COMMENTARY

INDIVIDUAL LIABILITY UNDER THE IDEA: *CROFTS* WARRANTS CORRECTION*

by
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In its recent decision in *Crofts v. Issaquah School District*,[1] a federal district court in the state of Washington denied the dismissal motion of the two individual defendants—the school district's superintendent and its special education director[2]—in a liability case under the Individuals with Disabilities Education Act (IDEA).[3] These defendants contended that the IDEA does not provide for liability of individuals in their personal, as contrasted with their official, capacity. Rejecting this argument and citing a Seventh Circuit decision,[4] the court reasoned: "Defendants do not cite to any binding legal authority that supports its assertion and the Court has not found a decision from the Ninth Circuit or any other circuit that states that school district employees cannot be held individually liable under the IDEA."[5]

This case note concludes that the *Crofts* ruling amounts to reversible error. Perhaps the court's analysis is attributable to the congested caseload of the federal courts, the specialized nature of IDEA cases, the *pro se* status of the plaintiff-parents or guardians, the briefs of the defendants, and/or the dismissal stage of the proceedings. In any event, one of the purposes of this brief commentary is to facilitate correction of this ruling during further proceedings in this case. The other purpose is to provide an objective analysis that is concise but comprehensive for other individuals, whether on the parent or district side as to whether the IDEA provides for personal liability of public school personnel.

* The views expressed are those of the authors and do not necessarily reflect the views of the publisher. Cite as 350 Ed.Law Rep. [497] (February 22, 2018).

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1. *Crofts v. Issaquah Sch. Dist*., 2017 WL 5756441, 71 IDELR ¶ 61 (W.D. Wash. Nov. 27, 2017). In the underlying due process decision, the hearing officer ruled in favor of the district for the various issues, including the appropriateness of the evaluation and the IEP. *Issaquah Sch. Dist*., 117 LRP 43171 (Wash. SEA June 14, 2017). This court decision was limited to the dismissal motion of the two individual defendants, thus leaving for a future decision, presumably in response to a summary judgment motion, rulings on the underlying issues as well as an opportunity to reconsider this individual liability ruling.

2. The rather detailed 35–page hearing officer decision only mentioned the superintendent and special education director incidentally in their routine roles in relation to the parents' mediation request. *Issaquah Sch. Dist*., 117 LRP 43171, at 15.

3. 20 U.S.C. §§ 1400 *et seq*. (2014).

4. *Stanek v. St. Charles Cmty. Unit Sch. Dist. No. 303*, 783 F.3d 634, 316 Ed.Law Rep. 618 (7th Cir. 2015).

5. *Crofts v. Issaquah Sch. Dist.*, 71 IDELR at *3.

Part I of this short article provides a quick overview of the IDEA in relation to liability both directly and via Section 1983.[6] This dual framework is warranted because the *Crofts* opinion does not make clear whether (1) Section 1983 is part of the parents' claim,[7] and (2) "liability" in this case refers to the remedy of money damages. Thus, for the sake of comprehensive coverage, this overview extends to Section 1983 and is not necessarily limited to money damages. Part II specifically analyzes the *Crofts* opinion in light of the pertinent case law within this dual framework.

I. Overview of the IDEA Without and With Section 1983

The IDEA is the primary legislation for students with disabilities in public schools.[8] Providing an individual right to adjudicative relief, starting with a due process hearing[9] and extending to concurrent jurisdiction in federal and state courts,[10] the IDEA accounts for an extensive body of case law.[11] The wide range of issues under the IDEA and its regulations start with child find and eligibility[12] and center on the IDEA's core obligation to provide each eligible child with a free appropriate public education (FAPE).[13]

The Direct Route: IDEA Alone

As a clearly settled matter, the IDEA does not extend to liability of school district employees in their individual capacity for two successive reasons. First, in the more general sense of liability, which is not limited to money damages, the IDEA structurally "does not provide for general subject

6. 42 U.S.C. § 1983 (2014).

