

School Law for Administrators

Bullying

Parents file lawsuit claiming school district discriminated against their disabled child by ignoring bullying and not providing FAPE

Citation: *Richardson v. Omaha School District*, 2019 WL 1930129 (W.D. Ark. 2019)

A federal district court in Arkansas has granted a school district's request for judgment without a trial in a case in which the parents of a disabled child claimed that he was bullied by his peers and teachers and subject to discrimination. The parents claimed that their child was denied a free appropriate public education (FAPE) and also filed a lawsuit claiming violations of Section 504 and the Americans with Disabilities Act (ADA). The court however granted the school district judgment without a trial.

Chad and Tonya Richardson filed a due process complaint against the Omaha School District before the Arkansas Department of Education under the IDEA. They complained that their son, L., was denied a FAPE because of his disability. The Richardsons complained that L. was bullied by his peers and also by teachers, and that the school district was deliberately indifferent to the bullying. They complained that the school district failed to provide L. with a FAPE.

The hearing officer agreed with the school district that, of the four incidents of bullying mentioned in the hearing, only one qualified as bullying. Also, the officer noted all incidents were promptly and thoroughly investigated. The hearing officer found that the incidents and the district's response to the incidents did not violate the IDEA. However, the hearing officer found that the district failed to provide L. with a FAPE by not reevaluating him in two years, as well as failing to provide sufficient IEPs.

The hearing officer ordered the school district to evaluate L. in the next 30 days, "for [the] purpose of obtaining a comprehensive understanding of [L's] academic, social, and behavioral deficits" and then to reconvene the IEP team to develop and update L.'s IEP based on the information received from the updated evaluations.

The Richardsons filed a lawsuit against the school district claiming violations of Section 504 of the Rehabilitation Act, as well as the ADA, based on discrimination of their son because of his disability. The school district asked the court for judgment without a trial.

The court granted the school district's request for judgment without a trial.

The school district argued that the Richardsons had produced no evidence that could convince a jury that the district and its staff were liable for violations of Section 504 or the ADA. The school district also argued there was no evidence to show it acted in bad faith in its response to bullying or complaints of bullying.

The Richardsons did not focus on bullying in their arguments before the court, but rather on the hearing officer's conclusion that the school district failed to provide proper assessments of L. or to provide adequate IEPs.

To prevail on a Section 504 claim, the Richardsons had to show that L. was "(1) . . . a qualified individual with a disability; (2) he was denied the benefits of a program or activity of a

Around the Nation ~ Oregon

Teachers sue Oregon Education Association claiming they were not allowed to quit the union

According to the lawsuit, when three teachers told the Oregon Education Association (OEA) that they wanted to quit the union, they were told that they would have to wait until "the annual window to drop their membership." The teachers, who wanted to stop paying their monthly dues, were told that they could not do so for several months. The teachers, two in Jackson County and one in Portland Public Schools named Michael Garcie, were forced to continue paying \$80/month until the window to stop paying arrived. These teachers filed a federal law-

suit against the OEA claiming that they should have been allowed to quit the union when they initially asked.

In 2018, in *Janus v. AFSCME*, the U.S. Supreme Court held that public employees who belong to a class represented by unions, such as public-school teachers, cannot be required to pay union dues against their will. In a 5 to 4 decision, a majori-

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public entity which receives federal funds; and (3) he was discriminated against based on his disability” (*Gorman v. Barch*). When both Section 504 and the ADA are asserted based on the failure to provide educational services to a disabled child, the “plaintiff must prove that school officials acted in bad faith or with gross misjudgment” (*Birmingham v. Omaha Sch. Dist.*).

Further, the court noted, the defendant’s “statutory non-compliance must deviate so substantially from accepted professional judgment, practice, or standards as to demonstrate that the defendant acted with wrongful intent” (*B.M. ex rel. Miller vs. S. Callaway R-II Sch. Dist.*). The Richardsons needed to establish discriminatory intent to recover compensatory damages under Section 504 and the ADA.

The school district argued that the only facts available about the bullying issues were those that existed in the record from the administrative hearing. The Richardsons did not provide any new facts about the bullying or response by the school district. The Richardsons criticized the school district’s focus on bullying, and argued that they had other proof to support their claims that the district failed to provide an education to L. as required by law.

However, the court noted that their complaint alleged discrimination against L. based on his disability time and time again, stating that L. was abused and oppressed by his peers and his teachers, which hindered his educational progress. Because of this emphasis on bullying and oppression in the complaint, the court stated it would “assume that the bullying claims and the ‘failure to educate’ claims explained in the hearing officer’s opinion form twin bases for the substantive law violations asserted in Counts II and III.”

The Richardsons also argued that their claims before the court were related to the school district’s failure to follow the hearing officer’s order to evaluate L. and provide adequate IEPs after the hearing. The court said it would not consider those claims against the district because they were brought after the hearing officer’s decision.

The court noted that the law is clear that “a party must ex-

haust the administrative remedies available under the IDEA before bringing a claim under a different statute seeking relief that is also available under the IDEA” (*B.M. ex rel. Miller*). The Richardsons’ post-administrative hearing claims—that the school district failed to follow the orders of the hearing officer to evaluate and provide IEPs for L.—had to be exhausted in a separate hearing before the Arkansas Department of Education.

