SCHOOLS AS INCUBATORS OF CONSTITUTIONAL LITIGATION

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State Bar of Texas
Supreme Court of the United States
United States Court of Appeals for the Fifth Circuit
United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

REPRESENTATIVE PUBLISHED DECISIONS

FW/PBS, Inc., v. City of Dallas, 493 U.S. 215 (1990) (upheld constitutionality of majority of municipal ordinance regulating sexually oriented businesses).

Morgan v. Swanson, 659 F.3d 359 (5th Cir. 2011) (en banc) (granted qualified immunity to elementary school principals on First Amendment challenge involving claims of viewpoint discrimination against student religious speech).

Furley v. Aledo Indep. Sch. Dist., 218 F.3d 743 (5th Cir. 2000) (upheld decision dismissing student's First Amendment claims relating to the student's proposed commencement prayer).

Doe v. Rains County Indep. Sch. Dist., 66 F.3d 1402 (5th Cir. 1995) (held that teacher did not violate student's constitutional rights by failing to report alleged sexual abuse despite state law requiring report).

Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).

Midland Indep. Sch. Dist. v. Watley, 216 S.W.3d 374 (Tex. App. – Eastland 2006, no pet.) (reversed and rendered judgment for school district and public official in retaliation/Whistleblower case).

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Berkman v. City of Keene, 311 S.W.3d 523 (Tex. App. – Waco 2009, pet. denied) (dismissed for lack of jurisdiction because contract for provision of city utilities did not fall within the limited waiver of governmental immunity for contracts).

Davis v. Dallas County Schs., 259 S.W.3d 280 (Tex. App. – Dallas 2008, no pet.) (en banc) (upheld decision of the trial court granting summary judgment in workers' compensation retaliation case).

Johnson v. Johnson County, 251 S.W.3d 107 (Tex. App. – Waco 2008, pet. denied) (upheld decision of the trial court granting governmental immunity in jail inmate suicide case).

Poteet v. Sullivan, 218 S.W.3d 780 (Tex. App. – Fort Worth 2007, pet. denied) (upheld decision of the trial court granting summary judgment to municipality in Fourth and Fifth Amendment challenge to a domestic violence civil standby).

Fantasy Ranch, Inc. v. City of Arlington, 459 F.3d 546 (5th Cir. 2006) (upheld municipal ordinance in federal civil rights case involving a First Amendment challenge).

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I. INTRODUCTION

The purpose of this paper is to provide an overview of some the more recent cases addressing constitutional issues taking place in schools.

II. CONSTITUTIONAL LITIGATION IN SCHOOLS RELATING TO FREEDOM OF SPEECH

A. *Tinker* Standard for Freedom of Speech

The Supreme Court outlined a standard in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), to use in determining when and under what conditions a school can limit a student's Free Speech rights under the First Amendment. Under *Tinker*, a school cannot suppress a student's speech unless the school officials reasonably conclude that it has or will "materially and substantially disrupt the work and discipline of the school" or collide with the rights of others. Courts will look to whether the speech was made on or off campus, whether the speech reached campus, what effect the speech had on campus or would likely have on campus, how the speech impacted the rights of others, and the nature of the punishment handed out.

B. Freedom of Speech in Schools as it Pertains to Social Media

In *Layshock v. Hermitage School District*, 650 F.3d 205 (3d Cir. 2011) (en banc), a student, on his grandmother's computer, created a "parody" MySpace account of his principal that included bogus answers to survey questions, which indicated that the principal had issues with drunkenness and drugs, referred to the principal as a homosexual and a whore, and discussed the size of the principal's genitals. The student went on to write under the "Interests" section — "Transgender, Appreciators of Alcoholic Beverages." "Steroids International" was a club listed for the principal. During that same period of time, three more fake profiles of the principal, all of which were more vulgar than the one in question, were created by other students. The fake profile in question was accessed by the student and by other students at the school. In response, although the school was not technologically able to cut off all access to MySpace from the school, it limited computer access to use in computer labs or the library, both areas which the school supervised.

The student who created the profile in question – the only one of the students who had created fake profiles to apologize – was suspended for 10 days, went to alternative education for about one semester, was banned from extracurricular activities, and was not allowed to participate in graduation ceremonies. The other student-creators of MySpace pages never apologized and were not disciplined.

The Third Circuit determined that the district's response to the student's conduct violated the protection of free expression guaranteed by the First Amendment because (1) the district could not establish a sufficient nexus between the student's speech and a substantial disruption of the school environment, (2) the First Amendment could not tolerate the district stretching its authority into his grandmother's home and reaching him while he was sitting at her computer after school in order to punish him for the expressive conduct that he engaged in there, and (3) his use of the district's web site did not constitute entering the school. The district, therefore, was not empowered to punish the student's out of school expressive conduct under the circumstances.

In *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011) (en banc), a student created a parody MySpace page of her principal in which she made comments about the principal's anatomy and the principal's wife, said that the principal was a pedophile and a sex addict, and purported to solicit children for sex acts. The student changed the public MySpace profile to a private profile that could only be seen by specific "friends". Moreover, students at the middle school could not access MySpace from school and, therefore, no student viewed the website while at school. The only copy of the page that reached school property was at the request of the principal so that he could look at it. The student received a 10-day suspension.

Regarding alleged disruptions, the school district said that two teachers had approached the principal about the page. One teacher had a five or six minute exchange in one of the classes when six or seven students discussed the profile, had to tell the students to stop talking three times, and raised his voice on the third occasion. The same teacher heard two students talking about the profile on another day and had to tell them to be quiet. This type of corrective action was not abnormal for that teacher on a regular basis. Another teacher reported that some students came to talk with her about the profile. Additionally, a counselor had to take over another counselor's duties for about half an hour to allow the other counselor to sit in on the meetings with the student who had created the profile.

The Third Circuit held that the school district had acted outside of its authority in punishing the student for out-of-school speech, finding that there was no substantial or material disruption and that there was no evidence that there would be substantial disruptions.

In *Kowalski v. Berkeley County Schools*, 652 F.3d 565 (4th Cir. 2011), a student created a MySpace page on her home computer called "Students Against

Slut Herpes" (aka "Students Against Shay's Herpes") ("S.A.S.H."). Shay was a fellow female classmate and was the main focus of the discussion on the page. Two dozen students responded to the friend request sent to about 100 people. The first person to respond was a male student from a school computer during afterhours class at the school. Statements like "Shay has herpes" were on the page, as well as comments indicating that Shay would find the page and that no one cared that she would. Two "edited" pictures of Shay were placed on the page. One of the pictures was edited to have red pock marks around Shay's face to signify the herpes and a sign was placed around Shay's pelvic area that read, "Warning: Enter at your own risk." The second photograph was captioned, "portrait of a whore." The next morning, Shay's parents came to school to complain and Shay went home without attending school because she felt uncomfortable. The school found that the student who created the MySpace page had created a "hate website" in violation of school policy and the student code of conduct against bullying, harassment, and intimidation. The student was suspended.

The Fourth Circuit held that the discipline was proper because the page had reached the school and was meant to do so, it disrupted the operation of the school, and it collided with the rights of others to be secure and to be let alone. The appellate court noted that Shay was required to miss school to avoid further abuse and that had the school not intervened, there was a potential for further abuse of Shay and of other students. The appellate court specifically found that schools have a "compelling interest" in regulating speech that interferes with or disrupts the work and discipline of the school, including discipline for student harassment and bullying.

C. Freedom of Speech in Schools as it Pertains to Religion

In *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), under the Milford Central School's facility community use policy, which governed after-hours use of its facilities, district residents could use the school for "instruction in any branch of education, learning or the arts [or] social, civic and recreational meetings and entertainment events, and other uses pertaining to the community welfare." However, when the Good News Club, a private Christian group that uses Bible lessons and religious songs for children between the age of 6 and 12, sought to hold its meetings in the school cafeteria after school, the Milford Board of Education denied the group's request on the grounds that its activities amounted to religious worship, which was prohibited by the community use policy.