7. Although the *Crofts* court's brief ruling does not expressly refer to Section 1983, in the two appellate decisions that it cites concerning IDEA liability, the plaintiff took the Section 1983 route to assert this claim. *Crofts v. Issaquah Sch. Dist.*, 71 IDELR at *2–3 (citing *Stanek v. St. Charles Cmty. Unit Sch. Dist.*, 783 F.3d 634, 316 Ed.Law Rep. 618 (7th Cir. 2015); *Blanchard v. Morton Sch. Dist*., 509 F.3d 934, 228 Ed.Law Rep. 35 (9th Cir. 2007)).

8. As an alternative and often secondary matter, Section 504 of the Rehabilitation Act and its sister statute, the Americans with Disabilities Act provide overlapping coverage, but this pair of statutes is not at issue in this case. For a systematic comparison, see, e.g., Perry A. Zirkel, *An Updated Comprehensive Comparison of the IDEA and Section 504/ADA*, 342 Ed. Law Rep. 886 (2017).

9. 20 U.S.C. § 1415(f). For an overview of the state systems implementing this statutory provision, including the option for a review tier, see, e.g., Perry A. Zirkel & Gina Scala, *Due Process Hearing Systems under the IDEA: A State-by-State Survey*, 21 J. DISABILITY POL'Y STUD. 3 (2010).

10. 20 U.S.C. § 1415(i)(2)(A).

11. *E.g*., Zorka Karanxha & Perry A. Zirkel, *Trends in Special Education Law: Frequency and Outcomes of Published Court Decisions 1998–2012*, 27 J. SPECIAL EDUC. LEADERSHIP 55 (2014) (analyzing the volume and outcomes of IDEA judicial rulings for a recent 15–year period); Perry A. Zirkel & Brent L. Johnson, *The "Explosion" in Education Litigation: An Updated Analysis*, 265 Ed. Law Rep. 1 (2011) (revealing the upward trajectory of IDEA litigation within the relatively level trend of K–12 litigation within the past three decades).

12. *E.g.*, Perry A. Zirkel, *Special Education Law: Illustrative Basics and Nuances of Key IDEA Components*, 38 TEACHER EDUC. & SPECIAL EDUC. 263 (2015) (explaining the IDEA issues of child find and eligibility and their overlap with FAPE).

13. *E.g*., *Sytsema v. Acad. Sch. Dist*., 538 F.3d 1306, 1312, 236 Ed.Law Rep. 94 (10th Cir. 2008) (referring to FAPE as the "central pillar" of the IDEA). For an outline of the four successively developed dimensions of this core obligation, see Perry A. Zirkel, *An Adjudicative Checklist of the Four Criteria for FAPE*, 346 Ed. Law Rep. 18 (2017).

matter jurisdiction."[14] Specifically, because the IDEA only establishes a hybrid right of parents of students with disabilities[15] and a corresponding obligation of local and state education agencies,[16] the parties in an IDEA case are limited to the parent and the public agency.[17] For example, albeit with a focus on the plaintiff's side, courts have concluded that the IDEA does not permit litigation between public agencies[18] or between a third party and a public agency[19] and, more specifically, that teachers and other school employees lack standing under the IDEA.[20] Similarly, the limited jurisdiction of the IDEA is tied to the initial adjudicative step of due process hearing,[21] which specifies the parents and the education agency as the parties. Indeed, there are no hearing officer decisions that have recognized an individual school employee as either a plaintiff or a defendant at the initiation of the IDEA's adjudicative process.[22]

Second, to the extent that liability refers to its more central meaning of money damages,[23] it is also clearly settled that the IDEA does not provide

14. *Gehman v. Prudential Property & Cas. Ins. Co*., 702 F.Supp. 1192, 1193, 51 Ed.Law Rep. 497 (E.D. Pa. 1989).

15. *E.g*., 20 U.S.C. § 1400(d)(1)(B) (purpose) and 1415(b) (procedural protections). "Parents" in this context serves as shorthand term that primarily refers to serving as proxy for their child with disabilities. As a broad hybrid, it also extends to a more limited extent to said student per the transfer of rights provision, *id*., § 1415(m), and to the parents' related but autonomous rights, *Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 219 Ed.Law Rep. 39 (2007) (ruling that parents may proceed *pro se* in federal court to enforce their independent rights under the IDEA).

16. *E.g.,* 20 U.S.C. §§ 1412(a) (obligations of state education agencies), 1413(a)–(d) (obligations of local education agencies), and 1415(a) (obligations of both state and local education agencies).

