Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

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Inside This Issue:

Attorney Fees Only Available for "Child with a Disability"

***T.B. v. Bryan Independent School District*, 08-20201 (5th Cir. 2010).**

The Fifth Circuit recently held that parents cannot collect attorney fees under the Individuals with Disabilities Education Act (IDEA) if their child has not yet been found to be a "child with a disability" as defined by the Act.

In third grade, T.B. was diagnosed with ADHD. He received accommodations under the Rehabilitation Act but was not eligible for special education services. In sixth grade T.B. began to act out and Bryan Independent School District (BISD) recommended a special opportunity school (SOS).

T.B.'s parent disagreed with that placement and when they lost their appeal, they removed T.B. from public school. At that time, T.B.'s parents' private education professional disagreed with the SOS placement and opined that T.B. was eligible for special education. T.B.'s parents then requested a due process hearing.

The hearing officer found that only IEP Teams or Admission, Review, and Dismissal Committees can determine whether a child is eligible for special education. T.B. appealed, but the magistrate agreed. The magistrate did, however, award attorney fees; the district court adopted the magistrate's opinion.

BISD disputed the attorney fees, arguing that T.B. did not meet IDEA's fee-shifting provision since he was not a prevailing party and had not been determined to be a child with a disability. A court may award attorney fees under the IDEA "to a prevailing party who is the parent of a child with a disability." A "child with a disability" is a child who has one of the specified conditions and, as a result, needs special education and related services.

The Court began its analysis by referencing other Circuit Court decisions on the same issue. The Third Circuit barred attorney fees in this situation and the Sixth Circuit also denied attorney fees in a case interpreting an earlier version of the fee-shifting provision. The Court did not identify any disagreeing circuits.

T.B.'s argument focused on § 1415(k)(5) of the IDEA which T.B. contended makes attorney fees available. He argued that § 1415(k)(5) gives a child who has not been determined to be eligible for special education the same privileges "children with disabilities" receive under the IDEA if the student violated the district code of conduct and the district knew the child had a disability.

However, the Court disagreed that the privileges allowed in those circumstances to children who have not been found a "child with a disability" included attorney fees. It found that § 1415(k)(5) is an exception to the general rule that children without disabilities as defined by the IDEA are not protected by the Act. T.B.'s argument could not overcome the plain meaning of the fee-shifting statute which only allows attorney fees to the parents of a "child with a disability."

The Court also did not agree with T.B.'s argument that prohibiting attorney fees would undercut the purpose of the IDEA. The Court noted that parents may file a suit just for attor-

(Continued on page 2)

Attorney Fees Only Available for "Child with a Disability", cont.

ney fees after their child has been found to be a "child with a disability."

How This Affects Your District:

First, this case makes clear that judges and hearing officers cannot decide whether a child has a disability. This is imperative to its holding disallowing attorney fees. It means that the child is not a child with a disability at the end of the case and attorney fees cannot be awarded

Second, relying on the fact that the child was not one with a disability, the decision is significant as it solidifies that the stated exception to the IDEA protections does not apply to attorney fees.

Although this case comes from the Fifth Circuit, the previous Sixth Circuit case mentioned suggests it may reach the same result. The Sixth Circuit could easily rely on its previous opinion to decide similarly to the Fifth Circuit. In addition, as the second case to decide this way after the current version of the IDEA came into effect, *T.B.* adds strength to the argument that attorney fees should not be granted.

Teacher's Section 1984 Claim Survives Dismissal

***Catlett v. Duncanville Independent School District*, No. 3:09-CV-1245-K (N.D. Texas May 27, 2010).**

The United States District Court for the Northern District of Texas recently dismissed claims against individual employees charged with false imprisonment because the same claim was made against this school district. However, the Court sustained a § 1983 claim against the district that its drug testing policy lead to a violation of a teacher's rights.

On November 5, 2008 Elijah Granger, principal of a middle school in Duncanville Independent School District (Duncanville), decided that a teacher, Bonnylen Catlett, may be under the influence of an illegal substance. Granger contacted Sandra Burks, Assistant Superintendent for Human Resources, to have Granger tested. Burks provided a voucher for a drug test without additional inquiry.

Granger, with the help of Carolyn Price, a school counselor, forced Catlett into Price's car. They drove her to a CareNow facility where a drug test was administered. The test did not show any illegal substances in Granger's body.

On January 15, 2009 Granger told Catlett to pack up and leave school stating he was recommending her for nonrenewal. On January 23, 2009, Catlett filed a grievance complaint with Duncanville. She noted a history of harassment and asked that Granger's recommendation for nonrenewal be removed.

Specifically, Catlett claimed that Granger humiliated her in front of students and colleagues. Catlett also claimed that on December 19, 2008 Granger berated her in front of her class. He later returned and ordered her to leave school immediately without time to get her work or personal items. He apparently also placed Catlett on a performance improvement plan twice and reprimanded her without any reason.

