

FALL 2011 NEWSLETTER

SCHOOL LAW UPDATE

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United States Court of Appeals for the Fifth Circuit

- ***Morgan v. Swanson*, 2011 U.S. App. LEXIS 19656 (5th Cir. September 27, 2011) (en banc)**

Though not clearly established prior to this decision, a majority of the Fifth Circuit concluded that the free speech clause applies to the speech of elementary school students while they are at school.

In this case, two Plano ISD elementary school principals were sued for allegedly preventing elementary students from passing out religious-themed items to their fellow classmates during school hours.

The Court determined that the free speech clause applies to the speech of elementary school students while they are at school. However, because this was not clearly established, the majority found that the two principals were entitled to qualified immunity.

The Court also determined that precedents permitting restrictions on “school-sponsored” speech is to be construed narrowly. The exception only applies to activities that may fairly be characterized as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so that the views of the individual speaker may not be erroneously attributed to the school.

- ***Swindle v. Livingston Parish School Board*, 2011 U.S. App. LEXIS 18629 (5th Cir. September 8, 2011)**

An expelled student is entitled to some kind of notice and hearing before being deprived of her ability to continue her public education without the delay, damage and stigma of being forced to repeat a grade.

Morgan, an eighth grader, was expelled for one year after she left a school event to smoke marijuana and returned to the event under the effects of the drug. Her parents requested that Morgan be provided with alternative education by the Livingston Parish School Board (“LPSB”). The Swindles were not given any kind of notice, hearing or process in connection with the LPSB’s denial of public education benefits to Morgan through an alternative education program, and went on to home school Morgan for the rest of the year. For the following school year, the Swindles petitioned LPSB to have Morgan readmitted. The LPSB agreed to readmit Morgan, but required that she reenter the eighth grade, not ninth.

The Swindles filed suit under §1983 alleging, among other things, that Morgan was entitled to procedural due process before she was refused access to alternative education. When state law creates an entitlement to alternative public education, a student's total exclusion from the educational process for more than a trivial period constitutes a deprivation of protected property and liberty interests subject to due process constraints. The Court, describing Morgan's interest as "her ability to continue her public education, without the delay, damage and stigma of being forced to repeat the eight grade," concluded that Morgan was, *at a minimum*, entitled to *some kind of* notice and hearing before being deprived of her alternative education.

- ***Sanches v. Carrollton-Farmers Branch ISD*, 647 F.3d 156 (5th Cir. July 13, 2011)**

A school district is not liable for student-on-student sexual harassment under Title IX for conduct that is more properly described as teasing or bullying than as sexual harassment, and that is motivated by personal animus, not by harassment based on sex.

Samantha Sanches was a student, and sometimes a cheerleader at Creekview High School in the C-FB ISD. Sanches alleges that during the spring of her junior year in 2008, she was sexually harassed by J.H., a Creekview senior and female cheerleader. Sanches alleged that on one occasion, J.H. indirectly referred to Sanches as a "ho," slapped the buttocks of J.H.'s former boyfriend, who, at the time, Sanches was dating, and starting rumors that Sanches was pregnant and that Sanches had a hickey. Sanches and her mother also allege that J.H. was, to some extent, to blame for Sanches's failure to make the cheerleading squad.

Sanches sued the school district for sex discrimination and retaliation under Title IX and 42 U.S.C. §1983. The Court, however, described the case as "nothing more than a dispute, fueled by a disgruntled cheerleader mom, over whether her daughter should have made the squad," and as "a petty squabble, masquerading as a civil rights matter, that has no place in federal court or any other court." After analyzing the allegations regarding J.H.'s conduct, the Court determined that the conduct was more properly described as teasing or bullying than as sexual harassment, and as being motivated by personal animus, not harassment based on sex. The Court stated that "J.H. was acting like a typical high-school girl whose ex-boyfriend began dating a younger cheerleader."

Furthermore, the Court found that, as a matter of law, J.H.'s conduct was not severe, pervasive, or objectively unreasonable. If it were, the Court reasoned, no conduct would be beyond the reach of Title IX, since high school "is a trying time for young people, who experience a wide range of emotions and often lack the skills to control them."