The court found that the post-hearing claims brought by the Richardsons were not distinctly Section 504 or ADA claims, but closer to the IDEA claims they initially brought in the first hearing. The court pointed out that the answers to the hypothetical questions—whether the claim would have been essentially the same if it took place in a public facility other than a school, or whether an adult could have brought the same claim—in this case would be “no.” That answer affirms that the claims fell under the IDEA exhaustion requirement.

The court further indicated that the brief filed by the Richardsons included voluminous affidavits by both parents attached, but with no guidance to find the evidence supporting their claims in those affidavits. The court quoted the Seventh U.S. Circuit, stating, “[j]udges are not like pigs, hunting for truffles buried in briefs” (*United States v. Dunkel*).

Having reviewed the facts around the four incidents of bullying contained in the hearing officer’s opinion, the court found that none of the incidents indicated bad faith or gross misjudgment by school district staff or administrators. Regarding the school district’s failure to evaluate L. and provide sufficient IEPs, the court found there were no alleged facts that pointed to the school district’s acting in bad faith or wrongful intent to violate the IDEA. “The facts at most indicate the District’s statutory non-compliance with the IDEA, which is not the same as intentional discrimination.”

Therefore, the court granted judgment without a trial to the school district, and dismissed the case with prejudice.

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ty of the Court determined that forcing employees to pay dues violated their First Amendment rights.

The teachers are being supported by the Freedom Foundation (FF), which has been battling with Oregon public employee unions for years. According to the FF, OEA and its affiliates are enforcing an arbitrary calendar that is unfair to teachers by only allowing them to quit the union during September. Rebekah Millard, an FF attorney representing the teachers said, “Labor unions cannot unilaterally wipe out public employees’ Constitutional rights during 11 months of the year.”

The timing and the motives of this lawsuit are being questioned by John Larson, OEA President, who said, “Today is just the latest event in a long line of frivolous lawsuits the corporate-backed, national antiworker Freedom Foundation has filed.” He continued, “This fringe group consistently opposes values Oregonians hold and has never lifted a finger to support students, educators, or improve conditions in Oregon classrooms.”

Source: *The Willamette Week*

—*School Law Bulletin*,
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Title IX

Transgender student files lawsuit against school district for violations of Title IX, Fourteenth Amendment

Citation: *J.A.W. v. Evansville Vanderburgh School Corporation*, 2019 WL 2411342 (S.D. Ind. 2019)

A federal district court in Indiana recently denied a school district's request for summary judgment and granted a student's request for summary judgment in a case in which a transgender student claimed violations of Title IX and the Fourteenth Amendment after being denied the right to use boys' restrooms while at school. The district had argued that the case was moot because the student had since graduated but the court disagreed, granting the student's request for partial judgment.

J.A.W., born a female, began identifying as male as young as age 11, and began feeling uncomfortable using the girls' restrooms or locker rooms in sixth grade. His mother and a social worker changed his schedule so he did not have to take physical education. He began to present outwardly as a boy in eighth grade and asked his teachers to address him using his male name and male pronouns.

In his freshman year, J.A.W. attended classes at North High School and Central High School in the Evansville Vanderburgh School Corporation (EVSC). He had to take physical education, and he and another transgender student began to use the boys' restroom to change before and after gym. A parent complained there were two girls using the boys' restroom, and J.A.W. was told not to continue. The two students were told to use another girls' locker room that was not in use or the gender-neutral restroom at the nurse's office. The nurse's office was located far from J.A.W.'s classes and was inconvenient.

During his sophomore year, J.A.W. attended North High School and Harrison High School. J.A.W. gave his principal a "Dear Colleague" letter that had been issued by the U.S. Department of Justice and the U.S. Department of Education that stated he should be able to use the restroom aligned with his gender identity. EVSC ultimately denied the request and continued to instruct him to use the girls' restrooms or the nurse's office restroom.

J.A.W. began counseling in September 2016 and met the criteria for gender dysphoria of adolescence. He began hormone therapy in fall of 2017 and began to appear much more like a teenage boy. During his sophomore year, J.A.W. contacted Dr. Dionne Blue, the school district's chief diversity officer, to ask about the district's policy regarding transgender students and restrooms. Blue responded there was no official policy but gave the same advice J.A.W. had been getting all along about which restrooms to use.

In his junior year, J.A.W.'s attorney informed EVSC that, because of the Seventh U.S. Circuit's decision in *Whitaker By Whitaker v. Kenosha Unified School District No. 1 Board of Education*, J.A.W. was entitled to use the boys' restrooms in school. The general counsel of the school district disagreed, saying the *Whitaker* decision did not represent law across the United States, and denied J.A.W. use of the boys' restrooms.

At this point, J.A.W. tried to avoid using restrooms during school, restricting his fluid intake, which was very uncomfortable. Using the girls' restrooms made him and his female peers uncomfortable as well.