The Good News Club filed suit under 42 U.S.C. § 1983, alleging that the denial of its request to use the facilities violated its rights to free speech, equal protection, and religious freedom. A federal district court in New York and the Second Circuit rejected the club's arguments. The courts essentially determined that the school's actions were constitutional because the club's activities were "quintessentially religious" and that religious instruction and worship can be excluded from public school facilities even when a public school has designated after-hours use of its cafeteria to be a limited public forum.

The U.S. Supreme Court disagreed, observing that when a state actor, such as a public school board, creates a limited public forum, it is free to restrict certain types of speech as long as the limitations do not discriminate on the basis of viewpoint and are reasonable in light of the purpose that the forum serves. Applying this standard, the supreme court found that the board's exclusion of the club constituted viewpoint discrimination.

In its analysis, the supreme court acknowledged that the board allowed a variety of groups to use its facilities for purposes dealing with the welfare of the community, such as moral and character development. The supreme court noted that the club clearly promoted community welfare through moral development but did so from a religious perspective and through openly religious activities, such as religious songs and biblical stories, unlike other groups; the Boy Scouts, Girl Scouts, and 4-H Club approached the same issues from secular perspectives.

Noting that the board disregarded the club's primary purpose as being the moral development of children, which was a goal closely aligned with its community use policy, the supreme court ruled that the board discriminated against the club because of its religious grounding. To this end, the supreme court reasoned that the board's exclusion of the club on this basis was unconstitutional viewpoint discrimination.

In *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011), a public high-school math teacher displayed large banners in his classroom with the following text: "IN GOD WE TRUST," "ONE NATION UNDER GOD," "GOD BLESS AMERICA," "GOD SHED HIS GRACE ON THEE," and "All Men Are Created Equal They Are Endowed By Their CREATOR." After the teacher refused to post the phrases in their historical context so as to avoid promoting religion, the school district instructed the teacher to remove the banners altogether. The teacher removed the banners, but then filed a lawsuit, alleging that the school district had violated his constitutional right to free speech by requiring him to remove the religious displays. After the district court ruled in the teacher's favor, the school district appealed.

The Ninth Circuit overturned the district court's decision and ruled in favor of the school district,

reasoning that while at work, a teacher speaks "not as an individual, but as a public employee," and the school has a right to ensure that a teacher's displays do not violate the Establishment Clause.

In *A.A. v. Needville Independent School District*, 611 F.3d 248 (5th Cir. 2010), a Texas public school district's grooming policy required that boys keep their hair trimmed so that it did not cover their ears or touch the top of their shirt collar at the back of the neck. The policy's stated design was "to teach hygiene, instill discipline, prevent disruption, avoid safety hazards, and assert authority." The parents of a Native American kindergartner sought an exemption from the policy so that their child could wear his hair long and in braids, in accordance with the family's Native American religious beliefs. When the school district refused to grant the exemption, the parents filed suit. Subsequently, the district court permanently enjoined the school district from applying its grooming policy to the child. The court concluded that the policy violated the child's rights under the Free Exercise and Free Speech Clauses as well as under the Texas Religious Freedom Restoration Act, and also violated the parents' due-process right to determine their child's religious upbringing. The school district appealed.

The Fifth Circuit upheld the district court's ruling, holding that the district's dress code restrictions substantially burdened the child's free exercise of his religious beliefs by subjecting him to social ridicule and the constant threat of punishment. Further, maintaining order and discipline in the school did not constitute compelling state interests sufficient to justify the dress code restrictions placed on the child. The appellate court made it clear that to show a compelling interest under the Texas Religious Freedom Restoration Act, a school district must show "specific evidence" that the child's religious practices jeopardize its stated interests. In this case, the district failed to show with sufficient particularity how its strong interests in maintaining order and discipline, among others, would be adversely affected by granting an exemption to the student.

In *Lee v. York County School Division*, 484 F.3d 687 (4th Cir. 2007), the parent of a high school student complained to the school that articles posted on a Spanish teacher's in-class bulletin board were overly religious for a public school classroom. The principal of the school reviewed the materials, reached the same conclusion, and removed the materials. The items removed were (1) a 2001 National Day of Prayer poster featuring George Washington kneeling in prayer; (2) a news article outlining religious and philosophical differences between President Bush and John Kerry; (3) a news article describing how then-attorney general John Ashcroft led staffers in voluntary Bible study sessions; (4) a news article detailing the missionary activities of a former Virginia high school student whose plane had been shot down in South America; and (5) a Peninsula Rescue Mission newsletter highlighting the missionary work of the dead student.

After the school board rejected the teacher's request to be allowed to repost the items, he filed suit. In the course of his pretrial deposition, the teacher explained that he had posted the items not because they were related to his Spanish curriculum, but because in addition to being responsible for his students' education, he also felt responsible for their moral welfare. The articles, he continued, were posted to uplift students and to encourage them not to be ashamed of their faith.

Agreeing that there was no dispute as to the facts of the case, both the teacher and the school board made motions for the district court to grant them judgment before trial. In reviewing the parties' submissions, the court determined that the postings were not protected by the First Amendment because they were curricular in nature and granted judgment for the school board. The teacher appealed.

The Fourth Circuit agreed with the district court. In reaching its decision, the appellate court noted that, according to Fourth Circuit precedent, curricular speech is, in effect, the carrying out of a teacher's duties as an employee of the school; thus it is a matter of private interest between the school board, as employer, and the teacher, as employee. By definition, then, it is not the kind of public speech that is protected by the First Amendment. Also, according to Fourth Circuit case law, "curricular" speech is broadly defined because of the recognition that public schools possess the right to regulate speech that occurs within a compulsory classroom setting and that a public school's power in this regard exceeds the permissible regulation of speech in other governmental workplaces or forums. Curricular speech constitutes school-sponsored expression and bears the imprimatur of the school. It must also be supervised by faculty members and designed to impart particular knowledge to students.

In this case, the materials removed from the teacher's bulletin board met these requirements. First, they were constantly present for review by students in a compulsory classroom setting. In addition, the items were posted on a school-owned bulletin board over which the school maintained control. Thus, even though the materials were not related to the teacher's Spanish curriculum, curriculum under Fourth Circuit precedent is not so narrowly defined as to exclude them. Curricular speech can be aimed at instructing and imparting knowledge that is not related to the particular curricular objectives a teacher must follow. Thus, because the teacher's postings were curricular,

the dispute over them amounted to an ordinary employment dispute, not a free speech issue.

D. Miscellaneous Freedom of Speech Issues Occurring in Schools

In *Morse v. Frederick*, 551 U.S. 393 (2007), a high school principal, at a school-sanctioned and school-supervised event, saw students unfurl a banner stating "BONG HITS 4 JESUS," which she regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. When one of the students who had brought the banner to the event refused, the principal confiscated the banner and later suspended the student. The school superintendent upheld the suspension, explaining that the student was disciplined because his banner appeared to advocate illegal drug use in violation of school policy. The district court concluded that the school officials had not infringed the student's rights to freedom of speech. The Ninth Circuit reversed, finding a First Amendment violation because the school officials punished the student without demonstrating that his speech gave rise to a risk of substantial disruption.

The U.S. Supreme Court held that because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials did not violate the First Amendment by confiscating the pro-drug banner and by suspending the student. In reaching its decision, the Supreme Court noted that the incident occurred at a school event in which the students were being supervised by teachers, and at which the district's student conduct rules applied. Moreover, the Supreme Court acknowledged that a reasonable interpretation of the banner was that it advocated drug use. Finally, the Supreme Court observed that the First Amendment does not require schools to tolerate at school events student expression that contributes to the dangers of illegal drug use in violation of a school policy.

