

# School Law for Administrators

## Due Process

### Teacher who was not fired did not have a due process right violation

Citation: *Shaw v. Rondout Valley Central School District*, 2015 WL 8492487 (N.D. N.Y. 2015)

A federal district court in New York has granted a school district's request to dismiss a tenured teacher's substantive due process claim against it. While the teacher argued that an investigation and later filing of complaints against her violated her property interest in her continued employment, the court found that she did not have a cognizable claim of a property right deprivation because she was not terminated from her position and a hearing officer found no fault and dismissed all of the district's complaints against her after a hearing.

Mindy Shaw is a tenured teacher at Marbletown Elementary School in the Rondout Valley Central School District. Shaw is licensed in New York as a special education teacher and has a doctorate degree in education. At the time of the lawsuit, Shaw had been teaching for the district for more than two decades and had received numerous awards and recognitions during her time at the school.

In April 2013, the superintendent of the school district and William Cafiero, who was the principal at Shaw's school, attended a budget meeting during which there was discussion of a 2-3 multiage classroom. In a later meeting, Cafiero told the superintendent and other district administrators that teachers had expressed concern about the 2-3, multiage classroom, but he was told during the meeting that he needed to comply with all policies that would go with such a classroom. He told the administrators that he believed the teachers were preparing a letter to the school board to express their concerns with the 2-3 multiage classroom, and they responded that it was district protocol that concerns first needed to be registered with the superintendent and assistant superintendent before they could be expressed to the school board.

After this meeting, according to Shaw, one of the attendees suggested searching Cafiero's e-mail history to find out if he was interacting with teachers about the potential letter of concern for the school board. The superintendent allegedly authorized this search and the district searched back six weeks unbeknownst to Cafiero. During the search, the district found e-mails between Cafiero and Shaw in which they discussed the letter the teachers were planning on sending to the school board. Also, they found e-mails in which Shaw assisted Cafiero or participated in writing evaluations of other teachers and staff members at the school.

After finding this, the district interviewed other teachers to confirm if they were aware that Shaw may have edited prelimi-

nary drafts of their evaluations. According to Shaw, the teachers said they were not aware but did not express any concern—in fact, they reported that they felt good that Shaw would have ensured the veracity of their evaluations. The district nonetheless contacted the New York State Educational Department about the issue and provided samples of the evaluations on which Shaw had assisted.

On advice of counsel the district had retained, the district administrators determined that her involvement in the evaluation process was inappropriate and the district brought five charges against Shaw including: 1) conduct unbecoming of a teacher; 2) drafting of false and/or fraudulent observation reports; 3) sharing or exchanging confidential employee information; 4) wrongfully drafting and submitting her own observation report; and 5) knowingly and wrongfully conspiring with Cafiero to prepare fraudulent observation reports. Shaw believed that these charges were drummed up in order to give the district justification to terminate her.

After a 16-day hearing on the charges in front of a hearing officer, the hearing officer found no evidence that Shaw had violated the confidentiality of any evaluation report or otherwise broken any specified rules in the district. Therefore, he dismissed all the charges against her. Nonetheless, Shaw decided to sue the school district alleging, among other things, that the district had violated her 14th Amendment substantive due process rights when it leveled the five charges against her and reported her to the state education department. In her complaint, Shaw claimed that the district's actions against her were malicious and outrageous and, moreover, unlawful. She believed the intent was to ruin her reputation and career, including her prospect for future employment. Shaw sought damages in the amount of \$20 million, arguing that the district's actions had caused her severe emotional distress, trauma, anxiety, humiliation, and loss of her good name and reputation, among other things.

The district moved to have the due process complaint (and the other complaints not discussed here) dismissed, arguing that, not only did Shaw not point with any specificity to a fundamental constitutional right she believed was violated, but even if her employment was such a right, she could not show that she was deprived of such right because she was not terminated and all charges against her were dismissed by the hearing officer.

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## You Be the Judge

# Was exhausting IDEA's administrative remedies required when claims were not brought under the IDEA?

### The Facts

A student attended high school in the same school as a male student who had previously sexually assaulted her sister. The student was not on an individualized education plan (IEP) under the Individuals with Disabilities Education Act (IDEA). Over the course of three years, the student and her mother made several requests to the district that she should not be placed in the same classroom as the male student or his brother. According to the family, the two boys taunted and harassed her during classes they had together. The district never agreed to place her in classrooms separate from those boys and eventually, the girl began experiencing anxiety and PTSD.

At that point, the student began homebound instruction in order to avoid having any more encounters with her harassers. The family then sued the school district, alleging that the district failed to accommodate the student's disability in violation of § 504 of the Rehabilitation Act and the ADA.

