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APPEALS COURT HOLDS THAT TITLE IX REQUIRES SCHOOLS TO PROVIDE TRANSGENDER STUDENTS ACCESS TO RESTROOMS CONGRUENT WITH THEIR GENDER IDENTITY

G. G. v. Gloucester County School Board, 2016 U.S. App. LEXIS 7026 (4th Cir. Va. Apr. 19, 2016). A three-judge panel of the Court of Appeals for the Fourth Circuit reverses the lower court's dismissal of a transgender boy's Title IX claim and holds that, with respect to bathrooms, the Department of Education's Office for Civil Rights' interpretation of Title IX regulations that school districts must treat transgender students consistent with their gender identity must be given controlling weight.

SUMMARY AND FACTUAL BACKGROUND

G.G., a student with a birth-assigned sex of female, informed the school district during his sophomore year that he identifies himself as a male. The school officials were supportive and took steps to ensure that he would be treated as a boy by teachers and staff. At G.G.'s request, school officials allowed him to use the boys' restrooms and he used the boys' restrooms without incident for about seven weeks. His use of the boys' restroom, however, aroused the interest of others in the community.

After two heated Gloucester County School Board ("Board") meetings, the Board passed a resolution limiting the use of locker rooms and bathrooms to corresponding biological genders (i.e., birth-assigned sex) and providing for "alternative appropriate private" facilities for "students with gender identity issues."

G.G. sued the Board, claiming that the Board impermissibly discriminated against him in violation of Title IX of the Education Amendments Act of 1972 ("Title IX") and the Equal Protection Clause of the Constitution and sought an injunction allowing him to use the boys' restroom. The lower court dismissed G.G.'s Title IX claim and denied his request for a preliminary injunction, but withheld ruling on the motion to dismiss G.G.'s equal protection claim. G.G. appealed this decision to the Court of Appeals for the Fourth Circuit.

DISCUSSION

To receive federal funding, school districts must be in compliance with Title IX. Title IX provides: "[n]o person…shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). The Department of Education's ("Department") regulations implementing Title IX permit the provision of "separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students

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of one sex shall be comparable to such facilities for students of the other sex." 34 C.F.R. § 106.33.
In an opinion letter dated January 7, 2015, the Department's Office for Civil Rights ("OCR") interpreted this regulation with respect to transgender students, stating: "When a school elects to separate or treat students differently on the basis of sex…a school generally must treat transgender students consistent with their gender identity."

The issue before a panel of the Court of Appeals for the Fourth Circuit was whether courts were bound to follow the OCR's interpretation of the regulation, as set forth in the January 7, 2015 letter. In *Auer v. Robbins,* the Supreme Court held that an agency's interpretation of its own ambiguous regulation must be given controlling weight unless the interpretation is plainly erroneous or inconsistent with the regulation or statute. 519 U.S. 452, 461 (1997).

Under the *Auer* test, a court must determine whether the regulation is ambiguous. The Fourth Circuit concluded that the regulation was ambiguous as to whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms.

Next, under *Auer*, a court must examine whether the interpretation is clearly erroneous or inconsistent with the regulation or statute. Because the term "sex" is not limited to a hard-and-fast binary division on the basis of reproductive organs, but instead acknowledges the varying physical, psychological, and social aspects included in the term, the court found that the interpretation was not plainly erroneous or inconsistent with the regulation or statute .

Accordingly, the court concluded that the Department's January 7, 2015 opinion letter, stating that school district "generally must treat transgender students consistent with their gender identity," was entitled to *Auer* deference, reversed the district court's dismissal of G.G.'s Title IX claim and remanded the case to the district court.

SUBSEQUENT DEVELOPMENTS

There have been two major developments since this decision. First, the Board filed a petition asking the U.S. Court of Appeals for the Fourth Circuit to order a rehearing by all 15 judges on the Fourth Circuit. The Fourth Circuit, in accordance with the Federal Rules of Appellate Procedure 41(d)(1), issued a mandate staying enforcement of the Fourth Circuit panel decision until further decision by the Fourth Circuit.