In *ACLU of Florida v. Miami-Dade School Board,* 557 F.3d 1177 (11th Cir. 2009), a parent of a child in the Miami-Dade School District—a parent who had been a political prisoner in Cuba—complained about the school library book *Vamos a Cuba* because he felt it portrayed a life in Cuba that did not exist and thereby created an illusion and distortion of reality. In response to this complaint, a review committee met and voted to retain the book. A second review committee reached the same decision. When the issue went before the Miami-Dade School Board, the School Board voted to remove the book—and the rest of its series, most of which had neither been challenged nor shown to contain inaccuracies—from the county schools and replace them with more accurate books. Two parents filed suit against the school board. The judge entered an injunction against the School Board preventing them from removing the books and stating that the Miami-Dade County School Board "intended by their removal of the books to deny school children access to ideas or points-of-view with which the school officials disagreed." The parents appealed.

The Eleventh Circuit lifted the injunction, concluding that the First Amendment does not require a school board to leave on its library shelves a purportedly nonfiction book that contains false statements. Thus, school boards may remove books that contain factual inaccuracies without violating freedom of speech rights.

In *Mayer v. Monroe County Community School Corporation*, 474 F.3d 477 (7th Cir. 2007), a teacher claimed that she was fired after a parent complained about remarks the teacher had made to her class. Specifically, one of the teacher's students in her grades 4-6 class on the eve of the Iraq war asked if she would participate in a peace rally. She replied: "I honk for peace." She also told her students during the same weekly current events discussion that "People ought to seek out peaceful solutions before going to war. The school system denied that the teacher was not rehired because she expressed an unpatriotic opinion about the war, maintaining instead that she was a bad teacher. It also said that parents began complaining about her in Oct. 2002, long before her Jan. 10, 2003 remarks.

The Seventh Circuit Court of Appeals held that "The First Amendment does not entitle primary and secondary teachers, when conducting the education of captive audiences to cover topics, or advocate viewpoints, that depart from the curriculum adopted by the school system." Thus, Mayer's First Amendment right to freedom of speech had not been violated.

In *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), a Louisiana parish school board decided to implement a mandatory school uniform policy. The school board believed the uniform policy would improve the educational process by reducing disciplinary problems. Several parents of students challenged the new dress code on grounds that it violated the students' right to freedom of speech. The school presented evidence that, since the adoption of the uniform policy, academic performance increased and discipline problems declined. A district court rejected the parents' lawsuit. The parents appealed.

The Fifth Circuit held that adjusting the school's dress code by adopting a uniform policy is a constitutional means for school officials to improve the educational process if it is not directed at censoring the expressive content of student clothing.

The school board uniform policy in this case was passed to improve the educational process by increasing test scores and reducing discipline problems. "This purpose is in no way related to the suppression of student speech," the appellate court wrote. "Although students are restricted from wearing clothing of their choice at school, students remain free to wear what they want after school hours."

In *Saxe v. State College Area School District*, 240 F.3d 200 (3rd Cir. 2001), two high school students challenged a school district's anti-harassment policy, contending it violated their First Amendment rights. The students believed that the policy prohibited them from voicing their religious belief that homosexuality was a sin. The policy provided several examples of harassment, including: "any unwelcome verbal, written or physical conduct which offends, denigrates or belittles an individual" because of "race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics."

The Third Circuit held that such a broadly worded policy prohibits too much speech and violates the First Amendment. Specifically, the policy prohibits a substantial amount of speech that is neither vulgar within the meaning of standards laid out in U.S. Supreme Court precedent. It even prohibits speech that harasses someone based on "clothing, physical appearance, social skills, peer group, intellect, educational program, hobbies, or values." The court noted that the policy must be judged under the *Tinker* "substantial disruption" test. This policy could essentially be applied to any speech that another might find offensive. "This could include much 'core' political and religious speech". "The policy, then, appears to cover substantially more speech than could be prohibited under *Tinker*'s substantial disruption test."

III. CONSTITUTIONAL LITIGATION IN SCHOOLS RELATING TO THE ESTABLISHMENT CLAUSE

Very generally speaking, the Establishment Clause prohibits local governments and public officials, in their official capacities, from advancing, coercing, or endorsing one particular religion and also prohibits the endorsement of religion as opposed to non-religion. Courts have found that in order to not violate the Establishment Clause, a local government's or public official's actions must have a secular purpose, not have a primary effect of advancing or inhibiting religion, not foster an excessive government entanglement with religion, and not persuade or compel a student to participate in religious exercise. It is the courts' interpretation of the Establishment Clause that has restricted the abilities of school officials to lead prayers with their students, teach religious material, and formally include support for religion in public schools.

A. The Establishment Clause and the Recitation of the Pledge of Allegiance in Schools

In *Elkgrove Unified School District v. Newdow*, 542 U.S. 1 (2004), Nedow, a father of a student, filed suit against the Elkrove Unified School District challenging the recitation of the United States Pledge of Allegiance in public schools. The father argued that the Pledge of Allegiance violated the Establishment Clause due to the words "under God," and thus could not be recited in public schools.

The U.S. Supreme Court side-stepped the constitutional issue and concluded that Nedow did not have standing to challenge the school district's policy in federal court because he was concurrently involved in a California family court dispute with his daughter's mother, and because the mother stated that she wanted their child to recite the Pledge as worded with "under God."

In *Newdow v. Rio Linda Union School Dist.* 597 F.3d 1107 (9th Cir. 2010), Newdow and three unnamed parents of children attending schools in the Rio Linda Union School District challenged the District's policy and practice established under California Education Code section 52720, which required a teacher-led, daily recitation of the Pledge of Allegiance. Under the District policy, objecting students and teachers could abstain from reciting all or part of the Pledge of Allegiance. Newdow and the parents claimed that the phrase "Under God" in the Pledge of Allegiance offended their beliefs that there is no God, interfered with their rights as parents, and indoctrinated their children with religious beliefs in violation of the Establishment Clause.

The Ninth Circuit found that teacher-led, voluntary recitation of the Pledge is not an establishment of religion prohibited by the Constitution. Applying legal precedents, the appellate court concluded that the Pledge was for the secular purpose of fostering patriotism, not religion. The appellate court observed that "not every mention of God or religion by our government or at the government's direction is a violation of the Establishment Clause." The appellate court found that governmental action violates the Establishment Clause only if it has the ostensible and predominate purpose of advancing religion. The appellate court concluded that the Pledge endorsed a form of government, not religion in general or any particular religion or any particular sect, and the words "under God" recognized the Founding Fathers' political philosophy that a power greater than government gave people their inalienable rights. The Ninth Circuit did not accept the contention that the daily Pledge recitation was coercive to pupils, noting that even if pupils were

coerced to listen to others reciting the Pledge and could feel induced to recite the Pledge themselves, the students were being coerced to participate in a patriotic, not religious exercise. Coercion to engage in a patriotic activity does not run afoul of the Establishment Clause.

B. The Establishment Clause and Voucher Programs in School Districts

In *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), in an effort to address the problem of failing public schools in Cleveland, the State of Ohio enacted a voucher program that provided vouchers to low-income parents for use at participating public and private schools. Once implemented, the schools that chose to participate were overwhelmingly religious private schools, and the vast majority of participating students went to private religious schools. A suit was brought by local taxpayers and students claiming that the voucher program unconstitutionally aided religious schools.

The U.S. Supreme Court held that the voucher program provided a religiously neutral benefit that gave parents a true private choice among a number of educational venues. Therefore, the program did not violate the Establishment Clause. In reaching its decision, the Supreme Court examined the program in its totality, looking at the options available for students to go to magnet schools, receive after-school counseling, or use a voucher to go to a private school. Key to the Supreme Court's decision was the twin requirements of neutrality and private choice. Since the program was designed to provide no incentive for either religious private, secular private, or public schools, the Supreme Court found that true private choice exists, even if the participants in the program overwhelmingly chose religious schools.

