School Law for Administrators

Title IX

Mother sues school district claiming violations of Title IX, civil rights, for coach's sexual relationship with daughter

Citation: *Campbell v. Dundee Community Schools, 2016 WL 5939880 (6th Cir. 2016)*

The Sixth U.S. Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

The Sixth U.S. Circuit Court of Appeals has affirmed a lower court's decision dismissing a mother's Title IX and civil rights claims filed on behalf of her daughter after it was discovered that her high school daughter was having a sexual relationship with her basketball coach. The court found that there was no evidence that any employee of the school district was aware of the sexual relationship.

Jane Doe was in the seventh and eighth grades at Dundee Middle School in the 2008-2009 and 2009-2010 school years. She played on the girls' basketball team both years, and her father, Chris Campbell, was assistant coach for the same time. The coach was Richard Neff, who was 47 years old in 2010. Although Chris Campbell was in a position to witness any inappropriate behavior on the part of Neff and his daughter, he never reported or suspected anything.

In the beginning of Doe's seventh grade year, Neff began texting the students on the team. Initially the texts were related to student/coach issues. By the summer of 2009, the texts Neff wrote to Doe were "excessive," involving other topics than school and basketball. He began to call Doe,and kissed her on the cheek secretly while watching a game on TV at Doe's father's house.

Neff began having sexual relations with Doe in the fall of 2009. He would secretly visit the family's property early in the morning and Doe would sneak out to meet him in his car, where Neff would hug, touch, and kiss her. The texts and phone calls Neff sent Doe started being sexual in nature.

In 2010, West Educational Leasing, Inc. assumed employment responsibilities for the school district's athletic department. West Educational Leasing did background checks on Neff as well as other employees. Neff did not have any prior criminal activity, and Superintendent Bruce Nelson said there was no documentation of inappropriate conduct in Neff's personnel record at this time.

The sexual relationship between Neff and Doe continued from January to April 2010, and they had sexual contact at least 15 times. Sometimes they had sexual contact in a school equipment room or even in the back of the team bus after a game. Neff told Doe to keep the relationship secret, and she did. During that time, the Athletic Director, Aaron Carner, was getting complaints from parents about Neff sitting in the back of the bus during team travel and his calling and texting students on the team. One parent, Jessica Burd, complained about the relationship between Doe and Neff in late February 2010. She complained to the school's vice principal, Carner, and Neff that Doe was "in love" with Neff, and that Neff was showing favoritism toward her during games. This caused friction among team members and Burd wanted the school administrators to put a stop to it. However, Burd never noticed that Neff reciprocated Doe's admiration. Instead, Burd was concerned that Neff's behavior was "odd" and negatively affecting the team dynamic. She was shocked when she learned of the sexual relationship between them.

School janitor Robert Kominek caught Neff and Doe having sex in a janitor's closet after school hours on April 23, 2010. Kominek reported the incident to Carner, who reported it to Nelson and was told to call police and Child Protective Services. Neff was arrested, prosecuted, and convicted, and is currently incarcerated.

Doe's mother, Pamela Campbell, filed suit against Neff, Carner, Dundee Community Schools, and West Educational Leasing, claiming violations of Title IX, 42 U.S.C.A. § 1983, and Michigan state law claims. The lower court granted the defendants' request for judgment without a trial regarding the federal and various state law claims. Because the district court had dismissed the federal law claims, it dismissed the remaining state claims without prejudice for lack of jurisdiction. Campbell appealed the decisions on the Title IX and Section 1983 claims.

The Sixth U.S. Circuit affirmed the lower court's ruling.

Title IX covers discrimination from any education program that receives federal financial assistance. "Title IX actions for monetary damages are available to students subjected to sexual harassment or abuse by a teacher" *(Williams ex rel. Hart v. Paint Valley Local Sch. Dist.).*

Since only recipients of federal funds are liable under Title IX, it does not permit individual liability for sexual harassment by school officials, since they are not direct recipients of federal funds. Therefore, the court ruled that the lower court properly dismissed the individual claims against Nelson and Carner. Also, since West Educational Leasing did not receive federal funds directly, it was not liable either. It was not enough that it was an entity that benefited from federal funds.

Dundee Community Schools (the school district) was a recipient of federal funds, and did not argue that its employee sexually abused Doe. For the school district to be liable under Title IX,

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Around the Nation ~ Illinois

School district sued after student commits suicide as a result of bullying

The distraught parents of a student who took her own life after being the object of constant bullying have filed a lawsuit against the Chicago Public School District. Beth Martin, the mother of McKenzie Philpot, who attended the Peirce School International Studies, alleges that school officials failed to address the peer bullying of her daughter that eventually led her to commit suicide. The suit asserts that school officials failed to fully investigate the claims, intervene in the bullying, and discipline any offenders.

