WINTER 2019 NEWSLETTER

SCHOOL LAW UPDATE

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UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

***Glass v. Paxton, et al*, 900 F3d 233 (5th Cir. August 16, 2018)**

Texas's Campus Carry Law, which prevents public universities from prohibiting students' rights to licensed concealed carry on campus, does not violate the First Amendment by chilling classroom speech.

In 2015, Texas enacted Tex. Gov't Code § 411.2031, the "Campus Carry Law," which allows public colleges to reasonably regulate carrying concealed handguns on campus, but the regulations may not have the effect of generally prohibiting the exercise of that right. The University of Texas at Austin's Board of Regents enacted policies pursuant to the new law, which effectively allowed licensed concealed carry by students in classrooms.

Three University of Texas professors brought suit, challenging the constitutionality of the Campus Carry Law and seeking declaratory and injunctive relief. They alleged that the law and policy: (1) violate their First Amendment rights by chilling speech inside the classroom; (2) violate their Second Amendment rights because the firearms were not "well regulated;" and (3) violate their right to equal protection because the University lacks a rational basis for determining where students can or cannot concealed-carry. Specifically, Glass argued that she had to self-censor and classroom speech would be dampened out of fear that a student with a concealed carry license could be moved to anger and impulsive action with their gun. She expressed particular concern for "religiously conservative students [who] have extreme views," and "openly libertarian students."

Texas moved to dismiss for failure to state a claim, and the district court dismissed the claims without prejudice, finding that the professors lacked standing based on their self-imposed censoring of classroom discussion caused by their fear of the possibility of illegal activity. The professors appealed. On appeal, the Fifth Circuit ruled that the chilled speech claim fails, because the chain of contingencies for the alleged harm serving as the catalyst for the professors' self-censorship in the classroom was not "certainly impending" to confer standing. Glass could not allege certainty as to how concealed-carrying students pose certain harm and how they will exercise their future judgment.

The professors' Second Amendment claim fails because the prefatory clause "well regulated" does not limit the scope of the individual right to keep and bear arms codified in the operative clause, but rather it announces a purpose.

The professors' equal protection claim also fails. The professors failed to show their was no rational basis for Texas's explanations for allowing the prohibition of concealed carry in other parts of the campus, like residence halls, but not classrooms, and for allowing private universities to ban concealed carry – that the state could respect the property rights of private schools, and that public safety and self-defense cannot be achieved if concealed carry is banned in the classroom, which is the core reason student go to campus.

***I.F. v. Lewisville Independent School District,* No. 17-40722, 2019 WL 491790 (5th Cir. February 8, 2019)**

A former high school student brought suit under Title IX against the school district alleging tat it was deliberately indifferent to her alleged student-on-student sexual harassment and retaliated against her by withholding Title IX protections.

While in the ninth-grade at Hebron High School in LISD, I.F. attended a non-school-sponsored, non-school-affiliated party at a private residence of a fellow student. At the party two male students engaged in sexual activity with I.F., which she claims was rape. She alleged that she was then bullied and harassed by fellow students, and that the school district did not properly respond to her complaints of bullying and harassment. She further alleged that the school district retaliated against her for complaining of the bullying and harassment.

The school district moved for summary judgment on the claims of deliberate indifference and on the retaliation claim, while the former student moved for partial summary judgment. I.F.'s motion was denied, and the school district's motion was granted as to the deliberate indifference claim, but the court allowed the retaliation claim to go to trial. After trial, a jury unanimously found that the school district had not retaliated against the former student. I.F. then appealed, challenging only the summary judgment on deliberate indifference.

The Fifth Circuit affirmed, finding that the deliberate indifference claim was properly dismissed on summary judgment. The Court found that LISD performed an extensive investigation within a reasonable time, and that the delay caused by following police instruction not to start LISD's investigation until CPD indicated that its criminal investigation was finished and subsequent delay due to holidays was not deliberate indifference. Moreover, the Court found that during the delay, LISD was taking active steps to provide relief to I.F. by taking various measures to assist with her workload while I.F. refrained from physically attending school.

