

# Overview of General Liability, Workers' Compensation, and Employment Law Issues in K-12 Educational Institutions

by Frank Cavanaugh and Jenna Zerylnick

*This article examines tort liability, workers' compensation, and employment law issues that pose unique challenges and create exposure to K-12 school districts. The article also provides examples and practice tips for attorneys practicing in these areas.*

Public schools play an important role in our society as education providers and serve a *parens patriae*<sup>1</sup> function. They also offer a valuable social opportunity for children and are a significant part of most communities as employers. According to the Colorado Department of Education, there are 178 independent K-12 school districts in Colorado. These districts vary in size and, as a whole, are among the largest employers in Colorado, employing a variety of employees in many jobs. K-12 schools are public entities and therefore are subject to various federal, state, and local regulations. K-12 school districts face tort, workers' compensation, and employment liability unique to their role in our state.

This article discusses a great breadth of topics, providing a highlight of key issues that create liability exposure unique to K-12 school districts.

## General Tort Liability

K-12 school district liability is tied to the Colorado Governmental Immunity Act (CGIA), requiring review of how the CGIA operates and areas where immunity from tort claims is waived.

## K-12 School Districts and Governmental Immunity

K-12 school districts originate under the Colorado Constitution and are regarded as quasi-municipal corporations.<sup>2</sup> The CGIA limits tort liability in K-12 school districts.<sup>3</sup> K-12 school districts are public entities within the meaning of the CGIA.<sup>4</sup> Charter schools are also protected under the CGIA.<sup>5</sup>

The CGIA provides sovereign immunity from claims that lie in tort except for claims where immunity is expressly waived. Waived immunity is construed narrowly because the legislature eliminated

sovereign immunity as a doctrine when the CGIA was enacted; therefore, unless immunity is expressly waived, it exists. The CGIA recognizes that public entities require limited liability. Otherwise, taxpayers would have too great a financial burden in supporting unlimited liability.<sup>6</sup>

K-12 school districts covered by the CGIA and employees of K-12 school districts enjoy qualified immunity from personal liability for any alleged tort committed in the course and scope of employment.<sup>7</sup> "Public employee" is defined broadly under the CGIA and includes individuals not compensated in a traditional sense, as well as elected or appointed officials. K-12 school district boards and authorized volunteers who have acted for the benefit of a public entity, at the request of and subject to the control of the public entity, are also employees.<sup>8</sup> If suit is brought naming a public employee as a defendant, the public employee has the burden of showing that he is immune from suit. If that burden is met, to overcome the immunity defense, the plaintiff must show that the public employee's actions producing injury were willful and wanton.<sup>9</sup>

## Exceptions to Sovereign Immunity

The waived exceptions to sovereign immunity relevant to K-12 school districts fall into specific areas including injuries arising from: (1) the operation of a motor vehicle owned or leased by a public entity; (2) a dangerous condition of a public building; (3) a dangerous condition due to snow and ice on property leading to a public building; (4) a dangerous condition of any public facility located at a park or recreation area that is maintained by a public entity; and (5) the operation and maintenance of any public swimming facility by a public entity.<sup>10</sup> There is also a new waiver of immunity for injuries attendant to a violent act at school.



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The Colorado General Assembly amended the CGIA in the 2015 legislative session to include a waiver of immunity directed at K-12 school districts. This amendment contained in Senate Bill (SB) 213, known as the Claire Davis School Safety Act, was prompted by the 2013 shooting death of the Arapahoe High School student for whom the bill was named. This new section of the CGIA creates a legal duty of reasonable care by school districts to protect students, faculty, staff, and others from harm that is reasonably foreseeable within school facilities or during school-sponsored activities. The amendment only applies to actions for serious bodily injury or death resulting from violence. The amendment defines "serious bodily injury" at the time of the injury, or at a later time, as involving "substantial risk of serious permanent disfigurement, or substantial risk of protracted loss or impairment of function of any part or organ of the body." The amendment was originally drafted to have an effective date of January 1, 2013, but that was removed, leaving the effective date the date of signature. Any case filed for an occurrence after that date but before July 1, 2017 may go forward with discovery. When this bill was moving through the General Assembly, it was amended so that a plaintiff in a case arising from an occurrence before July 1, 2017 cannot seek damages. This allows districts time to get new procedures in place without facing potential loss.<sup>11</sup>

Previously, the CGIA waived immunity when the public entity purchased insurance coverage for the claim being alleged.<sup>12</sup> The idea was that public funds used to buy coverage should remove any claim of immunity that could be asserted against a member of the public.<sup>13</sup> Notably, being self-insured, rather than having purchased insurance, did not invoke a waiver of immunity.<sup>14</sup> That section of the CGIA has changed. It now only allows for a waiver of immunity by resolution, so long as the resolution is legislative in nature, meaning it requires a majority vote by the governing body.<sup>15</sup> To the extent that a K-12 school district waives immunity by a vote of the school board, that resolution removes governmental immunity.

### Caps on Claims

On April 19, 2013, the CGIA was amended to increase the cap on damages from \$150,000 to \$350,000 per person and from \$600,000 to \$990,000 per event. Colorado is one of 33 states to limit damages under waived immunity.<sup>16</sup>

### Examples of Waived K-12 Tort Scenarios

K-12 school district tort immunity involves situational review of areas where immunity is waived. Here are fact-specific examples where waiver of immunity is considered by a court.

#### Sidewalks/Playgrounds and Fields

School districts maintain large properties, some owned and others leased. Under either situation, school districts are responsible for the condition of property under their control. School district responsibility for these areas has been a source of litigation in several scenarios.

In a recent case, *St. Vrain Valley School District RE-1J v. A.R.L.*, a minor was injured while playing on a zip-line during lunch recess. The playground where the zip-line was located was part of the school grounds provided for public use by the school. The Colorado Supreme Court found that the minor's injury occurring on the playground, as a public facility, was an immunity-waived

tort. The zip-line and the collection of playground equipment was a public facility. For application of the recreation area waiver, the zip-line was part of the recreational facilities that included other equipment. The Court recognized that a single piece of equipment standing alone may not qualify as a public facility in a recreational area under this same exception.<sup>17</sup> Multiple pieces of playground equipment changed the character of the area into a public facility.

The recreation area immunity may apply for an injury occurring on a public facility (1) if the facility shares common features with other items in the recreational area waiver, (2) if legislative history shows that it was intended to qualify as a recreational area, and (3) if it is a component of a larger set of items promoting a broader common purpose.<sup>18</sup> Therefore, in *Young v. Brighton School District 27J*, a case resulting from an injury due to a slip and fall on a cement walkway at an elementary school, the sovereign immunity defense did not apply. The sidewalk was a public facility under this section waiving immunity. The location of the slip and fall and the sidewalk were key facts in the Court's decision. In *Young*, the sidewalk was adjacent to the school property and easily accessible by the public. After *Young*, the Colorado Supreme Court announced a three-part test to determine whether a location of an injury is within a recreation area. First, a court is to determine whether the location of the injury was within the putative recreation area. Then it must determine if the primary purpose of the area was for recreation. Finally, the court must consider whether the facility in question is located in the recreation area.<sup>19</sup>

CGIA waivers are not mutually exclusive, so an injury claim could potentially fall under more than one waiver. Further, designation of a facility by the school district as recreational or non-recreational is not dispositive of whether an area falls under a waiver of immunity. For instance, there is no requirement that an athletic field where a student sustains injury be designated as a recreation area for the recreation area exception to apply. In *Denmark v. Board of Directors, Auraria Higher Education Center*, non-designation of a field as recreational was not a defense to a claim when the field was open to the public and had been used for recreational purposes.<sup>20</sup> Although the field in question was recreational, the *Denmark* court recognized that most sports fields at schools serve educational purposes and, therefore, are not a recreational area within the immunity waiver.