The suit also claims that school officials knew that the bullying of the student was "an ongoing issue, such that, according to the Student Code of Conduct, an investigation must be followed." Officials also allegedly "failed to inform police or juvenile authorities of the assaults, harassment, and otherwise dangerous and violent behaviors taking place on school premises" prior to the suicide.

CPS' Law Department launched an investigation into the situation based on a flier distributed by one of McKenzie's parents, which contained allegations that the school was aware of the bullying and unfair treatment, but failed to address it. Last month, a CPS spokesman said that the investigation concluded that "there was no credible evidence of bullying." A district official later repeated that statement when briefly addressing the issue during a school meeting.

The suit, which names CPA and the Chicago Board of Education as defendants, seeks damages in excess of $50,000. School officials have otherwise declined to comment on details of the district's investigation, citing the CPS policy of not commenting on legal matters. CPS continues to work with the Peirce school community to ensure a safe learning environment for its students."

Source: *Chicago Tribune.*

School Law Bulletin,
Vol. 43, No. 22, November 25, 2016, p. 8.

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

Campbell had to show "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct" (*Gebser v. Lago Vista Independent School Dist.)*. The Sixth Circuit found that there was insufficient evidence that either Nelson or Carner had actual notice of the sexual harassment or showed deliberate indifference to it.

Campbell argued that there were a number of ways in which the school officials had actual notice of the sexual harassment or abuse. She cited Neff's sitting at the back of the team bus, texting, and calling the team members on their cell phones, the "crush" Jane Doe had on Neff, and the school custodian's statement that he had a weird feeling about Neff and Doe, although he did not report this feeling until after they were discovered in the closet.

After receiving some parent complaints, Carner spoke to Neff and told him to avoid the appearance of unprofessional behavior. Neither the complaints of parents nor Carner's talk with Neff indicated that there was a risk of a possible sexual relationship between Neff and Doe. In Fact, Doe's father, who was an assistant coach and involved with both parties, was ignorant of the relationship. The court noted this, and stated: "This fact gives rise to the inference that the other observers with more distant relationships to Doe were not a fault when they did not take action remedy or report the unknown sexual activity."

The school district also was not deliberately indifferent to sexual harassment or abuse. Since there was no notice to the school officials of sexual abuse, there could be no deliberate indifference.

Campbell contended that Carner was covering up for Neff because when he talked to Neff about not sitting in the back of the bus, he said he was trying to protect him: "I felt like [Neff was] putting himself in a situation that was not good for him as far as sitting in the back of the bus [in] the dark with kids, more importantly, girls." However, the court found there was no evidence that Carner or any other school official was aware of the risk. Therefore, the lower court's decision to dismiss the Title IX claim was affirmed.

Campbell also appealed the decision on her Section 1983 claims against Nelson and Carner and the school district. However, the Sixth Circuit found that, under the landmark case *Monell v. Department of Social Services*, Campbell had to show that the school officials were "acting according to a 'policy' or 'custom' within the system that leads to or results in the deprivation of a constitutionally protected right of bodily integrity, specifically the right not to be sexually molested by her coach." Since the sexual relationship was concealed for almost a year, the school district did not create a custom that resulted in the sexual abuse.

As for Nelson and Carner, Campbell had to show that they violated a constitutional right that was clearly established at the time, and were not eligible for qualified immunity. She had to show the officials "at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending subordinate" *(Bellamy v. Bradley)*. Since the individual officials had no knowledge of the sexual relationship between Neff and Doe, they could not be held accountable for knowingly acquiescing in the unconstitutional conduct. Therefore, the Sixth Circuit affirmed the lower court's decision to dismiss the Section 1983 claim.

School Law Bulletin,
Vol. 43, No. 24, December 25, 2016, pp. 4-5.

Headlines on School Law

by Rob Taylor, PhD

Opt-out movement presenting legal challenges

While much has been written about how the reauthorized federal education law, Every Student Succeeds Act (ESSA), intends to transfer significant authority to states, nevertheless ESSA has kept in place the same percentage requirement as NCLB for states to test qualified students annually on acceptable standardized exams: 95%.

That high percentage is opening a conundrum for both states and federal officials who must decide what to do, or not do, when violations occur as more than 5% of students opt out of the tests. State education officials, even those who are not antagonistic to the assessments, have begun to complain that they have limited authority to stop parents from pulling their children out of the tests; and then there is the further complication of some recently passed laws by some legislatures intended to protect students from being punished academically for refusing to take the tests or for doing badly on the assessments.

