School Law for Administrators

First Amendment

Court denies principal's request to dismiss First Amendment claims after banning parent from school

Citation: *Johnson v. Perry, 2015 WL 6181745 (D. Conn. 2015)*

A federal district court in Connecticut recently denied a school principal's request for summary judgment in a case in which the parent of a high school student sued alleging a First Amendment violation after the principal banned him from school property and school sponsored events. The court found that there were questions of material fact as to whether the ban was viewpoint neutral as required and whether the principal would have known he was violating a constitutional right in enforcing the ban. The court also revived a due process claim that the student's father had formerly sued related to the same issue.

Stephen Perry was the principal of Capital Preparatory School, employed by the Hartford Board of Education. Norman Johnson's daughter was a student at the school. During the 2012-2013 school year, Johnson's daughter met with Perry to express her desire to discontinue playing for the varsity basketball team, saying that she did not get enough playing time to make it worth her while. Norman Johnson had also confronted the basketball coach on several times throughout the year about his daughter's lack of playing time. On February 7, 2013, Johnson, his wife, and their daughter met with Perry and the president of Hartford Parent Teacher Organization to discuss the daughter's participation on the varsity basketball team.

During the meeting, emotions ran high and Johnson raised his voice and banged the table with his hand. Based on this conduct, Perry decided to ban Johnson from the school and its events, with the exception of commencement. He sent Johnson a letter stating the same, and explaining that his "verbal altercations, physical intimidation, and direct threats to staff have created an unsafe environment for staff, students, and other parents and will no longer be tolerated." The letter was also sent to the board of education and the police department, as well as other communities and venues where the school's activities occurred.

According to Johnson, as a result of the letter, he and his family suffered embarrassment and harassment and he was not permitted to support his daughter in any of her scholastic activities. The ban was enforced on multiple occasions when Johnson attempted to attend events in support of his daughter.

Johnson later sued Perry, alleging that the ban was extreme and outrageous and carried out for the specific purpose of inflicting emotional distress. He also alleged that it violated his First Amendment right to peaceable assembly. Perry moved for summary judgment, arguing that the school was a nonpublic forum and that he was within the bounds of the law to restrict access so long as the restriction was reasonable in light of the purpose served by the forum and viewpoint neutral. As the principal, Perry said that he had the general supervisory duty to ensure the safety of school and students and that his decision to ban Johnson was in furthering this duty based on his concern that Johnson posed a danger to staff and students at the school. Alternatively, Perry also argued that Johnson did not have a First Amendment right to attend these activities.

The court concluded however that it was a disputed fact as to whether Johnson posed a danger to students and staff at the school. Further, the court concluded that whether Perry's action was actually based on a disagreement with the message Johnson was conveying was also disputed. The court noted: "That plaintiff's comments may have caused discomfort on the part of school staff, or may have been the subject of disagreement cannot justify governmental restriction or suppression based on those comments."

On the argument that Perry could restrict Johnson's access to the school without running a foul of the First Amendment because Johnson did not have a First Amendment right to access to school events, the court found that even so, this could not trump the requirement that restrictions on assembly and speech had to be reasonable and viewpoint neutral. Because there was a question about whether the actions were viewpoint neutral, the court denied summary judgment to Perry on the First Amendment claim.

Similarly, the court rejected Perry's request to dismiss Johnson's claim of intentional infliction of emotional distress. The court found that reasonable minds could disagree on whether Perry's actions were extreme and outrageous. For example, Johnson was not even permitted to drop off or pick up his daughter outside of the school, allegedly based on the content of his speech. Whether he suffered emotional distress from Perry's conduct was best determined by a jury, the court concluded.

The court also revived a due process complaint Johnson had

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Stay Put Provision

Parents argue new school district must maintain private placement under stay-put provision

Citation: *J.F. v. Byram Tp. Bd. of Educ., 2015 WL 6522635 (3d Cir. 2015)*

The Third U.S. Circuit Court of Appeals has jurisdiction over Delaware, New Jersey, and Pennsylvania.

The Third U.S. Circuit Court of Appeals recently affirmed a lower court's decision in a case brought under the Individuals with Disabilities Education Act (IDEA) in which the parents of a disabled child argued that a new school district to which they moved had to maintain their child's private placement pursuant to the stay-put provision while they went through a due process proceeding on the proposed individualized education plan (IEP). The appeals court found that the new school district was not required by the law to maintain the private placement under stay-put if it could not implement the placement, but instead needed to offer comparable services to the student while the due process hearing took place.

