



Ennis Roberts Fischer SCHOOL LAW REVIEW



1714 West Galbraith Rd.
Cincinnati, Ohio
45239

September 2012

District Liable Under Title IX in Locker Room Harassment Case

Mathis v. Wayne County Board of Education, No. 11-5979 (6th Cir. Aug. 23, 2012).

The 6th Circuit Court of Appeals upheld a \$200,000 jury award against a Tennessee school district for a Title IX violation stemming from incidents of student-on-student sexual harassment in a middle school locker room. The Court found that the district had acted with deliberate indifference in responding to the acts of harassment.

The two male victims of harassment were both in seventh grade and members of the school basketball team. At the beginning of the basketball season, the two boys were harassed by eighth graders on the team while using the locker room before and after practices. They were subjected to "lights out," in which the eighth graders gyrated on them in the dark, and one of the victims was forced to perform a "blind-folded sit-up," in which his face hit the bare buttocks of one of the eighth graders. The most aggressive incident occurred when one of the victims was anally penetrated with a marker.

The victims' parents voiced concerns to school administrators, which the Court believed were not taken seriously enough. Several of the perpetrators of the marker incident were suspended from school for eleven days and from the basketball team for a month. The other incidents were viewed by the principal as merely "bad pranks," and the principal issued verbal reprimands as punishment.

For the students and parents to succeed on their Title IX harassment claim, they had to show the following three things: (1) the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive them of access to the educational opportunities or benefits provided by the school; (2) the school district had actual knowledge of the sexual harassment; and (3) the school district was deliberately indifferent to the harassment. The school district argued that the victims failed to prove the deliberate indifference requirement.

To show deliberate indifference, the victims had to show that the dis-

trict's response was "clearly unreasonable in light of the known circumstances." The Court stated that the marker incident was not just "horseplay gone awry," as the district treated it, but was a serious sexual assault. Accordingly, the Court stated, such assault should have received a more severe punishment than was given. As to the other incidents experienced by the victims, the Court held that the district's eventual response was unreasonable because the district did not take sufficient actions to protect the victims, did not conduct an investigation of the incidents and did not punish the behavior in a timely manner.

How This Affects Your District:

This case demonstrates how a district can become liable under Title IX if accusations of sexual misconduct among students are not taken seriously. When accusations such as these are made, districts must respond quickly to decipher what accusations are true and to create a safe environment for all students by making clear, through disciplinary

(Continued on page 2)

Inside This Issue:

District Liable Under Title IX in Locker Room Harassment Case 1

Notice Requirements Related to Students With Disabilities 2

Duty of Care Present When Reporting Employment Information to Hiring District 2

Court Allows ADA Claim for Bus Driver Trainee 3

Requirement to Present Birth Certificate for School Enrollment is Unconstitutional 4

Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

District Liable Under Title IX in Locker Room Harassment Case, Cont.

actions, that harassment and bullying will be taken seriously. The General Assembly in Ohio has made it clear, through the Jessica Logan Act and other recent provisions related to student bullying

and harassment, that schools have a responsibility to ensure that students feel safe while at school. In order to comply with the law and to make decisions regarding student harassment easier, district policies

regarding bullying and harassment should explicitly state the steps your administrators will take whenever harassment is alleged.

Notice Requirements Related to Students With Disabilities

Over the past few months, ERF has done various presentations related to SB 316 and its effect on school districts. One change made by SB 316 relates to school districts' responsibilities regarding informing parents of students with disabilities about the Jon Peterson scholarship and the autism scholarship programs. There have been many questions posed about those responsibilities, therefore, we wanted to provide insight into what exactly is required.

According to R.C. 3323.052, each time a school district either completes an evaluation of a child with a disability or commences development, review, or revision of an IEP, the district must provide infor-

mation, via a notification, to that child's parents about both the autism scholarship program and the Jon Peterson special needs scholarship program. The notification must be provided to the parent either by letter or by electronic means. Specifically the notice must include the following statement:

"Your child may be eligible for a scholarship under the Autism Scholarship Program or the Jon Peterson Special Needs Scholarship Program to attend a special education program that implements the child's individualized education program and that is

operated by an alternative public provider or by a registered private provider."

