The statute was created out of a need to develop a workable policy regarding school closings while giving consideration to the wishes of the voters. The State's purpose in

offering a public school system is to provide an environment where a quality education can be provided equally to all. In pursuit of that goal, a workable plan to allow for the closing of schools due to declining enrollment was needed. K.S.A. 72-8136e was the legislatures' attempt to meet this State purpose. In light of these findings, the appellate court determined that the statute bore a rational relationship to a legitimate state goal. The judgment of the district court was reversed.

State, ex rel., Stephan v. Board of Education of Unified School District No. 428
647 P.2d 329 (Kan. 1982)

This action was brought to the Supreme Court of Kansas by the State of Kansas on relation of Robert Stephan, Attorney General. The State asked that the court issue an order or writ to require the Board of U.S.D. 428 to provide students of that district with bus transportation. On unification, the Board accepted the territory of a separate school district known as Bissell's Point. Before unification, the Bissell's Point School District provided bus service for its students. Following unification, this practice continued for the Bissell Point area, but not for other districts within the area of U.S.D. 428. In June 1981, the Board voted to discontinue bus service to students residing in the Bissell Point area. The Board notified the parents of those students affected and informed them that the Board would contract with them for the transportation of their children at a reasonable rate per mile. During the fall of 1981, a questionnaire was sent to parents of pupils in the Bissell's Point area who were eligible to receive either bus transportation or mileage reimbursement. Over two-

thirds of those who responded to the survey favored mileage reimbursement. The Board requested a legal opinion from the Attorney General as to the extent of its duty to provide or furnish transportation under statutes. The Attorney General issued a formal opinion advising the Board it had a duty to provide transportation and "could not issue mileage reimbursement contracts except under limited special circumstances" (p. 330). After obtaining an estimate of the cost of providing bus transportation, the Board reaffirmed its earlier decision to end bus service to the Bissell Point area and to substitute mileage reimbursement contracts for the entire unified school district. This action by the Board resulted in action being filed by the Attorney General.

To make its decision, the court relied on the statutes governing the transportation of students by school districts. K.S.A. 72-8301(c)(5) provides as part of the definition of the words "provide or furnish transportation" as meaning the right of a school district to "reimburse persons who furnish transportation to pupils, students or school personnel in privately owned motor vehicles." K.S.A. 72-8302 relating to the transportation of students provides in relevant part that the Board "may provide or furnish transportation for pupils to or from any school of the school district. Every school district must provide or furnish transportation for every pupil who resides in the school district…" living more than 2.5 miles from the school building attended. At issue in this case was the conflict between parties in their understanding of K.S.A. 72-8304 which states in part that in cases where it is "impracticable to reach a student's residence" by the prescribed route, and where the residence is more

than one mile from the prescribed route; and in cases where it is "impracticable to schedule a bus" for the transportation of a student, the board of education may contract for the transportation of each student to the regular route or to the school building. Mileage contracts must provide for the payment at a rate not to exceed the rate fixed each year by the Secretary of Administration for public officials as prescribed in K.S.A. 72-3203. The court cited two prior Kansas Supreme Court cases concerning school transportation. Those were *Harkness v. School District*, 103 Kan. 573, 175 P. 386 (1918), and *Kimminau v. Common School District*, 170 Kan. 124, 223 P.2d 689 (1950). Under state statutes in effect when those cases were decided, the court held that a school district had the option to pay the people transporting students or to furnish transportation by bussing. *Kimminau* had been decided under the laws that appeared in the General Statutes of 1949. Those statutes were rewritten in 1968 and the new laws concerning transportation of students appeared in K.S.A. 1969 Supp. 72-8301 *et seq.* The only change of note between the statutes was in the rate of reimbursement. The Attorney General argued that 72-8304 limited the circumstances under which mileage reimbursements could be made to the existence of one of the two situations mentioned in the statute. According to the Attorney General, it must either be impracticable to reach a student's home and the student resides one mile from the route, or it must be impracticable to schedule a bus for the student; a district should not be able to pay mileage for all eligible students. The court disagreed. The court found that there had been no great change in the meaning of the relevant statutes over time. The definition of the term "provide or furnish

transportation," continued to include both transportation by bus and mileage reimbursement. In light of the provisions in the present statutes, the court was of the opinion that the holdings with regard to providing transportation in *Harkness* and *Kimminau* were not changed. The court thus held that under the provisions of K.S.A. 72-8301 *et seq*. a school district may fulfill its obligation to "provide or furnish transportation" for students (1) by furnishing bus transportation, (2) by reimbursing persons who provide transportation in private vehicles, or (3) by a combination of bus transportation and mileage reimbursement. Therefore, the petition by the State was denied.