17. For example, not only are parents and these public agencies the only parties to the IDEA's adjudicative proceedings, *id*. § 1415(f)(1)(A), they are the only ones specified in the ensuing provisions for the response/sufficiency process, *id*. § 1415(c)(2)(B)(i), the resolution session step, *id*. § 1415(f)(1)(B)(i)(IV), the right to judicial appeal, *id*. § 1415(f)(2)(A), and the prevailing party provision for attorneys' fees, *id*. § 1415(i)(3)(B)(i).

18. E.g., *Lake Washington Sch. Dist. No. 414 v. Office of Superintendent of Pub. Instruction*, 634 F.3d 1065, 265 Ed.Law Rep. 889 (9th Cir. 2011); *Traverse Bay Area Pub. Sch. v. Mich. Dep't of Educ*., 615 F.3d 622, 260 Ed.Law Rep. 28 (6th Cir. 2010); *Lawrence Twp. Bd. of Educ. v. N.J*., 417 F.3d 368, 200 Ed.Law Rep. 524 (3d Cir. 2005); *Bd. of Educ. of Oak Park v. Kelly E*., 207 F.3d 931, 143 Ed.Law Rep. 70 (7th Cir. 2000).

19. *E.g*., *Woods Serv., Inc. v. Hazelton Area Sch. Dist*., 2016 WL 6216122, 68 IDELR ¶ 248 (M.D. Pa. Oct. 25, 2016); *Allstate Ins. Co. v. Bethlehem Area Sch. Dist*., 678 F.Supp. 1132, 45 Ed.Law Rep. 122 (E.D. Pa. 1987).

20. *E.g.*, *Jones v. Camden City Bd. of Educ*., 499 Fed.Appx. 127, 129, 290 Ed.Law Rep. 585 (3d Cir. 2009); *Collins v. City of N.Y*., 156 F.Supp.3d 448, 457, 332 Ed.Law Rep. 723 (S.D.N.Y. 2016); *Vanselous v. Bucks Cty. Intermediate Unit*, 63 IDELR ¶ 194 (E.D. Pa. Jan. 24, 2014), *adopted*, 63 IDELR ¶ 194 (E.D. Pa. June 18, 2014); *Wooderts v. Dall. Indep. Sch. Dist.*, 2010 WL 2160144 (N.D. Tex. May 3, 2010); *Ryan v. Shawnee Mission U.S.D. 512,*Ê416 F.Supp.F.Supp.2d 1090, 1098, 207 Ed.Law Rep. 120 (D. Kan. 2006).

21. 20 U.S.C. §§ 1415(b)(6) and 1415(f)(1).

22. See, e.g., Perry A. Zirkel & Cathy Skidmore, *National Trends in the Frequency and Outcomes of Hearing and Review Officer Decisions under the IDEA: An Empirical Analysis*, 29 OHIO ST. J. ON DISP. RESOL. 525 (2014) (analyzing a representative national sample of 361 hearing decisions for the 35–year period from 1978 to 2012, finding none where the defendant was an individual employee).

23. This meaning is particularly pertinent under the IDEA, because the typical remedies of tuition reimbursement and compensatory

this remedy.[24] The Ninth Circuit went to the additional step of extending the unavailability under the IDEA for compensatory damages[25] even to nominal damages.[26]

The Indirect Route: The Section 1983 Connection

As an alternative and indirect route,[27] Section 1983 provides the potential for monetary damages and other relief as applied to not only school districts but also their individual employees upon violation of federal constitutional or, depending on the statute, other federal rights. In determining whether Section 1983 is available as a connecting vehicle for remedying IDEA violations, the circuits initially—through the year 2000—were split, with the majority answering in the negative.[28] The minority consisted of the Third and Seventh Circuits.[29] However, in light of the Supreme Court's rather clear guidance in 2005,[30] the Third Circuit in *A.W. v. Jersey City Public*

