School Law for Administrators

Title IX

Female softball players seek attorneys' fee award after succeeding in getting consent decree

Citation: *Myers v. Board of Education of the Batavia City School District, 2016 WL 4642920 (W.D. N.Y. 2016)*

A federal district court in New York has granted the request for attorneys' fees sought by a group of high school female softball players after they were successful in getting a consent decree in their earlier Title IX suit.

In 2013, a group of female softball players who attended the Batvia City School District filed suit seeking declaratory and injunctive relief, alleging that the district discriminated against them "by providing superior facilities and equipment to the boys' baseball program than it provides to the girls' softball program." They did not seek monetary damages.

As the most significant example of the disparate treatment they experienced, the girls pointed to the difference between the facilities provided to the boys' baseball team and the girls' softball team. Specifically, the varsity boys' baseball team at the high school "play[ed] all home games at a professional minor league baseball stadium," and the varsity girls' softball team played in "a field that is poorly maintained, hazardous, lacks outfield fencing, and has no scoreboard, dugouts, or stands." The girls also alleged that the girls' softball team was not given access to bathrooms and locker rooms (while the boys were), that the lack of lights on the girls' field limited scheduling of games, that the girls received inequitable equipment and funding, and that the district was aware of its failure to comply with Title IX since at least February of 2011.

In their suit, the girls sought improvement of the softball team's facilities, along with preliminary and permanent injunctive relief requiring the district to remediate its violations of federal law by providing female athletes with treatment and benefits comparable to those provided by male athletes. They also sought attorneys' fees.

After lengthy negotiations (during which time preparation for

(Continued on Page 2)

In The News

Guidance on how to work with homeless students issued by the U.S. Department of Education

According to the U.S. Department of Education (ED), more than 1.1 million students in the United States were homeless last year, a record high, and this number grows bigger each year. From 2010 to 2012 the number of homeless students nationwide grew by 10%. These numbers cannot be ignored, and thus, the (ED) recently issued guidance on providing assistance to homeless students through Every Student Succeeds Act (ESSA). ESSA reauthorized the McKinney-Vento Education for Homeless Children and Youths program. The department also pointed out that homeless students face significant academic and socio-emotional issues, including an increased risk of dropping out of school.

Starting in the 2016-2017 school year, states and districts around the nation will be required to calculate graduation rates for homeless students. This data has never before been mandatory. Additional changes that will be mandated beginning this fall include: ensuring that preschool-aged homeless children have access to support services, protecting the privacy of information about a student's living situation, and providing homeless students with transportation to and from their "school of origin" until the end of the school year.

Collecting data on homeless students can be challenging because this population is transient, and often times doesn't have a "home base." A new definition of the "school of origin" is the school that the child or youth attended when permanently housed or the school in which the child or youth was last enrolled. That definition has been expanded under ESSA to include preschools. ED Secretary John B. King Jr., says that he hopes that the guidance will "serve as a tool to help states and districts better serve homeless children and youth—we can and we must do better."

Source: *Politico*

—School Law Bulletin,
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Around the Nation ~ Washington

A new charter school law is being challenged by the labor union coalition and teachers who claim that the law diverts money away from public schools

A new charter school law in Washington is being challenged by the Washington Education Association (WEA), a statewide teacher's union. In 2012, a voter referendum passed a law enabling charter schools to receive public funding. However, this law was overridden by the Supreme Court in 2015 after the state Supreme Court ruled that charter schools did not qualify as "common" or public schools since they were not overseen by locally elected school boards. For this reason, the court decided that charter schools did not qualify for public funding. Now, only one year later, this newly enacted legislation will restore funding to charter schools using a different pool of public money.

In order to qualify for public funding under the new legislation, charter schools will have to adhere to additional regulations. Even so, opponents of this law claim that it does not solve the original problem because charter schools still do not have enough oversight by public officials, and the money being used to fund the schools will still divert funds from public

(Continued on Page 3)

Title IX. . . *(Continued from page 1)*

litigation continued), the district and the girls reached a settlement with the help of a mediator and each side's experienced attorneys. The consent decree, which was finalized in April 2014, provided among other things that the district would make field modifications and install additional features at the girls' varsity softball field along with improvements to the junior varsity field, including specific safety features. The decree also included an acknowledgment by the girls that the district had converted the girls' primary field to an all-dirt infield in September 2013. The girls' other grievances were resolved through discussion and negotiation in the effort to reach the consent decree over litigation. The court approved the consent decree, finding that it addressed nearly all of the concerns raised in the original lawsuit.