Country Hills Christian Church v. Unified School District No. 512, Johnson County
560 F. Supp. 1207 (D. Kan. 1983)

Country Hills Christian Church was a Kansas not-for-profit corporation that had been organized and operated as a religious and church organization. The church had never had its own facilities for Sunday morning services and so utilized various buildings in the city. Many of the previous facilities utilized were not easily accessible to the older members of the church due to stairs and other physical barriers. The pastor of Country Hills, Larry Kuhl, submitted requests to the school district for permission to rent space at one of the elementary buildings for Sunday morning services on special Sundays. These six Sundays were days the pastor expected larger than normal attendance, such as Thanksgiving and Christmas. All six requests were denied on the grounds that they would violate the policies of the district which only

allowed church organizations to rent school district facilities for "non-religious meetings." School district facilities had been rented by non-school groups on numerous occasions. Examples of the various groups that had been permitted to rent facilities were the Democratic Party, a Hebrew academy, the Y.M.C.A., sports leagues and the Fellowship of Christian Athletes. School district policy No. 2000 only permitted use of school facilities for religious purposes, upon approval of the school board, for: (1) emergency situations; (2) the destruction of the usual meeting place; (3) the lack of any other available facility; (4) the hours of use do not occur immediately before, during or after any activity involving students; and (5) the applicants pay all costs associated with renting the school district facility. The school district would review all requests for use of facilities and any that were considered religious were denied. Country Hills Church brought a lawsuit against the district for declaratory judgment and a permanent injunction ordering the district to make school facilities open for purposes of religious worship.

The first question addressed by the court was whether the school district had created a public forum for non-school groups. Traditionally, a public forum was a park or a public street. However, those are not the only public places subject to the protection of the First Amendment. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969) held that a public school is a public forum for its students and teachers. Numerous other cases have found that if the public school is opened to the school district community during non-school hours, then it becomes a public forum for the community. USD 512 created a

public forum by and through their policies which allowed outside groups to use their facilities during non-school hours. Guidelines can be imposed which regulate the activities of outside groups, but they must be reasonable. Once a forum is opened to assembly or speaking by some groups, a school district may not prohibit other groups from assembling or speaking on the basis of what they intend to say. Exclusions from use of a public forum "may not be based on content alone, and may not be justified by references to content" (p. 1215). The plaintiffs in this case were prohibited from using school facilities solely because of the content of their proposed speech. The court found this to be a violation of the First Amendment. The school district argued that allowing buildings to be used for religious purposes would be a violation of the Establishment Clause. The court held that an equal access policy would not violate the Establishment Clause if it passed the three-part test from *Lemon v. Kurtzman*, 403 U.S. 602, 91 S. Ct. 2105, 29 L.Ed.2d 745 (1971). Applying the first prong, the court found that opening school facilities to community organizations for educational, cultural, political and other activities were entirely secular purposes. The school district did not "undertake to endorse these groups nor promote their views or ideals" (p. 1218). Allowing equal access to religious groups for purposes of worship would not weaken these secular purposes. Next, the court sought to determine if an equal access policy would advance or inhibit religion. Because an equal access policy permits all community groups to use school facilities, religious groups would share in the benefits with all of the other groups. This would neither advance nor promote religion. In terms of the third prong, the court found no excessive entanglement in an

equal access policy. In fact, the court believed that the school district's current policies presented a high degree of entanglement because the district had to determine in every questionable case what words and conduct constituted religious use or worship. An open access policy would eliminate the need for the school district to determine what uses were religious and what were not. The court found that the Establishment Clause "did not justify excluding the plaintiffs' religious services from School District buildings" (p. 1219). The court further held that the school district policies in question were unconstitutional and void. The defendants were ordered to permit the plaintiffs to use school district facilities for religious purposes during non-school hours on the same terms as other community organizations.

The school district made a motion for a new trial, but it was denied by the court.

Unified School District No. 407 By Boatright v. Fisk
660 P.2d 533 (Kan. 1983)

On February 8, 1982, Robert McCobb resigned from his position (position 7) as board member. On April 26, 1982, board member Elmer Svaty resigned as well (member 3). At the board meeting on May 10, 1982, which all five remaining board members attended, a motion was made and seconded that Lee Fisk fill position 7 on the school board. The vote for Fisk was three to two in his favor. On June 3, 1982, Fisk filed his oath of office with the election commissioner. On June 10, 1982, action was filed in court on behalf of U.S.D. 407 for a determination of whether a three to