J.F. was a student with disabilities who had an IEP provided by his home school district, Westwood, that placed him in a private school. He moved with his family from Westwood to Byram Township and enrolled in the school district there. Byram school district personnel met with J.F.'s parents to develop an IEP but consensus could not be reached, and the parents filed a due process hearing request. They also asked for an injunction to require Byram to pay for the private placement (from the Westwood IEP) during the pendency of the proceedings under the IDEA's stay-put provision. They argued that the private placement was the then-current placement at the time of their due process request.

The administrative law judge (ALJ) denied the request for an injunction requiring that the district fund the private placement; further it found that Byram had offered comparable services as the IEP offered by Westwood, and that J.F.'s parents would not cooperate to come up with a long-term IEP. The parents appealed to federal court and the court affirmed both decisions. The parents again appealed, arguing that the stay-put provision of the IDEA required the new district to fund the private placement which was the last agreed-upon placement for their child.

The appeals court affirmed the lower's decision on both counts. Under the IDEA, the stay put provision provides that during the pendency of a due process hearing, unless parties agree otherwise, the child is to remain in their "then-current educational placement."

While J.F.'s parents argued that the private school was the then-current placement because the only IEP in place at the time of due process hearing provided for his enrollment there, the appeals court found that the stay-put provisions on which they were relying was not applicable.

It noted that if the family had not voluntarily relocated from Westwood, there might be a closer question. But, here, where the family voluntarily moved, the appeals court concluded that the "purpose" of the stay-put provision was not implicated. The purpose of that provision, the court explained, is to "maintain the status quo in situations where the school district acts unilaterally." This is meant to protect students and their parents. Here though, the school district where the family chose to relocate was working with the family to develop an appropriate IEP and could not implement the private placement but offered services it believed were comparable.

The appeals court noted that it agreed with other decisions that when a transfer student had a disagreement about the appropriate educational placement, the student's new school district is responsible for satisfying the IDEA's requirement to implement the last agreed-upon IEP unless implementing that IEP is impossible for the new district. In that case, the appeals court noted, the exception should be for the new school district to adopt a plan that comes as close as possible to approximating the plan during the pendency of the due process proceedings.

The appeals court found support for this in the language of the IDEA, referencing 20 U.S.C.A. § 1414(d)(2)(C)(i)(I), which provides that: "In the case of a child with a disability who transfers

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filed earlier. It found that banning a parent from his child's public school could be seen to infringe on the parent's liberty interest in directing the education of the child. While school officials can legitimately restrict school access to ensure a safe and productive environment, they could not prohibit the parent from having "normal school access without affording the parent a fundamentally fair opportunity to contest" the restriction and stated reasons for doing so.

Finally, the court noted that the qualified immunity defense that Perry put forward depended on a credibility assessment of his stated purpose in enforcing the ban. Qualified immunity protects government officials from liability for civil damages if they are performing discretionary functions and their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have been aware. Because there was a genuine issue of material fact as to whether Johnson had suffered a violation of one of his constitutional rights because of the ban, and because there was a question as to Perry's motivation, the court determined that qualified immunity would be denied at this stage in the proceedings.

—School Law Bulletin,
Vol. 42, No. 23, December 10, 2015, pp. 3-5.

Discrimination

Students did not show district was deliberately indifferent to peer-on-peer racial harassment

Citation: *Fennell v. Marion Independent School Dist., 804 F.3d 398 (5th Cir. 2015)*

The Fifth U.S. Circuit Court of Appeals has jurisdiction over Louisiana, Mississippi, and Texas.

The Fifth U.S. Circuit Court of Appeals recently affirmed a lower court's decision in favor of a school district, finding that a group of African-American students did not prove that the district discriminated against them or violated their constitutional equal protection rights because they did not show the district was deliberately indifferent to peer on peer racial harassment, or that the school board in its policy setting role was aware of the harassment, much less condoned it.

In the case, three siblings (Kyana Fennell, Kyrianna Fennell, and Kavin Fennell) who are African-American, attended school in the Marion Independent School District. They were in elementary, middle, and high school when the incidents occurred. According to their complaint, all three suffered peer-on-peer racial harassment.