Ice and snow on school sidewalks is not uncommon and can produce injury. The actual location of the injury, the condition of the sidewalk producing the injury, and any fact relevant to a premises slip and fall case are also relevant in a suit against a school district based on the condition of the sidewalk. In *Martinez v. Weld County School District RE-1*, the slip and fall generating a case against the district was not subject to an immunity defense. In *Martinez*, the ice and snow constituted a "dangerous condition," thus waiving school immunity for an injury claim. The slip and fall producing injury occurred at a "problem area" where the ice buildup was "chronic and continuing." Therefore, facts supported a finding that the school district had notice of the danger and failed to mitigate the situation.<sup>21</sup>

Fact-specific analysis was further demonstrated in *Stanley v. Adams County School District 27J*, when the court determined that a service road leading up to a cafeteria on a K-12 property was not a public highway, road, or street as defined under the CGIA. The driveway was not a typical public road because it only serviced the

entrance to the cafeteria. This configuration benefited the school district's property and, though accessible to the public, was not there to help the public access the school building. Given these circumstances, the school district remained immune from the slip and fall injury claim on the service road.<sup>22</sup>

### Facilities

The CGIA waives governmental immunity for injuries resulting from a dangerous condition of a public building. A dangerous condition under the CGIA is limited to a condition that should have been known to exist and that existed for long enough that, with reasonable care, the condition should have been discovered. Further, the existence of wind, water, snow, ice, or temperature cannot, standing alone, constitute a dangerous condition.<sup>23</sup> To state a viable claim under this immunity waiver requires that the injury occur in connection with a negligent act or omission by the governmental entity and not a third party. The claim must also arise out of constructing or maintaining the facility and not be due to the design of the facility.<sup>24</sup>

For example, in *Padilla ex rel. Padilla v. School District No. 1*, a teacher used a storage closet as a time-out area for an unruly student.<sup>25</sup> The student was put in the closet, placed in a stroller, and propped against an open door. The student fell backward, hitting her head. The Supreme Court considered plaintiff's argument that this particular use of the storage closet was a dangerous condition, but determined that the use of the closet was not a dangerous condition for purposes of waiving immunity. The Court focused on the alleged negligent act and whether it was related to the construction or maintenance of the building. The Court determined that the negligent act was not related to construction or maintenance; therefore, immunity was not waived.

*Booth v. University of Colorado* provides an example of a dangerous condition located in a facility. In *Booth*, a dry-erase board that was not attached to a wall fell and caused plaintiff's injury. The injuries would not have occurred if the board were properly secured to the wall.<sup>26</sup> Therefore, the failure to affix the board created a dangerous condition producing injury and immunity was waived.

Like most cases, the facts control the analysis. For example, in *Hendricks by and through Martins v. Weld County School District No. 6*, a dangerous condition was found to exist when a student was injured sliding into an unpadding wall in an elementary school gym.<sup>27</sup> If padding had been present, the injury might not have occurred. As a result, the court determined the district should have acted to remove the danger by adding padding. In *Lions v. City of Aurora*, the Colorado Court of Appeals addressed where a district's obligations to act affirmatively begin and end. The court determined that maintenance of a public facility does not require upgrading, modernizing, or otherwise improving a design or the construction of a facility.<sup>28</sup> It is difficult to reconcile adding padding to a school gym wall as not upgrading or improving the design of a facility. Because school districts are heavily involved in property maintenance, what is reasonable will vary from location to location.

### Transportation

According to the American School Bus Council, school buses are the largest single source of mass transportation in the country.<sup>29</sup> As expected, school district buses and other vehicles can give rise to tort claims against the district. For immunity to fall under the applicable waiver, the injury has to arise out of the use of a vehicle by a district employee working in the course and scope of employment. Further, the vehicle has to be owned or leased by the school district. If the injury is not connected to the use of the vehicle, immunity is not waived. For instance, in *Robinson v. Ignacio School District*, an injury arising out of a school bus ride that was caused by the intentional act of another student did not fall within waiver provisions of the CGIA. The injury did not manifest from the operation of the bus; the bus was simply the location for the injury.<sup>30</sup>

The requirements for immunity waiver are narrowly construed by the courts. For example, in *DiPaollo v. Boulder Valley School District, RE-2*, immunity was not waived when the plaintiff was injured exiting the back of a badly damaged school bus. The bus was being used as an exhibit in a safety display. It was not func-



tioning as a bus; therefore, the injury did not arise out of use of a bus as a vehicle. The school district did not waive immunity.<sup>31</sup>

### Negligent Supervision

Unless the tort fits within an expressed waiver, the school district is immune from that claim regardless of whether the claim is a recognized tort. For instance, in *Ex rel. Loveland v. St. Vrain Valley School District RE-1J*, the court determined that although Colorado recognizes the tort of negligent supervision, this tort is not among those where immunity is waived. Therefore, negligent supervision is not a supportable claim against a school district because it is not a specifically waived tort claim under the CGIA.<sup>32</sup>

Notwithstanding the bar against a negligent hiring claim, CRS §§ 22-2-119 and 109.7 require that a background check be performed on a prospective employee of a school district. Section 109.7 also allows a school district to conduct a background check on existing employees. Further, § 103.9 allows a civil suit against a district for failure to perform a background check if the person hired without a background check had a criminal background involving sexual assault and/or sexual assault on a child or child abuse and that individual commits one of those crimes against a person he came in contact with through employment with the district. These statutes went into effect on June 5, 2008 and there are no reported cases involving them.

### Workers' Compensation

While K-12 school districts have immunity under the CGIA for some tort claims, school districts are similarly situated to other employers in the workers' compensation setting. Workers' compensation is a no-fault system. For an injury to be compensable under the Colorado Workers' Compensation Act (Act), it must occur within the course and scope of and arise out of employment. In addition, the injured worker must fit the definition of employee and the school district must also be an employer under the Act. The difference between a school district and other employers in the workers' compensation setting is that there is a very broad range of jobs within a district, making the analysis of whether a claim is compensable fact specific. In addition, different employees within a district may have their own contractual employment arrangements, such as union contracts, that can affect the statutory benefits under the Act. This happens because contractual arrangements for these employees can alter the workers' compensation benefit package by creating duplicative benefit entitlement, thus requiring coordination between workers' compensation benefits and contractual obligations.