two vote was sufficient to legally name Fisk to the board. While that suit was pending, at the June 14, 1982, board meeting it was moved and seconded that Jack Stoller be appointed to fill position 3. Again, the vote was three to two in favor of Stoller. Only five members were present because Fisk did not attend. Later during that meeting, Charles Wilson, position 5, resigned from the board. On June 21, 1982, the district court determined that Fisk had been duly appointed to position number 7. On June 22, 1982, Stoller filed his oath of office. At the next regular board meeting on June 29, 1982, some of the board members questioned whether Stoller could be named to the board. They argued that because there were six board members at the time the vote was taken on Stoller, a three to two vote would not have been a majority and so was insufficient. They decided to take a new vote to fill position 3. At the June 29 meeting, the board was back to five members due to the resignation of Wilson and the appointment of Fisk, with Stoller's appointment still undecided. The names of Jay Thielen and Stoller were placed before the board and Thielen was appointed to fill position 3 on a three to two vote. On July 14, 1982, the matter again went before the court to determine whether Stoller or Thielen, or either of them, were duly appointed to position 3. The district court held that Stoller had been duly appointed at the July 14 meeting. The district court ruling was appealed by different parties. The school district appealed all rulings of the court to determine whether Fisk, Stoller, or Thielen were duly appointed to the school board, and whether a school board could conduct business, at a regular meeting, which was not included in the published agenda. Fisk and Thielen appealed from the ruling that Stoller was

appointed to position 3, and Stoller appealed the ruling that Fisk was appointed to position 7. Fisk and Thielen also appealed from the district court's holding that the published agenda of a school board meeting could be amended at the meeting. To further complicate matters, two original board members were recalled from office at a special election held on November 2, 1982. This left the school board with two original board members, Fisk claiming position 7 and both Stoller and Thielen claiming position number 3. In order for the school district to remain open and for the board to be able to carry on its business, the appellate court entered an emergency order authorizing the two remaining original members, along with Fisk and Stoller, to serve on the school board.

The appellate court sought to answer two questions: (1) does a school board have the authority to consider matters at a board meeting that were not contained in a published agenda, and (2) how many votes are required to fill a vacancy on a school board? To settle the first issue, the court turned to K.S.A. 75-4318 which provides in relevant part that "(b) notice of the date, time and place of any regular or special meeting of a public body…shall be furnished to any person requesting such information…" and "(d) prior to any meeting…any agenda relating to the business to be transacted at such meeting shall be made available to any person requesting said agenda." The school board's written rules provided that "the superintendent shall make an agenda for each regular meeting and shall mail a copy of each agenda to members of the Board of Education" (p. 536). The rules also required that the agenda be mailed to the news media no later than 5:00 p. m. on the Friday before the regular

meeting. The appellate court noted that K.S.A. 75-4318 contained no requirement that a public body prepare and publish an agenda. It simply states that if an agenda is prepared it should be made available to anyone requesting a copy. The board procedures of U.S.D. 407 included an item on the agenda designated as "consent calendar" and at the beginning of every board meeting, additions or deletions could be made to the published agenda. At the July 14 meeting, the matter of making an appointment to fill position 3 was brought up as an item on the consent calendar and was approved by a five to nothing vote. Accordingly, the appellate court held that with no statute or board rule specifically prohibiting a school board from amending its previously published agenda, the agenda could be amended at any regular board meeting. The second issue addressed was whether the appointments of Fisk by a three to two vote of a five-person school board and the appointment of Stoller by a three to two vote on a six-person board were legal. The court had to consider several statutes in reaching a decision. K.S.A. 72-8205 provides in relevant part that "a majority of the full membership of the board shall constitute a quorum for the purpose of conducting any business of the school district, and the vote of the full membership of the board shall be required for the passage of any motion or resolution." K.S.A. 25-2022 provides that boards have the power to "fill by appointment any vacancy which occurs." K.S.A. 25-2022b deals with excessive vacancies on a school board and provides that if the membership of a board is less than four, the governor shall appoint sufficient members so that the membership totals four. The four members then have six months to appoint members to fill the remaining vacancies. The court

found that the words "full membership of the board" in K.S.A. 72-8205 clearly meant seven people, thus a majority of that membership would be four. K.S.A. 25-2022, which grants authority to a school board when it consists of four or more members, does not specify the number of votes to fill a vacancy. However, in the court's opinion, there was no reason for it to do so. When read in connection with the statute that gives the school board its general authority, it becomes "obvious" that a vote of four or more is required to fill a vacancy. The appointments of Fisk, Stoller, and Thielen all failed for lack of a sufficient vote. In order for U.S.D. 407 to continue to function, the court decided to hold its final opinion for thirty days after the mandate was issued or until the governor appointed additional people to the school board to bring its membership up to four, whichever occurred first. The judgment of the district court was affirmed in part and reversed in part.

