School Law for Administrators

Student Safety

Family sues after student sustains traumatic brain injury in football practice but continues to play

Citation: *Mann v. Palmerton Area School District, 2016 WL 3090404 (M.D. Pa. 2016)*

A federal district court in Pennsylvania has granted a school district and high school football coach's request for summary judgment in a case in which the parents of a student athlete who sustained a traumatic brain injury during football practice sued alleging that the coach and district had violated the student's constitutional due process rights based on a state-created danger theory. The court found that the coach was entitled to qualified immunity on the claim and that there was insufficient evidence to establish municipal liability against the district.

S.P. was a high school student in the Palmerton Area School District. He participated in the high school's football program, which was coached by Christopher Walkowiak. Walkowiak had started as an assistant coach in 2006 and became the head coach by 2011 when S.P. was an athlete on the team. Walkowiak had received safety training from DeSales University in preparation for his head coach position and based on this training was aware of the signs and symptoms of a concussion.

During the 2011 football season, the school district had a set of policies and procedures outlined in its Athletic Handbook, which documented that players who suffered injury or illness were required to be excluded from play until they were pronounced physically fit by a physician. The policies also required that injured athletes had to be cleared by the athletic trainer before returning to play and that the head coach was required to inform the athletic trainer of any injuries sustained during a game or practice by student athletes. While the Athletic Handbook did not have specific policies on handling of head injuries, deposition testimony indicated the district had adopted the OAA Orthopedic Specialists' concussion practices, but it was unclear if these were documented in writing during the 2011-2012 school year. They were documented in writing by the next year.

On November 1, 2011, S.P. was participating in football practice at the high school and, after a hit, ceased playing. There is some evidence that S.P. had received two hard hits during the practice, but did not stop playing until after the second. According to other members of the team, after the first hit, S.P. was acting dazed, confused, and disoriented, but was told by Walkowiak to continue playing. It was later determined that S.P. had sustained a traumatic brain injury including second impact syndrome during this practice.

The family later sued the district and Walkowiak, claiming that S.P.'s rights were violated as a result of Walkowiak's decision to tell S.P. to continue playing even after he exhibited signs of a concussion and the school district's failure to follow its own policy of requiring medical clearance for student athletes to return to play after sustaining an injury. Further, the family argued that his rights were violated based on the district's failure to have concussion policies in place and failing to train coaches properly on how to handle head injuries. They alleged that the district was liable under a state-created danger theory.

The district and Walkowiak requested summary judgement, arguing that Walkowiak was entitled to qualified immunity and that the family had not established sufficient evidence to support a state-created danger claim. The court agreed.

State-Created Danger

The court began by explaining that while the general rule is that the state does not have an affirmative obligation to protect its citizens from violent acts by private individuals, there are two exceptions: 1) the special relationship exception; and 2) the state-created danger theory, which originated in the U.S. Supreme Court's decision in *Deshaney v. Winnebago County Dep't of Social Servs.* The Third Circuit adopted the state-created danger theory in a 1996 case (*Kneipp v. Tedder*), finding that if harm incurred is a "direct result of state action" liability can attach under Section 1983 for constitutional rights claims.

The Third Circuit defined a test in a later case in which a state actor may be held liable if: "(1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted with a degree of culpability that shocks the conscience; (3) there existed some relationship between the state and the plaintiff such that the plaintiff was a foreseeable victim of the defendant's acts, or a member of a discrete class of persons subjected to the potential harm brought about by the state's actions, as opposed to a member of the public in general; and (4) a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all."

With these factors in mind, the court concluded that while a reasonable jury might find sufficient evidence existed to conclude that each of these prongs had been met (and thus that the family had established a *prima facie* in this regard), Walkowiak

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was protected by qualified immunity. State actors sued in their individual capacities under section 1983 are entitled to qualified immunity if their conduct did not "violate clearly established statutory or constitutional rights of which a reasonable person would have known." A state actor's conduct is thought to have clearly violated established law if, at the time the conduct occurred, "the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right."

The court cited a Third Circuit decision *Hinterberger v. Iroquois School District* in finding that Walkowiak was entitled to qualified immunity. In that case, a cheerleader sustained a head injury during practice when the coach directed her to attempt a new stunt in a space without enough matting. In that case, the Third Circuit concluded that: "[Plaintiff] does not cite, and we have not found, any precedential circuit court decisions finding a state-created danger in the context of a school athletic practice . . . We thus conclude that [Plaintiff's] alleged right was not clearly established at the time of her accident." The court in this case found this reasoning directly applicable. Therefore, it found that Walkowiak was protected by qualified immunity.

