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DISTRICT COURT ALLOWS FIRST AMENDMENT AND DUE PROCESS CLAIMS TO PROCEED IN FLYNN V. BIG SPRING SCHOOL DISTRICT

*Flynn v. Big Spring Sch. Dist., No. 1:22-CV-00961, 2024 U.S. Dist. LEXIS 168913, at *2 (M.D. Pa. Sep. 19, 2024) (District Court permits Plaintiffs who were regular attendants at school board meetings to move forward with First Amendment and Procedural Due Process Claims after being issued no-trespass letters for holding signs critical of the District and its policies during school board meetings).*

BACKGROUND

Lawrence Flynn and Ariene Reinford ("Plaintiffs") were residents of Big Spring School District ("the District"). Plaintiffs regularly attended District School Board meetings, provided public comment at those meetings, and held signs critical of District policies and decisions. At one school board meeting, the Plaintiffs provided public comment, Reinford placed a sticker on a bathroom door,[1] and Flynn held up a sign critical of the District's use of taxpayer funds and COVID-19 policies. Flynn held the sign above his head and turned the sign around to face the camera, as the school board meetings were live streamed. The District had a Policy that restricted the use of signs and placards at Board meetings ("Policy 903"), so the Board President enforced Policy 903 and asked Flynn to lower his sign because it was obstructing the view of other attendees. Other school board members commented that Flynn should lower his sign was because it was distracting and because the message on the sign was factually inaccurate.

A few days after the meeting, the Plaintiffs received no-trespass letters from the District's superintendent indicating that they were banned from attending school board meetings in person. The District live streamed its meetings, so Plaintiffs were able to virtually watch the school board meetings. Additionally, more than thirty (30) days after the no-trespass letters were in effect, the District permitted the Plaintiffs to submit public comments via email to the District superintendent and the school board members, wherein the comments would be read out loud and included in the official meeting minutes. During the time the no-trespass letters were in effect, the Plaintiffs did not submit public comment. However, Plaintiffs did communicate with the District about other matters. The no-trespass letters were in effect for six (6) months but were eventually rescinded.

Plaintiffs then filed this suit against the District alleging violations of their First and Fourteenth Amendment rights. The District Court granted partial summary judgment to the District and dismissed one (1) out of five (5) of Plaintiffs' claims.

DISCUSSION

The District Court dismissed Plaintiffs' claims challenging the constitutionality of Policy 903 as it applied to Reinford but

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refused to dismiss the claim as it applied to Flynn. The Court acknowledged that a school board meeting is a limited public forum where the government may restrict the time, place, and manner of speech, as long as those restrictions are reasonable and serve the purpose for which the government created the limited public forum. However, while the District claimed the purpose of Policy 903 was to keep order during meetings and prevent distractions and obstructed views, there was an issue of material fact as to whether the policy was unconstitutional as applied to Flynn because it appeared that the Policy was used to restrict the content of his speech rather than the time, place, and manner of his speech.

The District Court also refused to dismiss Plaintiffs' claims of retaliation under 42 U.S.C. § 1983. The First Amendment right to free speech includes not only the affirmative right to speak, but also the right to be free from retaliation by a public official for the exercise of that right. To bring a claim, under Section 1983, for First Amendment retaliation, the plaintiff must prove 1) that he engaged in First Amendment-protected activity, 2) that the defendant's allegedly retaliatory action was sufficient to deter a person of ordinary firmness from exercising his First Amendment rights, and 3) that there was a causal connection between the protected activity and the retaliatory action.

The Court reasoned that the Plaintiffs were engaged in protected First Amendment activity when they provided public comment and held signs critical of the District at the school board meeting; that the District's issuance of no-trespass letters to the Plaintiffs appeared to be causally connected to Plaintiff's protected First Amendment activity at the school board meeting; and that issuing no-trespass letters would effectively deter a reasonable person from exercising their First Amendment rights.

Further, the Court refused to dismiss Plaintiffs' claim that the District's decision to ban them from attending in-person school board meetings violated their First Amendment right to petition. The right to petition the government is one of the most precious of the liberties safeguarded by the Bill of Rights and is essential to the ideal of a republican government as it permits the "public airing of disputes, the evolution of the law, and the use of government as an alternative to force." While the Court did not analyze the merits of the District's argument that the Plaintiffs were still able to effectively participate in the meetings by submitting public comment electronically and live streaming the school board meetings, it determined that there was a genuine issue of material fact that allowed the Plaintiffs' claims to proceed at this stage of litigation.