State v. Board of Education of Unified School District No. 305, Saline County
764 P.2d 459 (Kan. App. 1988)

The board of education of U.S.D. 305 faced an asbestos removal crisis and placed the issue before the public as a bond election to fund the removal process. The dollar amount placed in the bond election for removal of the asbestos was determined by architect's estimates. Actual bid amounts were submitted about two weeks before the election. When the bids were opened, four nonelected administrators learned that the actual bid amounts were almost double the amount placed on the ballot for election. None of the four administrators informed the Board or the public of the

difference in the amounts until after the election. On April 11, 1987, the Board held a special meeting and met in executive session for all but the opening and closing minutes of the meeting. During that time, the Board discussed the failure of the four administrators to inform the Board of the bid amounts; the extent of the administrators legal rights; whether other people could have had pre-election knowledge of the bids; whether an investigative committee should be formed; who could serve on such a committee; and what compensation for committee members might be in order. Much of the discussion, according to Vicki Price, Board president, centered on who might be available to serve on an investigative committee without a conflict with the four named administrators or school board members. The State claimed that the April 11 meeting went beyond the scope of the stated reason for going into executive session, which was "personnel matters relating to nonelected personnel." The State further claimed that the Board also violated the Kansas Open Meetings Act (KOMA) during a meeting held on May 20, 1987, when it voted to go into closed session and stated its reason as being "for the purposes of discussing personnel matters of non-elected personnel because if this matter were discussed in open session it might invade the privacy of those discussed" (p. 460). The State argued that the motion did not meet the purpose and justification requirements of the KOMA. The district court found that the Board had not violated the KOMA at either meeting. The State appealed.

The purpose of the KOMA, K.S.A. 75-4319 *et seq.*, is to promote an informed electorate through the open conduct of governmental affairs. On appeal, the burden

was on the school board to show that the executive sessions in question did not violate the KOMA. In regards to the April 11 meeting, the question for the court was whether the Board exceeded the limitation of the KOMA, which provided that "no subject shall be discussed in closed session except personnel matters of non-elected personnel." While the KOMA does not specifically define "personnel matters," the court noted that it had been suggested that purpose of the exception was to protect privacy rights of employees, protect reputations, and encourage qualified people to remain in government employ. The appellate court could find no Kansas cases that were directly applicable to the case at hand, but it was able to use federal cases as a guideline. The Sunshine Act, 5 U.S.C. Section 552b (1982), like the KOMA, provides that the government's business should be conducted in the open and exceptions to an open meeting are narrowly construed. Federal cases finding a violation of the Sunshine Act have acknowledged that if the separation of "exempt and nonexempt topics would make a coherent discussion impossible, then it may be reasonable to close an entire meeting." *Common Cause v. Nuclear Regulatory Commission,* 674 F.2d 921(D.C.Cir.1982). As it applied to this case, the district court had found it would have been "burdensome and impractical" to separate the topics of the April 11 meeting into open and closed sessions. There was too much of a connection between the four administrators, whose privacy needed to be protected, and the events discussed to allow the board fluid transition between the topics that could be discussed in an open meeting and those that needed to be kept confidential. The appellate court agreed with the district court's rationale. Next, the court

addressed the motion made by the Board at the meeting held on May 20, 1987. The wording of the motion for the May 20 meeting was basically the same as for the April 11 meeting. As the State had no problem with the April 11 motion, the court did not see why it should have a problem with the May 20 motion. K.S.A. 75-4319(a) provides that public bodies may go into a closed session by making a motion that states the reason for closure, the subjects to be discussed, and the time the open meeting will resume. "Personnel matters of nonelected personnel" is a subject that may be discussed in a closed session. The appellate court found it to be "logical that the privacy rights of nonelected personnel subject to discussion was sufficient justification for a closed session to meet the KOMA" (p. 462). Accordingly, the judgment of the district court was affirmed.

Unified School District No. 501, Shawnee County, Kansas v. Baker
6 P.3d 848 (Kan. 2000)

Linda Baker had been employed as a teacher for U.S.D. 501 since 1984. Baker was elected to the Board of Education in 1999 and assumed her duties on July 1, 1999. The school district brought declaratory judgment action seeking to find out whether Baker could serve as a member of the Board while she was employed by the district. The Board argued that holding both positions violated Kansas statutes and the common-law doctrine of incompatibility of office. If Baker was indeed allowed to hold both positions, the Board claimed that Board Policy 1050 would prevent her from receiving her teaching salary. Board Policy 1050 stated, "board members of

Unified School District No. 501 shall not receive compensation for services rendered as an employee of the school district." The district court granted summary judgment in favor of Baker finding that: (1) the legislature had not specifically prohibited teachers from serving as school board members, (2) the Board's claim of incompatibility of office was supplanted by legislature, and (3) Board Policy 1050 was *ultra vires* and void as an impermissible attempt to delineate who is qualified to serve on the Board. The school board appealed and the case was transferred on motion to the Kansas Supreme Court.

