SUMMER 2017 NEWSLETTER

SCHOOL LAW UPDATE

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Doe v. Columbia-Brazoria Independent School District,* 855 F.3d 681 (5th Cir. May 3, 2017)**

A school district cannot be held liable under Title IX, Section 504, or the ADA for student-on-student assault if the school district lacked actual knowledge that the assault occurred, and if the assault was not otherwise reported.

John Doe, a former student, claimed he was sexually assaulted in the bathroom at Colombia Elementary School in 2002 when he was in the second or third grade. He alleges a male student made sexual contact with him and threatened Doe to keep him from reporting the assault. At no time did Doe report the assault to a teacher, administrator or other school employee; but rather claims his teacher should have known he was injured, and that the school should have known that the other boy had assaulted him or other students. Doe claimed he had an unspecified disability at the time of the incident. Doe claims the school should have protected him by, among other things, installing cameras in the school bathrooms.

Doe brought suit under Section 1983 for alleged due process and equal protection violations. He also alleged violations of Title IX, Section 504 of the Rehabilitation Act, and the American with Disabilities Act. The District moved to dismiss for failure to state a claim, and the district court summarily denied the motion without prejudice to refiling. The District timely filed its second motion to dismiss, which the district court granted.

On appeal, the Court affirmed dismissal of the Section 1983 claims because there was no special relationship between the plaintiff and the state via the school district. The Court affirmed dismissal of Plaintiff's Title IX claim because he failed to allege that the District had actual knowledge of the assault. Doe plead that he did not report the assault when it happened and even begged his mother not to report the incident. The dismissal of the Section 504 and ADA peer-to-peer harassment claims were likewise proper, because Doe did not plead sufficient fact that the District had actual knowledge of the assault.

***K.S. v. Northwest Independent School District,* No. 16-40093, 2017 WL 1683093 (5th Cir. May 2, 2017)**

Neither a school district's allegedly ineffective responses to student-on-student harassment, nor the district's alleged failure to follow the district's own policies and federal Office for Civil Rights guidelines constitutes deliberate indifference. So long as some action, even if it is ineffective, was taken by the school district in an attempt to address the harassment, the district is not deliberately indifferent.

K.S., a former student of the District, brought a Title IX lawsuit against the school district, alleging that the district failed to protect him from student-on-student gender-based harassment during the one semester that he was enrolled at the middle school. He alleged that he was harassed because of his sex by a number of other students, with most of the harassment centered in some way on the fact that at the time he had large breasts. Upon being made aware of the incidents, school officials took various measures to address the situation, including conducting investigations, and having teachers monitor parts of the school. In a number of the incidents involving K.S., investigations showed that he was the instigator.

For a school district to be liable for student-on student harassment under Title IX, the plaintiff must show: (1) the school had actual knowledge of the harassment; (2) the harasser was under its control; (3) the harassment was based on his sex; (4) the harassment was "so severe, pervasive, and objectively offensive that it effectively bar[red] [his] access to an educational opportunity or benefit"; and (5) the school was "deliberately indifferent" to the harassment. The district court granted the school district's motion for summary judgment, concluding that the plaintiff failed to present an issue of material fact as to whether the harassment was severe, pervasive, and objectively offensive so as to effectively bar access to an educational opportunity or benefit, and as to whether the school was deliberately indifferent to the harassment.

Since the failure to establish only one of the five elements is sufficient to grant summary judgment, on appeal, the Fifth Circuit only addressed the deliberate indifference element. The Fifth Circuit found that school officials investigated the incidents, and attempted to talk with K.S. and the other students involved in an effort to help them get along. It further found that while K.S. was sometimes one of the students suspended as a result of District investigations of incidents, there was no evidence that the suspensions were linked to sex-based harassment, which is the only type of harassment relevant to K.S.'s Title IX claim. Moreover, the District took relatively strong action to deal with the overall situation by moving forward with a psychological evaluation of K.S., telling teachers to monitor him at school, providing counselors to escort him to and from the restroom, and requiring him to sit behind the bus driver to avoid altercations on the bus. Since the district took some action, including some strong action, the Fifth Circuit concluded that the district court did not err in granting summary judgment and affirmed.

***American Humanist Association v. McCarty*, 851 F.3d 521 (5th Cir. March 20, 2017)**

Student-led invocations before school board meetings constituted legislative prayer, rather than school prayer, for purposes of the legislative prayer exception to the Establishment Clause.

The American Humanist Association ("AHA") alleged that the Birdville Independent School District's policy of inviting students to deliver statements, which can include invocations, before school-board meetings violated the First Amendment's Establishment Clause. From 1997 through February, 2015, the presentations were called "invocations," but were subsequently referred to as "student expressions." BISD would randomly select students from a list of volunteers to deliver the expression.