education services are consistently injunctive orders exclusively against school districts. *E.g.,* Perry A. Zirkel, *Compensatory Education: The Next Annotated Update of the Law*, 336 Ed. Law Rep. 654 (2016) (canvassing the case law as the latest in six successive compilations); Perry A. Zirkel, *Adjudicative Remedies for Denials of FAPE under the IDEA*, 33 J. NAT'L ASS'N ADMIN. L. JUDICIARY 214 (2013) (tabulating the frequency and outcomes of the IDEA's compensatory education and tuition reimbursement remedies in cases of FAPE denial); Perry A. Zirkel, *Tuition and Related Reimbursement under the IDEA: A Decisional Checklist*, 282 Ed. Law Rep. 785 (2012) (synthesizing the applicable case law for the IDEA's tuition reimbursement remedy). For the broader relief available under the IDEA, the case law lacks any adjudicative decisions specific to individual employees. *E.g*., Perry A. Zirkel, *The Remedial Authority of Hearing and Review Officers under the Individuals with Disabilities Education Act: An Update*, 31 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1 (2011). The same exclusive result applies under the IDEA's alternative enforcement mechanism. *See, e.g*., Perry A. Zirkel, *The Two Decisional Dispute Resolution Processes under the Individuals with Disabilities Education Act: An Empirical Comparison*, 16 CONN. PUB. INT. L.J. 169 (2017).

24. *E.g., Chambers v. Sch. Dist. of Phila*., 587 F.3d 176, 185–86, 250 Ed.Law Rep. 884 (3d Cir. 2009); *Ortega v. Bibb Cty. Sch. Dist.*, 397 F.3d 1321, 1325 (11th Cir. 2005); *Nieves-Marquez v. Puerto Rico*, 353 F.3d 108, 125, 183 Ed.Law Rep. 692 (1st Cir. 2003); *Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist.*, 288 F.3d 478, 486, 164 Ed.Law Rep. 573 (2d Cir. 2002); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 528, 125 Ed.Law Rep. 1078 (4th Cir. 1998); *Charlie F. v. Bd. of Educ. of Skokie Sch. Dist.*, 98 F.3d 989, 991, 113 Ed.Law Rep. 559 (7th Cir. 1996); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387, 79 Ed.Law Rep. 389 (6th Cir. 1992).

25. *E.g., Witte v. Clark Cty. Sch. Dist*., 197 F.3d 1271, 1275, 140 Ed.Law Rep. 468 (9th Cir. 1997); *Mountain View–Los Altos Union High Sch. Dist. v. Sharron B.H*., 709 F.2d 28, 30, 11 Ed.Law Rep. 845 (9th Cir. 1983).

26. *C.O. v. Portland Pub. Sch*., 679 F.3d 1162, 1167, 280 Ed.Law Rep. 28 (9th Cir. 2009).

27. The reason for this broader scope is primarily attributable to the possible basis of *Crofts*. *See supra* note 7 and accompanying text. As a supplementary matter, it is also attributable to the secondary purpose of addressing this issue concisely but comprehensively beyond the specific confines of this case.

28. *Padilla v. Sch. Dist. No. 1 of Denver*, 233 F.3d 1268, 1273, 149 Ed.Law Rep. 368 (10th Cir. 2000); *Sellers v. Sch. Bd. of Manassas*, 141 F.3d 524, 532, 125 Ed.Law Rep. 1078 (4th Cir. 1998); *Heidemann v. Rother*, 84 F.3d 1021, 1033 (8th Cir. 1996); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382, 387, 79 Ed.Law Rep. 389 (6th Cir. 1992).

29. *Marie O. v. Edgar*, 131 F.3d 610, 623, 122 Ed.Law Rep. 943 (7th Cir. 1997); *W.B. v. Matula*, 67 F.3d 484, 495, 104 Ed.Law Rep. 28 (3d Cir. 1995).

30. *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113 (2005) (adding to the comprehensive remedial scheme indication of congressional intent guidance that the provision

Schools *reversed its earlier opinion and joined the majority.*[31] *The First Circuit also added its agreement.*[32] *More recently, the Seventh Circuit observed that its early view may also warrant correction in light of Supreme Court's relevant jurisprudence but found revisiting the issue unnecessary within the confines of the case.*[33] *Finally, in* Blanchard v. Morton School District*, the Ninth Circuit joined the overwhelming majority of appellate authority in concluding that Section 1983 is not available to remedy violations of the IDEA, explaining that "[w]e are persuaded by the recent thoughtful, well-reasoned opinion of the Third Circuit."*[34]

II. Analysis of the *Crofts* Decision

The court's reasoning in denying the individual defendants' motion for dismissal[35] was relatively brief and readily identified.[36] Upon parsing, the reasoning relied on the purported amount of applicable appellate authority generally and specific to the Ninth Circuit. Thus, the analysis here successively addresses appellate authority generally across the circuits and then specifically at the Ninth Circuit, providing the respective correction in light of the foregoing framework.