New York and Colorado are two states that have left federal officials scratching their heads because opt-out resistance has been growing in these states since the opt-out movement welled up in 2014. In Colorado local media reported that last school year 10% of students in grades 7-10 refused to take the PARCC exam. In New York state 21% of students in grades 3-8 refused to take the state exams.

This is something of a dilemma for new U.S. Department of Education Secretary John King, Jr., who was the head of the New York Department of Education when the opt-out efforts started up in New York. Now as chief federal education official, he must decide whether to administer sanctions to states not meeting the 95% threshold, and if so, what kind of sanctions. Withholding federal dollars from states which claim their authority to force students into the testing room is restricted might lead to protracted legal battles. Should schools with high opt-out rates be somehow punished? Should individual students who skip the testing be hit with penalties, and under what rationale or legal authority?

State officials also find themselves caught between a rock and a hard place. Take new York's State Commissioner of Education Mary-Ellen Elia for example. A recent *EdWeek* article portrays her traveling the state last spring to support the state standardized tests as a reliable way to gauge how well students are meeting learning standards and how effectively schools are teaching. She even threw out time limits on the tests and asked teachers to review the questions to assure validity.

But when these measures failed to assuage the opposition of many parents and some teachers to the testing process—and the test refusal rate went up instead of down—Commissioner Elia decided upon a different tact. She wrote an August 1 letter to the U.S. Department of Education urging limited sanctions and better options from federal officials:

"Just as new York law requires that no school district shall make any student or promotion or placement decision based solely or primarily on student performance on grades 3-8 [English/language arts] and math examinations, there should be no consequences for any individual student based upon whether that student participates or does not participate in state assessments."

Her letter continues, "For example, no student should be denied promotion to the next grade based on failure to participate in a state assessment. Although we recognize that the statute contains the '95% denominator' provision, we are disappointed that USDE has not been creative in providing states with flexibility to address the potential unintended consequences of this provision of the law."

OPT-OUT RUMBLINGS HIT FLORIDA TOO

In late 2014 some Florida legislators were beset with questions from constituents about the implications of state statutes related to required examinations for public school students. Senator Don Gaetz from Tallahassee decided in early January 2015 to clear up some areas of confusion as to the opt-out movement by writing a letter to State Education Commissioner Pam Stewart, asking for clarity.

Commissioner Stewart replied with a long letter on January 26, 2015 quoting statute to Senator Gaetz and giving her interpretation of the ramifications of what she saw as the violation of specific statutes.

Among many comments, Commissioner Stewart wrote, "State law requires students to participate in the state assessment system; therefore, there is no opt-out clause or process for students to opt out or for parents to opt their children out," except for some clearly defined exclusions related to certain medical conditions and some special education issues.

Moreover, she wrote, "laws, rules, and precedents established by prior legal decisions and/or orders establish a foundation to support that certain willful opt-out behaviors may warrant disciplinary action against an educator's certificate." She also added that while, "There is no state legislative policy that guides local exemptions from local assessments. . . School districts are the most appropriate source of information on whether they allow exemptions and, if so, under what circumstances."

Apparently a number of school districts in Florida took Commissioner Stewart's no-nonsense approach to heart and decided to hold the feet of opt-out families to the fire. Parents of a dozen children from six counties—Broward, Orange, Osceola, Her-

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Around the Nation ~ Missouri

ACLU sues after school resource officer takes disabled student from class and handcuffs him

Kansas City Public Schools (KCPS) is facing a lawsuit brought by American Civil Liberties Union of Missouri (ACLU-MO) on behalf of an elementary school student who was handcuffed after being removed from class by the school resource officer (SRO) for crying and screaming. This problem began when Kalyb Wiley Primm, who is hearing impaired, attended George Melcher Elementary School in 2014. According to the lawsuit, Primm began crying and screaming in the classroom after being teased about his disability.

When his teacher felt that the situation was beyond her control, she called for SRO Brandon Craddock to help. Craddock forcefully removed Primm from the classroom in an effort to take him to Principal Anne Wallace's office. According to the lawsuit, Craddock pulled a "frightened" Primm by one arm through the hallway of the school. Primm resisted and he held on to a handrail with his free hand. At this point, Craddock twisted the boy's arms and handcuffed him.

The lawsuit contends that this situation could have been avoided, and in fact, was escalated by the actions of the SRO. The suit states that, "Instead of stopping or employing any de-escalation techniques, Defendant Craddock twisted (Kalyb's) arms and handcuffed. . . his arms behind his back, and then led him to the front office in handcuffs." Craddock's report of the incident says that he told Wallace that Primm had been "out of control in his classroom and refused to follow my directions," while the lawsuit suggests that Primm had stopped making noise when Craddock entered the classroom and that he only had to ask the boy twice to exit the room.