At a preliminary injunction hearing on the issue, Superintendent David Smith stated that EVSC did not have a formal policy, but had a practice. Smith said if J.A.W. had legally changed his birth certificate to male, the school district might have allowed him to use the boys' restrooms, but could have rescinded that permission if it caused a disruption.

In August 2018, the court entered a preliminary injunction allowing J.A.W. to use the male restrooms in EVSC, and the school district complied with the order. J.A.W. graduated from North High School in December 2018.

J.A.W. filed a lawsuit against EVSC claiming violations of his rights under Title IX and the equal protection clause of the Fourteenth Amendment, asking for partial judgment without a trial. EVSC countered, asking for judgment without a trial in its favor, and also asking the court to dismiss the case as moot since J.A.W. had already graduated.

The court denied the school district's requests for judgment without a trial and to dismiss the case as moot. The court granted partial judgment for J.A.W.

TITLE IX

J.A.W. argued that EVSC violated Title IX by refusing to allow him to use the boys' restrooms. Title IX protects against discrimination based on sex. EVSC argued that it had scant notice from J.A.W. on the issue. It was not until discovery in the case that EVSC knew that J.A.W. had been diagnosed with gender dysphoria, was undergoing hormone therapy, or had complaints about the accessibility of the gender-neutral restroom in the nurse's office. Since EVSC had complied with the preliminary injunction, it argued that it had not violated any of J.A.W.'s rights.

The court found that judgment in favor of J.A.W. and against EVSC was appropriate. As the Seventh Circuit stated, "A policy that requires an individual to use a bathroom that does not conform with his or her gender identify punishes that individual for his or her gender non-conformance, which in turn violates Title IX. . ." (*Whitaker*). Therefore, the court concluded that the school district violated J.A.W.'s rights under Title IX. Whether J.A.W. was entitled to damages for the violation was up to a jury to decide (*Horn v. A.O. Smith Corp*).

FOURTEENTH AMENDMENT

J.A.W. also argued EVSC violated his rights to equal protection under the Fourteenth Amendment. EVSC did not offer any argument regarding this claim other than the lack of notice argument that was discussed previously. That argument failed for the same reasons, since the court's ruling in *Whitaker* gave the

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District ordered to pay \$9.2 million in damages in suit alleging violation of copyright laws

DynaStudy, an education publisher, was awarded \$9.2 million in damages by a jury when she won a lawsuit accusing a school district in Houston of allowing the illicit copying and posting of the company's materials online, despite repeated warnings to stop. The suit alleged that the actions of the school district not only violated copyright laws, but also resulted in lost sales and a devaluing of the organization's work. DynaStudy provides students with course notes that offer reference guides throughout the year and study aids before unit tests and standardized assessments. The course notes cover a variety of subjects and grade levels and are meant to be aligned to Texas state standards. The company made it clear that these course notes were not to be copied, published, or shared, but a number of district employees disregarded these directions.

The lawsuit focused on 38 of DynaStudy's copyrighted works. According to the lawsuit, many district employees copied and shared their copyrighted material despite warnings on the documents that said, "Copying This Material is Strictly Prohibited." The suit contends that Houston officials violated copyright law numerous times between 2012 and 2015. One example, mentioned in the suit was a biology teacher who allegedly posted a copy of the DynaStudy materials online with the copyrights and trademarks removed. In another case, a high school employee allegedly posted DynaStudy physics and chemistry resources online for anyone to download. The

suit contends that these posts went viral, and the copied materials ended up getting used in school districts all over the state of Texas, losing Dyna Study a great deal of money.

After hearing these arguments, the jury awarded DynaStudy damages of different amounts for copyright violations of materials in different subject areas and grades, which collectively reached more than \$9 million. Copyright enforcement has traditionally been a huge concern for educational publishers, and for organizations that represent them and school districts are warned about the possible consequences of violating these laws. Still, this case stands out because the damages awarded to Dyna Study are so large.

It is unclear at this time if Houston officials will appeal this verdict and they are working on next steps. One change the district implemented immediately is an annual online training regarding copyright laws that is required for all employees at the beginning of each school year. Additionally, the district will provide in-person training to all building principals. A district spokesman said, "HISD will certainly be adding additional training and safeguards concerning the reproduction of copyrighted materials going forward."

Source: *Edweek Market Brief*

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school district notice that its practice was a form of "sex discrimination."

The Fourteenth Amendment protects against intentional and arbitrary discrimination. The court noted that J.A.W. had provided evidence that "EVSC's practice could not be stated without referencing sex and that the practice treated transgender students like J.A.W. differently. As such, the burden shifts to EVSC to demonstrate that its justification for the its practice was not only genuine but exceedingly persuasive."

EVSC provided no justification for its practice before the court. Therefore, the court granted J.A.W.'s request for partial

judgment without a trial. Whether he was entitled to damages and how much was up to a jury to decide.

MOOTNESS

EVSC also asked the court to dismiss the entire case based on mootness, since J.A.W. had already graduated. However, the court found that J.A.W. was entitled to seek damages for the violations of his rights, and therefore his claims were not moot. The court denied dismissal as to mootness.

—*School Law Bulletin*,
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