### Course and Scope and Arising Out of Employment

It is the claimant's burden to show that an injury occurred within the course and scope of employment. Generally, course and scope of employment is a question of time, place, and manner; however, the activity that produced the claimant's injury must also be sufficiently connected to claimant's ordinary job so that there is a nexus between the injury and the claimant's employment.<sup>33</sup> This is the "arising out of employment" requirement. The question of whether an injury arose out of employment requires the claimant to show a causal connection between employment and the injury so that the claimant's work is sufficiently related to the way the employee was hurt.<sup>34</sup> To determine whether an injury arose out of employment, the fact finder (an administrative law judge (ALJ))

must look at the totality of the circumstances, resolving conflicting evidence where needed.<sup>35</sup>

Analysis of the arising out of component of a work injury includes consideration not only of the work performed when the injury occurred, but also of methods of payment and specific facts attendant to the injury. For example, an elementary school counselor, recently certified by the Colorado High School Activities Association to referee volleyball games, was injured while refereeing an unsanctioned volleyball tournament at a middle school and filed a claim. This counselor was paid by the district to coach a different sport. An ALJ determined the claimant's injury did not arise out of the claimant's employment, rejecting the argument that being paid by the district for coaching a different sport somehow made the injury compensable. The ALJ gave weight to the fact that this was an unsanctioned sport at the middle-school level and it was unclear who was to pay claimant.<sup>36</sup>

The Act removes an individual from employee status if that individual is engaging in recreational activity. Recreational activities are not in the course and scope of employment and an injury during these activities does not arise out of employment. In *White v. Denver School District No. 1*, a substitute teacher was injured lifting weights at the school gym between periods. An ALJ found the claimant was engaged in recreational activity and, therefore, was not employed at the time of injury.<sup>37</sup>

Many compensability questions are the same for school districts as they are for other employers. For example, injuries that happen while going to or coming from work are usually not compensated under the Act. One notable exception to this rule includes work-related travel and parking lot injuries. Because districts maintain parking lots to be used by employees, an injury to an employee in those parking lots cannot be successfully denied based on the "going to and coming from rule." Further, to the extent that travel is required by a school district employee, injury attendant to travel cannot be successfully denied, so long as other course and scope requirements are met.<sup>38</sup>

### Employer/Employee Considerations

Most workers' compensation situations that are unique to K-12 school districts involve employee status. An employee and employer are defined under the Act in CRS §§ 8-40-202 and 203, respectively. "Employee" is defined broadly and covers a wide range of workers, while "employer" is not broadly defined. These definitions reflect reality in that there are more types of employees than employers. K-12 school districts are a good example of this. The districts themselves differ, but as employers they are all alike in their role relative to whom they employ. Unlike many employers that employ people doing jobs producing a specific product or providing a specific service, school districts employ people doing a wider range of jobs. This is a function of the broad types of work required to educate children.

For instance, school districts rely on volunteers. Volunteers serve a special role under the Act. Under CRS § 8-40-202(1)(a)(II), volunteers get the maximum rate of compensation when the volunteer-claimant is a "nonsalaried person in the service of the state of any county, city, town or irrigation, drainage or school district therein." The benefit rate is a primary cost driver in the Act because it determines the claimant's wage replacement rate and is a multiplier for medical impairment.<sup>39</sup> Therefore, determining whether an individual is an employed volunteer is of great importance to school

districts. Certain factual situations can make a volunteer also an employee under the Act.<sup>40</sup> Determining if a potential volunteer can maintain a claim against a school district for a work injury requires a determination of whether that individual is an employee.

In *Lammey v. Louis Palmer School District No. 38*, a volunteer teacher's aide who did not receive wages or benefits from the district but received a free meal and was reimbursed for out-of-pocket expenses was not an employee. The claimant was part of a parent-teacher organization program for volunteers. The ALJ determined that the claimant was not an employee or operating under an appointment, making the claimant an employee for purposes of a work injury.<sup>41</sup> The *Lammey* court gave weight to the claimant's lack of remuneration by the district, payment being an obvious sign of employment. Note that if the claimant's injury occurred due to a waived area of sovereign immunity, by denying that the claimant was an employee the school district could be exposing itself to a liability claim. The Act is the exclusive remedy for injured employees, but if the injured person is not an employee, that injured person may have remedies in tort. For instance, if Lammey's injury occurred when a dry erase board fell off a wall, a dangerous condition under *Booth*, the school district may have a tort loss rather than a work injury.

Most employees of a school district are employed in a traditional manner; however, employees for a school district can also include transient workers, workers who serve in a limited capacity for a limited time. For instance, in *Lyons v. CHSAA and Brighton School District*, an individual injured officiating a high school football game was found to be an employee of the district based on his \$37-

per-game payment. Claimant was not an independent contractor, as argued by the school district, because he could not negotiate his payment per game and had no control over the timing and location of games or over the details and duties of officiating.<sup>42</sup> Note claimant's low pay to officiate (\$37 per game) and contrast that to someone volunteering to officiate a game who is injured. If claimant's injury happened as a volunteer, his wage replacement rate per week could be the maximum, currently set at \$914.37 per week, as opposed to two-thirds of his average weekly wage officiating games at \$37 per game.

## Workers' Compensation Issues Unique to School Districts

The broad range of employment situations K-12 school districts have and the close confines in which employees interact with students raise unique issues for these districts in the workers' compensation setting.

### *Infectious Diseases*

As anyone with children knows, K-12 infectious diseases easily spread in schools. This is inevitable given the close interaction of students, teachers, and staff. "Occupational disease" is a term of art in the Act, whereas "disease" is not. An infectious disease may be occupational but not considered an occupational disease under the Act.

An "occupational disease" is defined in CRS § 8-40-201(14). The disease has to be "fairly traced to the employment as a proxi-

mate cause and which does not come from a hazard to which the worker would have been equally exposed outside of employment.” Occupational disease requires a “peculiar risk” for it to be related to work and compensable. The peculiar risk test limits the compensable scope to diseases that result from working conditions characteristic of the employment. The test requires that the hazards associated with the vocation producing the occupational disease must be more prevalent in the workplace than in everyday life or in other occupations.<sup>43</sup>

Most infectious diseases are contracted when an individual is exposed to the disease either directly or indirectly by a contagious carrier. An infectious disease, such as a virus, cannot be contracted gradually through repeated exposures. The traditional concept of an occupational disease in the workers' compensation system is a condition developing over a period of time with exposure to the offending activity or material.<sup>44</sup> An infectious disease, analyzed as a potential work-related condition, does not fit the model of an occupational disease. By contrast, an injury occurs when a traumatic event producing symptoms can be traced to a particular time and place.<sup>45</sup> Therefore, contraction of an infectious disease at a school district actually fits the model of an injury.

Colorado case law explains exposure to a disease as occupational; however, there is no guidance on the issue of whether a contagious disease can be compensable as an occupational disease, requiring exposure to a greater extent at work than away from work, or whether it is more akin to an injury based on a single exposure.<sup>46</sup> The problem for a worker claiming an occupational infectious disease is that the worker cannot pinpoint a specific incident where the disease was contracted. *Larson Worker's Compensation Law* identifies that the accidental injury test is the test applied in the majority of jurisdictions when considering whether contraction of an infectious disease can be treated as a compensable injury. Several jurisdictions in this majority require that there also be some unusual exposure associated with contraction of the disease. For instance, a nurse employed in a tuberculosis ward has unusual exposure to the disease secondary to the job. Under those circumstances, a nurse contracting tuberculosis would have a compensable injury.<sup>47</sup>

Colorado has considered a hepatitis C needle-stick scenario and drawn a similar analysis to the majority of jurisdictions identified by *Larson*. In *Tiltscher v. The Dialysis Partnership*, the claimant had multiple needle-stick events that could have caused the contraction of hepatitis C. The ALJ determined that, so long as the contraction can be sufficiently definite in time so as to show it was likely due to a needle stick at work, the specific needle stick need not be identified for a claim to be compensable.<sup>48</sup> A needle stick is easily identified as a specific trauma, and contracting a disease fits a similar analysis. It may be impossible to determine a point of contraction, but proof of repeated exposure to a setting where the disease was more prevalent than exposure outside of work should be sufficient to deem a disease occupational.

