<u>WINTER 2015 NEWSLETTER</u>

SCHOOL LAW UPDATE

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<u>UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT</u>

***Bell v. Itawamba County School Board*, 774 F.3d 280 (5th Cir. December 12, 2014)**

A student's rap song composed, recorded, and posted online completely off campus during non-school hours is protected speech under the First Amendment, where the School Board did not demonstrate that the song caused a substantial disruption, and the violent lyrics referencing the school's coaches were plainly rhetorical in nature.

In 2010, Taylor Bell, an 18-year old aspiring rapper and senior at Itawamba Agricultural High School, was informed by several female friends that two male athletic coaches at the school had inappropriately touched and made sexually-charged comments to them and other female students. During the Christmas holiday break, Bell composed and recorded a rap song about the female students' complaints at a professional recording studio. Bell did not use any school resources to create, record or upload the song to his Facebook profile and YouTube. While at least some students had access to the song via the internet, Bell did not play the song at the school or otherwise promote the song at the school. Further, school regulations prohibited students from bringing cellphones to school.

After one of the coaches was made aware of the song, he reported it. Shortly thereafter, Bell was informed that he was suspended effective immediately, pending a disciplinary hearing. At the hearing, Bell explained that the song's violent lyrics referencing the coaches were not intended to intimidate, threaten, or harass the coaches, but rather to reflect the possibility that a parent or relative of one of the female students might eventually react violently upon learning of the harassment. No evidence that the coaches actually felt threatened or that the song had caused or had been forecasted to cause a material or substantial disruption to the school's work or discipline was presented. The Committee upheld the suspension and placed Bell in an alternative school for the remainder of the nine-week grading period.

Bell brought suit alleging that the School Board, Superintendent, and Principal violated his First Amendment right to freedom of speech. Bell sought nominal damages, injunctive relief ordering reinstatement of school privileges and expungement of his record, and prevention enforcement of the school disciplinary code against students for out of school expression, as well as attorneys' fees and costs. The district court granted summary judgment in favor of Defendants, and Bell appealed.

The Fifth Circuit Court of Appeals held that the district court's interpreting *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) as applying directly to students' off-campus speech, including speech posted to the Internet that could be accessed at school, as well as their on-campus speech, was legally incorrect, and *Tinker* could not provide the School

Board a defense because the summary-judgment evidence did not support the conclusion that a material and substantial disruption at school actually occurred or could have been reasonably forecasted. The Fifth Circuit refused to expand *Tinker* to hold that the Internet has vitiated the distinction between on-and off-campus student speech, thus expanding the authority of school officials to regulate a student's speech when he or she is at home during non-school hours. The Court explained that it was especially reluctant to do so in this case where there was a lack of evidence of actual disruption to the school, and where school computers blocked Facebook and school policy prohibited cellphones, thus diminishing the likelihood that students would access the song on campus. Further, the evidence did not establish that the rap lyrics, which were rhetorical in nature, actually advocated a harm that is demonstrably grave and uniquely threatens violence as was the case in the off-campus, online speech of *Ponce v. Socorro Independent School District*, 508 F3d 765 (5th Cir. 2007), which threatened a "Columbine-style" shooting attack on an entire school.

N.B.: On February 19, 2015, the Fifth Circuit Court of Appeals issued an order in this case, granting rehearing en banc.

TEXAS COURT OF APPEALS

***In Re Vida*, No. 04-14-00636-CV, 2015 Tex. App. LEXIS 31 (Tex. App. – San Antonio, January 7, 2015, no pet. h.)**

The ecclesiastical abstention doctrine protects a superintendent of Catholic schools from claims brought by parents challenging the imposition of the diocese's age requirements.

In 2012, the Mary Help of Christians School in the Diocese of Laredo did not promote G.M. to the first grade after she successfully completed kindergarten at the school because she would not be six-years-old before September 1st, which was the Diocese's age requirement. G.M.'s parents asserted various claims against Rose Vida, superintendent of the Diocese of Laredo Catholic Schools, including alleging that Vida was negligent in misconstruing state law regarding school age requirements and that she tortuously interfered with their contract for G.M.'s enrollment in first grade. The parents also alleged a claim for conspiracy and requested a declaratory judgment.

The trial court denied Vida's plea to the jurisdiction asserting that the ecclesiastical abstention doctrine precluded the trial court from exercising jurisdiction over the claims asserted against her. Vida filed an original mandamus proceeding challenging the trial court's ruling.

The ecclesiastical abstention doctrine is a structural restraint on the constitutional power of the civil courts to regulate matters of religion. It generally provides that civil courts may not intrude into the church's governance of religious or ecclesiastical matters. If judicial resolution of a claim will interfere with a church's management of its internal affairs or encroach upon the church's internal governance, the court may not exercise jurisdiction over the claim. The parents argued that the age requirement is a purely secular policy based on a misinterpretation of state law, therefore, their claims relating to the enforcement of the age requirement raise no religious questions.

The Court of Appeals conditionally granted Vida's petition for writ of mandamus and ordered the trial court to enter an order granting Vida's plea to the jurisdiction. The Court noted that even if the School's age requirement was not required by Texas law, imposing civil tort liability on the superintendent for enforcing a policy establishing an age requirement would impinge upon the Diocese's ability to manage its internal affairs. Considering *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Court noted that just as the courts cannot question the admission requirements of churches, they also do not have jurisdiction to consider a claim arising from the admission requirements for Catholic schools which are subject to the authority of the Church.