Critical Legal Issues
for School Athletic Administrators

2017 THSADA State Conference

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Title IX

No person in the United States 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.

Facilities

Title IX requires that facilities be equal for both men and women. Both male and female students must have equal access to sports facilities:

34 C.F.R. Part 106.33

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

Facilities (Continued)

What is comparable?

- Are there enough facilities to give members of both sexes equal access?
- Do the facilities properly suit the purpose for which it is meant to provide equal access?
- Are the facilities equally maintained and upgraded?
- Are the facilities of the same quality in purpose and structure?
- Are the facilities equally available to members of both sexes?

Office of Civil Rights – Title IX Facilities Funding

OCR, the entity that enforces Title IX, says equal access must apply to all facilities that are separated by gender, including athletic fields, bathrooms, locker rooms, and even athletic storage facilities.

What does OCR look at?

- The funding spent on facilities.
  - OCR will review overall spending, even spending from booster clubs and outside organizations.
- The quality of the facilities.
  - Does the men's locker room have full-sized lockers and separate shower stalls but the women's locker room simply have cubby holes for storage and a community shower?
- The availability to the facilities.
  - Men's football field is used only for men's football and is closed to all other persons, but the women's soccer field is available to the soccer team during set times and leased to other organizations all other times.

What does OCR look at? (Cont.)

- The suitability of the facilities.
  - The men's basketball team practices in a closed basketball court with air conditioning, similar to the conditions used during games. The women's basketball team practices on a tar court outside and cannot practice during inclement weather.
- The maintenance and upkeep of the facilities.
- The quantity of facilities.
  - There are are more bathrooms for male students than for female students although 55% of the school's population is female.

Ollier v. Sweetwater Union High School District, 768 F.3d 843 (9th Cir. 2014)

- Female athletes and coaches claimed the school discriminated against them by providing them with inequitable:
  - practice and competitive facilities;
  - locker rooms and related storage and meeting facilities;
  - training facilities;
  - equipment and supplies;
  - transportation vehicles;
  - coaches and coaching facilities;
  - scheduling of games and practice times;
  - publicity;
  - funding; and
  - athletic participation opportunities.

Ollier v. Sweetwater Union High School District, 768 F.3d 843 (9th Cir. 2014)

- They also accused Sweetwater of not properly maintaining the facilities given to female student athletes and of offering "significantly more participation opportunities to boys than to girls.

- Court found that high school violated Title IX by not fully and effectively accommodating the interests and abilities of its female athletes.

Ollier v. Sweetwater Union High School District, 768 F.3d 843 (9th Cir. 2014)

Title IX regulations set out a three-part test to determine whether an institution is complying with the "effective accommodation" requirement:

- (1) Whether ... participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or

Ollier v. Sweetwater Union High School District, 768 F.3d 843 (9th Cir. 2014)

Title IX regulations set out a three-part test to determine whether an institution is complying with the "effective accommodation" requirement:

- (2) Where the members of one sex have been and are underrepresented among ... athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex;

Ollier v. Sweetwater Union High School District, 768 F.3d 843 (9th Cir. 2014)

Title IX regulations set out a three-part test to determine whether an institution is complying with the "effective accommodation" requirement:

- (3) Where the members of one sex are underrepresented among ... athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Title IX is not just about Athletics and Facilities

Title IX covers more than male and female athletics. Title IX provides protection to all students from being harassed based on their sex/gender or from being denied access to educational opportunities based on their sex/gender.

Title IX protects students from:

- Harassment from other students
- Harassment from faculty and staff
- Harassment from third parties
- Denial of access to education opportunities

OCR also enforces these parts of Title IX as well.

OCR has reviewed transgender issues under Title IX for several years.

- OCR has reviewed complaints regarding transgender students for several years. Many education institutions have worked with OCR to create resolution agreements that accommodated transgender students.

- Many institutions, individually, have also been working with transgender students for years to accommodate the students' needs and their privacy.

- OCR considers transgender issues important because OCR has found that transgender students are susceptible to harassment from other students.

Timeline of a Crazy Year
(April 2016 to March 2017)

April 19, 2016: *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016)

- The *Grimm* decision from the Fourth Circuit is an interesting case because of what it does not do: it does not spend any significant period of time talking about the transgendered issue as a civil rights issue.

- Instead, it is an almost scholarly analysis of when federal court should give deference to an administrative agency's interpretation of its own regulations.