In addition, on May 13, 2016, the Department of Education and Department of Justice issued a Dear Colleague Letter on Transgender Students ("Guidance"). The Guidance does not change any laws, but informs districts how existing laws will be interpreted. The Guidance states, with respect to restrooms and locker rooms, that school district should provide transgender students with the right to use restrooms and locker rooms consistent with their gender identity. In addition, transgender students should not be forced to use single-person facilities, though single-person facilities can be provided to anyone who wants privacy.

PRACTICAL ADVICE

While not binding on Pennsylvania school districts, *G. G. v. Gloucester County School Board* is an important case because it is the first decision issued by a federal appeals court on this issue and could be a persuasive authority for Pennsylvania courts. However, many questions concerning the treatment of transgender students remain unanswered. For example, G.G. only challenged the Board's policy with respect to separate restrooms, but the court's ruling could necessarily change the definition of "sex" for purposes of assigning separate living facilities, locker rooms, and shower facilities. The majority of the Fourth Circuit panel acknowledged that "an individual has a legitimate and important interest in bodily privacy such that his or her nude or partially nude body, genitalia, and other

private parts" are not involuntarily exposed. Accordingly, the court may have permitted separate locker room and shower facilities. However, the Guidance instructs school districts to permit transgender students to use bathrooms and locker rooms consistent with their gender identity.

Accordingly, because the issues involving transgender students are complex, controversial and novel, school districts should consult with their solicitor prior to implementing any policies concerning transgender students.

THE PENNSYLVANIA SUPREME COURT EXPANDS APPLICATION OF TRANSFER BETWEEN ENTITIES ACT

Central Westmoreland Career and Technology Center Education Association v. Penn-Trafford School District (Pa. Supreme Court, decided February 16, 2016). The Pennsylvania Supreme Court held that paragraph (b.1) of the Transfer between Entities Act, 24 P.S. §11-1113, required the Penn-Trafford School District to fill a vacant math teaching position from a pool of suspended CWCTC math teachers, even though there had been no transfer of programs or classes, because Penn-Trafford had assumed "program responsibility" for students who had previously received math instruction at CWCTC.

SUMMARY AND FACTUAL BACKGROUND

The Central Westmoreland Career and Technology Center ("CWCTC") provides career and technical training to high school students from numerous sending districts in Westmoreland County including the Penn-Trafford School District. For a number of years, CWCTC taught math to students enrolled in career and technical programs at the school. In early 2010, eight member districts of the CWCTC jointure, including Penn-Trafford, advised CWCTC that they would no longer be sending their technical students to CWCTC for math instruction and instead would be providing math instruction to their vocational students at their home schools. Due to this change by the eight member districts, CWCTC curtailed its math offerings and suspended five math teachers.

Initially, CWCTC took the position that Section 1113 of the School Code, known as the Transfer between Entities Act (the "Act"), was not implicated because no transfer of programs or classes had occurred. However, in response to a grievance filed by the CWCTC Education Association (the "Association"), CWCTC subsequently created a pool of suspended employees pursuant to paragraph (b.1) of the Act. The pool was comprised of the five suspended math teachers.

The existing math classes at Penn-Trafford had enough capacity to accommodate the vocational students and therefore no new math classes were added for the 2010-2011 school year. In March 2010, one of Penn-Trafford's high school math teachers resigned. A substitute teacher who was not in the CWCTC pool of suspended employees was hired to fill the vacancy. He subsequently stayed on for the 2010-2011 school year. The Association and the suspended employees informed Penn-Trafford that it was their position that the district was obligated to fill the math vacancy with one of the suspended teachers in the pool. The district responded that there had been no transfer of a program or classes so as to implicate the Act. The Association disagreed and further asserted that, even absent a program transfer, the district was still required to offer the math position to properly certificated employees in the pool pursuant to sub-paragraph (b.1)(2) of the Act since the district had assumed "program responsibility" for the transferred math students.