The Supreme Court acknowledged that there was a lack of clarity in Kansas statutes regarding this issue and cited four different Attorney General (AG) opinions that addressed this matter and came to opposite conclusions. Legislative exclusions of school board membership are found in K.S.A. 72-8202 *et seq.* Nothing in the language of these statutes expressly forbids teachers from serving on school boards. In examining prior language of the statute, the court could find no legislative intent on the question of whether a teacher could serve on a board. Since 1979, eleven bills to prohibit teachers from serving on the school board had been introduced in legislature and none passed. Baker argued that the failure to pass any of these bills indicated the legislature's intent to allow teachers to act as school board members. The Supreme Court, however, noted, "Legislative inaction is not necessarily indicative of legislative intent" (p. 853). Because the legislature had neither specifically authorized nor prohibited teachers from serving as school board members, the court determined that it must analyze the issue under common-law doctrine of

incompatibility of office. The incompatibility doctrine holds that the same person may not hold two offices that are incompatible with each other as a matter of public policy. Whether or not the person draws a salary from the positions is not the focal point, it is based on public policy considerations. The Supreme Court reviewed the opinions of courts in other states that had considered the same issue. In doing so, the court found that other states have held the offices of teacher and board member are incompatible. The court came to the conclusion that Baker's positions were also incompatible. By assuming the role of a teacher and school board member, Baker occupied one position that was subordinate to the other. As a Board member, she was the employer, and as a teacher, she was the employee. In the court's opinion, it was a clear conflict of interest for Baker to sit on a policy-making body that negotiated with the teachers' representative who was also her representative as a teacher. Baker, as a teacher, was subject to discipline by the school board. She could be nonrenewed or terminated by the school board on which she served. The court also pointed out that their research had not revealed a single case finding the positions of teacher and school board member compatible. K.S.A. 77-109 provides that the common law "as modified by…statutory law, judicial decisions…shall remain in force in aid of the General Statutes of this state." Thus, in the absence of clear legislative intent, the courts must rely upon common law. The remaining question for the court was whether the incompatibility doctrine produced a forfeiture of Baker's office on the school board or on her position as a teacher. Case law examined by the Supreme Court indicated that Baker's election to the school board acted as her resignation of

her teaching position. However, the court deemed it would be unfair to find that Baker had vacated her tenured teaching position. Instead, the court determined that because Baker had a contract with the school district her employment as a teacher would continue. The decision of the district court was reversed and Baker was disqualified from serving on the school board.

Holmes v. Unified School District No. 259
46 P.3d 1158 (Kan. 2002)

Brad Holmes and three other plaintiffs were employed as security personnel for USD 259 during a time when their holiday pay was not figured appropriately. After the school district found that there had been an error, it paid additional holiday compensation to all of the plaintiffs. The plaintiffs alleged they had not been fully compensated and sued the school district for additional pay. The district court denied the school district's motion for summary judgment and allowed the case to go to trial. After the bench trial, the district court found in favor of the plaintiffs and ruled USD 259 had to pay the requested additional sums for overtime. The school district appealed.

Policy 4504 (P4504) was the Board policy governing the rate of holiday pay. That policy was not followed as written even when the district realized it had underpaid the security personnel and tried to rectify the situation. P4504 required the Board to pay its security personnel triple for a national holiday and double time and a

half for Board-adopted holidays. The Board in this case paid the plaintiffs two times their rate of pay for the national holidays and one and a half times their regular rate for the Board-adopted holidays, then it provided one paid day off per holiday. The Board argued that being paid for a day off in addition to the aforementioned amounts of overtime equated the requirements of P4504. However, the plaintiffs were able to show that they lost money when paid for the one day off in addition to double time for national holidays and time and a half for Board-adopted holidays when compared to the amount they would receive if they were paid in accordance with P4504. The court determined that USD 259 had not followed Board policy and as a result, the plaintiffs lost money. The appellate court further held that the district court had correctly determined the amount owed the plaintiffs. Accordingly, the judgment of the district court was affirmed.

Conclusion

The 173 cases briefed in this study span almost thirty years. Fifty cases were brought by students, eighty-seven by employees, and thirty-six were filed by outsiders. School districts are much more likely to end up in litigation with employees than with students, as evidenced by the fact that exactly half of the total cases were brought by employees. As the table below shows, a majority of education litigation in the state of Kansas has been brought by employees challenging the termination or non-renewal of their contracts. School administrators would be wise to familiarize themselves with state statutes regarding evaluation deadlines, important dates for notification of nonrenewal and due process requirements for both tenured and non-tenured employees.