Across Circuits

IDEA alone. The first level is general,[37] focusing on the purported lack of federal appellate authority supporting the unavailability of the IDEA for individual liability of school district employees. The *Crofts* court's conclusion is correct in terms of direct holdings but only because the support is so solid at the two successive threshold barriers that effectively resolve the matter at earlier stages: (1) the structural limitation of the IDEA to parents and local or state education agencies, thus excluding employees in their individual, as compared with their official, capacity as well as any other third parties[38]; and (2) the overwhelming judicial authority that has ruled out the availability of money damages under the IDEA,[39] which is not only the core but also the most likely meaning of liability in this context.[40]

IDEA via Section 1983. Even though *Crofts* did not specifically mention Section 1983,[41] this alternative theoretically serves as the basis for monetary

of an express, private means of redress in the statute itself is ordinarily an indication that Congress did not intend to leave open a remedy under Section 1983).

31. *A.W. v. Jersey City Pub. Sch.,* 486 F.3d 791, 803, 220 Ed.Law Rep. 502 (3d Cir. 2007)

32. *Diaz-Fonseca v. Puerto Rico,* 451 F.3d 13, 28, 210 Ed.Law Rep. 544 (1st Cir. 2006).

33. *Stanek v. St. Charles Cmty. Unit Sch. Dist.*, 783 F.3d 634, 645, 316 Ed.Law Rep. 618 (7th Cir. 2015).

34. *Blanchard v. Morton Sch. Dist*., 509 F.3d 934, 937, 228 Ed.Law Rep. 335 (9th Cir. 2007).

35. The court separately dismissed the claims against them in their official capacity as duplicative of the claims against the district. The focus of this note is the claim against them in their individual capacity.

36. *See supra* text accompanying note 5.

37. The *Crofts* court first set forth this broad cross-jurisdiction view in terms of the purported amount of applicable authority: "Very few courts have examined the issue of whether the IDEA provides for individual liability." *Id.* at *2. Then, as shown *supra* text accompanying note 5, the court focused on the appellate level for "any . . . circuit."

38. *See supra* notes 14–21 and accompanying text.

39. *See supra* notes 24–26 and accompanying text

40. *See supra* note 23 and accompanying text.

or other remedies against public school employees. However, almost every federal appellate court that has addressed this issue, including the Ninth Circuit, has rejected Section 1983's threshold availability in connection with the IDEA, thus resolving the matter without separately and subsequently having to address the issue of whether individual defendants are subject to personal liability.[42] Indeed, the only decision that the *Crofts* opinion cites to support the lack of applicable authority[43] is that of the Seventh Circuit, which recognized that its earlier ruling is subject to question in light of the intervening case law at the appellate level.[44]

Ninth Circuit

The second level is limited to the applicable "binding" authority at the Ninth Circuit.[45] Apparently due to the thicket of rulings in *Blanchard v. Morton School District*, the judge in *Crofts* mis-identified the track of this case on appeal from his home district in western Washington,[46] thus missing the significance of the Ninth Circuit's aforementioned[47] pertinent, precedential decision. More specifically, in the original ruling under review in the precedential Ninth Circuit decision, the district court had dismissed two individual defendants for ineffective service of process and, separately, two other individual defendants for an entirely different reason, which in relevant part was as follows: "The District argues that these defendants may not be held individually liable under the . . . IDEA . . . when . . . used as a basis for the § 1983 claim. The court agrees."[48] In affirming this ruling without any alternative qualifier concerning service of process in *Blanchard I*,[49] the Ninth Circuit directly filled the *Crofts* prescription for a binding ruling that "school district employees cannot be held individually liable under the IDEA."[50]

Instead, the *Crofts* court, while correctly citing the original court decision, incorrectly quoted its reasoning as treating the non-liability of individuals under IDEA as only "an additional basis for dismissal" beyond ineffective process. Instead, the "additional basis" language was from a subsequent district court decision in the *Blanchard* case,[51] which named three other individual defendants and which the Ninth Circuit reviewed in a separate, unpublished ruling.[52] Moreover, in this second ruling, rather than not

41. *See supra* note 7 and accompanying text.

