FALL 2016 NEWSLETTER

SCHOOL LAW UPDATE

By John D. Husted

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Brinsdon v. McAllen Independent School District*, 2016 WL 4204797, --- F.3d --- (5th Cir. August 9, 2016)**

A high school student's refusal to recite the Mexican Pledge of Allegiance in her Spanish class was not exercising a clearly established First Amendment right such that the teacher and principal are entitled to qualified immunity. Also, the student's claims to equitable relief under § 1983 become moot upon her graduation.

As a sophomore at a public high school, student Brinsdon was allegedly compelled to recite the Mexican Pledge of Allegiance as an assignment for her Spanish class, and she refused. She later brought a § 1983 action against the school district, principal, and teacher seeking an injunction, a declaratory judgment, and nominal damages, claiming that her First Amendment rights were violated when she was compelled to recite the pledge and that she was retaliated against. She also brought an Equal Protection Clause claim arguing that she suffered disparate treatment when she was removed from class.

Because Brinsdon had graduated from high school, her equitable claims were dismissed as moot.

With regard to the claims against the school district, Brinsdon could not show that the assignment was an official policy or custom of the district, and could not show that a policymaker had constructive knowledge of the assignment. Brinsdon's argument that the teacher should be considered a policymaker failed.

With regard to the claims against the individual defendants, the court found that they were entitled to qualified immunity from the claims. The court examined existing law related to compelled speech, pledges of allegiance, and state measures to force an individual to be an instrument for fostering public adherence to an ideological point of view, but found no case law directly addressing the compelled recitation of simulated pledges. The court determined that in this case, the teacher intended the assignment to be a one-time educational exercise, and was not seeking to inculcate beliefs or foster Mexican nationalism. As such, the individual defendants were entitled to qualified immunity, as they were not ignoring clearly established contrary law when compelling the assignment of the Mexican pledge.

SUPREME COURT OF TEXAS

***McIntyre v. El Paso Independent School District*, No. 14-0732, 2016 WL 3536858 (Tex. June 24, 2016)**

Home schooling parents are not required to appeal a school district's actions to the Texas Commissioner of Education when they are aggrieved by violations of laws other than the state's school laws.

The McIntyre parents and children were criminally charged with contributing to truancy and failure to attend school. They claimed that they were exempt from compulsory attendance laws, because they were homeschooled.

They eventually sued the school district and its attendance officer, alleging that they violated the McIntyres' constitutional rights by prosecuting them for a crime they knew the McIntyres did not commit, and by using the charges to force the McIntyres to cooperate with other demands regarding meeting homeschooling verification requirements. The McIntyres alleged that their Texas and United States Constitutional rights to due process, equal protection, and free exercise of religion were infringed.

The District filed a plea to the jurisdiction and motion to dismiss, arguing, among other things, that the family failed to exhaust their administrative remedies as for their state law claims. The District argued that the family must first exhaust the grievance process before the Texas Commissioner of Education. The court of appeals agreed, and dismissed the claims for failure to exhaust administrative remedies.

Though the claims were related to the Education Code, the parents were not aggrieved by school laws or by violation of school laws, but rather claimed violations of due process rights under the state constitution. Therefore, the Texas Supreme Court held that the Commissioner of Education had no jurisdiction over the McIntyres' claims, so they had no administrative remedies to exhaust.

TEXAS COURTS OF APPEALS

***Neighborhood Centers Inc. v. Walker*, No. 01-14-00844-CV, 2016 WL 3345484 (Tex. App. – Houston [1st Dist.] – May 24, 2016, no pet. h.)**

The Texas Whistleblower Act applies to Texas open-enrollment charter schools.

Neighborhood Centers, a private, non-profit corporation that provides services to low-income communities in Houston, also operates the Promise Community School, an open-enrollment charter school established pursuant to Texas Education Code chapter 12.

Walker was hired to work as a third-grade teacher at the Promise Community School. She alleged that while employed with Neighborhood Centers, she observed health code violations and various testing irregularities, which she described as "cheating irregularities," "special

education testing irregularities," and untimely provision of Individual Education Plans. Walker eventually filed a workers' compensation claim for health issues that she asserts were caused by the health code violations that she observed.

Walker alleges that after filing the workers' compensation claim, she was demoted and reassigned to an Interventionist and Girl Scout Leader. Walker's workers' compensation claim was then denied. Walker then reported her observations regarding testing violations and health code violations to the Texas Education Agency and the Texas Health Department. She asserted that once these reports came to light, Neighborhood Centers terminated her employment.

Walker then filed suit, bringing claims of, among other things, retaliation under the Whistleblower Protection Act. Neighborhood Centers filed a plea to the jurisdiction, arguing that it was not a "political subdivision" or "local governmental entity" under the Whistleblower Protection Act. The trial court denied the plea as to the claim under the Whistleblower Protection Act, and Neighborhood Centers appealed.

On appeal, Neighborhood Centers argued that charter schools are not a political subdivision under the Act, because it does not have the characteristic of a state governing board or traditional powers of subdivisions of the state, such as the power to assess and collect taxes, an elected governing body, or jurisdiction over a portion of the state.

The court of appeals held that Neighborhood Centers' immunity from Walker's suit against it under the Whistleblower Act is expressly waived by the Whistleblower Act and the Education Code.

In construing the applicable statutes, the court noted that (1) the Whistleblower Act expressly states that it applies to public school districts, (2) the Education Code expressly provides that a charter school is subject to federal and state laws and rules governing public schools, (3) the Whistleblower Act contains an express waiver of immunity that applies to public schools, and (4) the recent amendment of Education Code Section 12.1056 provides that charter schools are immune from liability and suit to the same extent as public schools. Therefore, the court concluded that the Legislature clearly expressed its intention that the Whistleblower Act applies to open-enrollment charter schools just as it applies to public schools.

***Azleway Charter School v. Hogue*, No. 12-15-00257-CV, 2016 WL 2585963 (Tex. App. – Tyler May 4, 2016, no pet. h.)**

An open-enrollment charter school's superintendent is not an employee of a school district, and therefore is not required to exhaust administrative remedies set out in the education code before filing a breach of contract lawsuit based on his employment contract.

After Azleway's board of trustees voted to nullify Hogue's term employment contract, Hogue immediately filed a breach of contract lawsuit without first appealing the board's action concerning his written employment contract pursuant to Texas Education Code, Section 7.057(a)(2)(B). Azleway then filed a plea to the jurisdiction arguing that Hogue thereby failed to

exhaust his administrative remedies, a statutory prerequisite for school district employees imposed by the Texas Education Code.

The court determined that despite there being instances where an open-enrollment charter school is treated in the same manner as a school district, nothing in the Texas Education Code or the common law dictates that open-enrollment charter school employees must appeal to the commissioner a grievance caused by a provision of a written employment contract, as is required by school district employees.