In addition to that specific statement, the notice must also include the telephone number of the ODE office that is responsible for administering the scholarship programs and the specific location of scholarship information on the department's website. It is the responsibility of each district to develop a notice that meets these criteria. If you would like to see a sample notice, contact us and we will provide that for you.

Duty of Care Present When Reporting Employment Information to Hiring District

Doe-3 v. McLean Cnty. Unit Dist. No. 5, Nos. 112479/112501 (Ill. Aug. 9, 2012).

The Illinois Supreme Court ("Supreme Court") ruled that districts owe a duty to accurately provide employment information about employees to subsequent employers.

An elementary school teacher sexually abused two female students while employed by Urbana School District 116 during the 2005-06 school year. Prior to working at Urbana, the teacher worked at McLean County Schools, where he was accused of teacher-on-student sexual harassment, sexual abuse

and sexual grooming. The teacher was disciplined twice during the 2004-05 school year, and ultimately was dismissed by the district prior to the close of that year. The teacher signed a severance agreement concealing the sexual abuse and the district created a misleading letter of reference, which it furnished to Urbana.

When asked to provide employment information about White to Urbana, the former district falsely stated on Urbana's "Verification of Employment Form" that White had worked the entire 2004-05 school year. The district further concealed from White's new employer that he had been subject to

disciplinary removal twice and had left before the school year concluded. Urbana hired White as a first and second grade teacher. The two victims were students in his class.

This Court agreed that McLean owed a duty to Urbana, however, for different reasons. The Court held that the first district did not have a duty warn the second of the teacher's conduct, or to report his conduct to a state agency. Further, there was no duty arising from the creation of the misleading reference letter. However, the Court did hold that a duty arose when the first district filled out the employment verification form. When the district

Duty of Care Present When Reporting Employment Information to Hiring District, Cont.

filled in false information on the employment verification form, the district then became liable. Therefore, it was the misrepresentation of information that gave rise to the duty.

The Court reached this conclusion by analyzing four factors: 1) the reasonable foreseeability of the injury; 2) the likelihood of the injury; 3) the magnitude of the burden of guarding against the injury; and 4) the consequences of placing the burden on defendants.

Looking at the first requirement, the Court held that the injury to the two victims was foreseeable because the first district was well aware of White's conduct while employed within its district. Under the

second factor, the Court stated: "where a teacher who is known to have abused children is hired in a teaching position at another school, the likelihood that students at the next school will be abused by that teacher is within the realm of reasonable probability." Additionally, it would not be an undue burden for an employer to accurately complete an employment form and adverse consequences would not result from such a slight burden.

The Court also acknowledged that the public policy of Illinois favors protecting children, further supporting their finding of a duty.

How This Affects Your District:

While this case is not binding in Ohio, it shows that courts are likely to find a legally duty for school districts to report accurate employment information about former employees. The case does not suggest that former districts have an affirmative duty to warn subsequent districts about issues with employees. However, it does support the notion that districts cannot actively conceal such issues by falsifying or providing inaccurate information to other districts.

Court Allows ADA Claim For Bus Driver Trainee

Rosebrough v. Buckeye Valley High School, No. 10-4057 (6th Cir. Aug. 8, 2012)

Last month the Sixth Circuit Court of Appeals, in Cincinnati, revived the lawsuit of a woman who alleged she faced disability discrimination because she does not have a left hand.

In 2007, Buckeye Valley High School in Delaware, Ohio needed new bus drivers. At that time Rosebrough, the complainant, applied for a job as a cook. However, an administrator with the school suggested that she apply as a driver instead. The administrator discussed with the State whether the fact that Rosebrough had no left hand would affect her ability to drive a school bus for the district. After receiving a waiver from the State allowing her to operate a school bus notwithstanding her disability, Rosebrough began her training.