C. The Establishment Clause and School Sponsored Activities

In *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), students were elected by their classmates to give pre-game prayers at high school football games over the public address system. A number of students sued, arguing that such solemnizing statements or prayers constituted an endorsement of religion, violating the Establishment Clause. The district countered that the pre-game invocations were a long-standing tradition in Texas communities. Moreover, the prayer came from a student, thus making it student speech and not state-sponsored speech.

The U.S. Supreme Court ruled that the pre-game prayer given by a student at high school football games communicates a government religious endorsement, and as such, violates the Establishment Clause. In reaching its decision, the Supreme Court was not persuaded by the district's arguments, finding that the student speech was not private. The control the school maintained over the content of the student speech registered government preference for religious speech or prayer. In view of the history of religious practices in the school district, the district's student election policy appeared to be designed to maintain the practice of pre-game prayers. The Supreme Court also found that the voting mechanism used by the school to determine whether a message would be given and who would give it only exacerbated the Establishment Clauses issues since the different religious groups within the school now became rival political factions. Voting for the speaker ensured not only sectarian conflict, but that only the majoritarian religious voice would ever be heard. These factors led the Supreme Court to find that the district policy on pre-game messages resulted in both perceived and real endorsement of religion by the government, and therefore was unconstitutional.

In *Doe v. Elmbrook School District*, 687 F.3d 840 (7th Cir. 2012) (en banc), petition for a writ of certiorari filed No. 12-755 (Dec. 20, 2012), a public school district rented a local church to use for high school graduation ceremonies between 2000 and 2009. Several parents, students, and relatives of the school district of different religious beliefs sued, asserting that the school district's use of the church for the graduation ceremonies was a religious endorsement by a governmental body, and thus violated the Establishment Clause of the First Amendment.

The Seventh Circuit held that the school district's use of the space amounted to an unconstitutional governmental endorsement of religion. In reaching its decision, the appellate court noted that the school district's practice "conveyed a message of endorsement" and that "the sheer religiosity of the space created a likelihood that high school students and their younger siblings would perceive a link between church and state." Moreover, not only was the Church adorned with its own symbols, but it was covered with high school decorations, such that the school district placed its imprimatur on the Church's religious message. The appellate court also held that the school district's practice constituted religious coercion. By directing students to attend a pervasively Christian, proselytizing environment, the school district created a captive audience. "The only way for graduation attendees to avoid the dynamic is to leave the ceremony. That is a choice . . . the Establishment Clause does not force students to make."

In *Adler v. Duval*, 250 F.3d 1330 (11th Cir. 2001), Duval County, Florida instituted a policy for graduation ceremonies that allowed students of the senior class to vote on whether two-minute messages

would be given at the beginning and end of the event, and then permitted seniors to elect a student to supply such messages. These messages were to be prepared solely by the students elected, and no school official was to have any input or review over them. The stated goal was to allow students to control their own graduation ceremony without "monitoring or review by school officials." Several Duval County students brought suit, claiming this policy had the effect of advancing religion, and was a violation of the Establishment Clause.

The Eleventh Circuit held that the Duval County policy was constitutional, even in light of *Santa Fe Independent School District v. Doe*. The appellate court analyzed the policy first in light of the *Santa Fe Independent School District* decision. It found the differences substantial and important enough to distinguish the two situations. The appellate court found that the lack of oversight by administrators made the speeches the private speech of the students, and it was not transformed into government speech as in the *Santa Fe Independent School District* decision. This allowed the Eleventh Circuit to proceed to analyze the policy under the *Lemon* test. As it had previously done, the appellate court found that the policy passed muster under *Lemon*, as it had a secular purpose, did not have the effect of advancing or inhibiting religion, and did not excessively entangle the state with religion.

In *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000), high school students were selected to give the invocation and valedictorian graduation speeches, respectively. The district had a policy of reviewing the speeches. During this review process, the school informed the students that their messages were too sectarian and proselytizing and had to be modified. When the students refused, they were denied the opportunity to speak at graduation. The students sued, seeking damages for denial of their First Amendment rights.

The Ninth Circuit ruled that a graduation ceremony is not an open speech forum but a government ceremony, and as such, the school has a responsibility to avoid Establishment Clause violations during its graduation ceremony. The appellate court found that the close control the school exercised over every aspect of the ceremony gave the student speeches the implied endorsement of the school. Since the student messages bore the imprimatur of the school, the school had an obligation to make sure that the student messages would not violate the Establishment Clause. For these reasons, the appellate court found that the graduation prayer was problematic irrelevant of its specific theological content.

D. The Establishment Clause and School Policies With Opt-Out Provisions for Religious or Philosophical Objections

In *Littlefield v. Forney Independent School District*, 268 F.3d 275 (5th Cir. 2001), a Texas school district adopted a mandatory uniform policy. The policy contained an opt-out provision for those with sincere religious or philosophical objections to the policy. A group of students and parents contended that the opt-out procedures violated the Establishment Clause by favoring certain religions over others.

The Fifth Circuit ruled that the school's uniform policy was constitutional. The appellate court summarily rejected the Establishment Clause claim because there was no endorsement of religion implied by the policy and no coercion of students to participate in religion.

E. The Establishment Clause and School Board Meetings

In *Doe v. Indian River School District*, 653 F.3d 256 (3rd Cir. 2011), a school district's board, since its creation in 1969, opened its meetings with prayer. In 2004, after a heated debate over the propriety of prayer at graduations, the school board put its practice into formal policy. Two sets of parents with children in the school district challenged the constitutionality of the policy. The parents argued that it violated the Establishment Clause of the First Amendment. The parents noted that students often attended the meetings and should not have prayers imposed on them.

The school board contended that the prayer was justified under the legislative-prayer exception created by the U.S. Supreme Court in *Marsh v. Chambers*, 463 U.S. 783 (1983), in which the Supreme Court ruled that the Nebraska Legislature could have chaplain-led prayer without violating the Establishment Clause. The parents, on the other hand, contended that the legislative-prayer exception under *Marsh* should not apply to school boards where children are often present. Instead, they argued that the court should apply the graduation-prayer precedent from *Lee v. Weisman*, 505 U.S. 577 (1992), in which the Supreme Court struck down a school district's policy of prayer at graduation.

The Third Circuit found that the school board's prayer practice was more like prayer at a graduation than before a legislative body, and therefore violated the Establishment Clause. "The Indian River School Board carries out its practice of praying in an atmosphere that contains many of the same indicia of coercion and involuntariness that the Supreme Court has recognized elsewhere in its school prayer jurisprudence". The court also determined that the prayer policy excessively entangled church and state because board members composed and recited the prayers. "Government participation in the

composition of prayer is precisely the type of activity that the Establishment Clause guards against".

In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006) *vacated by* 484 F.3d 494 (5th Cir. 2007) (en banc), the twice-monthly meetings of the Tangipahoa Parish School Board opened with an invocation delivered by persons selected by the Board. The meetings were open to the public, including to students. The prayers often included references to "Jesus" and "Jesus Christ." The School Board, by a vote of 9-0, rejected a proposal to limit the prayers to a "brief non-sectarian, non-proselytizing invocation." The district court struck down the Board's practice as violative of the Establishment Clause, and the Board appealed.

The Fifth Circuit upheld the lower court's ruling that the Christian prayers presented in the parties' stipulation of facts violated the Establishment Clause and upheld the district court's injunction as it related to those and similar Christian prayers. However, the Fifth Circuit noted that "this holding is far more narrow than the relief granted by the permanent injunction at issue"—which barred all prayers. The court vacated the portion of the injunction applying to other types of prayer.

In February 2007, the Fifth Circuit granted rehearing *en banc*. The Fifth Circuit vacated its prior opinion, concluding that Plaintiffs had failed to show that they had standing to sue because there was no evidence in the record that Plaintiffs had attended any Board meetings at which an invocation was given.