TEXAS COURT OF APPEALS

***Terrell v. Pampa Independent School District,* No. 07-17-00189-CV, 2019 WL 150884 (Tex. App. – Amarillo, January 9, 2019, no pet. h.)**

A written notice posted in a school district's Administrative Building, and not posted to the District's website, that only identified the location of the school board meeting as "Pampa High School" without identifying the meeting room, full street address, or name of the city sufficiently

met the Texas Open Meetings Act's ("TOMA") requirement of identifying the place and alerting the public of the location of school board meetings.

Two teachers with probationary contracts brought suit against the School District, alleging violations of TOMA, and seeking to void actions taken at allegedly improperly noticed meetings. Specifically, the teachers allege that a meeting wherein Terrell's probationary contract was terminated was not properly noticed. Physical notice for the meetings during the relevant time period were posted inside an external glass door of the administrative building for PISD, but were not posted on the school's website, as is usually done, due to an issue arising from a transfer to a new website for the District.

TOMA requires posting of notice of each meeting on a bulletin board at a place convenient to the public in the central administrative office of the district, and a school district that maintains a website must concurrently post notice of each meeting on its website. Tex. Gov't Code §§ 551.051, 551.056(b)(3). a school district's failed good faith attempt to post a notice to its website is excused if the failure was due to a technical problem beyond the control of the district. Tex. Gov't Code §551.056(d)

The teachers failed to establish that the lack of specificity regarding the place of the meetings prevented anyone from attending any of the challenged meetings.

The court also found that there was evidence to support the trial court's findings that the notices were posted at least 72-hours before the meetings and that their content, which stated "[a]pproval and renewal of probationary contract employees," and "[a]pproval of termination of probationary contract employees" were subjects of the meetings.

***Texas Commissioner of Education v. Solis*, 562 S.W.3d 591 (Tex. App. – Austin August 22, 2018, rehearing denied)**

In certain circumstances, a school district employee need not first make a complaint about the school district's actions through the school district's local grievance policy procedures before filing a petition for review with the Commissioner challenging the school district's actions. Rather the Texas Education Code's "exhaustion of administrative remedies" requirement does not require that the aggrieved person have participated in a hearing before the board, but only that the board have made a "decision" or taken "action."

After Mission Consolidated ISD's superintendent did not take action to renew Plaintiff Dr. Solis's employment contract, she requested that the District's board of trustees review the superintendent's decision. The board of trustees denied the request.

She then filed a petition for review with the Commissioner of Education. The Commissioner-appointed administrative law judge issued an order stating that the Commissioner did not have jurisdiction to review board's decision. The ALJ determined that Dr. Solis did not exhaust administrative remedies, taking the position that the "exhaustion of administrative remedies" required by the Texas Education Code applies to the Commissioner's jurisdiction to review a

school district employee's grievance that has not first been before a hearing before the school district's board of trustees. The Commissioner adopted the decision. Dr. Solis then brought an action for judicial review in the District Court. The District Court reversed the Commissioner's decision and remanded the case to Commissioner for further proceedings. The school district and Commissioner appealed.

On appeal, the Court affirmed, holding that the statute requiring exhaustion of administrative remedies did not require a school district's board of trustees to hold a hearing and issue a decision before the Commissioner could review the superintendent's and board of trustees' decision to take no action on employee's employment agreement; rather, the exhaustion of administrative remedies requirement applies to the district court's jurisdiction, not the Commissioner's. The Court further held that the statute requiring exhaustion of administrative remedies before Commissioner of Education could review an administrative decision of a school district's board of trustees did not limit appeals to review of board's decisions that were made in the context of a grievance proceeding, but required Commissioner to base his decision on the record as it existed at the district level and the events evidenced by that record.