The girls later moved for more than $68,000 in attorneys' fees and costs. The school district opposed the award, arguing that the fees should be denied, or at least reduced. The court granted the request for attorneys' fees, finding the girls met the prevailing party requirements.

An attorneys' fee award is available in the Title IX context in "any action or proceeding to enforce a provision" of the law. Courts may, in their discretion, award the prevailing party a reasonable attorneys' fee. It is up to the court to determine if the fee requested is reasonable, considering primarily if a reasonable client would pay the fee and assuming that a client would want to spend the minimum amount required to have their case effectively litigated.

The court first considered the hourly rates requested for the three attorneys (which went from $185 to $305 an hour), finding that though the district was able to point to other cases where attorneys with comparable experience earned less than these hourly rates, the court noted the district failed to consider another case where attorneys were awarded exactly the same amounts. Thus, the court found the hourly rates were reasonable. The court also found the hours requested were reasonable, noting that the attorneys had already reduced the number of hours they were requesting compensation for by 70 hours. This was sufficient in the court's opinion and therefore, the court determined the nearly $68,000 requested was the "lodestar" amount. The next consideration was whether the court should reduce the fee based on limited success, as the district argued.

The most important consideration by a court is the determination of what constitutes reasonable attorneys' fees based on the degree of success in the legal action. Courts will decrease the amount of the fee requested in cases where a plaintiff received only limited or partial success. The district argued in this case that the plaintiffs "achieved virtually nothing in the way of success," noting for example that the upgrades to the softball field had been long underway. But the court found that this argument was "at odds" with the district's 'Affirmation in Support of the Joint Motion for Approval of the Consent Decree' in which the district affirmed that, "[e]very significant area of grievance offered by the Plaintiffs' Complaint, moreover, is either provided for by the Consent Decree's terms, or has otherwise been resolved through a course of discussion and negotiation in arriving at the Consent Decree." Further disputing the district's argument, the court noted that had all the change the district made indeed been "underway," the district should have settled with the girls earlier and saved everyone the time and costs of preparing for litigation. The court also rejected the district's argument that the fee should be reduced given its position as a public entity, finding nothing about its public status made a fee reduction appropriate in this case.

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Headlines on School Law

by Rob Taylor, Ph.D.

They say ESSA gives states and districts more autonomy, but . . .

OMG. Apparently UDL may be baffling hapless and ignorant teachers who sometimes use the principles of "universal design for learning" without knowing what they are doing, according to Michael Hodnicki, instructional coordinator for secondary language arts for the Cecil County Md. school district. Of course without support of the central office, he proclaims, teachers will likely fail to make the practice systematic.

George Van Horn, director of special education for Indiana's Bartholomew Consolidated School System, also does not trust teachers to take a shot at creative classroom activities. As Christina Samuels relates in a recent *EdWeek* piece on how the reauthorized federal law, Every Student Succeeds Act (ESSA), is telling educators to use UDL, "But it's not always easy to talk educators out of believing that there are only a few best ways to teach a lesson or deliver an assignment, Van Horn said."

The point of the article referenced above—one in a series of *EdWeek* write-ups trying to define the gargantuan reauthorized federal law—is that ESSA intends to promote the UDL teaching system through suggestions and mandates embedded in the law. It's hard to jibe this proposition with the already conventional wisdom that ESSA wants to hand over much greater authority and flexibility to states and school districts.

So, what is UDL? The article says, "Universal Design for Learning, or UDL, is an instructional framework that supports flexible ways for educators to teach lessons, as well as multiple ways for students to demonstrate what they know. The goal: to reach all learners, including students with disabilities and English-language learners."

Anything wrong with that? Nothing, I am suggesting here, except the dubious supposition that professional educators need—not their teacher training programs, not their district-guided professional development, not their collegial interchanges with other teachers—but the advice and direction of a law devised by our nation's Congresspeople, most of whom surely have never tried to run a classroom of children.

While UDL appears in the law, said Nancy Reder, co-chairwomen of the National UDL Task Force, that appearance is "spotty." Ms. Reder wanted a lot more, UDL not just mentioned in the assessment section of the law, "but on things you can do with the money." But no, she complains, "We didn't get that."

Again, the examples of UDL "lesson components" are not inherently objectionable. For example, we hear about:

- Instructional videos accompanied by scripts and closed-captioning for students who need those supports;
- Illustrations, simulations, images, or interactive graphics to support or replace information normally provided by plain text;
- Outlines and graphic organizers to help students organize key ideas and relationships; and
- Key information presented in a student's primary language, such as Spanish or American Sign Language.