Categories/Subcategories	Number of Cases
Suits by Students (Total)	50
• Negligence	22
• Control of Behavior	11
• School Program	4
• Equal Opportunity Issues	13
Suits by Employees (Total)	87
• Discrimination in Hiring or Promotion	3

• Termination and Discipline	61
• Professional Negotiations	19
• Torts	2
• Miscellaneous	2
Suits by Outsiders (Total)	36
• Contract Issues	16
• Fiscal Issues	12
• Negligence	2
• Miscellaneous	6

In order to draw a comparison between the number and types of education law cases in the state of Kansas during the writing of Betty Martin Dillon's book and the completion of this one, it was necessary to utilize Dillon's categorization system. It was much easier to fit the cases within this dissertation into one of her more broad classifications than to attempt to read each of the cases in her book and place them in Imber & Thompson's typology utilized here. In addition, many of the cases briefed by Dillon occurred well before 1960 and would not fit into the current system of typology. It is important to remind the reader that the only cases included in this dissertation were published opinions found on Westlaw. It is likely that there were cases that were not reported in Westlaw or any other source that were heard in the courts. The comparisons presented in this conclusion were done to give the reader a sense of how the types of cases heard in the Kansas courts has changed over the years.

Dillon's book included cases in the Kansas appellate courts from 1868-1979. Her book was comprised of 504 cases relating to Kansas public education, which over the 111-year time span averaged to 4.5 cases per year. This dissertation contains 173 cases spanning the years from 1981-2009. Over the 28-year time period studied, that averages out to 6.4 cases per year. This might indicate that the rate of litigation related to education has increased slightly when comparing the two time spans. However, comparing a 111-year time span to only 28 years might not be a true reflection of the rate of litigation. There were likely spans of time in the past one hundred years that had little education litigation. Instead, these numbers seem to indicate that when looking at the number of appellate opinions the rate of education litigation in Kansas has remained fairly steady. A comparison of the number of cases does not seem to support any notion that education has been any more litigious in the past thirty years than it was in the one hundred years preceding.

While there does not seem to be support for the idea that the *rate* of education litigation has increased, a comparison of the number of cases within each category does show how the *types* of litigation in Kansas education litigation have changed over the years. Appendix A provides the specific numbers comparing the typology in Dillon's study to this one.

In Dillon's book, the category of "school organization" contained 140 cases. In this dissertation, only nine cases fell within that category. School organization was made up of cases filed over the establishment of schools, high schools, school property, and school boards. A review of these cases reveals the interesting history of

Kansas schools. By 1980, most of the issues regarding property, consolidation, and establishing school boards had been resolved. This could help to explain the low number of cases falling within that category today.

School finance was the largest category of education litigation in Dillon's book with 212 cases. That is in comparison to the 25 cases dealing with finance in this dissertation. The largest group of cases within that category were those Dillon described as "bond issues." There were no cases found in Kansas courts from 1981-2009 regarding bond issues. The greatest numbers of cases in school finance in recent history are those dealing with challenges to the state funding formula. There have been eight cases since 1994 that challenged the state's finance formula with more looming on the horizon.

Dillon's third group of cases dealt with matters of church and state. She had twelve cases in that category with the majority of those falling under the headings of either compulsory attendance or aid to churches. This dissertation contains two cases related to church and state. One on the use of public school facilities for religious purposes and one on the benediction and invocation given at a high school graduation. The low number of cases in Kansas within this category is interesting given the number that can be found nationally. Dillon suggests this might due to the "rural character of the state" (Dillon, 1981, p. 304). Kansas' rural nature could make it possible that even if a public school supports religious activities so long as the local community does not disagree, no court action is taken.

A fourth category of cases involves teacher and other school employee issues. While Dillon only had 58 cases within that category, this dissertation contains 78 cases. This makes up 45% of all cases reported in this dissertation. In both studies, teacher dismissal dominated the category with 42 cases found in the past 28 years. Imber & Thompson's national research from their 1991 article found that employees suing to contest their firing made up 67% of all reported opinions from 1960-1988 (Imber & Thompson, p. 233). While not quite as high as that national average, it would seem that statistic held fairly true in Kansas. The large number of cases dealing with employee termination would certainly indicate that school districts should place an emphasis on the knowledge of contract law and state statutes pertaining to due process and nonrenewal procedures.

The numbers in Dillon's fifth category of student rights were comparable, with 44 cases during the time of her research and 24 from 1981-2009. However, one category in this area has increased considerably in recent years: special education cases. Dillon did not find any cases that would fall under this heading; this study produced ten. Changes to the IDEA and the emphasis on providing an appropriate education to students with special needs, as well as the likelihood that parents of special education students today are much more aware of their rights, could be credited with this increase. The increase in SPED cases suggests that school districts would be wise to educate their administrators and teachers on relevant state and federal laws pertaining to the IEP process and FAPE.

Another category of cases more prevalent in recent times than in the past is that of tort liability. Dillon found fourteen cases that were attributed to torts, with ten of those falling under the description of liability due to the negligence of employees. From 1981-2008 twenty-five cases that could be placed under the heading of tort liability were found in Kansas. Of those twenty-five, twenty-two were claims of negligence against the employees in a school district, the majority of which were brought by students. School districts should ensure that all personnel are well versed in the elements of negligence and measures that can be taken to avoid that type of litigation.