The Association and the suspended teachers filed suit in the Westmoreland County Court of Common Pleas seeking a declaratory judgment interpreting the Act to

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require Penn-Trafford to fill the vacant math position from the CWCTC pool, as well as for lost wages and benefits. The Common Pleas Court granted Penn-Trafford's motion for summary judgment, agreeing with its argument that no transfer occurred since no classes were "dismantled" at CWCTC and "reconstituted" at Penn-Trafford. A three judge panel of the Commonwealth Court affirmed, noting that the obligation to hire from the employee pool is limited to schools that receive transferred programs of some sort and that the term "transfer" means to carry or take from one person or place to another. The Association and teachers appealed to the Pennsylvania Supreme Court.

DISCUSSION

Resolution of the appeal required the Supreme Court to determine the meaning of paragraph (b.1) of the Act. The contested issue was whether the transfer between entities of students, as opposed to the transfer of programs or classes, is sufficient to invoke the employment priorities afforded by paragraph (b.1) of the Act. The Court focused on the second sentence of paragraph (b.1) which provides that no new professional employee who is classified as a teacher may be employed by a school entity "assuming program responsibility for transferred students" while there are teachers who are properly certificated for available positions in the pool. The Court ruled that by taking action to discontinue the practice of sending their technical students to CWCTC for math instruction, Penn-Trafford had "assumed program responsibility for transferred students" and was therefore obligated to fill its vacant math position with one of the suspended CWCTC math teachers in the pool.

The Court's finding that Penn-Trafford had assumed program responsibility for transferred math students apparently was based on the action taken by Penn-Trafford to discontinue the practice of sending its technical students to CWCTC for instruction in math. It is not clear if the same result would have occurred if the teachers had been suspended as a result of fewer students choosing to take math classes at CWCTC and instead electing to receive math instruction at their home district rather than as a result of an action by their home district to stop sending students to CWCTC for math instruction. However, the Central Westmoreland opinion confirms that it is not necessary that the teacher be suspended as a result of any transfer of a program, classes or even program responsibility for students in order to be placed in the pool. Rather, the Court recognized that "entrance into a pool of teachers can be predicated on the mere receipt of a formal notice of suspension."

PRACTICAL ADVICE

Before filling any vacant teaching positions, school districts should be sure to check with their Intermediate Unit and Career and Technology Center to determine if they have suspended teachers that hold certificates for available positions in the district. The district should then analyze whether it is obligated to offer any available position to properly certificated employees in the pool. Failure to do so could result in a court order directing that district to hire a teacher from the pool for a position that has already been filled.

DISTRICT POTENTIALLY LIABLE FOR HIRING TEACHER ALLEGED TO HAVE INAPPROPRIATELY TOUCHED STUDENTS

Poe v. Southeast Delco Sch. Dist., 2015 U.S. Dist. LEXIS 168598 (E.D. Pa. Dec. 16, 2015): Hiring a teacher with past allegations of sexual misconduct toward students made the district and an administrator potentially liable under the 14th Amendment when the teacher repeated similar behavior.

SUMMARY AND FACTUAL BACKGROUND

An assistant principal at Darby Township School hired a teacher who previously taught elementary school in another district, where he was investigated for complaints of inappropriately touching his students. The teacher resigned after the investigation at the previous school district, but the court's opinion does not mention any criminal charges or convictions related to the incident. Several years later, the assistant principal at Darby hired the teacher to teach fifth grade. The complaint alleges that the Darby assistant principal knew of the sexual abuse investigation at the previous school district when she hired the teacher. During the 2006-07 school year, a student in the teacher's class complained to administrators that the teacher was inappropriately touching her. The minor plaintiff in *Poe* alleged that the teacher was not disciplined for this 2006-07 incident, and that in 2011-12 the teacher inappropriately touched the minor plaintiff, who was a student in the teacher's class that year. After the plaintiff complained to administrators, the teacher was allegedly transferred to a second grade class and ultimately charged with criminal offenses related to his abuse of students at the school. The student's mother subsequently sued the school district and the assistant principal under 42 U.S. Code § 1983, alleging that school administrators failed to protect her child from abuse.