Among other incidents, the kids were subjected to racial slurs and epithets from other students on multiple occasions, both in school and out of school. For example, students in the elementary school began using the "n" word after their teacher read Huckleberry Finn to them. Separately, one of the children received a text message from another student calling her a "stupid ['n' word]." Finally, a noose was placed near their car with a note again using the "n" word and further comments on the superiority of the white race. This was not the first time a noose had been used in a racial way in the district, the prior year, another African-American student found a noose in his gym locker and students were made to run laps as punishment.

Aside from the peer-on-peer harassment, the Fennell children also reported that they experienced racially offensive treatment from school staff. They alleged that the high school athletic director made a racially offensive comment to Kyana and the softball coach engaged in allegedly racially motivated behavior with Kyra.

The school district responded to the reported incidents. Among other things, the district held a special assembly with students to remind them of the district's policies prohibiting racial harassment and bullying. The district also held a special training for its employees on the same topic. The training was done by an outside organization facilitated by the U.S. Department of Justice. However, the district would not agree to sign a resolution agreement provided by the DOJ on the school district's policies.

The family later sued the district, athletic director, and softball coach alleging race discrimination in violation of Title VI and a violation of the children's equal protection rights. The district and employees requested summary judgment and the lower court granted the request. The family appealed.

The appeals court affirmed the lower court's decision, but noted that the Title VI claim was one of first impression in the Fifth Circuit.

In their Title VI claim, the family had alleged that the children had been subjected to a racially hostile environment based on the peer on peer harassment. In requesting summary judgement, the school district argued that the harassment the children experienced was too periodic and sporadic to create a hostile environment. Further the district argued that it responded promptly and meaningfully to all reported incidents.

As the first matter, the court determined that the appropriate standard for this claim was the deliberate indifference standard, under which the Fennell children needed to show the harassment was "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to educational opportunities or benefits provided by the school" (a racially hostile environment), and the district had actual knowledge, had control over the harasser, and the environment in which the harassment occurs, and was deliberately indifferent.

Taking these things into account, the court concluded that there was a fact issue as to whether a racially hostile environment existed that deprived the children of access to education. Though the district characterized the incidents as sporadic and irregular, the court found that the racially-motivated incidents and comments the children experienced were "sufficiently regular and continuous to constitute 'severe, pervasive, and objectively offensive' harassment.

Next the court turned to the question of whether the district had been deliberately indifferent to the racial harassment. To show deliberate indifference to peer on peer harassment, the family needed to prove that the district's response or failure to respond was clearly unreasonable based on what was known about the incidents. The court found that the children failed to meet this standard, even considering the evidence in the light most favorable to them.

This was because the school district took what the court described as "relatively strong action" in response to the most "egregious" incidents even if some of its actions to more minor incidents left something to be desired. To summarize its conclusion, the court explained that while the family did not get all of the remedies they wanted and the district's actions did not stop all racial harassment, the district's actions could also not be said to be deliberately indifferent or tantamount to allowing racial harassment to continue.

On the equal protection claims, the court first noted that the defense of qualified immunity had not been raised on appeal and therefore would not be considered. Thus, the court addressed

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Around the Nation ~ Maryland

Teacher Work Day Rescheduled To Coincide With A Major Muslim Holiday

Legally, religious holidays may not be recognized by public schools, but as discovered in Maryland, there is some grey area in this rule. In a 6-2 vote, the Montgomery County Board of Education has decided to move a professional work- day for teachers and administrators to September 12, 2016, which could coincide with the Muslim holy day of Eid al-Adha. Eid al-Adha's celebration varies from year-to-year because it is based on a lunar calendar. In 2016, it is expected to fall on September 11, a Sunday, or on September 12, a Monday.

This decision represents a victory for the local Muslim community after years of lobbying for the same treatment as Christians and Jews. But Montgomery County Public School officials stand by their claim that they cannot, by law, close schools to observe religious holidays. Most school districts have changed their language from "Christmas Break" to "Winter Break," but this does not change the fact that schools are closed nationwide on Christmas. Schools are closed throughout the district on major Christian and Jewish holidays such as Christmas and Yom Kippur, but officials cite state requirements or operational effects such as expectations of large absenteeism on those days to defend their reasoning.

Many people have very strong feelings when it comes to religion, and there is no way to please everyone. MCPS made national news last year when they struck the names of religious holidays off of the county's school calendar document in an attempt to show neutrality, a move that drew criticism, including from the Muslim community. However, it has since created an additional online calendar on which users can view religious holidays and days of cultural celebration.