Dillon's final category was that of civil rights. Several of the twenty-four cases found in her book dealt with racial segregation and the efforts to desegregate Kansas schools, with the most well known being *Brown v. Board of Education of Topeka.* Dillon found eighteen cases of racial discrimination brought by students. This study only produced two. In total, the current study found ten cases that could be categorized as civil rights issues with three falling under the description of racial discrimination among the faculty and three claims of discrimination based on a disability.

An examination of the Kansas court cases provided in both Dillon's book and the current dissertation provides a thorough look at the history of public education litigation in the state of Kansas. The court cases in each study are placed in chronological order thus providing a timeline of the number and types of cases throughout the years. The open-ended nature of this study allows for future updates

and it could be used as the first step for further research projects. The potential certainly exists for one to look back at historical events, such as the civil rights movement or the inception of Public Law 94-142, to determine whether a correlation exists between those events and the number of education litigation cases found in Kansas during those times. It would also be possible to compare the types and rate of litigation in Kansas to national findings over a similar time span. However it is utilized, this study provides a closer look into education litigation in the state of Kansas and its relevance to public school districts across the state.

Appendix A

The tables within this appendix compare the number and typology of cases found within Betty Martin Dillon's handbook and this dissertation. Percentages of each total were provided to give a better picture of how certain categories have changed over the years. Dillon's categories and subcategories were utilized for the most part. However, in a few instances sub classifications had to be added in order to place newer cases, such as challenges to the State funding formula, which did not fit into the older system.

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
School Organization (Total)	140 (27.8%)	9 (5%)
• Adjacent Territory	14	0
• Disorganization/Consolidation	30	3
• District Board Officers	13	3
• High Schools	37	0
• Local Organization as a District	8	0
• Role of County and State Reps	13	0
• School Acre	10	3
• School Buildings	13	0
• Textbooks	2	0

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
School Finance (Total)	212 (42%)	25 (14.5%)
• Actions by County Superintendents	7	0
• Bond Issues and Elections	48	0
• Construction of Schools	15	4
• Disorganization and Annexation of Property	9	0
• District Board Treasurers	17	0
• Federal Funds	1	1
• Furniture and Supplies	16	4
• Higher Education	3	0
• State School Fund (Bonds)	5	0
• No Fund Warrants	7	0
• Opposition to School Tax by Special Interest	33	0
• Reorganization Property Tax Levy	10	0
• Sin Taxes	1	0
• Tax Levies	36	3
• Tuition Recovery	4	0
• Challenge State Funding Formula	0	8
• Employee Insurance Benefits	0	3
• Unemployment Benefits	0	1
• Overtime Pay	0	1

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
Church and State (Total)	12 (2.4%)	2 (1.2%)
• Challenge Parochial Attendance	1	0
• Compulsory Attendance	4	0
• Flag Salute	2	0
• Aid to Churches	4	0
• School Prayer	1	0
• Use of Facilities by Religious Groups	0	1
• Benediction at Graduation	0	1

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
Employee Relations (Total)	58 (11.5%)	78 (45%)
• Certification	5	0
• Collective Negotiations	8	19
• Other School Employees	6	13
• Recovery of Wages by Teachers	12	0
• Teacher Dismissal	17	40
• Teacher Retirement	3	0
• Valid Teacher Contracts	7	3
• Supplemental Contracts	0	3

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
Student Rights (Total)	44 (8.7%)	24 (14%)
• Compulsory Vaccination	1	0
• Expulsion/Suspension	2	3
• Extracurricular Activities	2	3
• Hair and Dress Code	1	0
• Searches	1	3
• Student Transportation	13	0
• Tuition	20	0
• Truancy	1	0
• Uniform Textbooks	3	0
• Free Speech	0	1
• Censure of Library Books	0	1
• SPED/IEP Issues	0	10
• Peer-on-Peer Harassment/Bullying	0	3

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
Tort Liability (Total)	14 (2.8%)	25 (14.5%)
• Freedom from Liability Due to Negligence of Employees	10	22
• Use of School Facilities	4	1
• Worker's Compensation	0	2

Category/Sub Categories	Dillon's Findings	Fitzgerald's Findings
Civil Rights (Total)	24 (4.8%)	10 (5.8%)
• Economic Discrimination	1	0
• Opposition to Desegregation	1	0
• Racial Discrimination against Faculty	1	3
• Racial Discrimination against Students	18	2
• Sexual Discrimination	3	1
• Age Discrimination	0	1
• Discrimination based on Disability	0	3

Glossary

Action – a lawsuit in which one party (or parties) sues another.

