50th ANNIVERSARY EDITION: NEWSLETTER

SCHOOL LAW UPDATE

by John D. Husted

***Harris v. Pontotoc County School District*, 2011 U.S. App. LEXIS 4639 (5th Cir. March 10, 2011)**

For a constitutional due process claim based on a school's suspension of a student, the school giving the student explanations of the accusations against him and an opportunity to respond to them was sufficient process before the suspension.

A virus attack was uploaded on a middle school's computer system. The plaintiff, a seventh grader at the school, was found in possession of a program of the type installed, and he was suspected of being responsible for the attack. The student received written charges from the school and was suspended that day. The student had meetings with school officials, and had multiple opportunities to give his side of the story; however, it was not clear that he had an opportunity to respond at the exact moment of suspension. After he was suspended, he alleged that his right to due process was violated.

While a State's extending the right to an education creates a protected property interest, the Fifth Circuit affirmed the district court's summary judgment, finding that the student was adequately informed of the specific charges from which the suspension derived and was given an opportunity to present his side of the story.

***Ruben A. v. El Paso ISD*, 2011 U.S. App. LEXIS 3906 (5th Cir. March 1, 2011)**

A school district's counterclaim is not an "action" subject to the IDEA's 90-day statute of limitations.

In October, 2006 a Special Education Hearing Officer ("SEHO") of the Texas Education Agency ("TEA") issued a final decision holding that EPISD had denied the son of Ruben A. a free appropriate public education ("FAPE"), but denied Ruben A.'s claim that EPISD failed to classify his son properly as a special education student. On January 23, 2007 Ruben A. filed a complaint in federal court for reasonable attorney's fees and costs as the prevailing party. EPISD answered the complaint and included a counterclaim alleging that the SEHO erred in its decision and EPISD sought its own attorneys fees and costs on the ground that Ruben A.'s complaint was for an improper purpose.

The district court dismissed the counterclaim as time-barred by the IDEA's statute of limitations. The Fifth Circuit overruled the dismissal, finding that an "action" is "brought" when a plaintiff files a complaint, whereas counterclaims are generally asserted in the answer to a previous complaint. Because the IDEA's statute of limitations

only limits a party's right to "bring an action," it does not apply to a school district's counterclaims.

***Fisher v. Univ. of Texas at Austin*, 631 F.3d 213 (5th Cir., January 18, 2011)**

UT's use of race in its undergraduate admissions process is constitutional.
Two Texas residents who were denied undergraduate admission to UT for the class entering Fall 2008 alleged that UT's admissions policies discriminated against them on the basis of race in violation of the Fourteenth Amendment and federal civil rights statutes.

The Court found that UT evaluates each application using a holistic, multi-factor approach, in which race is one of many considerations. UT modeled its program after the race-conscious admissions procedures approved by the Supreme Court in *Grutter v. Bollinger*, wherein the Supreme Court held that diversity, including seeking a critical mass of minority students, is a compelling state interest that can justify the use of race in university admissions.

***In the Matter of S.M.C., a Juvenile*, 2011 Tex. App. LEXIS 2069 (Tex. App.—El Paso, March 23, 2011)**

A search of a student's locker for drugs on a tip that student was "high" was reasonable, even when circumstances supported the possibility that the student was not actually under the influence of drugs.

The school suspected that SMC, a juvenile, possessed drugs because another student told administrators he was "high" and because his eyes were red. Even though SMC did not have any drugs on his person and informed the school that he had pink eye, the school searched his locker. Pursuant to this search, the school discovered a set of "knuckles".

The juvenile was charged with, among other things, the possession of a prohibited weapon. The juvenile appealed the trial court's denial of his motion to suppress evidence (the knuckles) on the basis that the search of his locker was conducted without any reasonable suspicion and in violation of his rights under the Fourth Amendment and Article I, Section 9 of the Texas Constitution.

The legality of a search of a student depends not upon probable cause to believe the student violated the law, but rather, upon the reasonableness, under all of the circumstances, of the search. Though the school did not conclusively determine that the juvenile was on drugs before the search, the search was reasonable in light of all the circumstances.

***Univ. of Tex. at San Antonio v. Wells*, 2011 Tex. App. LEXIS 920 (Tex. App.—San Antonio February 9, 2011)**

To establish jurisdiction under the Texas Whistleblower Act, a university employee's internal report of fraudulent activity is insufficient, because it is not a report to an appropriate law enforcement authority.

Wells worked in the University's Office of P-20 Initiatives. Her responsibilities included ensuring the integrity of expenditures and personnel assignments in accordance with legal requirements and contract terms. She alleges that she discovered illegal activities being carried out by her supervisors and that she reported these activities to the University's Manager of Compliance. The Manager of Compliance allegedly told Wells that if the fraud was occurring, the Office of Compliance would report the fraud to the police department and that Wells would be protected by the Whistleblower Act. After Wells was fired, she brought suit under the Texas Whistleblower Act.

The University filed a plea to the jurisdiction, which the trial court denied. On appeal the court found that UTSA, a university, has no authority to regulate under or enforce Texas's laws relating to fraud, nor does it have authority to investigate or prosecute criminal laws relating to fraud. Further, the fact that the Manager of Compliance told Wells that the Office would report the fraud to the police department showed that Wells did not reasonably believe in good faith that UTSA was an appropriate law enforcement authority. For these reasons, the trial court's order was reversed, and the claims against UTSA were dismissed for lack of jurisdiction.

***Simon v. Blanco ISD*, 2011 Tex. App. LEXIS 651 (Tex. App.—Austin, January 28, 2011)**

A School District's governmental immunity is not waived for a negligence claim under the Texas Tort Claims Act ("TTCA") where a student plaintiff is assaulted on a school bus by fellow students.

Plaintiff was assaulted by fellow students while a passenger on a school bus operated by the School District. Plaintiff brought suit against the District, alleging that its employee, the bus driver, was negligent based on his failures to stop the assault and seek immediate medical attention. The District filed a plea to the jurisdiction asserting governmental immunity. The appellate court determined that the student's injuries did not "arise from the operation or use of a motor-driven vehicle;" as required for immunity to be waived by the TTCA, rather, the school bus was only the setting for the injury. The district court's granting of the District's plea to the jurisdiction was affirmed.

***Galveston ISD v. Jaco*, 331 S.W.3d 182 (Tex. App.—Houston [14th Dist.], January 11, 2011)**

Under the Texas Whistleblower Act, the reporting of a violation of a University Interscholastic League ("UIL") rule does not constitute the reporting of "violation of a law," which is necessary for subject-matter jurisdiction.

Shortly after Jaco became the School District's Director of Athletics and Extracurricular Activities, he learned that a student on the Ball High School football team was in violation of a UIL rule regarding parent residency. Jaco discussed the matter with the UIL and school officials, and submitted a written report to the UIL, which in turn held that the high school forfeited certain wins and was disqualified from competing for the state championship. A few weeks after the report, the superintendent reassigned Jaco to the position of athletic trainer.

Jaco brought a constructive discharge claim against the District under the Texas Whistleblower Act. The District filed a plea to the jurisdiction, which the trial court denied. The appellate court, however, determined that a UIL rule does not constitute a "law," under Whistleblower Act. Since the court determined that the elements of such a claim are jurisdictional, the appellate court reversed the trial court's denial of the District's plea to the jurisdiction.

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