- Ultimately, the court concluded that the Department of Education's 2015 letter that found that Title IX applies to gender identity was a reasonable interpretation of its previous regulations, given the ambiguity (or silence) in both Title IX and its regulations as to how to treat transgendered students.

Timeline of a Crazy Year
(May 2016 to March 2017)

May 13, 2016: OCR Guidance ("Dear Colleague Letter")

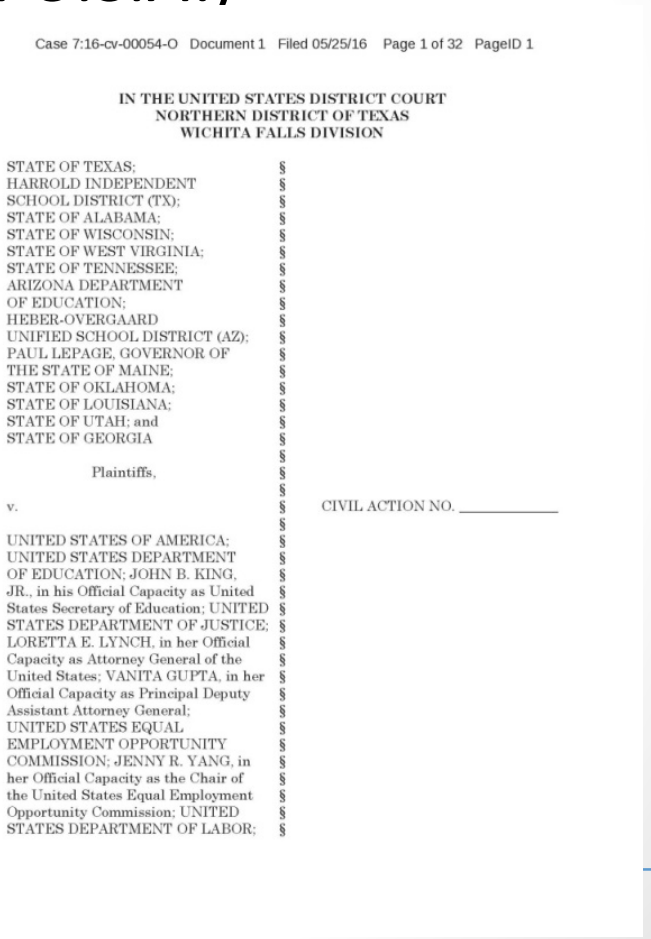
"To allow transgender students to participate in sex-segregated activities and access sex-segregated facilities consistent with their gender identity."

- Restrooms and Locker Rooms
- Athletics
- Housing and Overnight Accommodations

Timeline of a Crazy Year
(May 2016 to March 2017)

May 25, 2016: Texas Lawsuit against OCR and EEOC (*State of Texas v. U.S.A.*)

- Texas and 12 other states sued the Department of Education and other federal agencies seeking declaratory and injunctive relief based on federal overreach regarding the agencies' interpretation of federal laws regarding transgender issues.



Case 7:16-cv-00054-O Document 1 Filed 05/25/16 Page 1 of 32 PageID 1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
WICHITA FALLS DIVISION

STATE OF TEXAS; §
HARROLD INDEPENDENT §
SCHOOL DISTRICT (TX); §
STATE OF ALABAMA; §
STATE OF WISCONSIN; §
STATE OF WEST VIRGINIA; §
STATE OF TENNESSEE; §
ARIZONA DEPARTMENT §
OF EDUCATION; §
HEBER-OVERGAARD §
UNIFIED SCHOOL DISTRICT (AZ); §
PAUL LEPAGE, GOVERNOR OF §
THE STATE OF MAINE; §
STATE OF OKLAHOMA; §
STATE OF LOUISIANA; §
STATE OF UTAH; and §
STATE OF GEORGIA §
§
Plaintiffs, §
§
v. § CIVIL ACTION NO. _____
§
UNITED STATES OF AMERICA; §
UNITED STATES DEPARTMENT §
OF EDUCATION; JOHN B. KING, §
JR., in his Official Capacity as United §
States Secretary of Education; UNITED §
STATES DEPARTMENT OF JUSTICE; §
LORETTA E. LYNCH, in her Official §
Capacity as Attorney General of the §
United States; VANITA GUPTA, in her §
Official Capacity as Principal Deputy §
Assistant Attorney General; §
UNITED STATES EQUAL §
EMPLOYMENT OPPORTUNITY §
COMMISSION; JENNY R. YANG, in §
her Official Capacity as the Chair of §
the United States Equal Employment §
Opportunity Commission; UNITED §
STATES DEPARTMENT OF LABOR; §

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Timeline of a Crazy Year
(May 2016 to March 2017)

August 3, 2016:

United States Supreme Court issues an order staying the ***Grimm*** decision while the Court decides whether to hear the case.