Plaintiffs also argued that their procedural due process rights were violated when they were banned from attending school board meetings in person. While the District argued that there was not a due process issue because it permitted Plaintiffs to submit public comment to the superintendent and school board members via email, the Court pointed out that the Plaintiffs were not provided with a mechanism to challenge their bans until at least thirty (30) days after they received the no-trespass letters. Accordingly, the Court refused to dismiss Plaintiffs' procedural due process claims.

PRACTICAL ADVICE

School Districts can restrict the time, place, and manner of speech at school board meetings by adopting reasonable policies to ensure public meetings run efficiently and effectively. Districts can also remove citizens from public meetings for disruptive or threatening conduct. However, Districts should not remove or ban citizens from attending public meetings solely due to the content of their speech, which, as demonstrated in *Flynn*, can include signs that are critical of District policies or decisions.

[1] The Court did not have information related to the writing and/or content on the sticker.

COURT LIMITS TITLE IX / CIVIL RIGHTS CLAIMS AGAINST PARTICIPATING DISTRICTS IN TECHNOLOGY CENTERS

B.W. v. Career Technology Center of Lackawanna County, 2024 W.L. 4300718 (M.D. Pa. 2024). On various claims arising from alleged abuse of former students, Federal District Court denies summary judgment for career technology center, ruling that claims did not extend to center's participating school districts.

BACKGROUND

Title IX and Federal civil rights claims against public bodies often are interpreted broadly, but a recent decision from the Federal District Court for the Middle District of Pennsylvania refused to extend liability against a career technology center to school districts who were participating districts in the center's operations.

The Career Technology Center of Lackawanna County ("CTC") is a vocational-technical school that is under a Joint Operating Agreement involving several School Districts. The Joint Operating Committee ("JOC") operates the CTC, and the JOC's duties include hiring and firing of CTC employees. The JOC approved the hiring of Richard Humphrey as an automotive technology instructor. But over the following two school years, Humphrey sexually abused nine minor male students in his automotive technology class. Plaintiffs also claimed that three other CTC teachers or teacher's aides, the CTC's Director and Assistant Director, as well as an outside educational consultant were told about or witnessed firsthand Humphrey's sexual abuse or conduct. But the CTC did not report such abuse to law enforcement or otherwise discipline the teacher. Eventually a parent reported Humphrey, using ChildLine Services, and the police began a criminal investigation into Humphrey. Humphrey was suspended and eventually resigned; he was later charged and convicted of multiple sex crimes and pled guilty to 11 counts of indecent assault and one count of corruption of a minor. He was adjudicated a violent sexual predator and sentenced to serve 11 to 33 months in Lackawanna County Prison.

Subsequently, Plaintiffs filed a Complaint against the CTC and several of the participating School Districts in the Lackawanna County Court of Common Pleas, with Defendants removing the complaints to Federal court. After pruning several of the claims, discovery was taken and subsequently the Defendants filed summary judgment motions on the remaining claims, including for Title IX Sexual Harassment, 42 U.S.C. § 1983 Fourteenth Amendment Violation, and a 42 U.S.C. § 1983 Action for Failure to Train and Supervise. While the motions were pending, the Plaintiffs then amended their Complaint to include common law claims related to negligence and vicarious liability against the CTC and School Districts.

DISCUSSION

The legal standard for summary judgment motions is that such should be granted if the pleadings and discovery show there is no general issue to any material fact and from the facts the party is entitled to judgment as a matter of law. In deciding the Title IX Sexual Harassment claim, the Court found the issue was whether an appropriate person at the CTC and each of the four Districts had actual knowledge of the substantial danger Humphrey posed to students. The Court noted that such Title IX liability cannot be based on negligence but whether the defendant was "deliberately indifferent" to known acts of discrimination towards students and where such deliberate indifference to this actual knowledge caused the discrimination. Further, there must be an official decision by the defendant not to remedy the situation. The CTC argued that the students failed to show that an appropriate person at CTC had actual knowledge of the danger Humphrey posed to students. But the Court found abundant evidence that the highest-ranking administrators were directly told by multiple students about Humphrey's abuse. Moreover, no administrator took any action to protect the students upon receiving reports of such abuse or even made an attempt to investigate. Such behavior was clearly indicative of "deliberate indifference" by the CTC. Further, it was clear that the Plaintiffs were intentionally discriminated against by Humphrey who was criminally convicted of assaulting them. That discrimination affected Plaintiffs' training experiences at the CTC, in violation of Title IX.