They also alleged that the district retaliated against her and the family for asserting their rights by among other things disciplining the student, circulating an investigative report into her and her sister, and refusing to separate the student from the harassers. The district motioned for the claims to be dismissed based on lack of subject-matter jurisdiction, arguing that the parents had not exhausted the administrative remedies under the IDEA before pursuing their claims in court as required by the IDEA's exhaustion requirement. The lower court agreed and dismissed the complaint with prejudice. The family appealed.

### The Question

*Did the family have to pursue their claims under the IDEA even if the student was not on an IEP and they were alleging the claims under other laws? (See the answer on Page 3.)*

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## Due Process . . . (Continued from page 1)

A plaintiff can survive a motion to dismiss if they can make a claim with sufficient factual merit to show that they are entitled to relief. The facts alleged must result in a right of relief that is more than just speculative. If the facts alleged do not raise a plausible right of relief, the complaint must be dismissed.

The court began its analysis by explaining that substantive due process protects interests that are "implicit in the concept of ordered liberty," and protects individuals against "government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense" or conduct that is "so outrageously arbitrary as to constitute a gross abuse of governmental authority." The court also explained that in the context of a procedural due process complaint, a tenured teacher like Shaw "undeniably ha[s] a protected property interest in her continued tenured employment." But substantive due process rights are "considerably narrower in scope," the court wrote, because the interests protected in this context are fundamental rights protected by the constitution. Interests related to employment, the court wrote, are not typically considered fundamental rights. With this said however, the court noted that there are certain cases in which courts have found tenured faculty positions interests deserving of substantive due process protection, and for purposes of the motion to dismiss, the court noted that it would consider Shaw's

right to continued tenured employment such a right.

Nonetheless, the court found that her substantive due process claim had to be dismissed because she failed to allege that she was deprived of her protected property interest. While the school district did charge her with several violations with the alleged intention of terminating her, ultimately, all charges were dropped and she remained in her position. Additionally, the court found that Shaw failed to "plausibly allege any conduct that was sufficiently egregious, outrageous, brutally offensive to human dignity, or conscience-shocking so as to be actionable as a violation of substantive due process."

The court also rejected Shaw's argument that the district brought trumped up charges against her without adequately investigating the alleged misconduct first. But the court was unpersuaded. It found that contrary to her argument, the facts alleged in her complaint showed the district did engage in an investigation, including to question other teachers on the matter and to seek guidance from the state education department before bringing charges.

Because of these things, the court granted the district's motion to dismiss Shaw's complaint.

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# You Be the Judge (Answer)

*Was exhausting IDEA's administrative remedies required when claims were not brought under the IDEA?*

## The Judgment

The appeals court affirmed the lower court's decision, concluding that the claims turned on the educational placement of the student and the district's provision of a free appropriate public education (FAPE), and therefore claims that first needed to work through the Individuals with Disabilities Education Act's (IDEA) administrative framework. Therefore, the court affirmed the lower court's decision that it lacked subject-matter jurisdiction for the family's failure to exhaust the IDEA's administrative remedies.

The appeals court explained that under § 1415 of the IDEA, parents of children with disabilities are required to exhaust IDEA's administrative proceedings not only in actions brought directly under the statute, but also in actions seeking relief obtained under the IDEA. Courts consider if a claim relates to the identification, evaluation, or placement of a child, or the provision of a FAPE, and if the answer is yes, exhaustion of the IDEA's administrative remedies is required. This, the court explained, prevents parties from "circumventing" the IDEA's procedural framework by framing a complaint as falling under another statute when remedies are available under the IDEA.

The appeals court looked at the family's two claims. First was that the district failed to accommodate the student's disabilities by refusing to place her in other classrooms and thereby denied her the benefits of the school's educational programs. The second was that the school retaliated against the family after her mother complained.

The first claim, the court found, "intrinsicly" concerned the student's educational placement because it was focused on the school's decision about where the student should receive her education. The accommodation the family sought was to have her placed in classrooms away from her harassers. This claim, the court found, could have been remedied through the IDEA's administrative framework. Similarly, the claim that the

student was denied the benefits of participating in the school's educational programs related specifically to the district's provision of a FAPE. Though the parents argued that the claim was actually about the district's failure to prevent peer-to-peer bullying rather than shortfalls in education, the court found that the complaint specifically focused on the district's decision not to place the student in another classroom. Therefore, on these claims, the appeals court found that exhaustion of the IDEA's remedies was required and it lacked subject-matter jurisdiction.