On the question of municipal liability, the court explained that the district could not be held vicariously liable for the constitutional violations committed by its employees based on the U.S. Supreme Court's decision in *Monell v. N.Y. City Dep't of Soc. Servs.*, 463 U.S. 658, 694 (1978). Rather, for liability to attach, the court explained, there had to be a demonstration that the constitutional violation was caused by a policy, custom, or practice of the municipality. In this case, the family argued that the district was liable based both on municipal policies and customs that caused S.P. 's injuries, including a policy or custom of failing to medically clear student athletes; a policy or custom of failing to enforce or enact adequate policies for head injuries; and a failure to train the coaches on proper procedures and a safety protocol relating to head injures. However, the court found that there was insufficient evidence to support that there was any formal policy pursuant to which the school district could be held liable, such as a policy not to clear student athletes after injuries, a policy to ignore head injuries, or even evidence that the district's policy maker's acquiesced in the coach's actions.

In fact, the court noted, the district had numerous policies that addressed the safety of student athletes and procedures to be followed in the event of illness or injury. The Athletic Handbook also noted that certain things were required, such as that coaches were required to follow the recommendations of athletic trainers in regards to participation in games or practices. And while the handbook did not have a specific section on policies and procedures around head injuries and specifically concussions, the court found that many of the policies and procedures outlined in the handbook were applicable to all injuries, including head injuries and that no specific policy was therefore required. More importantly, the court noted, even if a policy turned out to be inadequate, this was not proof of deliberate indifference on the part of the school district or evidence of a policy to ignore head injuries. Moreover, unlike in certain other cases, there was not evidence here that there were repeated instances of students receiving injuries and being put back into practice or games that would have suggested a policy or practice.

The court also rejected municipal liability based on a theory of failure to train its employees. The court noted that while "the Supreme Court has recognized that in limited circumstances, a municipality may be held liable under a failure to train theory, the Court also explained that a municipality's 'culpability for a deprivation of rights is at its most tenuous where a claim turns on a failure to train.' " Indeed, The Third Circuit has held that here must be a pattern of similar constitutional violations by untrained employees in order for this theory of municipal liability to attach.

For these reasons, the court granted the district and Walkowiak's request for summary judgment.

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Around the Nation ~ Louisiana

Student Sues After School Personnel Search His Cell Phone After Physical Search

Matthew DeCossas, a student at Fontainebleau High School (FHS) has filed suit in federal court along with his parents against the St. Tammany Parish School Board. The lawsuit alleges that school officials' violated a number of DeCossas' constitutional rights by reading through all of the texts on his cell phone. DeCossas cooperated fully while officials searched his person, his bag, and his locker and found nothing. Next they asked for his cell phone, and asked him to unlock it, which he did without argument.

In looking at the text messages, officials came across a text conversation that DeCossas had with another student. In the conversation, DeCossas inquired about obtaining some Vyvanse, a stimulant used to treat ADHD. After reading this text, school officials called him back to the office interrogated him and the other student separately, Following this meeting, FHS informed DeCossas and his parents that he was expelled from school as a result of these texts. DeCossas and his parents then filed two separate appeals, one to school system administrators and the other to the St. Tammany Parish School Board. Both appeals were denied. Still, DeCossas, a member of the National Honor Society and the track team, was not ready to give up.

According to the lawsuit filed by DeCossas' parents, school officials violated their son's fundamental rights when they questioned him without informing his parents or advising him of his *Miranda* rights to remain silent and to have an attorney present. Additionally, the suit focuses on information read on the cell phone, which belonged to DeCossas' father. The suit alleges that administrators had no right to search the cell phone, and, therefore, any evidence gathered from the text conversation is, "fruit of the forbidden tree."

Another allegation in the lawsuit is that DeCossas was denied his due process rights. The suit refers to the school system's appeals process as a "sham" established to favor school administrators' point of view and deny students the ability to present evidence or have the assistance of counsel. Even so, the school district has their bases covered. Their student handbook explicitly states that state law prohibits the use of cell phones on school property and that even possessing one is against the rules. The handbook also says that any violation of the rule can result in confiscation of the phone, detention, or suspension.

The handbook also says that the school board reserves the right to examine the contents of any cell phone found at school. Additionally, according to the policy, school administrators have leeway to punish off-campus behavior if it affects the school's "learning environment." Even so, school district officials are not tasked with the responsibility of supervising off-campus behavior.