Agency relationship – the relationship of a person (called the agent) who acts on behalf of another person, company, or government, known as the principal. The basic rule is that the principal becomes responsible for the acts of the agent, and the agent's acts are like those of the principal (Latin: respondeat superior).

Amicus curiae – Latin for "friend of the court," a party or an organization interested in an issue which files a brief or participates in the argument in a case in which that party or organization is not one of the litigants. Usually the court must give permission for the brief to be filed and arguments may only be made with the agreement of the party the amicus curiae is supporting, and that argument comes out of the time allowed for that party's presentation to the court.

Appeal – to ask a higher court to reverse the decision of a trial court after final judgment or other legal ruling.

Appellant – the party who appeals a trial court decision he/she has lost.

Appellee – in some jurisdictions the name used for the party who has won at the trial court level, but the loser (appellant) has appealed the decision to a higher court. Thus, the appellee has to file a response to the legal brief filed by the appellant.

Class Action – a lawsuit filed by one or more people on behalf of themselves and a larger group of people who are similarly situated.

Declaratory Judgment – a judgment of a court that determines the rights of parties without ordering anything be done or awarding damages.

Defendant – the party sued in a lawsuit.

Directed verdict – a verdict by a jury based on the specific direction by a trial judge that they must bring in that verdict because one of the parties has not proved his/her/its case as a matter of law (failed to present credible testimony on some key element of the claim or of the defense).

Eminent domain – the power of a governmental body to take private real estate for public use, with or without the permission of the owner. The owner must then receive "just compensation."

Et seq – and the following; it is commonly used to include numbered lists, pages or sections after the first number is stated.

Ex rel – on information supplied by.

Fee simple – an absolute title to land, free of any other claims against the title.

Gross negligence – carelessness that is in reckless disregard for the safety or lives of others, and is so great it appears to be a conscious violation of other people's rights to safety.

Injunction – a writ (order) issued by a court ordering someone to do something or prohibiting some act after a court hearing.

In limine – from Latin for "at the threshold," referring to a motion before a trial begins.

Interlocutory appeal – any court (state or federal) which hears appeals from judgments and rulings of trial courts or lower appeals courts.

Judgment notwithstanding the verdict – reversal of a jury's verdict by the trial judge when the judge believes there was no factual basis for the verdict or it was contrary to law. The judge will then enter a different verdict as "a matter of law."

Mandamus – Latin for "we order," a writ (more modernly called a "writ of mandate") which orders a public agency or governmental body to perform an act required by law when it has neglected or refused to do so.

Negligence – failure to exercise the care toward others that a reasonable or prudent person would do in the circumstances; or taking action which such a reasonable person would not.

Plaintiff – the party who initiates a lawsuit by filing a complaint with the clerk of the court against the defendant(s) demanding damages, performance and/or court determination of rights.

Plurality opinion – A plurality opinion is the controlling opinion when no majority opinion exists, consisting of the majority of the majority. It is written when only a majority of the majority of judges agrees on the reasoning behind the decision.

Prima facie case – a plaintiff's lawsuit or a criminal charge that appears at first look to be "open and shut."

Pro se – Latin term meaning “for himself.” A party to a lawsuit who represents himself.

Rational basis – a test of constitutionality of a statute, asking whether the law has a reasonable connection to achieving a legitimate and constitutional objective.

Remanded – sent back to the lower court from which the case was appealed.

Res judicata – Latin for "the thing has been judged," meaning the issue before the court has already been decided by another court, between the same parties. Therefore, the court will dismiss the case before it as being useless.

Respondeat superior – a key doctrine in the law of agency that provides a principal (employer) is responsible for the actions of his/her agent (employee) in the course of employment.

Review – the judicial consideration of a lower court judgment by an appellate court, determining if there were legal errors sufficient to require reversal.

Statute – a federal or state written law enacted by the Congress or state legislature, respectively.

Strict scrutiny – a test of constitutionality as it applies to suspect categories and fundamental rights. Application of strict scrutiny requires that there be a compelling governmental interest for the discrimination.

Sua sponte – Latin for "of one's own will," meaning on one's own volition. It usually refers to a judge's order that has been made without a request by any party to the case.

Summary judgment – a court order ruling that no factual issues remain to be tried and therefore a cause of action or all causes of action in a complaint can be decided upon without trial. It is appropriate only when there are no material facts in dispute and the moving party is entitled to judgment as a matter of law. The court views the evidence and all reasonable inferences in the light most favorable to the nonmoving party.

Tort – a civil wrong or wrongful act, whether intentional or accidental, from which injury occurs to another. Torts include all negligence cases as well as intentional wrongs that result in harm.

Ultra vires – Latin for “beyond powers,” refers to acts of a corporation and/or its officers outside the powers and/or authority allowed a corporation by law. In the cases within this book, a school board would be the example of a corporation.

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