DISCUSSION

Typically, a school district is not responsible under the 14th Amendment, or section 1983, for instances of sexual abuse committed by a staff member against a student. However, there are exceptions to this general rule. First, when a school district is "deliberately indifferent" to the rights of students, and fails to establish a policy to protect students even though there is an obvious need to do so, the district may be liable for offenses committed by teachers. Second, when a district administrator knows of a danger to students and takes affirmative action to subject students to that danger, in a manner which "shocks the conscience," the administrator may be subject to liability under a "state-created danger" theory.

In this case the Plaintiff alleged the school district did not have adequate sexual abuse policies in place, including policies to train staff regarding sexual abuse allegations, to conduct investigations, to screen teachers or to discipline teachers accused of sexual abuse. Although the court conceded that the Plaintiff had not yet identified the exact manner in which the policies were insufficient, it held that the Plaintiff's claims on this issue could proceed on a "deliberately indifferent" theory.

The court also held that if the assistant principal knew of sexual abuse allegations against the teacher, but hired the teacher and placed him in an elementary classroom anyway, the assistant principal could be liable under a "state-created danger" theory. The court explained that the assistant principal took affirmative action to place the teacher in an elementary school classroom where he would be in regular contact with young children. The court did point out that this "state-created danger" form of liability was attached to the assistant principal but not to the district itself. The court explained, "As it would be entirely foreseeable to someone with knowledge of [the teacher's] history of abuse that such an ill-considered assignment of responsibilities without providing for adequate supervision could lead to more abuse of students, and a reasonable jury could certainly find that exposing students to the risk of abuse at the hands of a teacher is shocking. Plaintiffs have sufficiently stated a claim against [the assistant principal]."

The court allowed the "deliberately indifferent" and "state-created danger" claims to go forward against the school district and the assistant principal, respectively.

PRACTICAL ADVICE

Claims similar to those involved in this case can be avoided by implementing and following policies that

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prohibit hiring teachers with past histories of sexual abuse. Pennsylvania's recent Act 168 "Pass the Trash" amendments to the School Code now require all districts to gather employment history information from previous employers, in order to uncover past instances of child abuse. 24 P.S. § 1-111.1. Under Act 168, a Pennsylvania school district has broad discretion to reject an applicant who an employer previously investigated for sexual misconduct (unless the allegations were deemed false), disciplined or asked to resign for sexual misconduct, who resigned while allegations were pending, or who had a professional license suspended or revoked. There is no requirement that the applicant was criminally charged, or adjudicated by a child protection agency in order for the school district to take action. The School Code also now requires background checks every 60 months for all district employees and independent contractors who have direct contact with children. 24 P.S. § 1-111.

Every district should have policies in place to prevent sexual abuse and to report and discipline teachers who engage in sexual abuse of students. Districts should also ensure that these policies are consistently followed by district staff and administrators. Implementing and following the "Pass the Trash" and background check provisions of the school code is one step that every district should take in order to avoid sexual abuse of students by staff members. Without a sufficient set of policies in place a school district, and its administrators, are exposed to potential liability for sexual abuse of students by district employees and independent contractors.

TEACHER'S VERBAL ABUSE OF STUDENT DOES NOT RISE TO "CONSCIOUS-SHOCKING" LEVEL NECESSARY TO SUPPORT DUE PROCESS CLAIM

L.H. and C.H. v. Pittston Area Sch. Dist., 130 F. Supp. 3d 918 (M.D. Pa 2015) (Decided September 10, 2015). The District Court for the Middle District of Pennsylvania determined that verbal abuse by a teacher, by itself, does not constitute behavior so egregious as to support a student's substantive due process claim and related federal and state law claims.

