# 2015 YEAR IN REVIEW

# SCHOOL LAW UPDATE

**By John D. Husted**

## UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Ivy v. Williams*, 781 F.3d 250 (5th Circuit, March 24, 2015)**

Driver education was not a service, program, or activity of the Texas Education Agency (TEA), and therefore, the TEA was not required to ensure that driver education complied with the requirements of the Americans with Disabilities Act (ADA) and Rehabilitation Act.

Deafness Resource Specialist with the Texas Department of Assistive and Rehabilitative Services informed the TEA of the inability of deaf individuals like the named plaintiffs to receive driver education certificates. The TEA declined to intervene, stating that it was not required to enforce the ADA or act against private driver education schools without the US Department of Justice finding that such schools had violated the ADA.

Donnika Ivy and other deaf individuals brought a putative class action against TEA Commissioner Michael Williams seeking injunctive and declaratory relief requiring the TEA to bring driver education into compliance with the ADA.

The TEA sought dismissal based on standing and for failure to state a claim. The district court denied the motions and TEA appealed. The Fifth Circuit reversed and rendered judgment dismissing the case. Though the plaintiffs had standing, their lawsuit failed on the merits. The TEA does not itself teach driver education or contract with the schools who do so; rather, the TEA merely licenses, supervises, and regulates private driver education schools. Therefore, the Court found that driver education was not a service, program, or activity of the TEA, so it cannot be liable under the ADA. Public entities are not responsible for ensuring the ADA compliance of even heavily-regulated industries.

***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

***Robinson v. Williams*, No. 03-13-00244-CV, 2015 WL 3654652 (Tex. App. – Austin June 11, 2015, no pet. h.)**

A school district may terminate a public school teacher's term contract when a financial exigency that requires a reduction in the school district's personnel exists, even if the teacher applied to other teaching positions in the district that are open, when the total number of positions is greater than the number of new positions, and when there is no evidence that the teacher was more qualified than other applicants to the open positions.

The District employed Robinson as an English teacher pursuant to a three-year term contract; however, before her contract expired, the District's Board of Trustees voted to declare a district-wide "financial exigency" and the need for a "program change" and "reorganization." The Board approved the recommendation that 1,153 positions throughout the District be eliminated, of which 568 were teaching positions. The principal of Robinson's school recommended that four of the nine English teacher positions be eliminated, one of which was Robinson's.

Robinson protested the termination, and a hearing was conducted upholding the termination. During the Board's meeting to consider the hearing examiner's recommendation, Robinson's attorney attempted to present new evidence that, in part, showed that the District was increasing forces in areas that Robinson was certified to teach. The Board denied Robinson's counsel's request to consider the proffered evidence and upheld the termination.

Robinson appealed to the Commissioner of Education, who concluded that the District was only required to give Robinson preference over external applicants for open positions in the District for which she was qualified and for which she applied up until the date of the hearing before the hearing examiner. The Commissioner further concluded that Robinson was one of many teachers who lost their jobs and who were not rehired, and that nothing in the record indicated that Robinson was not considered for the other open positions for which she applied, or that she was more qualified than other teachers affected by the reduction in force who applied for them.

Robinson filed suit for judicial review of the Commissioner's decision. The district court affirmed the Commissioner's decision, and Robinson appealed. The Court of Appeals found that the Board had authority to terminate Robinson's contract due to a financial exigency that required a reduction of force, and that such an exigency existed in this case. Tex. Educ. Code § 21.211(a). Even though other positions became open and even though some new positions were added, it did not mean the overall workforce was not reduced. The evidence showed that the workforce was reduced by 568 teachers, 202 of those teachers returned to employment, 112 resigned, and 254 had not returned to employment, netting 366 reduction in teaching positions. The Court further found that the Board did not err when it refused to consider Robinson's counsel's additional evidence. Regardless, the evidence did not show that the District hired either external applicants for the other open positions or less qualified internal applicants.