Timeline of a Crazy Year
(May 2016 to March 2017)

August 21, 2016:

- Back in Texas, the federal district court rules that OCR cannot enforce its guidance until the court has issued a final decision or the Fifth Circuit Court of Appeals overrides the district court's decision.
- Because the U.S. Supreme Court had issued a stay until they could review *Grimm*, the judge rules that a national injunction was proper in this case.
- USA appeals to Fifth Circuit

Timeline of a Crazy Year
(May 2016 to March 2017)

February 22, 2017:

U.S. Departments of Justice and Education jointly withdrew the statements of policy and guidance reflected in the "Dear Colleague Letter" on Transgender Students jointly issued on May 13, 2016.

The U.S. Department of Justice and U.S. Department of Education also made clear that "[t]he Departments thus will not rely on the views expressed within them."

Timeline of a Crazy Year
(May 2016 to March 2017)

Texas Lawsuit against OCR and EEOC (*State of Texas v. U.S.A.*)

- March 2, 2017: Appellants (USA) move to dismiss appeal to Fifth Circuit

- March 3, 2017: Plaintiffs (State of Texas et al) dismiss case in the Northern District of Texas

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Timeline of a Crazy Year
(May 2016 to March 2017)

March 6, 2017:

The United States Supreme Court sends the ***Grimm*** case back to the Fourth Circuit "for further consideration in light of the guidance document issued by the Department of Education and Department of Justice on February 22, 2017."

Gloucester Cty. Sch. Bd. v. G. G. ex rel. Grimm, No. 16-273, 2017 WL 855755, at *1 (U.S. Mar. 6, 2017)

.

So where are we now?

Back where we were in March 2016!!!

…but not quite!

Under *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775 (1989), a number of courts have held that an employer's discrimination against a transgendered employee based on the employee's failure to conform to stereotypical gender norms is discrimination "because of sex" and may provide a basis for an actionable Title VII claim.

More Recent Case Law

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., No. 16-CV-943-PP, 2016 WL 5239829 (E.D. Wis. Sept. 22, 2016)

Bd. of Educ. of the Highland Local Sch. Dist. v. United States Dep't of Educ., No. 2:16-CV-524, 2016 WL 5372349 (S.D. Ohio Sept. 26, 2016)

Evancho v. Pine–Richland Sch. Dist., No. CV 2:16-01537, 2017 WL 770619 (W.D. Pa. Feb. 27, 2017)

Recommendations:

- I recommend at least in the short run that school districts have discussions with the transgendered student and family regarding whether the student wants to use a unisex bathroom.
  - I think the assumption that all transgendered students want to use a communal bathroom of their gender identity is incorrect; given issues of body shaming and bullying, I suspect that a number of those students would be perfectly happy using a unisex bathroom. After all, there is no worse place in the world a high school bathroom.

Recommendations:

- Following from the above, the most important thing a school district can do is communicate with the family, early and often.
- Consider creating an individual committee for each student – similar to an ARD committee for a disabled student -- to discuss these issues.
- Follow the UIL rules (until they get sued!)

Bullying

- **Public interest regarding bullying has continued to grow.**
  - Media coverage
  - New legislation
  - On-going litigation
  - Public health research

THE REGISTER CITIZEN

Windy, snow H: 36 L: 22 PAGE A12

Wednesday, March 20, 2013 75CENTS FACEBOOK.COM/REGISTERCITIZEN TWITTER.COM/REGISTERCITIZEN registercitizen.com

Bullying, hazing and rape at THS

Football coach knew about felony charges, but let 'MVP' play

Gonzalez Toribio

By Jessica Glenza
jglenza@registercitizen.com
@jessicaglenza on Twitter

TORRINGTON>> Two Torrington High School football players stand accused of sexual assault of a 13-year-old girl. Four others were suspended in a hazing scandal last fall that is still under investigation. One player, the team's second-highest scorer last fall, was allowed to play even though the team's coach knew he had been charged with felony robbery and assault.

School officials claim that the sexual assault charges against 18-year-olds Edgar Gonzalez and Joan Toribio, the hazing and other incidents are isolated problems and don't signal a deeper issue with the culture of Torrington High School, its athletic programs or football team.