This issue comes down to equity. Muslim community leaders say that the issue is fairness and that, without a school closing, Muslim students must choose between their faith and their education when Eid al-Adha or Eid al-Fitr fall on a school day. A board majority approved the measure even though it was not possible to be certain when Eid al-Adha will fall in 2016.

The next step in this process is that district staff members will go back to the board with a proposal for which professional workday would be switched to September 12 to accommodate the holiday. Montgomery County has five teacher workdays before the school year begins and four other professional days during the year.

Source: *The Washington Post*

—School Law Bulletin,
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school districts within the same academic year, who enrolls in a new school, and who had an IEP that was in effect in the same State, the local educational agency shall provide such child with a free appropriate public education, including services comparable to those described in the previously held IEP, in consultation with the parents until such time as the local educational agency adopts the previously held IEP or develops, adopts, and implements a new IEP that is consistent with Federal and State law."

The court noted that the IDEA does not discuss whether the stay-put provision imposes requirements above and beyond this provision, but noted that it has found in previous cases that the stay-put provision "yields to other procedures governing transfers." Therefore, the court found that because J.F.'s parents voluntarily relocated, the stay-put provision was inoperative and the district could meet its obligations by complying with the IDEA'S requirements to offer comparable services until an IEP had been agreed upon. The appeals court found no error with the ALJ and lower court's decision that the district met those obligations.

—School Law Bulletin,
Vol. 43, No. 1, January 10, 2016, pp. 3-4.

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the merits of claim against the school district first, finding that there was no evidence that the board of education knew of, much less condoned, the racially harassing conduct of its employees. For municipal liability for such a claim under § 1983, there had to be proof that the policymaker (which was the board) had an official policy that was a "moving force" behind the violation of constitutional rights.

Turning to the claims against the coach and athletic director, the court found that there was not sufficient evidence to support the claim in either case. For the softball coach, the court found there was no record that the coach acted on the basis of race in the incidents alleged. For the athletic director, though the record contained evidence that he made a racially biased remark, the court determined that this offensive remark on its own was not sufficient to support an equal protection claim, particularly where there was no evidence of other disparate treatment.

Therefore, the appeals court affirmed the lower court's decision in favor of the school district and its employees.

—School Law Bulletin,
Vol. 42, No. 24, December 25, 2015, pp. 5-6.

2015 Sports Law Year-In-Review

(Below please find the second part of a three-part installment by Lee Green, J.D. at Baker University in Baldwin City, Kansas discussing 2015 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Title IX

An effective strategy for school and athletics administrators seeking to gain a better understanding of the application of Title IX to gender equity in their institutions' sports programs is to read one federal court case opinion addressing the issue and one Office for Civil Rights (OCR) resolution agreement on the topic. The following are one of each – clearly and thoroughly written analyses setting forth the expectations of the federal judiciary and the OCR regarding Title IX and the precise steps that should be taken by any district to ensure compliance.

In 2015, in Ollier v. Sweetwater Union High School District, the district decided not to request an appeal before the U.S. Supreme Court of the September 2014 decision of the U.S. Court of Appeals for the Ninth Circuit upholding two previous lower court decisions against the district. The case originated with a dispute in 2006 over the inferiority of Castle Park (CA) High School's softball facilities as compared to its baseball facilities and in a 2009 preliminary ruling, a U.S. District Court found the school to be in violation of Title IX's "three-prong test" mandating equal sports participation opportunities for female students and in violation of Title IX's prohibition on retaliation against those who lodge complaints about inequities (the softball team's coach had been fired in response to his complaints about facility inadequacies).

In a 2012 decision, the lower federal court found the school to also be in violation of numerous requirements related to equal treatment of female student-athletes in the "other athletics benefits and opportunities" component of Title IX. The court found inequities for female student-athletes in 1) equipment, uniforms, supplies, and storage; 2) locker rooms, practice facilities, and competition facilities; 3) access to quality coaching; 4) publicity, marketing, and media services; 5) scheduling of practices and games; 6) access to athletic training and medical services; 7) institutional and administrative support services; and 8) recruiting resources to encourage enrolled girls to participate in sports. The case is an instructive one for school and athletics administrators and provides a blueprint for the expectations of the federal courts with regard to Title IX compliance by scholastic sports programs. The full-text of the Court of Appeals' decision in the Ollier case, including its extensive set of recommendations for Title IX compliance by high school athletics programs, is available at **http://cdn.ca9.uscourts. gov/datastore/opinions/2014/09/19/12-56348.pdf**.