The appeals court concluded that the retaliation claim was similarly barred. In an earlier decision, *Batchelor v. Rose Tree Media School District*, the Third Circuit found that "retaliation claims related to the enforcement of rights under the IDEA must be exhausted before a court may assert subject matter jurisdiction." In this case, the rights the family was advocating to have enforced were the right to a suitable educational placement and the right to a free appropriate public education, both of which are part and parcel of the IDEA. The appeals court rejected the family's argument that *Batchelor* should not apply because the student did not have an Individualized Education Plan (IEP) at the time as the child in that case did. The court noted, "*Batchelor* makes clear that *any* plaintiff raising claims that could be remedied through the IDEA'S administrative process must exhaust them before filing suit."

Thus, the appeals court affirmed the lower court's decision dismissing the suit for failure to exhaust. However, the appeals court did overturn the lower court's decision to dismiss the suit with prejudice, finding that it was inappropriate to enter such a judgment (which would go to the merits) on the district's motion to dismiss for lack of subject-matter jurisdiction.

This scenario is based on *M.S. v. Marple Newtown School Dist.*, 2015 WL 9301208 (3d Cir. 2015).

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## Around the Nation ~ Virginia

# A school district's revised nondiscrimination policy brings about a lawsuit brought by the Traditional Values Coalition challenging the inclusion of sexual orientation, gender identity, and gender expression

Andrea Lafferty of Fairfax county is the president of the Traditional Values Coalition has filed a lawsuit among with a student who has been identified as Jack Doe, against the Fairfax County School Board (FCSB). The suit challenges the board's revised nondiscrimination policy which prohibits discrimination based on gender identity, gender expression, and sexual orientation. The policy was made more specific in an effort to protect students, but many people believe that it may do just the opposite.

The lawsuit alleges that the revised policy could lead to confusion, raise privacy and safety issues, and affect both student-to-student and student-teacher relations. The lawsuit states that, "Inserting undefined terms into the student handbook and thereby subjecting students to discipline without proper notice of the conduct for which they can be suspended exceeds Defendant's authority under Virginia law."

An organization called Liberty Counsel is representing the plaintiffs. An LC spokesman, Horatio Mihet, said, "Fundamentally they [the plaintiffs] are opposed to local governments contravening state law," he continued, "I think the merits of the policies at issue here are merits that should be discussed and addressed at the state level by the state legislature, which has the constitutional authority to address this subject matter." Furthermore, Mihet says that he believes that the policy change "was done haphazardly and lacked clarity," creating an uncertain learning environment for students.

One issue, in particular, is raising concerns. This issue is the sharing of rest rooms and locker rooms. This is a hot topic in school districts around the country, and it is extremely hard to come to a consensus about what approach is "best for students." One important question is whether schools must require "cross-bathroom use and cross-dressing-room use" to avoid discrimination. Mihet is adamant that there is nothing in state law or Title IX, the federal law that bars sexual discrimination in education, that would prohibit schools from restricting bathroom use or locker room use. That argument is "devoid of legal merit," he added. Mihet asserts that allowing "a biological male to use a locker room where vulnerable females have an expectation of privacy would impede upon their interests as well."

In 1986, the Virginia Supreme Court adopted a legal principle known as Dillon's Rule, and by that standard the FCSB lacks the authority to expand protected classes beyond what the General Assembly allows. According to the lawsuit, changes such as these cannot be made because the General Assembly has not included either sexual orientation or 'gender identity' as protected classes under the laws of the commonwealth," the school board "wholly lacks authority to add those classes to its nondiscrimination policy and concomitantly, to add those categories to its student handbook as potential grounds for suspension."

The lawsuit asserts that Virginia Attorney General Mark Herring's opinion that the Virginia Constitution and the General Assembly bestowed a "broad grant of authority" that would let school boards include sexual orientation and gender identity in their nondiscrimination policies is based on an incomplete interpretation of the law. The suit alleges that the school board's authority is restricted. The legal complaint states, "Absent enabling legislation from the General Assembly or the Constitution, local governing bodies, including Defendant, cannot enact ordinances or policies that are more stringent i.e., protect more classes of people, than do state statutes."

According to the complaint filed by Liberty Counsel, disciplining students for discrimination based on sexual orientation and gender identity "is not necessarily implied" from state laws prohibiting unlawful discrimination because of "race, color, religion," and other classifications, "nor can it be implied from Title IX's sex-based discrimination."

In response, FCSB chair Pat Hynes said, "We have not been served with the lawsuit yet, but once we are, our attorneys will review it and file the appropriate response with the court." Hynes added, "The School Board and FCPS administration will continue to ensure that all of our students and employees are treated with dignity, respect, and equality."

Source: *Courthouse News Service*.

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