Athletic Director Mike McKenna said, "If you think there's some wild hand of athletes that are wandering around then I think you're mistaken."

"If you look at crime statistics these things happen everywhere and we're not any different than any other community," said McKenna.

But on social media in recent weeks, dozens of athletes and Torrington High School students, male and female, have taunted the 13-year-old victim, calling her a "whore," criticizing her for "snitching" and "ruining the lives" of the 18-year-old football players, and bullying students who defend her.

"Even if it was all his fault, what was a 13 year old girl doing hanging around 18 year old guys.." said a Twitter user with the handle, "@LoryyRamirez." That was reposted 11 times and received six favorites.

Another said, "If it takes two then why is only one in trouble? Ha," that was reposted 21 times and received 13 "favorites."

The cases of Gonzalez, 18, and Toribio, 18, both of 330 Highland Ave., remain sealed. Both are charged with three identical felonies, both for a second-degree sexual assault of a 13-year-old victim in Torrington. In both cases, the investigation began Feb. 10, 2013. It's unclear if the two cases are connected.

As the case remains sealed, basic details are unavailable, including where the incident is alleged to have occurred. Gonzalez's case was continued until April 2, Tuesday. Toribio's until April 23. Gonzalez is being held at New Haven Correction Center. Toribio is out on $50,000 professional surety bond.

VICIOUS TWEETS

A sealed case hasn't stopped the social media sphere from discussing it, however.

"I wanna know why there's no punishment for young hoes," asked "@asmedick." That comment was reposted three times.

Twelve days after the alleged incident, "@AyooWilliam" tweeted, "You destroyed two people's life." Another responded, "I hope you got what you wanted."

"sticking up for a girl who wanted the D and then snitched? have a seat pleaseeee," wrote "@ShelbyyKalinski."

Athletes, others taunt rape victim via social media

Dozens of Torrington High School athletes and other students, male and female, have taken to Twitter and Facebook in recent weeks to mock and criticize the 13-year-old victim of an alleged sexual assault by two 18-year-old Torrington High School football players.

Their posts have called the girl a "whore," criticized her for "snitching" and "ruining the lives" of the two athletes.

On Twitter, they have used hashtags including #FreeJoan3 and #FreeEdgar21 on statements mocking the victim and bullying students who have defended her.

See more on this story at www.RegisterCitizen.com

Schools are the Focal Point

- **Parental expectation** ➔ schools can and should prevent bullying
- **Legislative mandate** ➔ schools will be held liable if they do not protect students from bullying
- **Lingering policy issues** ➔ Which anti-bullying programs have been proven to be effective? Should the parents of bullies have greater accountability?

The Litigation Environment

- *A.P. v. Irvington Bd. of Educ.* (2012, New Jersey) –$16 million verdict for student who was paralyzed. District was found 80% at fault, the bully was 20% at fault.

- *T.B. v. School Bd. of Palm Beach* (2013, Florida) – $1.7 million verdict for special ed student who was sexually assaulted on a bus.

- *Doe v. State of Hawaii* (2013, Hawaii) – Settlement for $5,750,000 on behalf of special ed students who were sexually attacked.

Texas Definition of "Bullying"

- **Texas Education Code § 37.0832** – (a) Bullying is verbal or physical conduct that "has the effect or will have the effect of physically harming a student, damaging a student's property, or placing a student in reasonable fear of harm … or is sufficiently severe, persistent, and pervasive enough that the action or threat creates an intimidating, threatening, or abusive educational environment…"

AND …

Texas Definition of "Bullying"

(b) The bullying exploits an imbalance of power **and** interferes with a student's education or substantially disrupts the operation of the school.

Bullying and Texas Law

- The Texas anti-bullying statute requires school boards to adopt policies and procedures to address bullying and to disseminate these policies to students.
- The Texas statute does not create a cause of action or waive a school district's governmental immunity from suit.
- Federal law is the main source of legal liability for Texas schools.

Roe ex rel. Callahan v. Gustine Unified School Dist., 678 F.Supp.2d 1008 (E.D. Ca. 2009)

- Fall of 2006 - Plaintiff attended a football camp jointly coordinated by Gustine and Liberty High Schools.

- While at football camp, Plaintiff was assaulted by several upper class teammates ("the "Air Pump Incident"), and suffered additional acts of hazing by these individuals.