The use of handcuffs in schools is allowed, but only in the most extreme circumstances, and when someone's safety is in jeopardy. ACLU-MO Legal Director Tony Rothert said, "This child committed no crime, threatened no one, and posed no danger to anyone." He added, "Gratuitously handcuffing children is cowardly and violates the constitution." The ACLU-MO also said the cuffing violated state law, which maintains that schools should only use restraints on elementary or secondary students in extreme circumstances or emergencies.

There is a grey area in this case because as a school spokeswoman explains; in 2014 handcuffing students was one of a "number of methods our staff can use." Still, the ACLU-MO asserts that the school district was not in compliance with state policies that suggest handcuffs be used only in "extreme situations" and they do not believe that this situation qualifies as extreme.

KCPS, Craddock, and Wallace are all named as defendants in the lawsuit which, accuses them of violating the boy's constitutional rights against unlawful seizure and excessive force by "unlawfully restraining" him in violation of the Fourth and 14th Amendments. The lawsuit calls for compensation and attorney's fees, as well as a requirement that KCPS implement a training program for school resource officers that outlines the constitutional rights of children.

Source: *RT*

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

nando, Pasco, and Seminole—were informed their third graders would not be promoted to the fourth grade because they failed to participate in the annual standardized testing.

Jeb Bush when he was Governor had signed a bill tying advancement from third to fourth grade to performance on the test. Later, the legislature passed a "portfolio" option, according to a recent *Associated Press* article, which allowed students to be moved on when consideration was given to classroom work and teacher recommendations.

The parents of the 12 students being held back in the third grade jointly filed a lawsuit in the State Court of Judge Karen Gievers, claiming that in different areas of the state children were being treated unequally and there was confusion as to the meaning of relevant state statutes. Moreover, they claimed, by other measures than the state tests, it was clear their children, who had good grades and successful class work, could read quite sufficiently to be promoted.

In a hearing before Judge Gievers, Attorney David Jordan representing the Florida Department of Education argued the testing requirement was necessary because report cards would not show whether a child was capable of reading.

Judge Gievers opted to rush the hearing process, saying "Nobody wants to traumatize a child needlessly," and within two weeks, at the beginning of the school year on August 29, made her ruling. That ruling forbade the districts from holding the third graders back and argued that a poor showing on a standardized test—or no scoring in this case—could be made up for by considering classroom grades and teacher evaluations.

Parent Michelle Rhea cried at hearing the ruling, along with Judge Gievers' chastisement of the districts, and said of her nine-year old daughter, "She's a good kid, she works very hard, and she earned her grade. Her report card does mean something."

School Law Bulletin,
Vol. 43, No. 19, October 10, 2016, pp. 1-3.

2016 Sports Law Year-In-Review

(Below please find the second part of a three-part installment by Lee Green, J.D. on January 04, 2017 discussing 2016 Sports Law Year-In-Review. A special thanks to Mr. Green for allowing us to provide this information to all school administrators in Maine.)

Legal Issues In Athletics Administration

Liability for sports injuries. Concussion management protocols. Title IX compliance. Hazing. Sexual harassment and sexual violence. Freedom of speech and social media. Freedom of speech and national anthem protests. First Amendment religion issues. Student-athlete privacy rights. Due process and equal protection issues in athletics programs. Sports participation rights of transgender students. Disabilities law applied to sports programs. Labor law and the new Fair Labor Standards Act regulations. State association legal authority.

Over the course of the last year, federal and state lawsuits were filed, court cases were decided, legislation was enacted, administrative agency rulings were released, state athletic association decisions were rendered, and other legal pronouncements were handed down impacting school sports programs. In each instance, the principles that were established and the best standards of practice that were highlighted illustrate the importance for school administrators and athletics personnel of understanding contemporary issues in sports law and proactively applying that knowledge to policy development and day-to-day management of programs.

Title IX

In February 2016, in what might serve as a blueprint for Title IX compliance by school districts nationwide, district officials and athletic administrators in the Santa Paula Unified School District (California), after receiving input from female student-athletes, their parents, and members of a women's advocacy group regarding athletic inequities in the district, undertook a comprehensive Title IX self-audit. The assessment resulted in the addition of five new girls' programs – varsity golf, varsity water polo, junior varsity water polo, junior varsity tennis, and freshman soccer – in order to remedy sports participation disparities between boys and girls. Led by the District Superintendent and the Santa Paula High School Athletic Director, a strategic plan was developed to ensure equitable distribution of resources between boys' and girls' teams, including uniforms, equipment, practice facilities, competition facilities, locker rooms, access to quality coaching, and other of Title IX eleven categories of benefits and opportunities related to sports participation. Because of the proactive leadership by school officials, no complaints were filed with the U.S. Department of Education's Office for Civil Rights (OCR), the federal agency charged with enforcing Title IX, nor were any lawsuits filed. The district and its personnel were able to retain control over the situation and implement the corrective measures that they knew would best serve their students, while at the same time complying with both the spirit and the technical legal requirements of Title IX.