AHA sued individual board members and the district for monetary damages and for declaratory and injunctive relief, alleging that BISD has a policy, practice, and custom of permitting, promoting and endorsing prayers delivered by school-selected students at board meetings in violation of the Establishment Clause. The district court denied the individual defendants' motion to dismiss based on qualified immunity, and later granted the district's motion for summary judgment. The individuals' interlocutory appeal of the denial of qualified immunity and AHA's appeal of summary judgment were consolidated.

In holding that the school district was entitled to summary judgment and that the individual defendants were entitled to qualified immunity, the Fifth Circuit found that student-led invocations delivered before school board meetings constituted legislative prayer, rather than school prayer, for purposes of the legislative prayer exception to the Establishment Clause. Further, the fact that school board members often stood and bowed their heads during student-led invocations held before the meetings did not violate the Establishment Clause, as it would have been nonsensical to permit legislative prayers but bar the board from participating in the prayers in any way.

TEXAS COURTS OF APPEALS

***Dallas County Schools v. Vallet*, No. 05-16-00385, 2016 WL 7163824 (Tex. App. – Dallas, Dec. 8, 2016, no pet. history)**

A claim of intentional infliction of emotional stress arising from a school bus driver's act of leaving a six-year-old on the side of the road does not fall within the Texas Tort Claims Act's limited waiver of a school district's governmental immunity for certain damages arising out of the operation of a motor-driven vehicle.

Vallet sued DCS for negligence and intentional infliction of emotional distress after a bus driver left six-year-old T.J. on the side of a highway. Vallet alleged that DCS's immunity was waived because its employee was negligent in the operation of a motor vehicle by opening and closing the school bus doors.

DCS filed a motion to dismiss for want of jurisdiction, asserting that Vallet's negligence claim failed to fall within the limited waiver of immunity afforded under the Texas Tort Claims Act because it relates to the supervision or control of the student and not the operation of a motor vehicle. DCS further argued that Vallet's intentional infliction of emotional distress should be dismissed because the Act expressly provides that there is no waiver of immunity for intentional torts. The trial court denied the motion and DCS appealed.

The appellate court determined that Vallet's factual allegations do not demonstrate that T.J.'s alleged injuries arose from the operation or use of a motor vehicle or that a nexus exists between the District's use or operation of a motor vehicle and T.J.'s alleged injuries, finding that, at most "the allegations show the use or operation of the school bus furnished the condition that made T.J.'s injuries possible," as opposed to directly causing the alleged injuries. The court further held that DCS was immune from the intentional infliction of emotional distress, as it is an intentional tort for which immunity has not been waived.

***Connally v. Dallas Independent School District*, 506 S.W.3d 767 (Tex. App. – El Paso, 2016, no pet. history)**

A school district's departments of professional responsibility, audits, and professional standards are not "appropriate law enforcement authorities" to whom employees could report allegations of criminal violations and thereby trigger the protections of the Texas Whistleblower Act. However, an employee's report to the school district's police department does trigger the protections, even if the report was an oral conversation with district police officers.

Plaintiff Anita Connally was hired by the District as its Director of Compliance. Connally believed that in various instances, the District was not complying with the UIL rules for requiring student-athletes to reside within the attendance zone of the high school for which they played a varsity sport. Connally reported her suspicions of wrongdoing to the Office of Professional Responsibility (OPR), the Internal Audit Department (IA), and the Professional Standards Office (PSO). These departments were tasked solely with conducting internal, administrative investigations. Investigations found that certain coaches had engaged in fraud by forgery, had falsified district records, provided untruthful statements, and illegally recruited varsity players. The day after the investigation report was released to the public, the superintendent terminated Connally, arguing that she did not act soon enough to prevent the wrongdoing.

Connally sued the district, claiming that it wrongfully terminated her for making reports in violation of the Texas Whistleblower Act. The district filed a plea to the jurisdiction claiming governmental immunity and arguing that the departments to which Connally made reports were not appropriate law enforcement authorities. In response, Connally amended her petition and alleged that she also made reports to the DISD police department and the PSO's manager, who was a commissioned police officer and former detective. After oral argument, the district court dismissed Connally's suit.

On appeal, the Court concluded that the PSO manager was not acting in his capacity as a peace officer, and that Connally could not have had an objective good faith belief that he was an appropriate law enforcement authority. The court found, however, that Connally's affidavit testimony that she informally spoke with certain DISD police officers regarding the problem of parents and coaches falsifying addresses constituted sufficient reports of criminal violations under the Whistleblower Act.