IV. CONSTITUTIONAL LITIGATION IN SCHOOLS RELATING TO SEARCH AND SEIZURE

A. The Standard for School Searches by Administrators

In *New Jersey v. T.L.O.*, 469 U.S. 341 (1985), the U.S. Supreme Court set out the standard for a valid search under the Fourth Amendment in the school context by administrators, which is that the search must be (1) justified at its inception and (2) reasonable in scope. That is, school administrators must have a justifiable reason to initiate a search of the phone, and the search must not exceed reasonableness. For example, an administrator may have a reasonable suspicion that a student was using a cell phone during the instructional day in violation of the student handbook, but his search that goes beyond determining whether the phone was on and used may go too far. A reasonable suspicion that an obscene message was sent may justify a search of greater scope. In any case, some courts have determined that school administrators may not conduct an "unfettered search." This reasonable suspicion standard for school officials is a somewhat lesser standard than the "probable cause" standard that applies to searches by law enforcement.

B. Search and Seizure on School Grounds

In *Safford Unified School District #1 v. Redding*, 557 U.S. 364 (2009), a middle-school student who was caught red-handed with prescription-strength ibuprofen (in violation of the school's drug policy) implicated another 13-year-old girl. On the sole basis of this accusation, school officials searched the girl's backpack, finding no evidence of drug use, drug possession, or any other illegal or improper conduct. The school officials then took the girl to the nurse's office and ordered her to undress. Not finding any pills in the girl's pants or shirt, the officials ordered the girl to pull out her bra and panties and move them to the side. The observation of the girl's genital area and breasts also failed to reveal any contraband. The girl's mother, whom the girl had not been permitted to call before or during the strip search, sued the school district and officials for violating her daughter's Fourth Amendment rights to be protected from unreasonable search and seizure. The trial court and a panel of the Ninth Circuit ruled against her, but the en banc Ninth Circuit reversed, finding the search unjustified and unreasonable in scope, and therefore unconstitutional.

The U.S. Supreme Court held that the strip search violated the student's Fourth Amendment rights, noting that under the resulting reasonable suspicion standard, a school search "will be permissible … when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." The required knowledge component of reasonable suspicion for a school administrator's evidence search is that it raise a moderate chance of finding evidence of wrongdoing. Thus, while there was sufficient suspicion to justify searching the student's backpack and outer clothing, there was insufficient suspicion to warrant extending the search to the point of making the student pull out her underwear.

In *Board of Education v. Earls*, 536 U.S. 822 (2002), the Oklahoma School District implemented a program requiring all middle and high school students who wanted to participate in extracurricular activities to submit to urinalysis testing for drugs. Two high school students and their parents sued the school district asserting that the policy violated the students Fourth Amendment rights. The district court disagreed and ruled in favor of the school administrators. On appeal, the circuit court ruled in the students' favor, agreeing that the policy violated the Fourth Amendment.

The U.S. Supreme Court found that the random drug testing of children participating in extracurricular

activities was reasonable under the Fourth Amendment. The Supreme Court reached this decision in part due to its concern that children receive adequate protection to enable learning. The court recognized the state's "special responsibility of care and direction" over its children. Notably, a concurring opinion suggests that a different result might be reached if a school were to extend its mandatory drug testing to include all students.

In *M.W. v Madison County Board of Education*, 262 F. Supp. 2d 737 (E.D. Ky. 2003), a female ninth grade student was taken to the principal's office by her ROTC/physical education teacher. The teacher left the student in the principal's office and returned to class. The principal asked the student to identify herself, but she did not answer him. The principal asked a police officer who was assigned to the school to help in the identification process. The student remained silent. Ultimately the police officer took her to the police station where she was placed in detention. The student's parents filed suit in federal district court alleging that their daughter's removal from school and placement in detention were violations of the Fourth Amendment's protection from *unreasonable seizure*.

The district court concluded that the principal's conduct in detaining the student to establish her identity and his turning the matter over to the police were reasonable under the circumstances. The district court noted that just because a student is removed from school by a police officer does not necessarily establish a constitutional violation.

In *United States v Auilera*, 287 F. Supp. 2d 1204 (E.D. Cal. 2003), in response to an anonymous tip that a "male who had flashed a weapon by lifting his shirt above his waist was approaching the school," two school security rushed to a portable classroom area where they confronted the intruder. Subsequently they searched him and found a sawed-off shotgun in his waistband. The intruder was arrested and charged with possession of an unregistered firearm on school property. The non-student/intruder filed suit in federal district court alleging that he had been subjected to an "unlawful search and seizure."

The district court concluded that the intruder's constitutional rights had not been violated based, in part, on the following: (1) school security personnel had reasonable suspicion to search the non-student intruder, and (2) the search, as conducted by the security officers, was directly related to its initial purpose and reasonable in scope. Finally, the court did not consider the search of the student's clothing (he was initially subjected to a pat down search of his clothing) "excessively intrusive."

V. LITIGATION IN SCHOOLS RELATING TO TITLE VII, TITLE IX, 14TH AMENDMENT, AND SECTION 504

A. Discrimination in Schools Based on Gender

In *Biediger v. Quinnipiac Unniversity*, 691 F.3d. 85 (2nd Cir. 2012), Quinnipiac University announced plans to cut its women's volleyball team, men's golf team, and men's outdoor track team. At the same time, the University pledged to create a new varsity sport, competitive cheerleading. Some of the Quinnipiac women's varsity volleyball players and their coach filed suit against the University alleging that Quinnipiac's decision to eliminate its volleyball team violated Title IX of the Education Amendments of 1972 (20 U.S.C. § 162, et seq.) and its regulations (34 C.F.R. Part 106).

The district court granted a preliminary injunction, preventing Quinnipiac from eliminating women's volleyball as a varsity sport. The court held that Quinnipiac's "roster management" deprived women students of equal participation opportunities in varsity sports. Specifically, Quinnipiac insisted that various women's sports have a "roster floor"—a team count padded by athletes not actually needed for the team, so that a number of purported players actually had as their "principal role" "to provide a gender statistic rather than a meaningful contribution to the team." Conversely, as is common in competitive sports, male teams had a roster cap, so that some men interested and able to play were not afforded the chance. Accordingly, even though the gender split among varsity student athletes at Quinnipiac seemed to track the student gender demographics more generally, the Court held that this proportionality was actually illusory.

A bench trial was then held on the Title IX theory that Quinnipiac discriminated in 2009 and 2010 on the basis of sex in its allocation of athletic participation opportunities. The district court found for the plaintiffs, holding that the University's competitive cheerleading team did not qualify as a varsity sport for the purposes of Title IX and, therefore, its members could not be counted as athletic participants under the statute: "Competitive cheer may, sometime in the future, qualify as a sport under Title IX; today, however, the activity is still too underdeveloped and disorganized to be treated as offering genuine varsity athletic participation opportunities for students." In addition, the Court held, Quinnipiac was impermissibly triple counting women cross-country runners, tallying them, as well, as participants in indoor and outdoor track, even when they did not in fact so participate. Finally, cutting volleyball, the Court concluded, would only exacerbate the ongoing violation of Title IX. Accordingly, the Court prohibited the immediate elimination of women's volleyball, in 2010-2011, although it made clear that

Quinnipiac could subsequently cancel that team, "so long as any decision to eliminate women's volleyball is accompanied by other changes that will bring the University into compliance with Title IX."

The Second Circuit Court of Appeals affirmed the district court's findings and injunction in their entirety.

In *Communities for Equity v. Michigan High School Athletic Association*, 178 F. Supp. 2d 805 (W.D. Mich. 2001), *aff'd* 377 F.3d 504 (6th Cir. 2004), *cert. granted, vacated* 544 U.S. 1012 (2005); *aff'd* 459 F.3d 676 (6th Cir. 2006), the parents of high school girls challenged Michigan's high school sports schedule, arguing that their daughters were at a disadvantage to the boys because they were forced to play in a "non-traditional" season. Among the disadvantages claimed by the parents was "the decreased ability to be nationally ranked or obtain All-American honors," which in turn affects the "visibility to recruiters in terms of college athletic scholarship opportunities." The parents sought injunctive relief under Title IX, the Equal Protection Clause of the Fourteenth Amendment, and the Elliot-Larsen Civil Rights Act (a Michigan statute) ("ELCRA"), requiring male and female sports to be played in the same season, or alternatively, scheduling the same number of male and female sports in non-traditional seasons.

