SUMMER 2013 NEWSLETTER

SCHOOL LAW UPDATE

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SUPREME COURT OF THE UNITED STATES

***Fisher v. University of Texas at Austin*, 133 S.Ct. 2411 (June 24, 2013)**

Courts must apply the demanding burden of strict scrutiny when reviewing any admissions program that uses racial categories or classifications.

When Fisher, a Caucasian, was rejected for admission to the University of Texas's 2008 entering class, she brought an Equal Protection Clause claim against the University challenging its undergraduate admissions process. The University's current admissions process considers race as one of various factors. The University adopted the program after the Supreme Court decided *Grutter v. Bollinger*, 539 U.S. 306 (2003), which upheld the use of race as one of many factors in an admissions program.

The district court granted summary judgment to the University, and the Fifth Circuit affirmed, holding that while a strict scrutiny analysis, which requires a compelling governmental interest and a narrowly tailored means of achieving that goal, applies, courts are to give substantial deference to the University, both in the definition of the compelling interest in diversity's benefits and in deciding whether the University's specific plan was narrowly tailored.

The Supreme Court vacated the Fifth Circuit decision and remanded the case because under the strict scrutiny burden articulated in *Grutter*, a court may give some deference to a university's judgment that diversity is essential to its educational mission, so long as diversity is not defined as mere racial balancing; however, a university receives no deference on whether the means it has applied to achieve that goal have been narrowly tailored. Narrow tailoring requires a court to verify that it is necessary for the university to use race to achieve the educational benefits of diversity.

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Morgan v. Plano Independent School District*, No. 12-40493, 2013 U.S. App. LEXIS 15257 (5th Cir. July 26, 2013)**

Under the Texas Religious Freedom Restoration Act (Texas RFRA), plaintiffs must strictly comply with the Act's 60-day, certified mail pre-suit notice requirement, or else governmental immunity is not waived and a court has no jurisdiction.

The Morgans, parents of a former elementary school student in the PISD, brought various claims against certain governmental officials and the PISD, including a Texas RFRA claim, after

the student was prevented from distributing a "candy cane ink pen" with a laminated card containing a religious message. The Texas RFRA states in part that a person may not bring an action to assert a claim under this chapter unless, 60 days before bringing the action, the person gives written notice to the government agency *by certified mail, return receipt requested.* The Morgans, through their attorney, delivered a pre-suit notice letter via fax and U.S. mail to the school's principal. The letter was also emailed to others. PISD sought partial summary judgment on Plaintiff's Texas RFRA claims, arguing that the Morgans' Texas RFRA claim was barred because their pre-suit notice was insufficient. The district court held that the Morgans' notice was sufficient, and PISD appealed.

The Fifth Circuit reversed and dismissed the Morgans' Texas RFRA claim, holding that the certified mail, return receipt requested notice requirement was not complied with and that this statutory requirement regarding the form of notice is jurisdictional.

***Wyatt v. Fletcher*, 718 F.3d 496 (5th Cir. May 31, 2013)**

A student in a public secondary school does not have a clearly established Fourteenth Amendment privacy right that precludes school officials from discussing the student's private matters, including matters relating to sexual activity of the student, with the student's parent, nor is there a clearly established Fourth Amendment right barring a student-coach confrontation in a closed and locked room.

As next of friend of her 16-year old minor daughter, Wyatt brought suit under 42 U.S.C. § 1983 against her daughter's high school softball coaches because the coaches disclosed her daughter's sexual orientation to Wyatt during a disciplinary meeting. Upon hearing a rumor that the student was in a relationship with an 18-year old female student, the softball coaches confronted the student in a closed-door meeting, and later disclosed to Wyatt in an arranged meeting that her daughter was having an inappropriate relationship with another female. Wyatt's daughter had not previously disclosed to Wyatt that she was gay. Wyatt claimed that this disclosure constituted a Fourteenth Amendment invasion of her daughter's privacy. Wyatt also brought a Fourth Amendment claim based on the disciplinary confrontation between the coaches and Wyatt's daughter in a locked locker room.

The Fifth Circuit court reversed the district court's denial of the coaches' motion for summary judgment based on qualified immunity. The Fifth Circuit held that there is no clearly established law holding that a student in a public secondary school has a privacy right under the Fourteenth Amendment that precludes school official from discussing with a parent the student's private matters, including matters relating to the sexual activity or orientation of the student. Further, such students have no clearly established Fourth Amendment right that bars a student-coach confrontation in a closed and locked room.

TEXAS COURT OF APPEALS

***Damuth v. Trinity Valley Community College*, No. 12-12-00353-CV, 2013 Tex. App. LEXIS 9556 (Tex. App. – Tyler July 31, 2013, no pet. h.)**

For purposes of the Tex. Local Gov't Code § 271.151's limited waiver of governmental immunity for government contract claims for goods or services, a community college teacher/coach's employment contract does not fall under the category of "services."

Damuth entered into a written employment agreement with Trinity Valley Community College (TVCC) to coach and teach. Five months into the one year contract, he was discharged. He brought suit for breach of contract against TVCC. The trial court granted TVCC's motion to dismiss and plea to the jurisdiction, and Damuth appealed the order. Damuth contended that Tex. Local Gov't Code § 271.151's limited waiver of governmental immunity for a breach of contract claim based on an "agreement for providing goods or services to the local governmental entity," applied in this case, because his employment contract was a contract for services.

Though Chapter 271 provides no definition for the term "services," and though the Texas Supreme Court previously held that an employment contract between a city and fire fighters for fire protection services constituted "services," under Chapter 271, the plain language of the statute's limited waiver of immunity does not apply to a community college's teacher/coach employment contract.

***Houston Independent School District v. Rose*, No. 01-13-00018-CV, 2013 Tex. App. LEXIS 8098 (Tex. App. – Houston [1st Dist.] July 2, 2013, no pet. h.)**

In order to bring a suit against a school district based on an employment contract dispute, a school district employee must first exhaust the statutory administrative remedy requirements, even if she only seeks a declaration that the district violated her Texas state constitutional rights.

Rose worked for Houston ISD under a one-year term contract for the 2010-2011 school year. In the spring of 2012, Houston ISD informed Rose that it was eliminating her position as part of a reduction in force and that it would not to renew her contract for the upcoming year. Rose initiated an administrative grievance. Before exhausting the review procedures statutorily prescribed by the Texas Education Code, Rose filed suit, seeking a declaration that the district violated her rights under Tex. Const. art. I, §§ 3 and 8. Houston ISD filed a plea to the jurisdiction contending that the court lacked subject matter jurisdiction due to Rose's failure to first exhaust her administrative remedies. The trial court granted the plea in part but refused to dismiss Rose's request for a declaration that the district violated her state constitutional rights, so Houston ISD pursued an interlocutory appeal.

The Court of Appeals reversed the judgment denying Houston ISD's plea to the jurisdiction, and remanded with instruction to dismiss the declaratory relief claim for want of jurisdiction. Though there is an exception to the exhaustion of administrative remedies requirement for some constitutional claims, the exhaustion requirement still applies when the constitutional claims are only ancillary to and supportive of a complaint about the board's handling of an employment contract or application of school law. Since Rose's declaratory relief was ancillary to her employment contract complaint, the exhaustion requirement applied, and Rose did not meet her burden to show an exception to the exhaustion requirement.