42. *See supra* notes 28, 31, 32, 34 and accompanying text.

43. *Crofts v. Issaquah Sch. Dist.,* 71 IDELR at *2 (citing *Stanek v. St. Charles Cmty. Unit Sch. Dist.*, 783 F.3d 634, 16 Ed.Law Rep. 618 (7th Cir. 2015)).

44. *See supra* note 33 and accompanying text.

45. *See supra* note 5 and accompanying text.

46. *Crofts v. Issaquah Sch. Dist*., 71 IDELR at *2: "Defendants cite to only one decision in this district that held that individual defendants may not be sued in their individual capacities under the IDEA" (citing *Blanchard v. Morton Sch. Dist.,* No. CV 02–5101FDB, 2006 U.S. Dist. LEXIS 26807, 2006 WL 1075222 (W.D. Wash. Apr. 20, 2006).

47. *See supra* note 34 and accompanying text.

48. *Blanchard v. Morton Sch. Dist*., 2006 WL 1075222 (W.D. Wash. Apr. 20, 2006), *corrected*, 2006 WL 1419381 (W.D. Wash. May 19, 2006).

49. 509 F.3d 934, 228 Ed.Law Rep. 335 (9th Cir. 2007) (*Blanchard I*).

50. *See supra* note 5 and accompanying text.

51. *Blanchard v. Morton Sch. Dist.*, 2006 WL 2459167 (W.D. Wash. Aug. 25, 2006)

52. *Blanchard v. Morton Sch. Dist.*, 260 Fed. Appx. 992, 993–94 (9th Cir. 2007) (*Blanchard II*).

"stay[ing] silent" on the issue of individual liability under the IDEA, which is the *Crofts*' characterization of *Blanchard II*,[53] the Ninth Circuit (1) concluded that the service was effective against one of these defendants in addition to the district, and then (2) dismissed the IDEA claims against the remaining defendants based on *Blanchard I*.[54] In any event, regardless of the unpublished decision in *Blanchard II*, *Blanchard I* provides the specific binding authority that the *Crofts* court sought.[55]

Even if the Ninth Circuit's decision were not dispositive, the *Crofts* court reliance on the purported absence of authority was misplaced. To the extent that default reasoning applies, it would be more relevant, in light of the fundamental structure of the IDEA and the almost uniform direction of appellate judicial authority, to state the question in the obverse: Is there any Circuit Court of Appeals decision that has specifically held that public school employees are subject to liability under the IDEA? As comprehensive canvassed in this case note, there is no such decision.

Conclusion

In sum, whether viewed in terms of the limited jurisdiction of the rights and obligations under the IDEA or in terms of the weight of federal appellate authority in the Ninth Circuit and elsewhere, the rather cursory analysis in *Crofts* warrants prompt reconsideration and correction. School employees who violate the rights of students with disabilities face notable consequences in terms of discipline, including termination, tort liability, and, via Section 1983, constitutional liability. If these consequences are not sufficient, providing for individual liability under the IDEA with or without Section 1983 is a policy matter for Congress or state legislatures to address much more clearly and definitively. Under the current jurisprudence of the Supreme Court and the Circuit Courts of Appeals, the *Crofts* ruling that individuals are subject to liability under the IDEA amounts to reversible error.

53. *Crofts v. Issaquah Sch. Dist*., 71 IDELR at *3: "[T]he Ninth Circuit specifically affirmed dismissal of the individual defendants on the basis of ineffective service of process, and stayed silent on the district court's statement regarding their individual liability."

54. *Blanchard v. Morton Sch. Dist.*, 260 Fed. Appx. 992, 993–94 (9th Cir. 2007) (*Blanchard II*).

55. *See supra* text accompanying notes 5 and 50.