The district court held that the Michigan High School Athletic Association's ("MHSAA')'s actions violated all three. On appeal, the Sixth Circuit upheld the holding of the district court, but affirmed only on the basis of the Equal Protection Clause. The Sixth Circuit intentionally chose to not address plaintiffs' Title IX or ELCRA claims. MHSAA filed a petition for writ of certiorari with the United States Supreme Court. The Supreme Court vacated the decision of the Sixth Circuit and remanded the case for consideration in light of the Court's decision in *Rancho Palos Verdes v. Abram,* 544 U.S. 113 (2005), in which it held that the Telecommunications Act precluded individually enforceable rights under § 1983 because the statute provided a "comprehensive enforcement scheme". Over seven years after its commencement, the Sixth Circuit made its final pronouncement on the case. On remand, the Sixth Circuit affirmed its prior decision, and in addition, held that Title IX was not an exclusive federal remedy and that MHSAA had violated Title IX, the Equal Protection Clause, and ELCRA.

B. Discrimination in Schools Based on Religion

In *Slocum v. Devezin*, NO. 12-1915, 2013 U.S. Dist. LEXIS 77558 (E.D. La June 3, 2013), a teacher spoke to the school principal about taking time off from 10:00 a.m. on Tuesday until 10:00 a.m. on Wednesday each week for the Sabbath. The teacher submitted a reasonable accommodations request and believed it had been approved. She subsequently received a letter from Human Resources denying her request for time off. The teacher filed a lawsuit alleging religious discrimination by school officials in violation of Title VII of the Civil Rights Act of 1964.

The school argued that a school board is not required to accommodate a teacher's request when such an accommodation is an "undue hardship." They claimed that the teacher's weekly absences from her classes would be an undue hardship to the school and would require the school to bear a more than minimal cost.

The district court agreed with the school, noting that if the plaintiff was absent every Tuesday, the school would have to hire a substitute every week, or overload another teacher's classroom by moving students one day every week. The district court found that this would be an undue hardship on the school.

C. Discrimination in Schools Based on Disability

In *Stewart v. Waco Independent School District*, 711 F.3d 513 (5th Cir. 2013) *vacated* No. 11-51067, 2013 U.S. App. LEXIS 11102 (5th Cir. Tex. June 3, 2013), a student sued the school district claiming that she had mental retardation, a speech impairment, and a hearing impairment. She attended high school in the district and received special education services. After an incident involving sexual contact between the student and a male student, the district modified the student's individualized education program (IEP) to provide that she be separated from male students and remain under close supervision while at school.

The suit alleged, however, that the student was involved in three other instances of sexual conduct, which she characterized as "sexual abuse" over the next two years. A male student sexually abused her in a restroom. Finding that the student was "at least somewhat complicit" in the activities, the district suspended the student for three days. A similar incident occurred when school personnel allowed the student to go to the restroom unattended. Then, another incident occurred in which a male student "exposed himself" to the student. The district allegedly suspended the student again as a result of this incident. According to the suit, the district did not take any steps to further modify the student's IEP or to prevent further abuse.

The student sued the school district alleging claims under Title IX of the Education Amendments of 1972, the Americans with Disabilities Act (ADA), and § 504 of the Rehabilitation Act of 1973. The trial court dismissed the case in its entirety because it was an attempt to hold the district liable for the actions of a private actor. The student appealed to the Fifth Circuit Court of Appeals, but only with respect to the dismissal of the § 504 claims.

The Fifth Circuit held that Stewart had stated valid claims under § 504. Under § 504, "no otherwise qualified individual with a disability in the United States, . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance . . ." To establish a claim for disability discrimination, a student must allege that the school district has "*refused* to provide reasonable accommodation for the handicapped plaintiff to receive the full benefits of the school program." This standard can be met by facts creating an inference of "professional bad faith or gross misjudgment," which the appeals court defined as a gross departure from accepted standards among educational professionals.

The appellate court differentiated this § 504 standard of liability from Title IX's deliberate indifference standard, which is a more stringent standard. Under Title IX, a discrimination claim based on peer harassment requires a showing that the district's response was clearly unreasonable in light of the known circumstances, such that the district's actions subjected the student to further discrimination. In addition, the harassment must be so severe, pervasive, and objectively offensive that it effectively bars a student from access to an educational opportunity or benefit. Here, the student's factual allegations failed to state that the district's responses to the incidents were so unreasonable as to rise to the level of deliberate indifference under a Title IX theory of liability.

According to the appellate court, however, the student could state a viable § 504 claim based on the district's alleged refusal to make reasonable accommodations for her disabilities. The Fifth Circuit clarified that "bad faith or gross misjudgment are just alternative ways to plead the refusal to provide reasonable accommodations." To establish a claim, a plaintiff need not show that the district explicitly refused to make reasonable accommodations. Instead, professionally unjustifiable conduct would suffice. According to the appeals court, a school district can be held liable under § 504 when it "fails to exercise professional judgment in response to changing circumstances or new information, even if the district has already provided an accommodation based on an initial exercise of such judgment."

D. Discrimination in Schools Based on Race

In *Fisher v. University of Texas*, ___ U.S. ___, No. 11-345, 2013 U.S. LEXIS 4701 (June 24, 2013), a white female was denied admission to the University of Texas at Austin. The white female filed suit against the university and other related defendants, claiming that the University of Texas' use of race as a consideration in admission decisions was in violation of the equal protection clause of the Fourteenth Amendment and a violation of 42 U.S.C. Section 1983. The university argued that its use of race was a narrowly tailored means of pursuing greater diversity. The district court decided in favor of the University of Texas, and the United States Court of Appeals for the Fifth Circuit affirmed the district court's decision. Fisher appealed the appellate court's decision.

The U.S. Supreme Court overruled the Fifth Circuit's holding and remanded the case back to the lower court for another look. The court noted that the Fifth Circuit needs to subject the University of Texas admission plan to the highest level of judicial scrutiny as required by the Supreme Court's 2003 decision in *Grutter v. Michigan*, 539 U.S. 306 (2003), upholding affirmative action in higher education.

The Supreme Court emphasized "[a]s the Court said in *Grutte*r, it remains at all times the university's obligation to demonstrate, and the judiciary's obligation to determine, that admissions processes 'ensure that each applicant is evaluated as an individual and not in a way that makes an applicant's race or ethnicity the defining feature of his or her application'".

In *Grutter v. Bollinger*, 539 U.S. 306 (2003), a 43-year-old white female, applied for admission to the University of Michigan Law School. The white female had a 3.8 undergraduate GPA and a score on the LSAT that placed her nationally in the 86th percentile. After several months of being placed on a "wait list," she was notified that her application for admission had been denied. She then filed a class action suit in a U.S. District Court, claiming that she was denied admission because minority students were given preferential treatment. The District Court ruled for the white female and concluded that "the university's use of race as a factor in its admissions decisions was unconstitutional and a violation of the Civil Rights Act of 1964." It enjoined the law school from continuing to use race in its admissions decisions. The law school appealed to the U.S. Court of Appeals for the Sixth Circuit which overturned the lower court's judgment. The Sixth Circuit reasoned that the law school had tailored its admissions procedure in compliance with U.S. Supreme Court precedent.

The U.S. Supreme Court held that diversity is a compelling interest in higher education, and that race is one of a number of factors that can be taken into account to achieve the educational benefits of a diverse student body. The Supreme Court found that the individualized, whole-file review used in the University of Michigan Law School's admissions process is narrowly tailored to achieve the educational benefits of diversity.