The question at hand is not whether or not DeCossas bought Vyvanse from a friend, he fully admits to this action. However, he claims that his interactions did not occur on campus, and that the way school officials got their evidence against him was unlawful. Assistant Principal Michael Astugue contends that while DeCossas admitted buying and taking Vyvanse off-campus, he also admitted to buying it another time on campus on January 4th. DeCossas does not deny making this statement, but he says it is untrue, and he made it up because he felt pressured by Astugue, Administrative Assistant Leonard Tridico and school resource officer Bryan Gerchow to admit to something he did not do after they repeatedly pulled him out of class and pressured him to confess.

School officials have the right to question students without reading their *Miranda* rights, but if the questioning could lead to criminal charges, which the possession of drugs could, then they are legally required to read them their *Miranda* rights. The lawsuit asserts that school officials, "called DeCossas back and willfully and in maximum bad faith, conducted another unauthorized, illegal, forced detention, and forced interrogations without his having been advised about any of his legal rights or provided any opportunity for even a phone call." DeCossas claims that school officials obtained their information illegally, and should not be allowed to use it against him.

DeCossas believes that this fight will be an uphill battle and the odds are stacked against him. Still, he will not give up and in his lawsuit he is asking the school district to expunge all disciplinary records from his file, to allow him to return to school, and to be awarded monetary reimbursement for the mental anguish that this situation has caused. He admits to making poor choices, but he would also like to see the school district held accountable for their actions.

Source: *The New Orleans Advocate*

—School Law Bulletin,
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In the News

A recent federal report indicates that schools around the nation are increasingly becoming re-segregated

The pivotal Brown vs. the Board of Education ruling in 1954 changed the face of public schools in the United States with the goal of creating equal opportunities for all students who attend public schools. Over the next couple of decades, schools became increasingly more and more integrated and graduation rates for African American students grew tremendously. Sadly, the pendulum seems to be changing directions.

According to a report that was recently released by the Government Accountability Office (GAO), the number of schools that are segregated along racial and financial lines more than double over a 13-year period. In 2000, 7,009 public schools were classified as poor and racially segregated. By 2014, that number had climbed to 15,089, which means that 16% of the nation's schools are segregated.

Segregation in our nation's schools has become more complex, and is not so much a matter of black and white students any more. In fact, the Latino population and other Limited English Proficiency (LEP) students make up a significant part of the student population. Unfortunately, many schools have not evolved fast enough to properly service this population of students, and these students are not getting an equal opportunity for a good education.

A 2000 Current Population Survey showed that white students have a high school graduation rate of 88% nationally, 28% college graduation. This can be compared with the African American population where 79% graduate from high school and 17% graduate from college. The Latino population lags far behind with only 57% graduating from high school, and 11% moving on to earn a college degree. These numbers point to the unequal opportunities these students are being given.

The GOA report found that 61% of schools with high concentrations of low-income students were racially segregated, with at least three-quarters of their student bodies being comprised of black or Latino students. In order to rectify this situation, the report recommends that the U.S. Department of Education step up it's monitoring of discrepancies between schools. There are currently 178 open desegregation cases based on court orders from 30 to 40 years ago.

Re-segregation has not been focused on because standardized testing, teacher evaluations, charter schools, and Common Core standards have been in the forefront of the public's attention. Re-segregation can happen incidentally as a result of demographic groups relocating to different school districts, or it can happen intentionally.

Our country took two steps froward when we began the desegregation process in 1954, but if we are not careful, we will take three steps back without even realizing what happened. The legacy of segregation in American public schools was spotlighted last week when a judge in Mississippi ordered a district to integrate its schools after a five-decade long court battle. The sheer persistence of segregation signifies that it will be a multigenerational problem that will demand political, cultural, and financial investments to resolve.

Source: *Education News*

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Did You Know?

DOE Releases "Quick Guide" on Improving School Climate

In a recent release, the U.S. Department of Education discussed the importance of developing and fostering a good school climate. A school climate, the guide suggests, "reflects how members of the school community experience the school, including interpersonal relationships, teacher, and other staff practices, and organizational arrangements." The climate also includes factors that support learning and physical and emotional safety, with a focus on connection, support, and engagement. That a positive climate helps students to realize high behavioral and academic standards as well as encouraging and maintaining respectful, trusting, and caring relationships throughout the school community.

In the quick guide, there are tips on improving school climate through easy and inexpensive means. The guide recommends setting up a core planning team, reviewing existing interventions aimed at improving climate, evaluating their effectiveness, and identifying other interventions to improve school climate.

School climate, the guide notes, is a regulatory focus in education, and is a factor in improving the educational outcomes of students.

To see the Quick Guide, visit the Department of Education's homepage.

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Vol. 43, No. 10, May 25, 2016, p 4.