SUMMARY AND FACTUAL BACKGROUND

Early in the 2012-2013 school year, Kelli Diaz ("Diaz"), an eighth grade social studies teacher in the Pittston School District, verbally abused one of her students in front of his classmates. Diaz told the student to "shut up" and asked, "Do you have a problem…or Tourette's [Syndrome]?" Diaz also said "It's day 13 and I can't stand you already" and "I'm not the only teacher who can't stand you." The incident was recorded on the student's cell phone.

The parents of the student ("Plaintiffs") demanded that the District investigate the matter and terminate Diaz as a result of the incident. Plaintiffs also claimed that the District should never have hired Diaz in the first place because she had previously entered a plea of guilty on a disorderly conduct charge. The District investigated the matter but did not terminate Diaz.

Dissatisfied with the School District's response to the incident, Plaintiffs filed suit against Diaz, Superintendent Michael Garzella and the Pittston Area School District in the United States District Court for the Middle District of Pennsylvania, alleging violations of state law for intentional infliction of emotional distress ("IIED") and negligent hiring and supervision, a First Amendment retaliation claim and federal due process and related claims under 42 U.S.C. § 1983.

Diaz, Garzella and the School District filed motions for summary judgment seeking to have the claims dismissed.

DISCUSSION

The District Court addressed the claims against Diaz first. With respect to the claim for IIED under Pennsylvania law, the Court noted that the conduct in question must be regarded as sufficiently extreme to constitute "outrageousness" as a matter of law. The Court concluded that while the comments Diaz made were inappropriate, "the plaintiffs have failed to demonstrate that defendant Diaz's conduct was so extreme or outrageous as to rise to the level necessary to satisfy a claim of IIED."

Similarly, with respect to the Section 1983 claims raised by the Plaintiffs against Diaz, the Court determined that while "the behavior exhibited by defendant Diaz was highly inappropriate and unprofessional," the actions of Diaz did not rise to the "conscience shocking" level necessary to support a substantive due process claim. Accordingly, the Court granted the motion for summary judgment filed by Diaz.

The School District successfully asserted that it was immune from the state law claims raised by the Plaintiffs pursuant to the Political Subdivision Tort Claims Act. However, the Court found that this immunity did not apply to Superintendent Garzella because employees of a political subdivision may be liable where the conduct amounts to "actual malice" or "willful misconduct." As such, the Court turned to the merits of the state law claims filed against Garzella to determine whether the Superintendent's handling of the situation was so outrageous as to satisfy the requirements of an IIED claim. The Court recognized that Garzella and the School District were bound by the School Code and the multi-step progressive disciplinary procedures in the collective bargaining agreement. In this case, Garzella and the Board hired an investigator who concluded that Diaz's conduct did not violate the School Code. Upon review of the investigator's report, Garzella decided to impose discipline at the first step of the progressive disciplinary system in the collective bargaining agreement which included a verbal warning and a related course over the summer prior to returning to work. The Court found that Garzella's conduct was not so extreme or outrageous to support an IIED claim and granted his motion for summary judgment on that count.

The Court next considered and dismissed Plaintiffs' First Amendment retaliation claim, which was based on Plaintiffs' allegations that the failure of the School District to remove Diaz and/or properly respond to Plaintiffs' inquiries regarding the status of the investigation forced Plaintiffs to home school their son for five months. As the Court noted, generally, "a failure to act on a complaint is not a retaliatory or adverse action sufficient to sustain a First Amendment retaliation claim."

Similarly, Plaintiffs' substantive due process claims under Section 1983 filed against the School District were dismissed by the Court because there was no affirmative action by the District which resulted in a "state-created danger." In addition, where there is no underlying constitutional violation, the District could not be liable under a theory that it failed to train, monitor or supervise its employees.

The District Court therefore granted the motion for summary judgment filed on behalf of Superintendent Garzella and the School District and dismissed Plaintiffs' complaint.

PRACTICAL ADVICE

Obviously, teachers should be discouraged from verbally insulting students. However, liability exposure to teachers and school districts is generally limited in such cases as long as the district takes appropriate action to investigate and impose discipline as appropriate under the School Code and the collective bargaining agreement.

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