In reaching its decision, the Supreme Court stated

that "[a]lthough all government uses of race are subject to strict scrutiny, not all are invalidated by it," and that "context matters" when reviewing programs in which race is taken into account. The Supreme Court rejected the assertion that "the only governmental use of race that can survive strict scrutiny is remedying past discrimination." It recognized that "universities occupy a special niche in our constitutional tradition," and deferred to the University of Michigan Law School's good faith educational judgment that diversity is essential to its institutional mission.

The Supreme Court found that the educational benefits of diversity "are not theoretical but real". Those benefits included "cross-racial understanding" and the breaking down of racial stereotypes. The Supreme Court cited social science research showing that "student body diversity promotes learning outcomes, … better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals." Finally, the Supreme Court noted that diversity is particularly important in the law school context because law schools "represent the training ground for a large number of our Nation's leaders." The Supreme Court concluded that "[e]ffective participation by members of all racial and ethnic groups in the civic life of our Nation is essential if the dream of one Nation, indivisible, is to be realized."

The Supreme Court next found that the Law School's admissions program was narrowly tailored to achieve its compelling interest. The Supreme Court held that universities may consider race or ethnicity as a "plus" factor in the context of individualized review of each applicant, and that admissions programs must be "'flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant.'" Institutions may not, however, "establish quotas for members of certain racial groups or put members of those groups on separate admissions tracks."

The Supreme Court went on to hold that "[n]arrow tailoring does not require exhaustion of every conceivable race-neutral alternative," and that a university need not choose between commitments to excellence and to a diverse student body. Institutions must give "serious, good faith consideration" to workable race-neutral alternatives to achieve these objectives, but the Supreme Court indicated that the Law School had adequately done so. The Supreme Court held that the Law School's flexible admissions program does not unduly harm members of any racial group, because all applicants have the opportunity to demonstrate how they would contribute to the diversity of the entering class. Finally, the Supreme Court held that "race-conscious admissions policies must be limited in time," and that universities should consider sunset provisions and periodic reviews for such programs. It concluded with an expectation that, 25 years from now, such programs will no longer be necessary.

VI. CONSTITUTIONAL LITIGATION IN SCHOOLS RELATING TO QUALIFIED IMMUNITY

In *Wyatt v. Fletcher*, No. 11-41359, 2013 U.S. App. LEXIS 11045 (5th Cir. May 31, 2013), a student at Kilgore High School, attended a meeting of her varsity softball team. The meeting was held at an off-campus playing field where practices regularly took place. During the meeting, the team's coaches allegedly led the student into a nearby locker room, locked the door, yelled at her and questioned her about an alleged relationship with another, older student. Thereafter, the coaches met with the student's mother to discuss the student's alleged relationship with the other, older student. During that meeting, the coaches allegedly implied that the student was a lesbian. The coaches maintained they were obliged to contact the student's mother because rumors regarding the student's relationship with the older student were causing dissension on the team. Further, they claimed, the older student was a potentially dangerous, underage user of illegal drugs and alcohol, and any possible sexual relationship between the two students was a valid concern.

The mother, on behalf of her daughter, sued the coaches for violations of her daughter's rights to privacy under the Fourth and Fourteenth Amendments of the U.S. Constitution. The coaches asked the district court to dismiss the claims based on qualified immunity, but the district court denied their motion. The coaches appealed.

The student argued that the coaches violated her Fourth Amendment right to be free from unreasonable seizure by "seizing" her and yelling at her in a locked room. The Fifth Circuit rejected this argument as unsupported by Fourth Amendment case law, particularly as applied to student-athletes who voluntarily subject themselves to regulation by their coaches. Moreover, the appellate court found that any alleged verbal abuse or yelling that may have occurred did not give rise to a constitutional violation under controlling case law. Accordingly, the appellate court rejected the student's Fourth Amendment claim, stating, "[T]here is nothing per se unreasonable about a one-on-one, closed door meeting between coaches and student athletes."

Addressing the student's Fourteenth Amendment privacy claim, the Fifth Circuit reviewed extensively the U.S. Supreme Court and federal circuit case law regarding the right to privacy. While recognizing the existence of a general right to privacy (i.e., the right to be free from government disclosure of private facts

about its citizens), the Fifth Circuit concluded there was no controlling case law that clearly established a Fourteenth Amendment privacy right prohibiting "school officials from communicating to parents information regarding minor students' interests, even when private matters of sex are involved." In the absence of such controlling authority, it held, the coaches were entitled to qualified immunity because there was no clear violation of the student's rights under the Fourth or Fourteenth Amendments.

In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), parents of Plano Independent School District elementary school students filed suit against the school district and the principals at various elementary schools. The parents alleged that the principals violated the First Amendment when they placed restrictions on the distribution of religious items at school. Specifically, the suit alleged that at a winter-break party, one of the principals prohibited the distribution of candy cane-shaped pens with an attached message regarding the religious origin of the candy cane. According to the lawsuit, other children were allowed to bring non-religious items to the party, while those with religious messages were excluded.

The other principal allegedly prohibited one student from distributing tickets to a religious drama. On another occasion, she allegedly prohibited the same student from distributing pencils at her daughter's "half-birthday party" in the school cafeteria at lunch, and after school hours. The pencils bore the message, "Jesus loves me this I know for the Bible tells me so." According to the lawsuit, the items were restricted based only on the religious viewpoint expressed.

The principals sought dismissal of the claims, arguing that they were entitled to qualified immunity. The trial court denied the principals' request for qualified immunity and the Plano ISD administrators appealed.

On appeal to the Fifth Circuit Court of Appeals, the court initially ruled that the principals were not entitled to qualified immunity. However, the appellate court agreed to hear the case *en banc*. The main issue before the appellate court was whether, based on the facts as alleged in the lawsuit, it was "clearly established" at the time of the alleged misconduct that the principals' actions in restricting the distribution of the religious material violated the First Amendment. The appellate court ultimately held that it was not "clearly established," stating:

> "We hold today that the principals are entitled to qualified immunity because clearly established law did not put the constitutionality of their actions beyond debate. When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion. 'The many cases and the large body of literature on this set of issues' demonstrate a 'lack of adequate guidance,' which is why no federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first."

In reaching its decision, the Fifth Circuit noted that when considering a defendant's entitlement to qualified immunity, a court must be able to point to controlling authority, or a robust consensus of persuasive authority, that defines the contours of the right in question with a high degree of particularity. When considering a defendant's entitlement to qualified immunity in a situation where no directly controlling authority prohibits the defendant's conduct, a court looks to the law of other jurisdictions in assessing whether a reasonable official would have known that his conduct was unlawful. Where no controlling authority specifically prohibits a defendant's conduct, and when the federal circuit courts are split on the issue, the law cannot be said to be clearly established for purposes of determining whether the defendant is entitled to qualified immunity.

In *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), a high school student was castigated by his teacher and then paddled by a school administrator for raising his fist during the recitation of the Pledge of Allegiance. The student remained silent and raised his fist to express support for a fellow student who had been forced to apologize to his class for refusing to recite the pledge one day earlier. The student said he believed the treatment of the other student was unfair and unconstitutional.

The student sued the teacher, principal, and the Walker County Board of Education, alleging a violation of his First Amendment rights. The district court granted summary judgment to the defendants, reasoning that they had qualified immunity because there was no clearly established right to silently raise one's fist during the pledge.

On appeal the Eleventh U.S. Circuit Court of Appeals reversed, saying that the lower court erred in dismissing the claims based on qualified immunity. The appellate court reasoned that it was improper for the district court to grant the teacher and principal

qualified immunity because it was clearly established under U.S. Supreme Court precedent that students cannot be forced to recite the Pledge of Allegiance.

The school officials argued that the teacher and principal were justified because the student's act in raising his fist was disruptive and upset other students. The appellate court disagreed noting, "Where students' expressive activity does not materially interfere with a school's vital educational mission, and does not raise a realistic chance of doing so, it may not be prohibited simply because it conceivably might have such an effect."