In March 2016, a settlement was reached just two weeks before a trial was to begin in a Washington state federal court in *Carpio v. Federal Way Public Schools*, a Title IX suit filed by the father of two female wrestlers attending separate schools, Todd Beamer High School and Decatur High School, one of whom was a two-time state champion in her weight class. Among the inequities alleged between the boys' and girls' wrestling teams at the two schools were that boys practiced in wrestling rooms designed for their sport while girls were limited to using the cafeterias; boys received access to more time with coaches and superior quality of coaching than girls; boys received two uniforms each while girls received one; transportation and lodging for road trips were provided by the school for the boys, but not for the girls; and girls endured multiple other disparities included in Title IX's eleven areas of other athletic benefits and opportunities accompanying sports participation and for which equivalence must be provided. The settlement included a timeline for the implementation of a series of specific remedies agreed to by the parties, along with the hiring of a district athletic director to ensure equitable and consistent practices across all of the sports programs in the district's four high schools and seven middle schools.

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2016 Sports Law Year-In-Review. . . . *(Continued from page 5)*

In September 2016, in *Empire Justice Center v. Batavia City Schools*, a U.S. District Court judge in New York ordered a school district to pay more than $68,000 in legal fees to the attorneys who represented a group of student-athletes in a Title IX lawsuit related to disparities between the boys' baseball and girls' softball facilities at Batavia High School. The suit was settled in June 2014 with the district agreeing to spend $175,000 constructing a new softball facility to remedy the inequity posed by the boys' team playing its home games in a local minor league baseball stadium.

In September 2016, a settlement was reached in *Light v. Lexington County School District One*, a lawsuit alleging multiple inequities between the sports facilities provided for boys' and girls' teams at Lexington High School (South Carolina), including boys' football and baseball teams with both competition fields and practice facilities while girls' softball has only a field for games, boys' facilities with superior amenities (scoreboards, lighting, restrooms, parking, and quality of seating for fans) to those at girls' facilities, and priority of access for male student-athletes to athletic trainers, medical services, and weight rooms. The settlement included a timetable for the district to remedy the issues identified in the suit and a commitment by administrators to provide equal opportunities in all of its athletic programs.

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.

Throughout 2016, a San Diego school district continued to implement the corrective measures set forth in *Ollier v. Sweetwater Union High School District*, a November 2014 decision issued by the U.S. Court of Appeals for the Ninth Circuit upholding two previous lower court decisions. 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**.

Throughout 2016, the Chicago Public Schools continued to implement remedial measures agreed to in a July 2015 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, 58.7.5% 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. The full-text of the resolution agreement is available at www2.ed.gov/about/offices/list/ocr/docs/investigations/05111034.html.

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2016 Sports Law Year-In-Review. . . . *(Continued from page 6)*

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, eight 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 be 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 February 2016, the U.S. Supreme Court denied certiorari and refused to hear an appeal of *Bell v. Itawamba County School Board*, an August 2015 ruling by the U.S. Fifth Circuit Court of Appeals sitting en banc (all 15 active judges participating) that reversed a December 2014 ruling by a Fifth Circuit three-judge panel that the district had 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 (Mississippi) 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 the 2015 *en banc* ruling, 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*, concluding that the intimidating and harassing language directed at school officials in the postings could reasonably be 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.

In January 2016, the Fremont County (Colorado) District Attorney announced that none of the more than 100 students, many of whom were student-athletes, involved in a sexting scandal at Cañon City High School would be charged with crimes, prosecutions that might have resulted in students having to register as sex offenders. The scandal began when school administrators searched the contents of some student smartphones for nude photographs of a high school cheerleader that she had allegedly texted to her boyfriend, a football player at the school, who then proceeded to forward the pictures to other members of the team, with the images eventually being widely circulated among the student body.

Students voluntarily allowed the search of their phones because they were using "hidden photo vault" apps and they incorrectly believed that school officials would not be able to retrieve any explicit photos stored behind the password-protected, covert interfaces incorporated into such apps, safeguards that were easily bypassed by district IT personnel. The searches revealed not just the picture of the cheerleader on many of the phones, but 351 separate and highly explicit photos of 106 different students at the school. Exacerbating the situation was the fact that a significant percentage of the students at the school had copies of at least some of those pictures on their phones because of a game being played among the student body using a point system for accrued images, with higher point values attached for more explicit pictures and for ones of the more attractive students on campus.