Catlett was a substitute teacher for the rest of the year but complained she was used very little. In April the superintendent contacted her stating her contract would not be renewed. Catlett then sued and the Court addressed Duncanville's Motion to Dismiss.

The Court first addressed individual defendants Granger, Price and Burks' motion to dismiss the false imprisonment claim against them pursuant to the Texas Tort Claims Act (TTCA). The TTCA precludes recovery against individual employees. It only allows a plaintiff to recover from a government entity "when 1) a suit is filed against the governmental entity only, 2) a suit is filed against both the governmental entity and the employee, and 3) a suit is filed against the employee who was acting within the scope of his employment and the suit could have been brought against the governmental entity." The defendants argued the false imprisonment claim against them must be dismissed because Catlett also asserted the claim against Duncanville. The Court agreed and dismissed the claim.

Duncanville also asserted immunity from punitive damages. Since the law is clear that a local government entity is exempt from punitive/exemplary damages under § 1983, the Court dismissed claims for those damages.

Duncanville then argued all § 1983 claims against it must be dismissed. It alleged Catlett had not adequately pleaded her claims. In addressing this claim the Court said that a government entity cannot be liable under § 1983 for its employees' actions. It is only liable for results it is actually responsible for. Thus, Catlett had to plead that a district custom or policy lead to the violation of her rights. Since

(Continued on page 3)

Teacher's Section 1984 Claim Survives Dismissal, cont.

she alleged Duncanville's drug testing policy caused her rights to be violated, the Court refused to dismiss the claim. The policy was readily available, on Duncanville's website and publicized by the school board.

How This Affects Your District:

First, although the false imprisonment claim against individual employees was thrown out, it was dismissed only because Texas law prohibits the claim if it is also alleged against a local government entity. The district will continue litigation to defend the claim.

The fact that the false imprisonment claim was even brought is also important. Administrators should not physically force employees to comply with a policy. Government employers can require drug testing in other ways. Perhaps the district could require the test to be done by a certain date otherwise the teacher would have to take unpaid leave.

Finally, it may be prudent for districts to provide procedures along with their policies. This case shows that implementing a policy incorrectly may result in § 1983 claims against the district.

Sixth Circuit Upholds Ban on Clothing Bearing the Confederate Flag

***Defoe v. Spiva*, No. 06-00450 (6th Cir. November 18, 2010).**

The United States Court of Appeals for the Sixth Circuit recently held that a school district's ban of the Confederate Flag at school was not a violation of students' freedom of speech.

Anderson County Schools had racial tension since the schools were integrated. White students often taunted and teased minority students and used derogatory phrases. In 2005 students threw Oreos onto the basketball court as a multi-racial student warmed up. Students draped a Confederate Flag in a hallway when two black students enrolled in the District after being displaced by Hurricane Katrina. Racially charged graffiti was found in various locations. It included a hangman's noose painted near words attacking an interracial high school couple. The District also had problems enrolling minority students who did not want to attend school in the District because of the racism.

As a result of the tension, school officials would not allow students to wear clothing depicting Confederate Flags at school pursuant to the district's dress code. The dress code prohibits clothing bearing racial or ethnic slurs and symbols. Administrators feared that removing the ban would disrupt the learning environment.

On October 30, 2006 Defoe wore a shirt bearing a Confederate Flag to school. In the past he complied when he was told to remove the clothing or turn it inside out. This time, however, he refused and was sent home. A week later, Defoe wore a belt buckle with a Confederate Flag. After again refusing to comply with the dress code, he was suspended. Plaintiffs filed suit at the end of November, 2006 alleging violations of the First and Fourteenth Amendments.

The Sixth Circuit first outlined precedential cases on student speech in schools. It summarized that *Bethel School District No. 403 v. Fraser*, a case where a student made a vulgar speech at a pep rally during the school day, prohibits vulgar, lewd, indecent, or plainly offensive student speech. *Hazelwood School District v. Kuhlmeier*, where students sued after their stories on divorce and teenage pregnancy in the school newspaper were censored, held that districts have some authority to censor speech that is viewed as school-sponsored if the censorship is parallel to pedagogical concerns.

The Court found that the present case was guided by a third student speech case, *Tinker v. Des Moines* which governs speech that does not fall under *Kuhlmeier* or *Fraser*. In *Tinker*, students planned to wear black armbands to protest the Vietnam War. Right before the day the students planned to wear the armbands, administrators implemented a dress code prohibiting armbands. When the students were punished for wearing them anyway, they sued. The United States Supreme Court held that student speech may only be regulated "when the district reasonably believes the speech will substantially and materially interfere with schoolwork or discipline."