The students argued that such liability should also flow to the School Districts. But the Court found that they failed to establish that an appropriate person at each

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District had actual knowledge of the danger posed. Pointing to the CTC Director was insufficient: the Court found that the Director was employed by the CTC, not the participating districts, and the district administrators did not have the authority to take unilateral action against Humphrey. Also there is no evidence that the JOC had knowledge that it should have terminated him prior to the state investigation.

On their Section 1983 claims, the Plaintiffs argued that the CTC and the Districts, through their policymaking officials, maintained and endorsed practices that resulted in violation of their constitutional rights, including the right to bodily integrity (such as being free from sexual abuse). The Court found the record showed the CTC's policies and procedures for reporting sexual abuse were inconsistent with Pennsylvania law, especially as the CTC directed its teachers to report suspected abuse only to the school building administrator and not to ChildLine first. In its failure to report, a reasonable jury could find the CTC's training deficiency was a result of deliberate indifference by CTC officials. But in extending this liability to the District, there was no evidence to show that a training deficiency on the District's part, and none of the Districts through their JOC representative could have unilaterally approved any policy changes.

The Court also considered reviewed claims made under the Pennsylvania Political Subdivision Tort Claims Act ("Act"). Under the Act, public entities are generally immune from injury claims, but under a recent amendment, sexual abuse claims are excluded from immunity. The Court rejected CTC's argument that its officials' failure to report the crimes was outside the Act, to the contrary, such actions for failing to report were related to the CTC administrators' official duties. Further, it was clear that the CTC could theoretically be sued for negligence for sex abuse, as well as for negligent hiring, retention, and supervision claims related to sex abuse. But there was no proof that the CTC knew or could have known of any incidents relating to Humphrey's past. Further, liability could not attach to the individual School Districts as there was no employment relationship between the individual School Districts and the CTC employees.

The Court ruled in favor of the CTC on issues such as negligent hiring as no proof existed that the CTC knew of Humphrey's past. More important, the Court overall granted summary judgment in favor of the District on any claims against them. While the Plaintiffs argued that as members of the JOC, the Districts were ultimately responsible for the activities at the CTC, the Court noted that career technology centers are separate legal entities from school districts and no evidence existed that any of the Districts were aware of the teacher's behavior before his arrest.

PRACTICAL ADVICE

One could misinterpret the primary holding of the *B.W.* case and believe that participating school districts are automatically free from legal actions involving career and technology centers. But the true lesson is that any school entity must be vigilant in addressing sexual harassment cases. Even if a school entity has policies that address Title IX or sexual abuse issues, entities still must follow all requirements under law, such as ChildLine communications, and maintain training in reporting abuse incidents in order to preclude liability.

DISTRICT COURT DISMISSES A PARENT'S ASSOCIATIONAL DISCRIMINATION CLAIM AGAINST A SCHOOL DISTRICT

J.L., et. al. v. Lower Merion School District, 2024 U.S. Dist. LEXIS 209674 (E.D. Pa. November 19, 2024) (A parent did not sufficiently allege an associational discrimination claim stemming from a school district's discrimination against her autistic son)

BACKGROUND

Alex Le Pape, a student at Lower Merion School District ("District") since 2006, was diagnosed with autism as a child and identifies as a non-speaker. In tenth grade, Alex began communicating using the "spelling to communicate" method, in which he would point to letters on a letter-board held by a communication support person.

Initially, the District did not allow Alex to utilize a letter-board in class but later granted him permission. The District did not, however, provide him with a trained communication support person. Alex's mother then sought permission from the District to serve as his communication partner during class and extracurricular activities. She reduced her work schedule in order to do so.

The District initially agreed to this arrangement. Over the next few years, however, there was back-and-forth between Alex's parents and the District about who would serve as Alex's communication partner and whether his individualized education plan ("IEP") should be revised. Eventually, in 2018, the District decided that Alex should not be allowed to use a letter-board in class at all. Thereafter, Alex's parents began homeschooling him.

The District later revised his IEP to allow him to use a letter-board but again did not agree to fund a communication support person. Alex's parents did not return him to school. In order to homeschool Alex, his mother took a leave of absence, paid for her own health insurance, and continued with a reduced work schedule. She was unable to return to her normal work schedule, and her salary was reduced.