The presence of such pictures on the devices technically constituted felony possession of child pornography under Colorado state law. The involvement of the football team in the scandal resulted in the cancellation of the remainder of its season, but as opposed to imposing additional penalties on every student involved in the scandal, the school has implemented a teachable-moment, education-focused approach towards teaching the students about the potential legal consequences of sexting, the issues posed by social media, and the possible lifelong consequences of such behaviors.

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2016 Sports Law Year-In-Review. . . . *(Continued from page 7)*

Constitutional Law: Freedom of Speech & National Anthem Protests

As with so many other actions by professional athletes that quickly filter down to college, high school, and youth sports, San Francisco 49ers quarterback Colin Kaepernick's national anthem protests have trickled down to athletes at all levels. Since he initiated his protests against social injustice during his team's first preseason game in mid-August, hundreds of college, high school, and youth sports athletes have engaged in similar stands at the beginning of games. The issue facing school and athletic administrators has been whether to sanction players conducting such protests with suspensions or expulsions from their teams and whether such punishments would be constitutionally permissible or would violate the student-athletes' First Amendment rights to freedom of speech, expression, and protest.

Based on U.S. Supreme Court decisions interpreting the authority of schools to limit student speech, any penalties levied by a public school (a state actor) on a national anthem protest would likely fail judicial scrutiny on constitutional grounds should the student file a free speech challenge in court. In the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District* (1969), a case in which students conducted an anti-Vietnam War protest that was just as controversial then as the national anthem protests are today, Justice Abe Fortas made the now-famous statement in the Court's majority opinion that "students do not shed their constitutional rights at the schoolhouse gate" and concluded that schools do not have the authority to limit student speech unless it "materially and substantially" interferes with the educational process. Subsequent cases clarified that schools may limit on-campus student speech that is lewd or profane, speech that is part of the school curriculum (such as a student newspaper), speech that advocates drug use by students, and speech that constitutes a true threat against the school community. The national anthem protests that have taken place at dozens of high school sports events nationwide do not fit into any of those categories of permissible restrictions on student speech. And courts have consistently refused to apply the legal standard that interscholastic sports participation is a privilege, not a right, when freedom of speech issues are involved in a sanction imposed on a student.

Despite the objections from community members that consistently arise to anthem protests by student-athletes – blowback that is often vitriolic in nature – school and athletic administrators might be best served by taking note of the following quote. Commenting on his advocacy of freedom of speech and promoting the "marketplace of ideas" concept he first posited in the Supreme Court's decision in *Abrams v. United States* (1919), Justice Oliver Wendell Holmes Jr. once stated to a newspaper reporter that "every American believes in free speech unless it's speech he doesn't agree with."

Constitutional Law: Freedom of Religion

In January 2016, in *Matthews v. Kountze Independent School District*, the Texas Supreme Court ruled that a full review should be granted to the constitutional claims of a high school cheer squad in a case dealing with the right of squad members 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, a Texas Court of Appeals ruled that the issue was moot because of the district's policy change. The January 2016 decision by the Texas Supreme Court stated that the issue is not moot, because the district could reinstate the ban in the future if it so decided, and remanded the case back to the Texas Court of Appeals for a full review of the First Amendment issues related to the situation, foremost the question whether the banners are school-sponsored speech (in which case they are impermissible under the Establishment Clause) or whether they are private speech by the cheerleaders (in which case they are permissible based on the Free Speech Clause and the Free Exercise of Religion Clause). That decision is expected sometime during 2017.

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In November 2016, in a case pending in federal court in Florida, *Cambridge Christian School v. Florida High School Athletic Association*, the state association requested a summary judgment in a dispute involving pre-game prayer over a sports venue's public address system (the court had not yet issued a ruling as of the copy deadline for this article). In December 2015, before kickoff in the Class 2A state football championship game at Camping World Stadium (formerly the Citrus Bowl) in Orlando, CCS was denied the use of the loudspeaker system to conduct a pre-game prayer because, according to the FHSAA, the facility is a public-owned, public-operated, funded-by-public-tax-dollars entity and the association itself is a public, quasi-governmental entity, therefore the First Amendment's Establishment Clause – which prohibits government sponsorship of religious activity – barred the use of the public address system.

