2014 YEAR IN REVIEW

SIGNIFICANT DECISIONS IN 2014:

SCHOOL LAW

By John D. Husted

FIFTH CIRCUIT COURT OF APPEALS

***Morgan v. Swanson*, No. 13-40433, 2014 U.S. App. LEXIS 10293 (5th Cir. June 3, 2014)**

A school official is entitled to qualified immunity from an elementary school parent's First Amendment viewpoint discrimination claim arising from the discretionary decision to not allow a parent to distribute religious material to other adults at his son's in-class winter party.

In December, 2003, Mr. Morgan attended his son's elementary school in-class winter party. Principal Lynn Swanson prohibited Morgan's son from distributing candy canes bearing a religious message at the in-class party, and the family filed suit alleging a First Amendment violation. In *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) (en banc), the Court held that Swanson's conduct was unconstitutional, but she was entitled to qualified immunity because relevant law was too "abstruse" and "complicated" for Swanson to have known how to handle the situation. Now, with this case, Mr. Morgan asserts that he, too, experienced viewpoint discrimination when Principal Swanson told him not to distribute the religious material to other consenting adults in the classroom. Morgan alleges that regardless of the forum, viewpoint discrimination regarding private speech is unconstitutional.

A school official is entitled to qualified immunity from civil liability arising out of her discretionary decisions unless her conduct is "clearly established" as unconstitutional. In considering whether Morgan's asserted right to distribute the material was so clearly established so as to overcome Principal Swanson's qualified immunity, the court found that educators are rarely denied immunity from liability arising out of First-Amendment disputes, except in the rare exceptions involving scenarios in which a factually analogous precedent clearly established the disputed conduct as unconstitutional. Additionally, plaintiffs do not overcome qualified immunity by alleging the violation of a right that is only defined at a high level of generality. Where, as here, there is no authority recognizing an asserted right, and where the area of law is abstruse and complicated, the asserted right cannot be clearly established for qualified immunity purposes. Therefore, the Court dismissed Mr. Morgan's claim.

SUPREME COURT OF TEXAS

***Ysleta Independent School District v. Franco*, 417 S.W.3d 443 (Tex. December 13, 2013)**

Under the Whistleblower Act, Tex. Gov't Code §554.001, reports of alleged violations of law made to a chief academic officer charged only with internal compliance is jurisdictionally insufficient. In the school context, reporting to school officials not charged with enforcing laws outside the district falls short.

Franco, a principal at a pre-K Academy in the Ysleta ISD sent a memorandum to his immediate supervisor, the chief academic officer, reporting various asbestos hazards. Eventually, the ISD indefinitely suspended Franco, and he filed a whistleblower claim. The ISD filed a plea to the jurisdiction, which was denied by the courts below

The Supreme Court reversed the courts below, noting that a report to someone charged only with internal compliance is jurisdictionally insufficient, and that Franco failed to show an objective, good-faith belief that the ISD qualifies as an appropriate law-enforcement authority under the act.

TEXAS COURT OF APPEALS

***Kountze Independent School District v. Matthews*, No. 09-13-00251, 2014 Tex. App. LEXIS 4951 (Tex. App. – Beaumont May 8, 2014, pet. filed) (mem. op.)**

A school district's prompt voluntary action in adopting a policy that allowed high school cheerleaders to include religious content in run-through banners displayed at sporting events mooted the Parents' dispute about whether the cheerleaders could put such messages on the run-through banners.

Parents of certain members of the Kountze High School cheerleading squad brought suit against Kountze ISD, who is represented by FHMBK, after its former superintendent Kevin Weldon issued a statement prohibiting the cheerleaders from including religiously-themed messages on run-through banners used at the beginning of football games. The District appealed the denial of its plea to the jurisdiction, asserting that the trial court erred when it denied the plea because the Parents' claims are moot and the trial court, therefore, lacked subject matter jurisdiction.

In reversing the trial court's order against the District, the Court found that the Parents' claims against the District were moot because the District adopted a new policy which states, in part, that "school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious." The Court found further support in the fact that the District had made judicial admissions affirming its new policy and its future intentions regarding religious content on the run-through banners. Further, in light of the District's creation of the new policy, there was no evidence that a ban was capable of repetition, nor was there evidence of any collateral consequences where the cheerleaders never actually had a banner containing religious messages banned per the former superintendent's statement.