- There was no evidence that the coaches witnessed or otherwise knew of any of the events involving the Plaintiff – but they had witnessed a similar incident involving another athlete.

Roe ex rel. Callahan v. Gustine Unified School Dist., 678 F.Supp.2d 1008 (E.D. Ca. 2009)

student-to-student sexual harassment:

- the school district must exercise substantial control over both the harassed and the context in which the known harassment occurs;
- the plaintiff must suffer sexual harassment ... that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school;
- the school district must have actual knowledge of the harassment; and
- the school district's deliberate indifference subjects its students to harassment.

(3) the school district must have actual knowledge of the harassment….

- "Title IX's third element is satisfied once an appropriate official has actual knowledge of a substantial risk of abuse of students, whether or not directed at Plaintiff specifically."

- "On the current record, taking the evidence in Plaintiff's favor, whether this conduct was sexual in nature or was instead indicative of childish behavior gone too far is a function of intent and cannot be resolved. The total dispute over the sexual nature of the St. Jean assault precludes an entry of summary judgment in this case."

(4) A school district is liable under Title IX only where the district itself remains deliberately indifferent to known acts of harassment….

"Construing the record and reasonable inferences therefrom in the light most favorable to Plaintiff, a trier of fact could also find that Scudder had "actual notice" on the afternoon of July 14, 2006. It appears from the record an investigation on July 14 or July 15, 2006 would have elicited the same findings the police and district investigations later revealed, and could have prevented the sexual assault against Plaintiff, as well as assaults against several other Gustine High players. A question of material fact exists as to to whether GUSD exhibited deliberate indifference. Summary judgment is DENIED on the Title IX claim."

EMPLOYEE STANDARDS OF CONDUCT

DH (EXHIBIT)

EDUCATORS' CODE OF ETHICS

3. Ethical Conduct Toward Students

Standard 3.2. The educator shall not intentionally, knowingly, or recklessly treat a student or minor in a manner that adversely affects or endangers the learning, physical health, mental health, or safety of the student

Standard 3.5. The educator shall not intentionally, knowingly, or recklessly engage in physical mistreatment, neglect, or abuse of a student or minor or minor.

Alexander v. Troup ISD, Dkt. No. 023-R2-02-2016 (Comm'r Dec. 2016)

- District terminated coach "for using force against three students and for routinely using inappropriate language."
  - The coach allegedly slapped two students and shoved another student down
  - The hearing officer found that the coach used profane and offensive language in the course of his professional duties, in the presence of (and sometimes directed at) students and other staff
- The Commissioner determinates that this constituted good cause to terminate the coach's term contract.

Alexander v. Troup ISD, Dkt. No. 023-R2-02-2016 (Comm'r Dec. 2016)

- "The fact that a book used in an English class contained strong language is no excuse for Petitioner using equally strong language. Language that is appropriate in an English test may not be appropriate for a professional educator to use before students."

- "The fact that another of Respondent's coaches was ejected from a game due to the use of foul language also does not excuse Petitioner. A one-time use of foul language in the heat of competition is not the same thing as consistently using very foul language during practice."

Larberg v. Bellville ISD, Dkt. No. 005-R2-10-2016 (Comm'r Dec. 2016)

"Petitioner's use of profanity, in particular the use of the F-word to disparage a student after receiving a written memorandum that clearly indicated that the use of profanity in the classroom would result in a recommendation for dismissal, amply supports the termination of Petitioner's contract."

BREAK

barnesandnoble.com | Former Medina High Sch | Search Results | students

www.clevescene.com/scene-and-heard/archives/2014/08/28/former-medina-high-school-basketball-player-sues-after-getting-cut-from-team

SCENE NEWS Scene & Heard

SCENE & HEARD

Thursday, August 28, 2014

Former Medina High School Basketball Player Sues After Getting Cut From Team

Posted By Doug Brown on Thu, Aug 28, 2014 at 3:02 pm

A 2013 graduate of Medina High School is taking to federal court because he feels he didn't get enough playing time on the varsity basketball team and that his First Amendment and due process rights were violated when he was finally booted from the team for taking to Twitter to complain about it.