Rosebrough alleged that during her training her supervisor commented on a need for extensive training because of her missing hand. She further alleged that the supervisor commented that she would be unable to operate some bus models because of the difficulty of opening the doors. At some point the administrator who originally offered Rosebrough the opportunity to apply for the job allegedly made statements regarding Rosebrough becoming "high maintenance." Further, the administrator may have alluded to the fact that parents would not be happy with Rosebrough as a driver. The administrator stated that even if those comments were made, they were not in reference to Rosebrough's missing hand, but rather to issues with her demeanor and reckless driving habits. Conversely, Rosebrough alleged that these comments were made and she took them to mean that parents would not be happy with her as a driver

because of her disability.

To complete her training Rosebrough needed assistance from a trainer in the school district that planned to hire her, in order to obtain her commercial driver's license ("CDL"). Rosebrough asserted that the school district would not schedule a trainer to accompany her for the commercial license test and thus, she never finished her training to become a school bus driver.

This Court held that the ADA covers "discrimination on the basis of disability during job training." Therefore, individuals are protected from discrimination when training for a position if that discrimination could deny them the opportunity to obtain qualifications necessary to gain employment in a particular position. It is, however, important to note that the Court did not comment on whether it thought

(Continued on page 4)

Court Allows ADA Claim For Bus Driver Trainee, Cont.

there was actually discrimination in this case. The only ruling was regarding whether a person who is training for a job can file a claim for disability discrimination under the ADA.

How This Affects Your District:

It is important to remain cognizant of the fact that an ADA claim can apply to people who are not only employees, but who are training to be employees. While none of the allegations from this case have been proven as fact regarding

the district discriminating against the trainee with a disability, the district will be liable for that discrimination if those allegations are proven to be true. In general, a person must be "otherwise qualified" for the position they wish to obtain in order to file a disability discrimination claim. The Court noted that since "job training" is included in the ADA provisions, a person is protected by the ADA while he or she receives any training that is required to perform essential functions of the job for which that per-

son is applying. Therefore, if a district begins aiding an applicant with obtaining qualifications for a position, the district should avoid discontinuation of that assistance unless there is a justifiable reason not dealing with the applicant's disability.

Requirement to Present Birth Certificate for School Enrollment is Unconstitutional

***Hispanic Interest Coalition of Alabama v. Alabama*, Nos. 11-14535-14675 (11th Cir. Aug. 20, 2012).**

The Alabama legislature passed HB 56 in June 2011. This bill was implemented, according to the legislature, to maximize enforcement of federal immigration laws and to discourage illegal immigration within the state of Alabama.

The part of the bill that was challenged in this case made it a requirement for schools to determine whether an enrolling child was an illegal immigrant. In order to make that determination, schools were to ask each student for his or her birth certificate. If there was not a birth certificate available or if it was determined the student was born outside of the United States, then the parents of that child were required to notify the school of the country of citizenship of the student. This notification had to be provided through official documentation and testimony from the parents. If a parent chose not to comply, then the student would automatically be presumed to be an illegal immigrant.

The Hispanic Interest Coalition of Alabama ("HICA") challenged this piece of legislation on the grounds that it violated the Equal Protection Clause. The Court used the U.S. Supreme Court case of *Plyler v. Doe*, to note that HICA was likely to succeed on its merits under the Equal Protection Clause. In *Plyler v. Doe*, the U.S. Supreme Court held that if a provision "significantly interferes with the exercise of the right to an elementary public education" then that provision is unlawful. The Court in the instant case held that the section being challenged did cause such significant interference, because parents were likely to keep their children home rather than send them to school with the knowledge that the school would ask for citizenship documentation.

The only way that the Court would uphold the section challenged is if there is a "substantial state interest" in knowing this information that outweighs the detriment it would cause to the students who would likely not attend school. Finding none, the Court ruled that the section was unconstitutional and went against the landmark *Plyer*

case.