The Plaintiffs have sought review from the Texas Supreme Court. Also, the lower court may review whether or not the Parents are entitled to attorney's fees.

***Dallas Independent School District v. Watson*, No. 05-12-00254, 2014 Tex. App. LEXIS 2383 (Tex. App. – Dallas February 28, 2014, pet. filed)**

Under the Texas Whistleblower Act, a school district employee's report of a belief that conduct might happen in the future that might violate the law does not amount to a good-faith report of an existing or past violation of law.

Watson worked as a plumber for DISD for nineteen and a half years until he was terminated in 2007. On July 11, 2007, Debbie Pruitt, Watson's supervisor, notified him to stop his normal duties and start gas tests at schools in their division, and she allegedly demanded that Watson do three tests a day. Watson and his co-worker completed one test that day. The next day, a heated argument ensued between Pruitt and Watson over Watson's progress on the gas tests. On July 13, Watson called the Texas Railroad Commission (TRC) and later the Texas State Board of Plumbing Examiners (TSBPE), to inform them he was being pressured into doing gas tests in an unsafe, hurried-up manner. On July 16, Watson was informed that he was being taken off the gas tests. Shortly thereafter, he was notified that his employment was being terminated due to his insubordination and hostile and belligerent behavior.

Watson filed suit, claiming he was terminated in violation of the Texas Whistleblower Act. The trial court denied DISD's plea to the jurisdiction, the case went to trial, and in accordance with the jury's verdict, the Court entered judgment in favor of Watson. The court of appeals reversed the trial court's judgment and dismissed the case for lack of subject-matter jurisdiction. Watson's allegations merely recite his prediction that completing three gas tests on a single day in the future might be "unsafe" and "hurried-up." A report of belief that laws might be violated in the future is not a good-faith report of existing or past violation of law required to support a claim under the Texas Whistleblower Act.

***Marquez v. Clint Independent School District*, 445 S.W.3d 450 (Tex. App. – El Paso, September 24, 2014, pet. filed)**

Complaints against a school district for alleged violations of state constitutional rights, as opposed to violations of school laws, are within the jurisdiction of a trial court and not the Commissioner of Education, and the general rule requiring exhaustion of administrative remedies under Tex. Educ. Code § 7.057 does not apply to such complaints.

Several parents brought suit against Clint ISD on behalf of their minor children seeking a declaratory judgment, temporary injunction, and permanent injunction for alleged violations of the Texas Constitution. Specifically, the Parents allege that the school district violated, and continues to violate, the rights and equal rights of their children, and those similarly situated, by failing and refusing to provide their children with equal education funding appropriately weighted according to the state funding formula. In response to the Parents' petition, the school district filed a motion to dismiss and plea to the jurisdiction, alleging, in part, that the Parents failed to exhaust administrative remedies. The trial court heard the school district's motion and found that the Parents failed to exhaust their administrative remedies, and dismissed the Parents' action, and the Parents appealed.

The Court of Appeals concluded that the trial court erred in finding that it was without jurisdiction and in dismissing the Parents' action for failing to exhaust administrative remedies, due to the constitutional nature of the Parents' pleadings. Constitutional issues are not appropriate for administrative appeal and may be taken directly to the courts. Since the Parents' complaints did not relate to violations of "school laws," the Commissioner of Education had no jurisdiction over the claims.

***Houston Independent School District v. PERX*, No. 14-13-01115-CV, 2014 Tex. App. LEXIS 9605 (Tex. App. – Houston [14th] August 28, 2014, no pet. h.)**

The assault of a student on a school bus does not arise from the school district's failure to operate a security camera on the school bus, such that the school district has waived governmental immunity under the Texas Tort Claims Act.

PERX, the mother of WRRX, a special-needs student attending elementary school at Houston ISD, was contacted by the school and informed that WRRX had been sexually assaulted by two other students while on the bus. Soon after, PERX learned from WRRX that other similar assaults occurred in the days leading up to the complained-of assault. PERX filed suit against the school district, seeking damages and alleging various negligent acts and omissions that proximately caused WRRX's personal injury. The school district filed a plea to the jurisdiction, contending that it had not waived governmental immunity. The trial court denied the school district's plea to the jurisdiction, and the school district filed an interlocutory appeal.