MOST POPULAR

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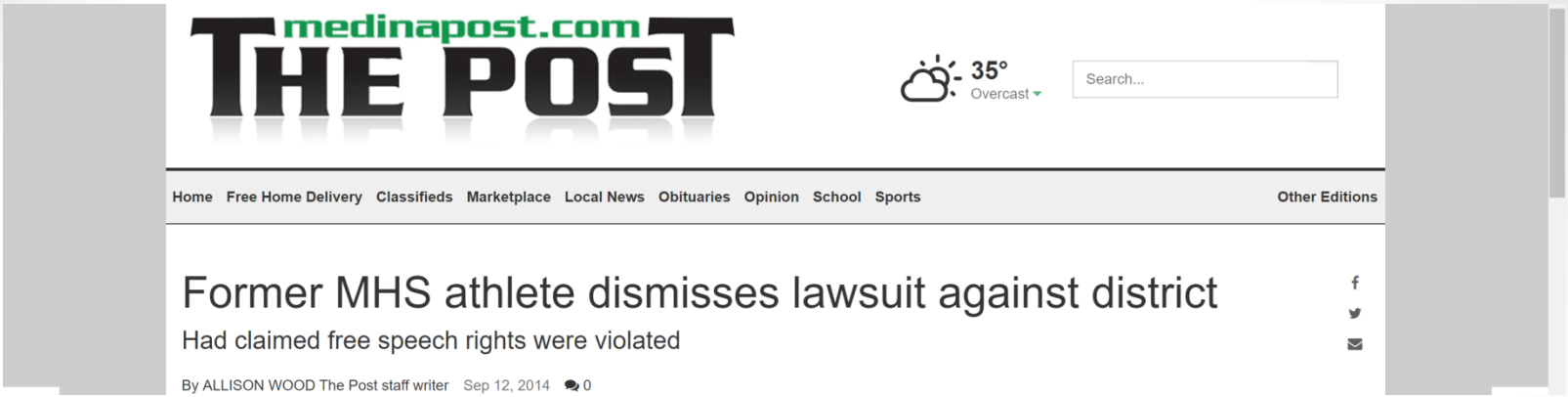
- "Am I that bad that I can't even play on a losing team? #sittingonalosingteam.“
- "At this point the trainer has been on the floor more than I have”
- "Elyrias coaches and Brunswicks coaches said they would take me to play basketball... if only it was legal #satthroughthreelosses”



Former MHS athlete dismisses lawsuit against district

Had claimed free speech rights were violated

By ALLISON WOOD The Post staff writer Sep 12, 2014 0

From Glunt's story "**Athlete: Lawsuit dropped over backlash on social media**":

> In a statement from Johanson released by his attorney, Steve Bailey, the Medina High graduate said he was dropping the lawsuit because he was concerned with negative criticism he received from community members.
>
> "Frankly, the media attention this matter garnered, and the sometimes vicious and personal public response through social media was more than I wanted my parents to endure," Johanson said. "The stress has adversely affected my mother's health, which is more important to me even than the principle raised in my lawsuit."

Essentially, the person who filed a federal lawsuit against his former coach, athletic director, principal and school district and asked for $75,000 in damages because he sat on the bench before getting cut dropped the suit because *other* people were acting irrationally.

The Mouthy Athlete – *Rutherford v. CyFair ISD* (S.D. Tex. 1998)

- Senior baseball player statesthe following in his publicly-published "senior will":
  - "To Coach Hooks I leave a $40,000 debt, I figure you cost me that much with your 3-7 season."
  - "I also leave Coach Brent "Puss" McDonald a fast ball and an unhittable gravity ball."
- Upset about the comments, the head baseball coach benched Rutherford as the starting pitcher for the regional quarter-finals game.

The Mouthy Athlete – *Rutherford v. CyFair ISD* (S.D. Tex. 1998)

Did getting benched violate the students' due process rights?

- The Texas Supreme Court ruled in *Spring Branch Indep. Sch. Dist. v. Stamos*, 695 S.W.2d 556 (Tex. 1985) that under both the United States and the Texas Constitution, "students do not possess a constitutionally protected interest in their participation in extracurricular activities." *Id.* at 561. Because they do not possess such a right, the student did not have any right to procedural due process. *Id.*

- *See also Niles v. Univ. Interscholastic League*, 715 F.2d 1027, 1029 (5th Cir. 1983).

The Mouthy Athlete –
Rutherford v. CyFair ISD (S.D. Tex. 1998)

Did getting benched violate the students' free speech rights?

"The punishment imposed upon Rutherford—not being allowed to play as starting pitcher in one baseball game—was reasonably related to the school's pedagogical interest in teaching the "habits and manners of civility," and Rutherford's comments were properly considered inappropriate coming from an older student athlete."

Can schools regulate online, off-campus speech?