How This Affects Your District:

While this decision is not binding on Ohio cases, it illustrates that the decision in *Plyler v. Doe* is still relevant. From time to time districts ask questions regarding whether they can require that a parent present a birth certificate upon enrollment in a district. While districts are allowed to ask for that documentation, they are not allowed to require it in order to enroll. In Ohio, if parents do not present a birth certificate when enrolling a child, the district does have a responsibility under the "Missing Child Law" to report the lack of birth certificate to local law enforcement agencies in order to ensure the child is not a missing child. However, the child must still be enrolled and if the child is found to not be missing, no other repercussions can come of the child or parents for lack of birth certificate or proof of citizenship.

Education Law Speeches/Seminars

Administrator's Academy Dates at Great Oaks Instructional Resource Center

You can enroll in an Administrator's Academy session using the form on our website or by emailing Pam Leist at pleist@erflegal.com.

September 27th, 2012 — *Sports Law*

December 6th, 2012—*Navigating Workers' Compensation and Unemployment Law Issues*

March 7th, 2013—*Advanced Topics in School Finance Law*

June 13th—*Special Education Legal Update*

July 11th—*Education Law Legal Updates 2012-2013*

Other Upcoming Presentations

Bronston McCord
Mercer County & Auglaize County Treasurers Retreat on September 7, 2012
Legal Update

Erin Wessendorf-Wortman
SOESC Superintendent's and Administrator's Retreat on September 14, 2012
Legal Update

Bill Deters & Jeremy Neff
Clermont County ESC on September 18, 2012
Effective IEP Teams

Jeremy Neff
Greater Cincinnati Human Resources Association on September 20, 2012
Basics of FMLA

Erin Wessendorf-Wortman
Brown County ESC on October 29, 2012
Cyberlaw

Webinar Archives

Did you miss a past webinar or would you like to view a webinar again? If so, we are happy to provide that resource to you. To obtain a link to an archived presentation, send your request to Pam Leist at pleist@erflegal.com or 513-421-2540. Archived topics include:

- Education Law Legal Update - Including SB 316
- Effective IEP Teams
- Cyberlaw
- FMLA, ADA and Other Types of Leave
- Tax Incentives
- Prior Written Notice
- Student Residency, Custody and Homeless Students
- Ohio Budget Bill/House Bill 153
- Student Discipline
- Media and Public Relations
- Gearing Up for Negotiations

Need to Reach Us?

William M. Deters II
 wmdeters@erflegal.com
 Cell: 513.200.1176

J. Michael Fischer
 jmfischer@erflegal.com
 Cell: 513.910.6845

Jeremy J. Neff
 jneff@erflegal.com
 Cell: 513.460.7579

Pamela A. Leist
 pleist@erflegal.com
 Cell: 513.226.0566

C. Bronston McCord III
 cbmccord@erflegal.com
 Cell: 513.235.4453

Gary T. Stedronsky
 gstedronsky@erflegal.com
 Cell: 513.674.3447

Ryan M. LaFlamme
 rlaflamme@erflegal.com
 Cell: 513.310.5766

Erin Wessendorf-Wortman
 ewwortman@erflegal.com
 Cell: 513.375.4795

ERF Practice Teams

Construction/Real Estate

*Construction Contracts, Easements, Land Purchases
and Sales, Liens, Mediations, and Litigation*

Team Members:
 Bronston McCord
 Ryan LaFlamme
 Gary Stedronsky

Workers' Compensation

*Administrative Hearings, Court Appeals, Collaboration
with TPA's, General Advice*

Team Members:
 Ryan LaFlamme
 Pam Leist
 Erin Wessendorf-Wortman

Special Education

*Due Process Claims, IEP's, Change of Placement,
FAPE, IDEA, Section 504, and any other topic related
to Special Education*

Team Members:
 Bill Deters
 Pam Leist
 Jeremy Neff
 Erin Wessendorf-Wortman
 Michael Fischer

School Finance

Taxes, School Levies, Bonds, Board of Revision

Team Members:
 Bill Deters
 Bronston McCord
 Gary Stedronsky
 Jeremy Neff