Most diseases spread in schools are of minor concern because they are treatable and/or run their course with little repercussion. More troubling diseases, like Methicillin-resistant staphylococcus aureus (MRSA) or tuberculosis are of greater concern for communal settings like schools. Diseases like MRSA and tuberculosis are more closely tied to the physical facility and how it is maintained and administered than other diseases transported by individual carriers. The maintenance of people and areas can control the spread of these diseases. In other states tuberculosis outbreaks in schools

have produced widespread testing and treatment for the disease.<sup>49</sup> MRSA outbreaks have resulted in complete school shutdowns.<sup>50</sup>

### *Centers for Disease Control Recommendations*

The Centers for Disease Control and Prevention (CDC) have made recommendations to employers in the event of many types of infectious disease outbreaks. These recommendations fall into passive and active categories. Passive recommendations involve common-sense awareness based on seasonal absenteeism due to illness. They encourage employees to stay at home if they feel sick. Further, the CDC recommends other passive common sense steps such as “social distancing.”<sup>51</sup>

Of late, CDC recommendations to employers are more active. Besides recommending vaccines against the flu, the recommendation plan for seasonal flu includes advising workers to stay home, sending sick workers home, and separating sick workers from other workers for at least 24 hours after being fever free. The CDC also recommends disinfectant soap at work stations and aggressive cleaning of surfaces. The CDC even encourages active screening of employees.<sup>52</sup> To the extent a school district does not follow those recommendations, it can make a claim more likely to be found compensable. If there is evidence of a school district not following CDC recommendations, it is easy for an ALJ to find it more likely than not that a claimant employed by a school district contracted an infectious disease at work as opposed to somewhere else. School districts must be conscious of infections contracted at school as work-related occupational events. A work-related infection can result in liability for any of the benefits owed in an ordinary workers' compensation claim.

### *Union Contracts and PERA*

Some employees of school districts are covered under union contracts. These contracts can specify off-work terms and conditions, short- and long-term disability requirements, pension plans, and job descriptions that have overlapping application to workers' compensation benefits. For instance, short- and long-term disability is akin to wage replacement benefits under the Act and, in the context of a union contract, may be partially employer funded. Coordination of payment of wage replacement benefits can be complicated. A workers' compensation carrier's obligations under the Act to pay benefits is separate from other agreements or obligations outside the Act. For example, a carrier still has to pay wage replacement benefits to an injured worker under the Act notwithstanding the worker's eligibility for another form of wage replacement. It then falls upon a school district employer and/or its carrier to coordinate these benefits to prevent potential double recovery to the claimant.

The same holds true for pension plans. To the extent these are employer funded, an offset for wage replacement benefits may exist. In the alternative, if these are employer funded under the terms of a union contract, the fact that union members contribute to the plan is part of the negotiated agreement, but does not change the offset available to the employer, because the employer funds the plan.<sup>53</sup> Coordination of benefits to prevent double recovery and give the school district employer a proper offset is unique to larger employers, such as school districts, with a partially unionized work force.

School district employees are also PERA eligible. Depending on the employee, the amount of district contribution is an offset to



permanent total disability benefits. The difficulty in determining this offset is in calculating contribution amounts. These amounts change over the employee's years of service. Because these amounts change year to year, the calculation can require a weighted average for proper offset. This is also a coordination of benefits issue that is unique to public entity employers like school districts.

## Employment Law in K-12 Schools

Legal representation of school districts and teachers is a niche area of employment law. In some scenarios, students even require legal representation in employment-law-related matters. This section highlights key employment law issues in K-12 schools generally, as well as recent legislative changes impacting employment law in Colorado schools.

### *Legal Status: Public, Private, or Charter*

One of the first steps in analyzing most employment law issues in K-12 schools is determining whether the school qualifies as a public or private entity. At first blush, labeling a school as public or private appears to be a straightforward task. However, in the employment law context, the terms "public" and "private" can be overbroad and, in some cases, misnomers. Numerous employment law issues in schools turn on whether a school or its employees are classified as "public," "state actors," or "an arm-of-the-state," such as claims involving the CGIA, assertions of Eleventh Amendment immunity, and alleged constitutional rights violations. Further complicating classification is the fact that a school may be considered public for some purposes and private for others.<sup>54</sup> For example, a school generally regarded as private can be awarded state actor status in certain situations.<sup>55</sup> Conversely, a school generally regarded as public may not receive state actor status in some scenarios.<sup>56</sup>

School districts typically own some characteristics that are public in nature and some that are private. This fact enables school districts and school district employees to opportunistically argue for or against public status, depending on the objective.<sup>57</sup> Throughout history, characterization of schools and school employees as public or private has been a consistent theme of school law litigation. Accordingly, it is advisable to begin any employment law analysis involving a K-12 school with consideration of whether the entity and its employees qualify as public in the scenario at hand.

In Colorado, there are three broad classifications of K-12 schools: public schools, non-public schools, and charter schools.<sup>58</sup> The Colorado Department of Education's definition of a public school emphasizes the source of funding as the determinative factor for defining public schools.<sup>59</sup> The Colorado Department of Education uses the term "non-public school" to refer to private, parochial, and independent schools.<sup>60</sup> Colorado's Charter School Act defines a charter school as "a public, nonsectarian, nonreligious, non-home-based school which operates within a public school district."<sup>61</sup> While classification of all three types of schools has served as the basis for litigation, the hybrid and autonomous nature of charter schools has recently been the subject of litigation throughout the nation and in Colorado.<sup>62</sup> Examination of charter school litigation throughout the states is important to accurately characterize a school as public or non-public in employment law matters.

Courts in multiple districts have addressed whether to characterize charter schools as public or private, and the results have been

inconsistent. At times, charter schools have emphasized their public characteristics to obtain certain benefits and avoid liability, while at others times, charter schools have emphasized their private characteristics to avoid legal duties and liability placed on public entities.<sup>63</sup> One consistent factor in charter school litigation, however, is that courts often base the analysis of a charter school's legal status on the statutory language enabling the charter school.<sup>64</sup>

Colorado has addressed classification of charter schools through statutory and case law. Colorado's Charter School Act explicitly labels charter schools as public schools.<sup>65</sup> In *King v. United States*, the Tenth Circuit held that a Colorado charter school was a public entity entitled to governmental immunity under the CGIA.<sup>66</sup> Even though Colorado's enabling statute for charter schools calls them public schools, review of case law in other districts warns that a statutory declaration of "publicness" is not controlling.