Taylor Bell
aka "T-Bizzle"

Bell v. Itawamba County School Board,

859 F.Supp.2d 834 (N.D.Miss.2012), *rev'd*, 774 F.3d 280, 304–05 (5th Cir.2014), *rev'd en banc*, 799 F.3d 379 (5th Cir. 2015).

- Taylor Bell recorded a rap song that accused two coaches at the school of engaging in sexual misconduct with female classmates
- Bell shared the video, which used vulgar language and contemplated that the coaches might face retaliatory violence, with his **Facebook** friends and posted it on **YouTube**.
- Bell was suspended and later sent to an alternative school.
- He appealed the disciplinary ruling to the school board and lost, and filed a federal lawsuit alleging First Amendment violations.

Bell v. Itawamba County School Board

- "betta watch your back / I'm a serve this nigga, like I serve the junkies with some crack";
- "Run up on T–Bizzle / I'm going to hit you with my rueger";
- "you fucking with the wrong one / going to get a pistol down your mouth / Boww"; and
- "middle fingers up if you want to cap that nigga / middle fingers up / he get no mercy nigga".

Bell v. Itawamba County School Board

"Over 45 years ago, when *Tinker* was decided, the Internet, cellphones, smartphones, and digital social media did not exist. The advent of these technologies and their sweeping adoption by students present new and evolving challenges for school administrators, confounding previously delineated boundaries of permissible regulations."

Bell v. Itawamba County School Board

"The pervasive and omnipresent nature of the Internet has obfuscated the on-campus/off-campus distinction advocated by Bell, making any effort to trace First Amendment boundaries along the physical boundaries of the school campus a recipe for serious problems in our public schools. Accordingly, in light of our court's precedent, we hold *Tinker* governs our analysis, as in this instance, ***when a student intentionally directs at the school community speech reasonably understood by school officials to threaten, harass, and intimidate a teacher***, even when such speech originated, and was disseminated, off-campus without the use of school resources."

Bell v. Itawamba County School Board

Factors to consider in applying *Tinker*....

Based on the facts at issue, the court found that "the manner in which [Bell] voiced his concern – – with threatening, intimidating, and harassing language – – must be taken seriously by school officials, and reasonably could be forecast by them to cause a substantial disruption."

Online Speech by Teachers:

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- High school English teacher
- Started a blog entitled *Where are we going, and why are we in this handbasket?*
  - Did not expressly identify either where she worked or lived, the name of the school where she taught, or the names of her students.
  - Claimed her blog was meant to be viewed by friends that she had asked to subscribe - did not intend for it to be read by the public at large.
  - For most of its existence, only had nine (9) subscribers

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

At the top of her January 20, 2010 blog post, there was a depiction of a school bus with a "Short Bus" sign and the following heading:

"I DON'T CARE IF YOU LICK THE WINDOWS, TAKE THE SPECIAL BUS OR OCCASSIONALLY PEE ON YOURSELF … YOU HANG IN THERE SUNSHINE, YOU'RE FRIGGIN SPECIAL."

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Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- "I'm being a renegade right now, living on the edge and, um, blogging AT work…However, as I'm blogging about work stuff, I give myself a free pass of conscience."

- "Also, as the kids get worse and worse, I find that the canned comments don't accurately express my true sentiments about them….if it's a kid that has no personality, I'll put 'ability to work independently."

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- A complete and utter jerk in all ways. Although academically ok, your child has no other redeeming qualities.
- Shy isn't cute in 11th grade; it's annoying. Must learn to advocate for himself instead of having Mommy do it.
- Two words come to mind: brown AND nose.
- Gimme an A.I.R.H.E.A.D. What's that spell? Your kid!
- Nowhere near as good as her sibling. Are you sure they're related?
- I won't even remember her name next semester if I see her in the hall.
- Just as bad as his sibling. Don't you know how to raise kids?

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- Dresses like a street walker.
- Whiny, simpering grade-grubber with an unrealistically high perception of own ability level.
- One of the most annoying students I've had the displeasure of being locked in a room with for an extended time.
- Am concerned that your kid is going to come in one day and open fire on the school. (Wish I was kidding.)
- I hear the trash company is hiring ...
- I called out sick a couple of days just to avoid your son.
- There's no other way to say this: I hate your kid.