Alex's parents subsequently sued the District for intentional discrimination against Alex as well as associational discrimination against themselves. Following a remand from the Third Circuit on other issues, the District moved to dismiss all the claims. After oral argument, the Eastern District denied the District's motions as to the intentional discrimination claims but reserved judgment on the associational discrimination claims for the mother. (The Plaintiffs conceded at oral argument that no such claim existed for the father.)

DISCUSSION

The District set forth two arguments in support of its motion: 1) the Plaintiffs did not plead any associational discrimination claim in their Amended Complaint and were foreclosed from doing so at this stage; and 2) even if the claims had been properly pled, the Plaintiffs failed to set forth facts establishing that the District discriminated against Alex's mother. The Court, ultimately, agreed with both of the District's arguments and granted the District's motion.

The Plaintiffs argued that they need not plead such a claim in their Amended Complaint and that the mother's associational discrimination claims were instead based on evidence in the record. The Court disagreed, citing a plethora of caselaw holding that a plaintiff may not amend its complaint in response to a motion for summary judgment. Further, the Court rejected the idea that the mother's associational discrimination claims served as a constructive motion to amend the Amended Complaint to include these claims. Accordingly, the Plaintiffs' failure to plead these claims warranted summary judgment in favor of the District.

The Court also held that, even if these claims were properly pled, the mother did not suffer any direct injury from the District's associational discrimination. In order to succeed on an associational discrimination claim, the mother must have suffered a direct injury from the District's discrimination against her. Here, however, there was no evidence that the mother's lost wages and health insurance coverage stemmed from the District's treatment of her. Instead, these injuries stemmed from the District's treatment of Alex. Therefore, the mother's derivative injuries could not form the basis of an associational discrimination claim.

PRACTICAL ADVICE

In *J.L.*, the District and Alex's parents engaged in significant back-and-forth regarding Alex's IEP and an appropriate communication support person. The District repeatedly changed course and reneged on promises made to the parents. Thus, one lesson from the *J.L.* decision is that school districts need to work effectively with parents in formulating an IEP that is satisfactory to all parties in order to avoid costly litigation. Additionally, the *J.L.*. opinion shows that parents of disabled students can sue for associational discrimination, and school districts need to be mindful that such claims may arise.

SCHOOL DIRECTOR'S FIRST AMENDMENT RIGHTS NOT VIOLATED WHEN BOARD AND SUPERINTENDENT CRITICIZE HIS OFFENSIVE SOCIAL MEDIA POSTS

Detschelt v. Norwin School District 23-cv-1402 (W.D. Pa. Dec. 20, 2024). The District Court for the Western District of Pennsylvania dismisses complaint filed by school director which alleged that statement issued by the school district and superintendent to the community in response to his social media posts constituted unconstitutional retaliation in violation of the First Amendment.

BACKGROUND

On October 25, 2022, Deschelt, a duly elected member of the Norwin Board of Education (the "School Board" or the "Board"), posted an image of a satirical Halloween costume package (the "Meme") on the Norwin Area Talk Facebook page, that contained and displayed the phrase "[Expletive deleted] Retard" in reference to a person depicted with a "Medical Mask" and "Virtue Cape" who has had "3 [presumably Covid] Boosters" and has a "Sense of Superiority."

Shortly after posting the meme, Deschelt removed it, stating, in part: "Sorry if anyone was offended by my costume meme…I've removed it due to some people reaching out feeling strongly against it." On another Facebook group, Deschelt wrote, in part: "…but I still stand by the humor of the overall meme and hope it makes the libs 'Reeeeeeeeee.'"

On October 28, 2022, District Superintendent Taylor informed the Board that he had drafted a statement and, later that day, sent the statement to the District's 7,713 stakeholders. The statement provided, in part:

> The District was made aware of social media posts shared on Facebook by a member of the Norwin Board of Education, Mr. Alex Detschelt, containing the "R-word" and later edited to include the "Reee" phrase. The District recognizes that many found his posts to be insensitive and offensive not only to our families of students with special needs, but to members of our school community.

On October 28, 2022, the District also issued a press release that was substantially identical to the statement. Deschelt sued the District and Superintendent Taylor, alleging that they devised, issued, and publicly released the District's statement and press release in retaliation for Detschelt posting the Meme and subsequent comments. Detschelt further alleged that the District's statement and press release were issued for the sole purpose and effect of chilling and deterring Detschelt "from engaging in pure speech and expressive conduct" protected by the First Amendment, "activity such as criticizing the administrative regime of the School District or privately posting potentially offensive memes on private Facebook pages that are nonetheless within the ambit of speech covered by the First Amendment."