In *Caviness v. Horizon Community Learning Center, Inc.*, the Ninth Circuit held that a private, nonprofit corporation that operated an Arizona charter school was not a state actor with respect to employment matters.<sup>67</sup> Notably, the plaintiff in *Caviness* argued that charter schools were state actors for all purposes, including employment matters, under the state's statutory and regulatory scheme.<sup>68</sup> In support of this argument, the plaintiff cited Arizona statutes that defined charter schools as "public schools."<sup>69</sup> The Ninth Circuit disagreed and noted that a private entity may be a state actor for some purposes, but not for others.<sup>70</sup> In sum, the *Caviness* court did not believe Arizona's legislative declaration that charter schools were public was determinative of the issue of

whether charter schools were state actors. Instead, the court evaluated the enabling statute's language and the charter contract to conclude that the charter school at issue was not a state actor in the context of employment actions.<sup>71</sup>

Two recent cases in Chicago involving the National Labor Relations Act (NLRA) provide another example of how charter schools may emphasize their private characteristics for strategic reasons in employment law matters.<sup>72</sup> In *Chicago Mathematics* and *Pilsen Wellness Center*, two charter schools in Illinois emphasized their private characteristics in an effort to subject themselves to federal regulation applicable to private sector employers instead of state regulation because the schools found the federal regulations more favorable.<sup>73</sup> The National Labor Relations Board (NLRB) held that it had jurisdiction over the charter schools under the NLRA, the federal statute applicable to private sector employers.<sup>74</sup> The NLRB reasoned that the private, nonprofit corporation that ran the charter school qualified as an employer under the NLRA, thus subjecting the schools to federal rather than state legislation.<sup>75</sup>

While Colorado's statutory declaration that charter schools are public and the Tenth Circuit's holding that a charter school was a public entity under the CGIA provide some assurance that Colorado law regards charter schools as public, litigation in other districts warns that the hybrid nature of charter schools creates ambiguity about their legal status notwithstanding a statutory declaration.<sup>76</sup> There likely is room for litigation in Colorado over the public status of charter schools, and there may be room for forum shopping regarding which law applies to a charter school in certain situations.<sup>77</sup> Attorneys representing charter schools should be aware of the risks presented by emphasizing a charter school's private characteristics to avoid liability.<sup>78</sup> Emphasizing the private nature of charter schools may have the unintended consequence of subjecting charter schools to heightened federal regulation and exposure to arguments that charter schools should not receive public funding.<sup>79</sup>

### *Regulation and Rights of Public Education Employees*

The NLRA governs unionization of most private sector employees.<sup>80</sup> Regulation of unionization of state and local public sector employees, including public school teachers, is governed by the states and, in some cases, local authorities.<sup>81</sup> In Colorado, a combination of state statutes and case law governs public teachers' right to unionize, bargain collectively, and strike.<sup>82</sup> This section addresses the basic framework of law affecting unionization of Colorado educators, as well as two recent state level legislative reforms impacting employment law in Colorado K-12 public schools.

**Colorado unionization laws for teachers.** In Colorado, it is legal for teachers to participate in collective bargaining.<sup>83</sup> Colorado's first collective bargaining agreement for teachers went into effect on November 21, 1967.<sup>84</sup> These teacher contracts eventually became known as master agreements.<sup>85</sup> Initially, there was no legal framework guaranteeing Colorado teachers the right to bargain collectively, and there is still no state statute directly addressing the issue.<sup>86</sup> Instead, public school employees secured their right to bargain collectively through case law. In 1976, *Littleton Education Association v. Arapahoe County School District* established that school boards have authority to enter collective bargaining agreements with representatives of school employees provided that the agreements do not conflict with existing laws governing the conduct of the state school system.<sup>87</sup> Colorado is one of only twelve states

allowing teachers the right to strike, although it is a qualified right to strike, subject to certain limitations and notice requirements.<sup>88</sup> Colorado charter schools have avoided unionization. As of the 2009–10 school year, 100% of Colorado's charter schools were not unionized.<sup>89</sup>

### *Colorado School Board Open Meetings Initiative*

In November 2014, Colorado voters approved Proposition 104.<sup>90</sup> The initiative amended Colorado law to require local school boards or their representatives to negotiate collective bargaining agreements in meetings open to the public.<sup>91</sup> Approximately one-quarter of Colorado's school districts, accounting for approximately three-quarters of the state's public school students, have collective bargaining agreements.<sup>92</sup> Previously, the law permitted public negotiation of teacher agreements but did not require public negotiation. The new law, known as the Colorado School Collective Bargaining Agreement Sunshine Act, went into effect on December 17, 2014.<sup>93</sup> While the margin of voter approval in passing the law was wide, the breadth of the statute's language has been subject to criticism and may open the door to litigation regarding what qualifies as a "meeting of a board of education at which a collective bargaining agreement is discussed."<sup>94</sup> Defining the parameters of a "school board meeting" is not a novel issue, as defining the parameters of a meeting arises in other contexts involving governing bodies or entities and public notice. In light of the new law, school board members should be mindful when discussing collective bargaining agreements and related issues with or in the presence of more than one school board member, whether such communication takes place in person or even electronically.

### *Senate Bill 10-191: The Educator Effectiveness Bill*

Created in 1984, Colorado's Licensed Personnel Performance Evaluation Act addresses licensed personnel evaluations for K-12 educators.<sup>95</sup> Only minor amendments were made to the Act until 2010 when the Colorado legislature passed SB 10-191, informally referred to as the "Educator Effectiveness" bill.<sup>96</sup> SB 10-191 made significant changes to the Licensed Personnel Performance Evaluation Act and the Teacher Employment, Compensation, and Dismissal Act of 1990. This following discussion highlights just a few of the major reforms effectuated by the revised legislation.

A controversial component of the new Act is the weight school districts must place on student test scores when evaluating teachers. The new law requires school districts to base at least 50% of teacher and principal evaluations on student learning outcomes, as demonstrated by standardized test scores and other measures.<sup>97</sup> Under the new law, the remaining 50% (or less) of teacher and principal evaluations are based on supervisor evaluations.<sup>98</sup>

Another significant departure from former law is that the new Act changes the way teachers attain the job protection generally known as tenure. While the term "tenure" does not actually appear in the Colorado statutes, the concept is captured by statutes that provide procedural protections making it more difficult to fire a teacher who attains non-probationary status.<sup>99</sup> Previously, a teacher who completed three years of employment and was re-engaged for a fourth year automatically received non-probationary status and was no longer subject to certain conditions of employment and dismissal.<sup>100</sup> Probationary teachers were subject to the provisions of CRS § 22-63-203, which regarded renewal and non-renewal of probationary teachers' employment contracts. This statute allowed



the chief administrative officer of a school district to recommend that a school board not renew the employment contract of a probationary teacher “for any reason he deems sufficient.”<sup>101</sup>

Before passage of SB 10-191, there were no statutory provisions providing for revocation of non-probationary status. Similar to former law, the new Act assigns “probationary” and “non-probationary” status to teachers. However, the new Act adds criteria, other than the mere passage of time, for teachers to attain or lose non-probationary status.<sup>102</sup> The new law defines a probationary teacher as one who has not completed three consecutive years of demonstrated effectiveness or a non-probationary teacher who has had two consecutive years of demonstrated ineffectiveness.<sup>103</sup> Now, teachers must continually demonstrate effectiveness to maintain the benefits of non-probationary status. If a teacher does not continually demonstrate his or her effectiveness, non-probationary status and its accompanying procedural protections can be lost.<sup>104</sup>