We hear more from the UDL proponents. Lessons might include audiovisual components, illustrations, enlarged print, glossaries, as if such lesson components are not approaches that teachers, even without assigning to their lessons the UDL

(Continued on Page 4)

Around the Nation ~ Washington. . . *(Continued from page 2)*

schools, no matter if the funding comes from another pool, it is still public money. WEA is challenging the new legislation with hopes of, once again, blocking public money from going towards funding charter schools.

Kim Mead, WEA president, contends that there are other problems with the new legislation including that the Alternate Learning Experiences, which are programs that allow school districts to contract with outside providers to offer specialized services, need to be clarified. Mead said, "This law still does not meet our state's rigorous standards for funding, accountability, or public education. It shortchanges the more than one million public school students who are still waiting for the state to meet its constitutional obligation to them and their education.

Public schools in the state have been plagued with budget problems for years, and have been continually underfunded, and these problems have not yet been corrected. Ironically, the same year the first charter law was passed by voters, the state's supreme court ruled in a case called *McCleary v. Washington* that lawmakers were failing to adequately fund public education. Last August, it declared the legislature in a contempt of court, and levied a daily $100,000 fine on the state. Lawmakers failed to resolve the issues raised in *McCleary* this session, instead passing legislation instructing the state legislature to design and approve a plan for satisfying the court next year.

Source: *Education Week*

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Headlines on School Law. . . *(Continued from page 3)*

label, certainly know about from their higher education teacher training programs and their work in a school community. And the same goes for techniques such as group projects, multimedia presentations, drawings, music, standing desks, and yoga balls.

In my local district in the Colorado mountains—in which my children grew up attending, some of my grandchildren now attend, my daughter teaches, and my wife serves on the school board—the documents sent out to parents about everything going on never mention UDL.

However, creative ideas and strategies are alive everywhere in the local schools. "Mindfulness" is a teaching focus used to reduce stress, STEM projects abound, arts integration is popular, maker-space media centers are opening in the elementary schools, dual language programs are seeing great success, and the community has rallied around making certain each student has the up-to-date technological devices they need.

Last week, I attended a wax museum project in which fourth graders chose a hero figure to study and then performed as that figure to an audience of other children and adults. District teachers and administrators seem to have a pretty good grasp on how to pursue "new" and creative educational strategies, and all without cajoling or threatening coming from Congress or the U.S. Department of Education (ED).

ESSA Rules on Accountability and Testing Yet To Be Finalized

ESSA regulations have not been put in cement yet. Draft rules, pretty much crafted by ED officials, were issued on May 26 and will be open to public comment until August 1. Trying to strike a balance between some lawmakers who want to move toward greater autonomy for states and civil rights advocates who seek first and foremost to provide educational equity for low-income students has not been an easy process. As *EdWeek* write Andrew Ujifusa put it, "In their proposed rules on school accountability, federal officials are attempting to walk a fine and aggressively scrutinized line."

New ED Secretary John King, Jr. waxed optimistic. "States now have an opportunity to use really thoughtful, evidence-based interventions," he said. But since testing requirements have not been particularly dialed back, meaning the opt-out movement is not likely to slacken, many observers are wondering how genuine the new, proposed flexibility for states will be when federal law requires a tight compliance on test-taking mandates.

Generally the draft accountability regulations of ESSA cover what states must measure in the area of school performance, how such data is to be made public, and how to define school improvement. While states will have new flexibility in choosing just what indicators can be used to judge school performance, academic indicators (as opposed, for example, to school climate and student engagement) will be required to carry by far the most weight.

And testing mandates can be strict. In the draft rules, schools are also required to assess 95% of all their students and 95% of all subgroups. States are not told how to deal with schools that do not meet these levels but, whether or not there is significant opting-out, states will be mandated to develop rigorous strategies to counter it. Strong civil rights proponents continue to be wary of states failing to collect the disaggregated data that serves to show where low-income and racial groups are being treated inequitably.

Cecilia Munoz, director of the White House Domestic Policy Council, acknowledges the ESSA goal of transferring authority to states, but as a rule-making panel member, she says, "We're trying to balance that flexibility with strong civil rights guardrails."

So, whether because ESSA tries to mandate some areas that should be left mainly to local professional discretion such as how to be creative in the classroom, or because some local activities such as inequitable practices really need to be analyzed and overseen by federal officials, states and local districts may find the promised increase in autonomy and flexibility mainly a mirage.

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