DISCUSSION

To plead a claim of retaliation for the exercise of First Amendment rights, a plaintiff must adequately allege the following three elements: "1) constitutionally protected conduct, 2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and 3) a causal link between the constitutionally protected conduct and the retaliatory action."

Initially, the court agreed with Detschelt that he engaged in constitutionally protected conduct when he posted the meme and meme-related comments – matters of public concern – as a private citizen because his posts referred critically to Covid-related measures and "liberals" shortly before an election.

As for the second element, because the alleged retaliatory conduct by the District was its own official speech (i.e., the statement and press release), the court first had to determine whether such official speech can be legally retaliatory. The court concluded that the press release and statement were not retaliatory.

"Official speech will only constitute a retaliatory act if it is of a 'particularly virulent character.'" Under this test, the court, considering the allegedly retaliatory speech at issue, asks "'whether there was a threat, coercion, or intimidation, intimating that punishment, sanction, or adverse regulatory action will follow.'" The court concluded that the statement and press release did not meet the virulent character test because they explained that the District was made aware that

Detschelt had posted the meme that "many found…to be insensitive and offensive" and conveyed that the District "does not condone nor support the use of these terms in any capacity" and that Detschelt's postings "represent his personal views and do not represent, nor reflect, the views of the Norwin School District, the District Administration, or the Norwin Board of Education." In other words, the court dismissed the complaint because the statement and press release in no way communicated "a threat, coercion, or intimidation, intimating that punishment, sanction, or adverse regulatory action will follow.

PRACTICAL ADVICE

Detschelt demonstrates that while school board members have First Amendment rights, school districts and school boards also have First Amendment rights. In other words, school employees and other board members have the right to rebut and refute the comments made by a fellow board member. When those rights conflict with one another, speech must be of a particularly virulent character to violate the First Amendment. When issues like this arise, schools should work with their solicitors to ensure any statements do not cross the threshold from protected rebuttal speech to retaliatory speech.

FEDERAL GRANT EXPENDITURES PROPERLY EXCLUDED FROM CHARTER TUITION CALCULATIONS

Esperanza Academy Charter School v. The School District of Philadelphia, 2024 WL 4875053 (Pa.Cmwlth. 2024). (Pennsylvania's Commonwealth Court held that school districts' deductions of federal grant expenditures from charter school tuition calculations were appropriate and compliant with the Charter School Law.)

Section 1725-A of the Charter School Law establishes the formula for calculating the tuition rates paid by school districts to charter schools for the enrollment in charter schools of school district resident children. Generally, the statute bases charter school tuition upon the school district's budgeted total expenditure per averaged daily membership (ADM), excluding certain costs such as the budgeted expenditures for nonpublic school programs, adult education programs, student transportation services, facilities acquisition, construction and improvement services, and debt service.

For the purpose of calculating charter school tuition rates, the Pennsylvania Department of Education promulgated Form PDE-363 which enumerates a school district's budgeted educational expenditures. In addition to those costs specifically excluded by Section 1725-A of the CSL, the PDE-363 also includes exclusions for: regular education (federal only), vocational education (federal only), other instructional programs (federal only), Pre-K (federal only), Pre-K (state Pre-K counts only), pupil personnel (federal only), instructional staff (federal only), administration (federal only), pupil health (federal only), business (federal only), operation and maintenance of plant services (federal only), central (federal only), other support services (federal only), and operation of noninstructional services (federal only).

For the 2015-16 school year, the School District of Philadelphia completed the PDE-363 form to compute its charter tuition rates and, as provided by that form, excluded budgeted expenditures paid through federal funds and grants. Esperanza Academy Charter School and Esperanza Cyber Charter School contested the school district's tuition calculation, contending that the exclusion of federal expenditures per the PDE-363 form was not authorized by the CSL. Before the Secretary of Education, the charter schools' claims were denied. That ruling was appealed by the charter schools to the Commonwealth Court.

The Commonwealth Court upheld the Secretary's determination. The court concluded that Section 1725-A of the CSL does not require the inclusion of expenditures paid for through federal grant funds to be used in charter tuition calculations. The court observed that restrictions within federal laws governing the school district's use of such funds required that they be used only for district-operated programs. Because the only permissible use of those funds is for the benefit of the school district's students, the court reasoned that their inclusion in the charter school tuition calculation resulted in an improper diversion of those funds to charter schools.

Accordingly, the practice of excluding federally funded expenditures from charter school tuition calculations as instructed by the PDE-363 form remains valid.

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