The sweeping new Act largely took effect in the 2014–15 school year and required school districts to revamp the way they handle teacher and principal evaluation and termination. The Act allows school districts some discretion in crafting the details of their evaluation systems. School districts may implement the Colorado State Model Evaluation System, which was guided by the State Council for Educator Effectiveness, or districts may create their own system, as long as the system adheres to state statutes and regulations.<sup>105</sup> The new Act also required school districts to develop an incentive system on or before August 1, 2014, with the purpose of encouraging effective teachers in high-performing schools to move to schools with low performance ratings.<sup>106</sup>

These changes to educator tenure and evaluation practices have sparked controversy among teachers and the public. Another component of the Act—the mutual consent provision—has already produced litigation in Colorado. This provision provides that teachers can only be permanently assigned to schools through mutual consent hiring. “Mutual consent hiring” means that teaching positions are assigned based on agreement by both the teacher and principal.<sup>107</sup> Previously, the law did not require mutual consent, and principals did not have the right to select teachers. A school district could unilaterally place a teacher at a school, regardless of the principal’s position on the teacher’s employment.<sup>108</sup>

The practical effect of the mutual consent provision was that some teachers were left without jobs. According to the Colorado Education Association (CEA), more than 100 Denver Public Schools teachers lost their jobs as a result of this provision.<sup>109</sup> In response, the CEA, the state’s largest teacher union, brought a class action lawsuit on behalf of five Denver Public Schools teachers who lost their jobs after passage of the mutual consent provision, arguing that the law violated teachers’ due process rights.<sup>110</sup> In June 2014, Denver District Court Chief Judge Michael Martinez disagreed with the CEA and dismissed the lawsuit. The CEA appealed the dismissal.<sup>111</sup> At the time of this article’s publication, the appeal was pending.

### Section 1983: A Source of Employment Law Exposure

While public school districts enjoy a substantial amount of immunity from tort claims, the public status of the majority of Colorado’s K-12 schools subjects them to increased liability exposure in the employment law arena. Specifically, § 1983 of Title 42 of the United States Code is a significant source of exposure for K-12 schools, because § 1983 provides a route for employees to

bring federal civil actions against public employers under a variety of employment-related theories.<sup>112</sup> Individuals frequently bring employment law claims against public school districts under the First, Fourth, and Fourteenth Amendments.<sup>113</sup> A detailed overview of § 1983 claims is beyond the scope of this article. Attorneys representing K-12 employees should be familiar with the substantive and procedural advantages of § 1983 claims, and attorneys representing school districts should develop preventive and reactive strategies to minimize § 1983 exposure.

### Conclusion

Attorneys representing school districts or employees of school districts face unique challenges that result from the wide range of jobs and the public status of most K-12 schools. Public schools enjoy limited immunity from tort claims under the CGIA while facing heightened exposure to employment-law-related claims under § 1983. Further, the wide range of jobs and close social confines of most K-12 schools make them fertile grounds for workers’ compensation claims. In most scenarios, the initial question of whether a school holds public status can have a significant impact on the outcome of a case. For an attorney involved in school law, the unique liability issues faced by K-12 schools and layers of applicable federal, state, and local regulations can be difficult—but interesting—to navigate.

### Notes

1. Latin for “parent of the nation,” a legal guardian or informal caretaker.
2. Colo. Const. art. IX, § 15; *Ball v. Well County School Dist. No. RE-3J*, 545 P.2d 1370 (Colo.App. 1975).
3. CRS §§ 24-10-101 *et seq.*
4. CRS § 24-10-103(5).
5. *King v. U.S.*, 53 F.Supp.2d 1056 (D.Colo. 1999).
6. CRS § 24-10-102.
7. CRS § 24-10-118(2)(a).
8. CRS § 24-10-103(4)(a).
9. *Smith v. Bd. of Educ. of School Dist. RE-1*, 83 P.2d 1157 (Colo.App. 2004).
10. CRS § 24-10-106(1)(a) to (f).
11. CRS § 24-10-106.3.
12. *See State v. Mason*, 724 P.2d 1289 (Colo. 1986) (citing CRS § 24-10-104(1)).
13. *Moreland v. Bd. of County Comm’rs of LaPlata County*, 725 P.2d 1 (Colo.App. 1985); McQuillin, 18A *Municipal Corporations: Municipal Liability for Torts* § 53:77.1 Waiver and Estoppel—Liability Insurance as Waiver (Thomson Reuters, 2005-16).
14. *Cobbin by Cobbin v. City and County of Denver*, 735 P.2d 214 (Colo.App. 1987).
15. *Colorado Special Dists. Prop. and Liability Pool v. Lyons*, 277 P.3d 874 (Colo.App. 2012).
16. CRS § 24-10-114.
17. *St. Vrain Valley School Dist. RE-1J v. A.R.L. by and through Loveland*, 325 P.3d 1014 (Colo. 2014).
18. *Young v. Brighton School Dist. 27J*, 325 P.3d 571 (Colo. 2014) (citing *St. Vrain Valley School Dist. RE-1J*, 325 P.3d 1014).
19. *Daniel v. City of Colorado Springs*, 327 P.3d 891 (Colo. 2014).
20. *Denmark v. Bd. of Directors, Auraria Higher Educ. Center*, 954 P.2d 624 (Colo.App. 1997).
21. *See generally* CRS § 24-10-106(1)(d)(III); *Martinez v. Weld County School Dist. RE-1*, 60 P.3d 736 (Colo.App. 2002).
22. *See* CRS § 24-10-106 (1)(c) and (d)(I); *Stanley v. Adams County School Dist. 27J*, 942 P.2d 1322 (Colo.App. 1997).