The Court also found that the school district was not deliberately indifferent in its response, even if its response, as Sanches alleged, was ineffective or failed to comply with the school district's own regulations.

Supreme Court of Texas

- ***LTTS Charter School, Inc. v. C2 Construction, Inc.*, 342 S.W.3d 73 (Tex. June 17, 2011)**

An open-enrollment charter school is a “governmental unit” for Texas Tort Claims Act purposes, and is thus able to take an interlocutory appeal from a trial court’s denial of its plea to the jurisdiction.

LTTS Charter School is an open-enrollment charter school that retained C2 Construction to build school facilities at a site Universal Academy had leased. C2 filed a breach of contract suit, and LTTS filed a plea to the jurisdiction claiming immunity from suit. The trial court denied the plea, and LTTS brought an interlocutory appeal. The Court of Appeals dismissed the interlocutory appeal on the basis that the open-enrollment charter school is not a “governmental unit,” under the Texas Tort Claims Act. The Texas Supreme Court granted the school’s petition for review to determine whether the court of appeals properly determined its jurisdiction.

The Court found that open-enrollment charter schools are indisputably part of the Texas public-education system, and derive their governmental status and authority from legislative enactments. Open-enrollment charter schools are authorized to operate in a facility of a commercial or nonprofit entity, an eligible entity, or a school district, including a home-rule school district. A charter school’s status and authority derive from legislative action, as opposed to administrative action, even though a charter school necessarily requires a charter granted by the State Board of Education.

After a thorough analysis of the various legislative provisions concerning charter schools, the Texas Supreme Court held that an open-enrollment charter school qualifies under the Tort Claims Act as an “institution, agency, or organ of government” deriving its status and authority from legislative enactments.

Texas Court of Appeals

- ***West Houston Charter School Alliance v. Pickering*, 2011 Tex. App. LEXIS 6589 (Tex. App. – Houston [1st] August 18, 2011, no pet. h.)**

In the context of a claim under the Whistleblower Act, a claimant does not satisfy the Act’s requirement to exhaust the governmental entity’s grievance process by merely communicating her complaints, but not initiating the process under the school’s procedure after it had been provided to her.

Pickering, the school’s administrator, filed a suit against the charter school alliance and several of its board members, asserting that the school violated the Texas Whistleblower Act by retaliating against her after she reported to the Texas Education Agency that the board was holding meetings in violation of the Texas Open Meetings Act. The school filed a plea to the jurisdiction, contending that Pickering failed to initiate a grievance under the school’s grievance procedure before filing suit. Pickering responded that the school’s grievance procedure did not apply to her and that she had appealed the school’s actions by a letter her attorney sent to the school board.

A jurisdictional prerequisite to initiating suit under the Whistleblower Act is that the claimant must first initiate action under the grievance or appeal procedures of her governmental employer. Merely complaining of the school's action without attempting to comply with the school's known grievance procedure does not satisfy the Whistleblower Act's requirements. Instead, the employee must initiate action under the actual grievance or appeal procedures of the employing entity.

- ***Poole v. Karnack ISD*, 344 S.W.3d 440 (Tex. App. – Austin May 5, 2011, no pet.)**

A teacher's request for assault leave under the education code may be denied if it is not made within a reasonable time.

On September 25, 2001, Poole was injured in the course of her employment as a public school teacher when a student opened the metal door to a restroom stall while Poole was inside. The door struck Poole in the head, causing her injury. Poole alleges that the incident constituted an assault.

On September 15, 2003, almost two years after the incident, Poole requested assault leave under the education code. To explain the delay, Poole contends that she was unaware of the availability of assault leave until August 22, 2003. The principal denied the assault leave on the basis that it was not filed within 15-days of the date Poole first knew or should have known of the event about which she was complaining in accordance with the District's policy. Poole appealed the decision through the District's grievance process, and then appealed to the Commissioner of Education.

The Commissioner also dismissed the grievance on the basis of the request for leave filed 720 days after the event was untimely, not only under the District's 15-day deadline, but also under the education code, because the request was not made within a reasonable amount of time after the alleged assault. Upon review, the Court deferred to the Commissioner's interpretation of the education code, because it was reasonable and did not contradict the plain language of the statute.