The Court based their analysis on a previous Sixth Circuit case, *Barr v. Lafon*, where another district prohibited the Confederate Flag. Plaintiffs tried to distinguish *Barr* since no disruption had actually occurred in the District; they also argued that racial tension was very low. The Court responded by stating that *Tinker* does not require actual disruption. They also found that the evidence suggested racial tension is actually very high in both the District's high schools. So much, in fact, that it violated other students' rights to be secure. Thus, although the learning environment

(Continued on page 4)

Sixth Circuit Upholds Ban on Clothing Bearing the Confederate Flag, cont.

had not actually been disrupted, the District could easily conclude that displays of the Confederate Flag would likely lead to disruptions.

To support its conclusion that officials could ban the Confederate Flag, the Court noted similar holdings in other Circuits. Cases from the Fifth and Tenth Circuits were cited along with *Barr v. Lafon*.

The Sixth Circuit next addressed Plaintiffs' argument that the District policy resulted in viewpoint discrimination. The Court acknowledged that districts cannot ban some racially divisive symbols and allow others. However, it also noted that the code of conduct prohibits all racial or ethnic slurs; gang affiliations; vulgar, subversive, or sexually suggestive language or images; or displays of items students cannot legally buy. Testimony suggested that Malcolm X shirts were also banned, which showed that the District did not discriminate among different viewpoints.

Plaintiff's final argument alleged that the prohibition is not narrowly tailored and thus unconstitutional since there are no exceptions to the general ban on the Confederate Flag. The Court struck down the argument however, explaining that there is no reason or authority to adopt a case-by-case basis for prohibiting the Confederate Flag.

How This Affects Your District:

This case serves as a guideline for districts faced with a similar situation. If speech is regulated, and guided by *Tinker*, it must pass the *Tinker* test. The speech does not have to actually be disruptive, but it must be likely to cause disruption. The facts surrounding why the speech is banned will suggest the likelihood of disruption. Administrators may not ban speech simply because it makes others uncomfortable or is unpopular.

Additionally, any regulation must be viewpoint neutral. In this case, the ban on Confederate Flags was constitutional because the District did not allow any racially divisive speech. School districts are not permitted to prefer one opinion on an issue over another.

Finally, the District's regulation was narrowly tailored. Districts must regulate speech in a way that does not encroach on other speech that should be allowed. However, case-by-case decision-making is not always necessary according to the Sixth Circuit.

Congress Passes Healthy, Hunger-Free Kids Act

S.3307: Healthy, Hunger-Free Kids Act, 111th Congress, 2009 -2010.

On December 13, 2010 Congress passed the Healthy, Hunger-Free Kids Act of 2010. The Act appropriates $4.5 billion dollars to expand access to programs to reduce childhood hunger, improve foods' nutrition in order to promote health and fight childhood obesity, and simplify program management and improve integrity.

$1.2 billion dollars is dedicated to ending childhood hunger. Under this section of the Act:

- The Child and Adult Care Food Program will see increased funds so children can receive a meal, rather than a snack, after school.
- More free meals will be provided to students through Universal Meal Service and the Supplemental Nutritional Assistance Program.
- Foster children will automatically receive free meals at school.
- Benchmarks will be implemented in order to help States improve performance.
- The Summer Food Service Program will be better advertised through more marketing materials.

Billions of dollars will also be invested in ways to promote health and reduce childhood obesity. Under this section of the Act:

- Reimbursement rates for school meals will increase based on school performance.
- The Secretary of Agriculture may establish nutritional standards for food sold on school campuses during the school day.
- Child care providers participating in the Child and Adult Care Food Program must meet new nutritional requirements.

Other provisions of the Act work to ensure that Federal reimbursements to schools are being used for free and reduced-cost lunches rather than other aspects of food-service. The Act also provides $40 million dollars to help cafeterias establish school gardens and use local food. Finally, the Act requires schools participating in the Federal School Lunch Program to update wellness policies with transparency and public input.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff. Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

Jeremy Neff
at Butler County ESC on January 6 and 10, 2011
Roundtable/Legal Update

Bronston McCord and Bill Deters
At Great Oaks Instructional Resource Center on January 20, 2011
Administrator's Academy: Gear Up for Negotiations

Ennis Roberts & Fischer will now be utilizing interactive technology that helps us serve and inform you better! All Administrator Academy seminars will now be webcast! Live webcasts allow you to 'attend' and fully interact in the Administrator Academy remotely. The webcast is streamed to your home or office computer. In addition, webcast attendees can view the presentation's Power Point slides, chat with presenters, and ask and answer questions. The seminar streams live but presentations will also be recorded and archived for later viewing.

In the future, look forward to tuning into Q&A sessions where ERF will inform clients of changes in statutes, regulations, or caselaw that affect all Ohio districts. Finally, feel free to inquire how this new technology can help you cut costs in ways such as hosting an administrative seminar remotely. Please contact Pam Leist for details.

Administrator's Academy Dates at Great Oaks Instructional Resource Center

April 7th, 2011 – *Media and Public Relations*

June 21st, 2011 – *Student Education and Discipline*

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

Pamela A. Leist
pleist@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com

Erin Wessendorf-Wortman
ewwortman@erflegal.com