The FHSAA decision was based on the U.S. Supreme Court's ruling in *Santa Fe ISD v. Doe* (2000), a case in which the Court held that prayer at sports events sponsored by "state actors" violates the Establishment Clause. However, the facts underlying the CCS dispute are slightly different from the Santa Fe ISD case, which involved athletic contests between public high schools – private schools are not restricted by the Establishment Clause – and the CCS dispute involves a private school playing in a public facility, albeit in a contest sponsored by a state actor (the FHSAA). It is relevant to note that in the Santa Fe ISD case, in addition to its primary ruling, the Supreme Court made it clear that the Establishment Clause does not limit the ability of students, fans, or student-athletes to pray anytime they choose before, during, or after a sports event and that the First Amendment bars only government sponsorship of that prayer by state actors such as public schools or public school employees. Therefore, spontaneous prayers initiated by players-only in a locker room or on a field are permissible and group prayers organized by private school officials for the private school community are also permissible. Such was the result at the 2015 Florida 2A state championship game – before CCS played University Christian, another private school, the teams gathered a midfield for a prayer, and after the game, players, coaches, and fans from both schools congregated on the field for a community prayer. The FHSAA's denial of the use of the public address system did not ultimately inhibit the ability of any of those individuals to engage in prayer. University Christian won the game 61-16.

In August 2016, a former public high school football coach filed a federal lawsuit in the state of Washington after he lost his job for refusing to discontinue his participation with players in on-the-field prayers after games. In the pleadings filed in *Kennedy v. Bremerton School District*, the former coach asserts that his dismissal violated his First Amendment rights to freedom of speech and free exercise of religion. In September, the judge overseeing the case refused to issue a preliminary injunction ordering that the coach be restored to his coaching position at *Bremerton High School* until a full trial is held to resolve the legal issues presented by the suit. As discussed supra, U.S. Supreme Court precedents limit only the involvement of government entities (including public high schools), and government employees (including public school employees such as teachers and coaches), in religious activities held in conjunction with sports events.

Constitutional Law: Invasion of Privacy

In November 2016, criminal charges were filed in a case, *State v. Mathers*, illustrating the need for operators of athletic facilities, including schools, to enact reasonable rules and safeguards designed to protect the privacy of individuals using restrooms, locker rooms, and shower rooms against surreptitious photography using digital cameras, smartphones, tablets, or other devices. The situation involved a former Playboy Playmate of the Year, Dani Mathers, 29, who took a picture of a 70-year-old woman in a locker room shower at an LA Fitness Center and posted the image on her Snapchat social media account, along with a mocking caption fat-shaming the elderly woman. Mathers received extensive backlash for the malicious act from her Snapchat followers, the media, and her radio-station employer, who fired her after the incident, and the victim is threatening a civil suit for invasion of privacy. Although Mathers argued to authorities investigating the incident that the victim did not have a reasonable expectation of privacy in a shower room, the Los Angeles City Attorney's Office – although acknowledging a diminished level of privacy against what presumably was a limited number of persons who might have been physically present in the fitness center locker room – concluded that no one would expect a nude photo taken without permission to be disseminated to tens of thousands on social media. The criminal charge filed against Mathers is an invasion of privacy cause of action called Dissemination of Private Images, which carries a possible sentence of up to six-months in jail, although a diversion program is a more likely penalty for a first offense. The lesson to be learned from the situation for school athletic programs is that student-athlete codes of conduct should include strict prohibitions on the use of cameras in any form, now ubiquitous in their presence in electronic devices, in

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locker rooms, shower rooms, and restrooms, and that an emphasis should be placed by athletic personnel on educating student-athletes regarding common sense parameters for the posting of images and messages on social media.

Constitutional Law: Due Process

In August 2016, in *DeLaTorre v. Minnesota State High School League*, a federal judge dismissed a lawsuit filed by a former high school soccer player who claimed that the state athletic association had violated his constitutional right to due process when it refused to grant to him an exception to the state's transfer and residency requirements for athletic eligibility. The case involved a student at Cretin-Derham Hall High School whose parents were divorced and who in 2012 had moved from Mexico with his mother and sister and played on the high school soccer team, followed by a decision to return to Mexico to live with his father for his sophomore year of high school. When he returned to CDH for his junior year and attempted to regain his eligibility to play interscholastic soccer, DeLaTorre discovered that he would be required to sit out a year and would not be eligible until his senior year. After an appeal to the MSHSL failed, he sued the association and several of its officials for a violation of his right to due process. In ruling that DeLaTorre did not have a constitutionally protected property or fundamental liberty interest to successfully make a due process claim, the judge cited numerous cases holding that participation in interscholastic athletics is a privilege, not a constitutional right. The court therefore concluded that, because DeLaTorre had prior notice of the eligibility rules and transfer bylaws, along with receiving an opportunity to request a waiver and appeal the denial of that waiver, his legal interests had been more than adequately protected.