The Texas Tort Claims Act provides a limited waiver of governmental immunity for school districts for personal injury that "arises from the operation or use of a motor-driven vehicle or motor-driven equipment." Tex. Civ. Prac. & Rem. Code § 101.021. The parties disputed whether the school's failure to operate the security camera on the bus, and the failure to review the footage, constitutes the operation or use of a motor-driven vehicle, and that WRRX's injuries "arise from" that operation or use. "Arises from," as it is used in the statute, requires a nexus between the injury and the operation or use of the vehicle, and requires more than a mere involvement of the party, and the operation or use of the motor vehicle must do more than furnish the condition that makes the injury possible.

The Court of Appeals held that, because the nexus between the injury and the use of the motor vehicle in this case involves no more than the mere involvement of the security camera, the student's injury did not "arise from" the failure to operate and monitor the camera, so the school district's governmental immunity had not been waived.

***El Paso Independent School District v. McIntyre*, No. 08-11-00329-CV, 2014 Tex. App. LEXIS 8567 (Tex. App. – El Paso, August 6, 2014, pet. filed)**

Even though under Texas Supreme Court case *Tex. Educ. Agency v. Leeper*, a home school can be a private school within the meaning of the statutory exemption to compulsory attendance law requirements, a school district has the authority to investigate truancy claims or to request information from parents of home school children regarding their curriculum, and the

requirements to exhaust administrative remedies before bringing suit against a school district may still apply to homeschool parents and students.

This lawsuit brought by Michael and Laura McIntyre and five of their nine children against the school district and various school district employees, concerns the balance between parents' right to home school their children and the rights of a school district to investigate the curriculum utilized.

After the Fall 2004 semester, the McIntyres began homeschooling their children. In January 2006, the school district's attendance officer Mark Mendoza received complaints from Michael McIntyre's parents that their grandchildren were not attending school or otherwise receiving a proper education. Shortly thereafter, Mendoza confirmed that the oldest McIntyre child, Tori, had run away from home at age seventeen so she could "attend school," and that when she enrolled with the school district, she was unable to provide any information regarding the level of her education or her parents' curriculum.

In December of 2006, school district representatives visited the McIntyre home and inquired about the curriculum and attempted to obtain a signed home school verification form, which the McIntyres refused to provide. In January 2007, after the McIntyres refused to cooperate with the school district's requests for information, Menodza filed truancy complaints relying on the information provided by the grandparents and Tori. The school district informed the McIntyres that they could submit documentation showing that they were, in fact, providing an education at home, but Laura McIntyre responded that she did not feel that it would be right to do so. In July 2007, the McIntyres initiated the instant suit. Shortly thereafter, an assistant district attorney dismissed the truancy complaints because Tori and the grandparents did not want to testify.

The McIntyres brought various state and federal claims against the school district and various district employees. The District defendants' pleas to the jurisdiction and motion for summary judgment were denied, so they brought this appeal.

The court held that the McIntyres failed to exhaust their administrative remedies as to their state law claims. Generally, an aggrieved party must exhaust all administrative remedies for grievances arising under school laws, unless they are exempt for reasons such as the aggrieved party would suffer irreparable harm, the claims are for a violation of constitutional or federal right, the cause of action is purely a question of law and not a factual dispute. The court found that the Texas Education Code administrative remedies still applied to the McIntyres, even though they homeschooled, that the McIntyres claims included questions of fact, not just questions of law, that even though their claims included constitutional allegations, they all relate to the administration and applicability of school laws, and that they would not suffer irreparable harm. The court also dismissed the federal law claims against Mendoza based on qualified immunity, based in part on the fact that, the Leeper decision did not preclude an attendance officer from requiring the McIntyres to produce evidence regarding their curriculum. Further, the McIntyres failed to raise a fact issue that a sincerely held religious belief was substantially burdened, such as in *Wisconsin v. Yoder*. The court remanded the remaining claims.