23. CRS § 24-10-103(1).
24. *Padilla ex rel. Padilla v. School Dist. No. 1*, 25 P.3d 1176, 1181 (Colo. 2001).
25. *Id.*
26. *Booth v. Univ. of Colorado*, 64 P.3d 926 (Colo.App. 2002).
27. *Hendricks by and through Martins v. Weld County School Dist. No. 6*, 895 P.2d 1120 (Colo.App. 1995).
28. *Lions v. City of Aurora*, 987 P.2d 900 (Colo.App. 1999).
29. American School Bus Council, [www.americanschoolbuscouncil.org](http://www.americanschoolbuscouncil.org).
30. *Robinson v. Ignacio School Dist.*, 328 P.3d 297 (Colo.App. 2014).
31. *DiPaollo v. Boulder Valley School Dist. RE-2*, 902 P.2d 439 (Colo.App. 1995).
32. *Ex rel. Loveland v. St. Vrain Valley School Dist. RE-1J*, 328 P.3d 228 (Colo.App. 2012).
33. *Madden v. Mountain West Fabricators*, 977 P.2d 861 (Colo. 1999); *Price v. Indus. Claim Appeals Office*, 919 P.2d 207 (Colo. 1996).
34. *Madden*, 977 P.2d 861.
35. *Cordova v. Indus. Claim Appeals Office*, 55 P.3d 186 (Colo.App. 2002).
36. *Ortiz v. Pueblo City Schools*, WC No 4-838-088 (ICAO Aug. 21, 2013).
37. *White v. Denver School Dist. No. 1*, WC No. 4-378-998 (ICAO Sept. 16, 1999); CRS § 8-40-201(8).
38. *Madden*, 977 P.2d 861.
39. CRS § 8-42-107.
40. CRS § 8-40-202(1)(a)(I)(A) defines “employee” to include “[e]very person in the service of a . . . school district or any other taxing district . . . under any appointment or contract of hire.”
41. *Lammey v. Louis Palmer School Dist. No. 38*, WC No. 3-899-563 (ICAO Sept. 19, 1990).
42. *Lyons v. CHSAA and Brighton School Dist.*, WC No. 3-965-656 (ICAO Dec. 7, 1992).
43. *Anderson v. Brinkhoff*, 859 P.2d 819 (Colo. 1993).
44. *Campbell v. IBM Corp.*, 867 P.2d 77 (Colo.App. 1993).
45. *City and County of Denver v. Moore*, 504 P.2d 367 (Colo.App. 1972).
46. *Indus. Comm’n v. Corwin Hosp.*, 250 P.2d 135 (Colo. 1952); *Denver General Hosp. v. Pollard*, 417 P.2d 231 (Colo. 1966).
47. *Larson Workers’ Compensation Law* § 51.05 (unusual exposure or cause) (LexisNexis, Release number 114, June 2015).
48. *Tiltscher v. The Dialysis P’ship*, WC No. 4-017-751 (Nov. 16, 1994) (citing *Hallenbeck v. Butler*, 74 P.2d 708 (Colo. 1937)).
49. Grant Union High School in California, Murrieta High School in Georgia, Lely High School in Florida, and Charlotte Central School in North Carolina had tuberculosis outbreaks.
50. Mt. Clemens High School in Michigan was shut down in 2013 for a MRSA outbreak.
51. Glass *et al.*, “Targeted social distancing designs for pandemic influenza,” *CDC Emerging Infectious Diseases J.* (Nov. 2006), [wwwnc.cdc.gov/eid/article/12/11/06-0255\\_article](http://wwwnc.cdc.gov/eid/article/12/11/06-0255_article).
52. CDC, “Influenza (Flu),” [www.cdc.gov/flu/index.htm](http://www.cdc.gov/flu/index.htm).
53. *In the Matter of the Claim of Rolland Wilcox v. Whitney Electric*, WC Nos. 4-016-802 and 4-023-769 (Nov. 20, 1992) (citing *Scriven v. Indus. Comm’n*, 736 P.2d 414 (Colo.App. 1987)).
54. *See Caviness v. Horizon Community Learning Ctr., Inc.*, 590 F.3d 806, 814 (9th Cir. 2010).
55. *See Milonas v. Williams*, 691 F.2d 931, 940 (10th Cir. 1982).
56. *See Caviness*, 590 F.3d at 814.
57. *See Green et al.*, “Having it Both Ways: How Charter Schools Try to Obtain Funding of Public Schools and The Autonomy of Private Schools,” 63 *Emory L.J.* 303 (2013).
58. *See generally* Colorado Department of Education, [www.cde.state.co.us](http://www.cde.state.co.us).
59. Colorado Department of Education, “Definition of a Colorado Public School,” <https://cdeapps.cde.state.co.us/DefinitionofaColoradoPublicSchoolFinal.pdf>.
60. Colorado Department of Education, “Colorado Non-Public Schools,” [www.cde.state.co.us/choice/nonpublic\\_index](http://www.cde.state.co.us/choice/nonpublic_index).
61. CRS § 22-30.5-104(1).
62. *See generally* Green, *supra* note 57.
63. *Id.* at 336.
64. *See generally id.*
65. CRS § 22-30.5-104(2)(b) and (4)(a).
66. *King v. United States*, 301 F.3d 1270 (10th Cir. 2002).
67. *See generally Caviness*, 590 F.3d 806.
68. *See id.* at 813-14.
69. *Id.*
70. *Id.* at 814.
71. *Id.* at 816.
72. *See* Green, *supra* note 57 at 315.
73. *See generally Chicago Mathematics*, 359 NLRB No. 41, slip. op. at 1; Green, *supra* note 57 at 315-16.
74. Green, *supra* note 57 at 315-16.
75. *Id.*
76. *See generally id.*
77. *See id.*
78. *Id.* at 336-37.
79. *Id.*
80. Sanes and Schmitt, “Regulation of Public Sector Collective Bargaining in the States”<sup>3</sup> (Center for Economic and Policy Research, 2014), [www.cepr.net/documents/state-public-cb-2014-03.pdf](http://www.cepr.net/documents/state-public-cb-2014-03.pdf).
81. *Id.*
82. *See id.*
83. *Littleton Educ. Ass’n v. Arapahoe County School Dist.*, 553 P.2d 793 (Colo. 1976).
84. Colorado Education Association, “Collective Bargaining,” [www.coloradoea.org/center-for-organizing/bargaining.aspx](http://www.coloradoea.org/center-for-organizing/bargaining.aspx).
85. *Id.*
86. *Id.*
87. *Littleton*, 553 P.2d 793.
88. Sanes and Schmitt, *supra* note 80 at 9; *Martin v. Montezuma-Cortez School Dist. RE-1*, 841 P.2d 237 (Colo. 1992).
89. National Alliance for Public Charter Schools, “Dashboard: A Comprehensive Data Resource From the National Alliance for Public Charter Schools,” [dashboard.publiccharters.org/dashboard/schools/page/union/state/CO/year/2014](http://dashboard.publiccharters.org/dashboard/schools/page/union/state/CO/year/2014).
90. Ballotpedia, “Colorado School Board Open Meetings, Proposition 104 (2014),” [www.ballotpedia.org/Colorado\\_School\\_Board\\_Open\\_Meetings,\\_Proposition\\_104\\_\(2014\)](http://www.ballotpedia.org/Colorado_School_Board_Open_Meetings,_Proposition_104_(2014)).
91. CRS § 22-32-109.4.
92. “Proposition 104 School Board Meeting Requirements” 1 (2014), [www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/3913942eb4dff41387257ce5005aedb7/\\$FILE/Proposition%20104%20Merged.pdf](http://www.leg.state.co.us/LCS/Initiative%20Referendum/1314initrefr.nsf/b74b3fc5d676cdc987257ad8005bce6a/3913942eb4dff41387257ce5005aedb7/$FILE/Proposition%20104%20Merged.pdf).
93. CRS § 22-32-109.4.
94. *The Denver Post* Editorial Board, “Proposition 104 Shines a Light on Teacher Contract Talks,” *The Denver Post* (Oct. 7, 2014), [www.denverpost.com/editorials/ci\\_26681587/proposition-104-shines-light-teacher-contract-talks](http://www.denverpost.com/editorials/ci_26681587/proposition-104-shines-light-teacher-contract-talks). *See* CRS § 22-32-109.4.
95. Colorado LegiSource, “Educator Effectiveness and Senate Bill 10-191,” [www.legisource.net/2012/12/20/educator-effectiveness-and-senate-bill-10-191](http://www.legisource.net/2012/12/20/educator-effectiveness-and-senate-bill-10-191). *See* CRS §§ 22-9-101 *et seq.*
96. *Id.*
97. Colorado Association of School Boards, “Educator Effectiveness (SB 191),” [www.casb.org/Domain/142](http://www.casb.org/Domain/142).
98. *Id.*
99. *See generally* CRS § 22-63-203.
100. Colorado LegiSource, *supra* note 95; CRS § 22-63-203.
101. CRS § 22-63-203(4)(a).
102. Colorado LegiSource, *supra* note 95.
103. CRS § 22-63-103(7).
104. Colorado LegiSource, *supra* note 95.