Constitutional Law: Equal Protection & Transgender Students

The development of fair, practical, and legally sufficient policies regarding the inclusion of transgender athletes in sports activities is one of the latest civil rights challenges facing sport governing bodies and educational institutions.

On May 13, 2016, a Dear Colleague Letter (DCL) was jointly issued by the U.S. Department of Education's Office for Civil Rights and the U.S. Department of Justice's Civil Rights Division summarizing the Title IX obligations of schools regarding transgender students in the context of the law's prohibition on sex discrimination. The DCL states that for purposes of Title IX, a student's sex is considered to be gender identity, not anatomical gender at birth, and therefore schools may not treat a transgender student differently than they would treat other students of the same biological gender, including with regard to sports participation opportunities and access to facilities such as restrooms, locker rooms, and shower rooms. The DCL is available full-text at **www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf**. Issued along with the DCL was a separate document titled Examples of Policies and Emerging Practices for Supporting Transgender Students containing policies that school districts, state education agencies, and high school athletics associations have adopted to help ensure that transgender students enjoy a supportive and nondiscriminatory school environment. That document is available at **www2.ed.gov/about/offices/list/oese/oshs/emergingpractices.pdf**.

In April 2016, in *G.G. v. Gloucester County School Board*, a three-judge panel of the U.S. Court of Appeals for the Fourth Circuit ruled that the refusal by a school to allow the use by transgender students of school facilities (such as a restroom) consistent with their gender identity is unlawful because such restrictions constitute gender discrimination specifically prohibited under Title IX as clarified by the May 2016 DCL. The case involved a female-to-male transgender boy who had been using the boys' restrooms at Gloucester High School (Virginia), with no problems arising from his use of those facilities until community members objected on political grounds, followed by the school district enacting a ban on the practice. In May 2016, the Fourth Circuit refused to grant an *en banc* rehearing of the case (with all 17 active judges participating). In August 2016, the U.S. Supreme Court issued a stay of the original Fourth Circuit ruling, pending its decision whether to hear an appeal of the case. In October 2016, the Supreme Court granted *certiorari* and will review the case to resolve two issues: 1.) Whether courts should defer to the May 2016 DCL; and 2.) whether educational institutions covered by Title IX must treat transgender students consistent with their gender identity. More than 7,000 petitions for appeals are received by the Supreme Court each year and approximately 80 cases are granted review. The G.G. suit is considered by most legal experts to be the most significant case on the Court's docket this term; oral arguments will likely be held in February or March of 2017, with the Court's ruling in the case expected in June.

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In August 2016, in *State of Texas v. U.S.A.*, a suit filed by a coalition of the attorneys general of eleven states, a federal judge blocked implementation of the May 2016 Title IX DCL requiring schools to provide access for transgender students to facilities such as restrooms consistent with their gender identity pending resolution of issues concerning the validity of the DCL as a source of law and whether the definition of sex in Title IX should be interpreted as gender identity or anatomical gender at birth. The U.S.A. has filed an appeal of the ruling with the U.S. Court of Appeals for the Fifth Circuit and the U.S. Supreme Court's decision in the *G.G.* case will likely impact the ongoing viability of the ruling in the *State of Texas* case.

In August 2016, just five days after the ruling in the *State of Texas case, in Carcano v. McCrory*, a federal judge in North Carolina, using the May 2016 DCL and relying on its interpretation of the word sex in Title IX to be gender identity, issued an injunction blocking implementation of North Carolina's law known as HB2 which prohibits anyone in the state from using any restroom or facility inconsistent with their anatomical gender at birth. The *Carcano* ruling allowed the University of North Carolina (and all educational institutions in the state, including colleges and K-12 schools), to provide access to facilities based on gender identity. As with the *State of Texas* case, the U.S. Supreme Court's decision in the *G.G.* case will likely impact the ongoing viability of the ruling in the *Carcano* case.

Although the NFHS has yet to develop uniform national recommended criteria for evaluating the eligibility of transgender high school student-athletes, more than 30 state associations have developed policies regarding the inclusion of transgender student-athletes in school sports programs and which might serve as models for districts attempting to develop transgender strategies at the local level. Each state association's policy is available on its website. For additional guidance, consult a 2010 position paper titled *On The Team: Equal Opportunity for Transgender Student-Athletes* that was endorsed by the NFHS and NCAA. The 57-page document, available full-text at **www.nclrights.org**, sets forth detailed recommendations for policy development, protection of the privacy, safety, and dignity of transgender student-athletes, and best practices for schools, athletic administrators, and coaches.