In July 2015, the Chicago Public Schools entered into a resolution agreement with the U.S. Department of Education's Office for Civil Rights (OCR), which had in 2010 initiated a Title IX compliance review of the athletics programs at the 98 district high schools. The OCR investigation found a widespread failure of the schools to satisfy Title IX's "three-prong" test. Despite approximately 50%-50% male-female-enrollment district-wide, 58.7% of sports participation opportunities went to boys and only 41.3% went to girls, yielding a 17.4% shortfall in prong-one proportionality. And none of the schools could demonstrate a prong-two "history and continuing practice of program expansion" or a prong-three "full and effective accommodation of the athletic interests and abilities of the female enrollment." The resolution agreement establishes a timetable for the district to remedy its Title IX problems over the next four years and, in the same way the Ollier case is instructive regarding the expectations of the federal courts regarding Title IX, the Chicago settlement provides a blueprint regarding the expectations of the OCR regarding Title IX.

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2015 Sports Law Year-In-Review. . . . *(Continued from page 5)*

Constitutional Law: Freedom of Speech & Social Media

Courts continue to struggle with the issue whether schools have the authority to sanction students or student-athletes for inappropriate, off-campus postings on social media websites in violation of school or athletics codes of conduct. Since 2011, seven U.S. Court of Appeals decisions and more than a dozen U.S. District Court rulings have addressed the issue, with the common thread running through the cases being that schools may sanction such communications, but only if the postings create or could reasonably forecast to create a substantial disruption at school, if the postings constitute bullying or harassment against other students or school officials, or if the postings manifest a "true threat" of violence, one that would be reasonably interpreted by the reader as manifesting an intent by the poster to carry out the threatened actions. Courts have also consistently ruled that school social media policies, in order to survive judicial scrutiny, must be precisely-written and narrowly-tailored to prohibit only those forms of student speech that the school is constitutionally authorized to sanction.

In August, in Bell v. Itawamba County School Board (MS), the U.S. Fifth Circuit Court of Appeals, sitting en banc (all 15 active judges participating), reversed a 2014 ruling by a Fifth Circuit three-judge panel that the district violated the free speech rights of a student expelled from his extracurricular activities and suspended from school for posting online a video he created featuring a rap song that accused two coaches at Itawamba Agricultural High School of inappropriate conduct with female students. The 2014 decision found that the school did not have the authority to sanction the student because the video was produced off school property, posted online from the student's home, did not use school resources (neither its computer hardware nor software), and was never accessed by any students on school property. However, in its 2015 en banc rehearing, the Court of Appeals upheld the district's actions and ruled that it did not violate the student's free speech rights based upon the "substantial disruption" standard established in the U.S. Supreme Court's 1969 decision in Tinker v. Des Moines School District. In the 2015 Bell decision, the court held that intimidating and harassing language directed at school officials could reasonably forecast to cause a substantial disruption on school property and that despite the fact that the postings took place off school property, the school had the authority to punish the offender.

Constitutional Law: Freedom of Religion

In September, the Texas Attorney General filed a brief with the Texas Supreme Court requesting that the state high court agree to hear the appeal of an October 2014 ruling by a state court of appeals in Matthews v. Kountze Independent School District, a case dealing with the right of high school cheerleaders to display religious messages on banners at their public school's athletic events. The dispute arose in September 2012 when the district, concerned that the display of Bible verses on run-through banners at high school football games violated the First Amendment's Establishment Clause, prohibited the practice. Citing their free speech and free exercise of religion rights, the cheerleaders filed a lawsuit and a state trial court judge issued a temporary restraining order staying the implementation of the ban pending a full resolution of the case. In April 2013, the district changed its policy to allow such banners at school sports events and in May 2013, the same judge who had previously issued the temporary injunction ruled that the display of the banners was constitutionally permissible. The Kountze ISD then requested that a state appellate court clarify the district's obligations regarding church-and-state issues, but in May 2014, the appellate court ruled that the issue was moot because of the district's policy change. The cheerleaders, in order to eliminate the possibility of the policy being amended in the future in a manner that might limit their ability to display the religious messages, requested that the Texas Supreme Court hear the case and issue a definitive ruling on the free speech and free exercise of religion issues in the case. If the state high court agrees to hear their appeal, oral arguments and a ruling will likely be issued sometime during 2016.