105. Colorado Department of Education, "State Model Evaluation System," [www.cde.state.co.us/educatoreffectiveness/statemodevaluation](http://www.cde.state.co.us/educatoreffectiveness/statemodevaluation) system.

106. Colorado Association of School Boards, *supra* note 97; CRS § 22-9-106(8).

107. Colorado Department of Education, "Senate Bill 10-191—Mutual Consent," [www.cde.state.co.us/educatoreffectiveness/sb-consent](http://www.cde.state.co.us/educatoreffectiveness/sb-consent).

108. Garcia and Engdahl, "Denver Judge Tosses Teachers' Mutual Consent Lawsuit," *Chalkbeat Colorado* (June 6, 2014), [co.chalkbeat.org/2014/06/06/denver-judge-tosses-teachers-mutual-consent-lawsuit/#.VU57Zf10yUl](http://co.chalkbeat.org/2014/06/06/denver-judge-tosses-teachers-mutual-consent-lawsuit/#.VU57Zf10yUl).

109. Stokols, "Teachers Union Sues Over Controversial 2010 Tenure Law," *Fox 31 Denver* (Jan. 29, 2014), [kdrv.com/2014/01/28/teachers-union-will-sue-state-over-controversial-2009-tenure-law](http://kdrv.com/2014/01/28/teachers-union-will-sue-state-over-controversial-2009-tenure-law).

110. Garcia and Engdahl, *supra* note 108.

111. *The Denver Post*, "Colorado Education Association Appeals Dismissal of Lawsuit" (Dec. 12, 2014), [www.denverpost.com/news/ci\\_27126933/colorado-education-association-appeals-dismissal-lawsuit](http://www.denverpost.com/news/ci_27126933/colorado-education-association-appeals-dismissal-lawsuit).

112. *See* 42 USCA § 1983 (West).

113. *See* Schools Legal Service Orange County Department of Education, "Liability Under Section 1983" 1 (2003), [www.ocde.us/LegalServices/Documents/LIABILITY\\_UNDER\\_SECTION\\_1983\\_wcopyright.pdf](http://www.ocde.us/LegalServices/Documents/LIABILITY_UNDER_SECTION_1983_wcopyright.pdf). ■

## QUESTIONS

1. Which of the following statements about charter schools is not true?
  - a. Colorado's Charter School Act explicitly classifies charter schools as public schools.
  - b. The Tenth Circuit held that a Colorado charter school was a public entity entitled to governmental immunity under the CGIA.
  - c. A charter school may be considered public or a state actor for some purposes but not others.
  - d. A statutory declaration of a charter school's public status is absolutely controlling.
2. Teachers at public K-12 schools in Colorado do not have the right to which of the following?
  - a. strike
  - b. negotiate employment agreements in private
  - c. unionize
  - d. collectively bargain
3. SB 10-191, the Educator Effectiveness Bill, requires schools to do the following:
  - a. retain tenured teachers regardless of their measurable performance
  - b. administer the Praxis exam to every teacher every two years
  - c. base at least 50% of teacher evaluations on student learning outcomes
  - d. allow non-probationary teachers significant academic freedom regardless of learning outcomes
4. Under the amendment to the CGIA contained in CRS § 24-13-106.3, what are the limits of liability for a single occurrence happening on January 5, 2015?
  - a. \$150,000
  - b. \$990,000
  - c. \$0
  - d. \$350,000
5. A teacher slips and falls after leaving her car to enter the building. The area is a well-known trouble spot for ice accumulation. The car was parked in a designated parking area for faculty at public school. Is this a compensable claim under the Colorado Workers' Compensation Act?
  - a. No, claimant was not within the course and scope of employment because she had not begun working.
  - b. Yes, even though claimant is going to work and has not arrived yet, when the employer designates specific areas to park within the employer's control it will render an injury compensable.
  - c. No, claimant's injury did not arise out of employment; however, claimant may bring suit in tort in district court.
  - d. Yes, but claimant may also bring suit in tort in district court for the same injuries.
  - e. both b and d
6. Claimant, a school nurse, contracts whooping cough. Whooping cough has been going through the school and she has seen multiple cases as the school nurse. The public at large has not had as severe an outbreak. Is claimant suffering from an occupational disease and/or is the claim compensable under the Colorado Workers' Compensation Act?
  - a. No, claimant cannot point to a specific time of infection so the claim is not compensable.
  - b. No, the claim is not for an occupational disease *per se*, requiring proof of exposure greater than the level of exposure outside of work.
  - c. No, claimant, as a nurse, should have taken extra precautions and instead she carelessly exposed herself to whooping cough at school and in the public. Equity dictates the claim should not be compensated.
  - d. No and yes, the claim is likely compensable even though it does not fit an occupational disease scenario. If claimant can point to specific instances of direct exposure to whooping cough in patients at school, without being able to discern an exact incident of infection, and the condition is more prevalent at work than in the public at large, it will likely be compensable. Note that carelessness resulting in injury is not a defense to a claim in a no-fault setting.

*Answers on page 85.*



# Test Answers

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Below are the answers to the test questions for the corresponding Education Law articles. The questions appear at the end of the respective article.

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Credit for reading the October 2015 articles will be granted for two years (through December 31, 2017).

## Overview of General Liability, Workers’ Compensation, and Employment Law Issues in K-12 Educational Institutions

Page 25

by Frank Cavanaugh and Jenna Zerylnick

### ANSWERS

1. d: A statutory declaration of a charter school’s public status may be meaningless. In *Caviness*, the Ninth Circuit held that an Arizona charter school was not a state actor in the context of § 1983 employment actions, even though Arizona statutes defined charter schools as public schools.

2. b: Teachers at public K-12 schools in Colorado have the right to strike, unionize, and collectively bargain, although the right to strike is a qualified right, subject to certain limitations. Effective December 2014, with the passage of the Colorado School Collective Bargaining Agreement Sunshine Act, local school boards or their representatives must negotiate collective bargaining agreements at meetings open to the public.

3. c: The new Act requires that schools base at least 50% of teacher and principal evaluations on student learning outcomes, as demonstrated by standardized test scores and other measures.

4. c: SB 2013 only allows for discovery for incidents happening between January 1, 2013 and July 1, 2017.

5. e: An injury in a parking lot often presents a unique exception to the going to and coming from work rule that says such injuries are not compensable. They are deemed to have arisen out of and occurred in the course and scope of employment, particularly when the employer has control over the lot and designates parking spaces. Claimant may also have a third-party case in tort, but not against the school district. The district is immune from suit under exclusive remedy provisions.

6. d: No: Contracting an infectious disease does not fit the model of an occupational disease under the Colorado Workers’ Compensation Act. Yes: Even without being able to discern a specific exposure to a disease creating an infection for claimant, if some specific instances of direct exposure can be proven, the claim will likely be found compensable.