In *Doninger v. Niehoff*, 642 F.3d 334 (2d Cir. 2011), the junior class secretary and other students were distressed by the postponement of a school event by the superintendent and school principal. In order to garner community support for the event, the junior class secretary and three other students sent out a mass email urging that supporters call and email the superintendent and principal. The strategy worked as both received an influx of calls and emails. In fact, the principal, who was away from the school for a training day was called back to school due to the influx. The principal saw the secretary in the hallway and told her that she was disappointed that student council members had resorted to a mass email instead of coming to speak privately with the superintendent or the principal. The principal went on to say that those in student government are expected to work cooperatively with the administration in carrying out objectives and are charged with demonstrating good citizenship at all times. The principal also mentioned that the email was inaccurate and that she was amenable to re-scheduling the event and asked the student to send a corrective email. That night, the junior class secretary instead wrote a posting on her blog that included the phrase "jamfest is cancelled due to the douchebags in central office." The blog also urged others to contact the principal to "piss her off more." More calls and emails poured in. As a result of the calls and emails, both the superintendent and principal were forced to miss or arrive late at school-related activities. The principal decided that the junior class secretary would be prohibited from running for senior class secretary. The student filed suit against the school officials alleging violation of her First Amendment right to free speech.

The Second Circuit concluded that the school officials were entitled to qualified immunity because any First Amendment right allegedly violated was not clearly established, such that "it would [have been] clear to a reasonable [school official] that [her] conduct was unlawful in the situation [she] confronted."

In reaching its decision, the Second Circuit noted that the Supreme Court precedent does not necessarily insulate students from discipline for speech-related activity occurring away from school property. Moreover, Second Circuit precedent indicated that there might be cases in which it is appropriate for school districts to discipline a student for activity occurring away from school property. Thus, the Second Circuit concluded that there was no bright-line principle strictly limiting the regulation of off-campus speech under the circumstances of the case.

VII. CONSTITUTIONAL LITIGATION IN SCHOOLS RELATING TO DUE PROCESS CLAIMS

In Morrow v. Balaski, No. 11-2000, 2013 U.S. App. LEXIS 11246 (3d Cir. June 5, 2013) (en banc), Brittany and Emily Morrow were subjected to threats and physical assaults by Anderson, a fellow student at Blackhawk High School. After Anderson physically attacked Brittany in the lunch room, the school suspended both girls. Brittany's mother reported Anderson to the police at the recommendation of administration. Anderson was charged with simple assault, terroristic threats, and harassment. Anderson continued to bully Brittany and Emily. A state court placed Anderson on probation and ordered her to have no contact with Brittany. Five months later, Anderson was adjudicated delinquent and was again given a "no contact" order, which was provided to the school. Anderson subsequently boarded Brittany's school bus and threatened Brittany, even though that bus did not service Anderson's home. School officials told the Morrows that they could not guarantee their daughters' safety and advised the Morrows to consider another school. The Morrows filed suit under 42 U.S.C. § 1983, alleging violation of their substantive due process rights. The district court dismissed, reasoning that the school did not have a "special relationship" with the students that would create a constitutional duty to protect them from other students and that the Morrows' injury was not the result of any affirmative action by the defendants, under the "state-created danger" doctrine.

On appeal, the Plaintiffs again alleged that the Defendant violated the substantive due process clause of the Fourteenth Amendment which "protects individual liberty against 'certain government actions regardless of the fairness of the procedures used to implement them.'" The Third Circuit stated that it was sympathetic towards the Plaintiffs' situation, noting that the Plaintiffs were both verbally and physically abused. When the Plaintiffs asked the Defendants for help, they were simply advised to change schools. However, the Third Circuit cited to U.S. Supreme Court precedent, stating that "as a general matter . . . a state's failure to protect an individual against private violence simply does not constitute a violation of the due process clause." The due process clause only prevents acts by the state that deprive "individuals of

life, liberty, and property without 'due process of law.'"

The Supreme Court however did carve out a narrow exception, the "special relationship" exception, where "the state takes a person into its custody and holds him there against his will." Another possible exception is where "the state's own actions create the very danger that caused the plaintiff's injury."

In discussing the "special relationship" doctrine, the Third Circuit followed its own precedent. The "special relationship" doctrine's duty to protect arises out of a state's deprivation of liberty, not its failure to act to protect the plaintiff against other private parties, despite the knowledge of the harm or the expressed intent to help. The Third Circuit further noted that it has already decided that, even though public schools limit a child's freedom and state law may compel attendance, such circumstances alone simply do not create the type of physical custody necessary for the exception. The court also relied on *dicta* from a prior U.S. Supreme Court Opinion, which suggested that public schools as a general matter do not have the type of physical custody of their students necessary for the special relationship exception.

The Third Circuit however recognized the possibility that under special and narrow circumstances, depending on the relationship between a particular school and a particular student, such a special relationship may exist. However, the Court held that the case here did not fall into that special category, despite the repeated assaults and violence. The Third Circuit noted that such narrow circumstance must be so significant as to forge a different kind of relationship between the student and a school than is inherent under the traditional in loco parentis authority, for example the emergency need for a school lockdown in the case of a shooting. Here, the facts that the bully was violent, and subject to a restraining order, did not give rise to that narrow scenario.

Notably, the court rejected the argument that the school's decision to enforce school policies that prevented the parents from seeking redress was enough to create a special relationship. The court also rejected the dissent's argument that schools are akin to foster care placements, which are subject to the special relationship doctrine. Foster care involves children who are dependent on the state to meet their basic needs and the state has a continuing responsibility for the child's well being. Public school children, on the other hand, primarily depend on their parents for care and protection, not the state. The Third Circuit reiterated that the "due process clause is not a surrogate for local tort law or state statutory and administrative remedies" and rejected the idea that any special relationship existed in the current case.

In *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915 (3d Cir. 2011), a student created a parody MySpace page of her principal in which she made comments about the principal's anatomy and the principal's wife, said that the principal was a pedophile and a sex addict, and purported to solicit children for sex acts. The student changed the public MySpace profile to a private profile that could only be seen by specific "friends". Moreover, students at the middle school could not access MySpace from school and, therefore, no student viewed the website. The only copy of the page that reached school property was at the request of the principal so that he could look at it. The student received a 10-day suspension.

Regarding alleged disruptions, the school district said that two teachers had approached the principal about the page. One teacher had a five or six minute exchange in one of the classes when six or seven students discussed the profile, had to tell the students to stop talking three times, and raised his voice on the third occasion. The same teacher heard two students talking about the profile on another day and had to tell them to be quiet. This type of corrective action was not abnormal for that teacher on a regular basis. Another teacher reported that some students came to talk with her about the profile. Additionally, a counselor had to take over another counselor's duties for about half an hour to allow the other counselor to sit in on the meetings with the student who had created the profile.

The parents of the student filed suit alleging among other claims that the school district violated the parent's Fourteenth Amendment due process rights to raise their child in the manner that they saw fit. Specifically, they argued that, in disciplining the student for conduct that occurred in her parent's home during non-school hours, the school district interfered with the parent's parental rights.

The Third Circuit noted that "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." This liberty interest, however, is not absolute, and "there may be circumstances in which school authorities, in order to maintain order and a proper educational atmosphere in the exercise of police power, may impose standards of conduct on students that differ from those approved by some parents". Should the school policies conflict with the parents' liberty interest, the policies may only prevail if they are "tied to a compelling interest."

The Third Circuit concluded that it could not find that the parents' liberty interests were implicated. In reaching its decision, the appellate court noted that the school district's actions in no way forced or prevented the parents from reaching their own disciplinary decision, nor did its actions force her parents to

approve or disapprove of her conduct. Further, there was no triggering of the parents' liberty interest due to the subject matter of the school district's involvement; a decision involving a child's use of social media on the internet is not a "matter[] of the greatest importance."