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

Kids! I don't know what's wrong with these kids today! Kids! Who can understand anything they say? They are disobedient, disrespectful oafs. Noisy, crazy, sloppy, lazy LOAFERS (and while we're on the subject) Kids! You can talk and talk till your face is blue. Kids! But they still do just what they want to do. Why can't they be like we were? (Perfect in every way!!!) What's the matter with kids today? $? ? My students are out of control. They are rude, disengaged, lazy whiners. They curse, discuss drugs, talk back, argue for grades, complain about everything, fancy themselves entitled to whatever they desire, and are just generally annoying....

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- Principal's description of students' and parents' reaction to blog: "Kids were furious. They were livid. The calls that were coming in from parents, the e-mails that were coming in, kids had copies of it and they were distributing it in the halls."
  - school "like a ticking time bomb"
  - environment "was so incendiary" that the administration "thought we're going to have a riot or a sit-in or worse."
  - School eventually received over 200 requests from parents to remove their children from Munroe's classroom (or not put them in her class the following year).

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

- With regards to the *Connick* "public concern" test, the Court "reluctantly assume[d] for the purposes of this opinion that Munroe's speech satisfied the 'public concern' requirement."
  - Although the Court noted that the school had presented "a strong case for why Munroe's speech failed to touch on a matter of public concern," it conceded that "there were, at the very least, occasional blog posts that touched on broader issues like academic integrity, honor, and the importance of hard work."
  - The Court also found that the fact that Munroe's blog "became the subject of extensive media coverage" by *The Huffington Post*, ABC, CBS, NBC, Fox News, and multiple print media sources (including *Time Magazine*), "indicated that Munroe met the 'public concern' element."

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

Pickering balance test:

- "[T]he inquiry involves a sliding scale, in which the amount of disruption a public employer has to tolerate is directly proportional to the importance of the disputed speech to the public."

- "Given our reluctance to assume that the speech at issue here implicated a matter of public concern in the first place, we determine that the interests of Munroe and the public in this speech were entitled to (at best) only minimal weight under the *Pickering* balancing test."

Munroe v. Central Bucks Sch. Dist., 805 F.3d 454 (3d Cir. 2015)

"[T]he First Amendment does not require a school district to continue to employ a teacher who expresses the kind of hostility and disgust against her students that Munroe did on her blog and then publicly defends such comments to the media—which results in serious negative reactions on the part of both students and parents, the submission of numerous parental "opt-out" requests, and the hiring of an additional teacher."

What Can Teachers do during Student-led Prayers during School Events?

The courts have generally rejected claims by teachers that their Free Exercise rights have been violated when their schools have instructed them not to participate in student religious activities:

- In *Daugherty v. Vanguard Charter Sch. Academy*, 116 F.Supp.2d 897, 916-17 (W.D. Mich. 2000) the Court noted it would be troubled if teachers "played a more active, participatory role in the prayer gathering" beyond passive supervision.

- In *Doe v. Wilson County School System*, 564 F.Supp.2d 766, 801-803 (M.D. Ten. 2008) the Court found that teachers who bowed their heads when prayers were offered and wore "I Prayed" stickers during instructional time following the National Day of "crossed the line of permissible supervision of the students at the event," thereby violating the Establishment Clause.

- In *Doe v. Duncanville ISD*, 70 F.3d 402 (5th Cir. 1995), the Court upheld an injunction prohibiting employees from leading, encouraging, promoting, participating, or "supervising" student prayers during curricular or extracurricular events.

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- High school football coach brought suit after his school principal told him to stop participating in various prayer events related to the football team.

- For twenty-three seasons, Coach Borden and the team engaged in pre-game prayer activities at a team dinner and prior to games in the locker room.

  - Originally a local minister led the pre-meal prayer; starting in 1997, at the request of the athletic director, the minister stopped attending, but drafted a prayer for Coach Borden or one of his team members to say.

  - Borden himself led the prayers in the locker room.

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Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- After a number of student complaints in 2005, the principal told Borden that he could no longer lead the prayers.
- At the next team dinner, Borden told the students that if they were uncomfortable, they could wait in the restroom until the prayers were over.
- That generated even more complaints, and the Superintendent told Borden that he needed to disassociate himself completely from the prayers, which would truly need to be student-initiated and student-led.

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- A memo generated by the school attorney cited the *Duncanville ISD* decision and stated that employees cannot participate in student-initiated prayer, and that "[i]f while acting in their official capacities (school district) employees join hands in a prayer circle or otherwise manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion," and that such conduct was prohibited.

- Specifically, Borden was told he could not silently bow his head during his team's pre-meal grace, or take a knee with his team during a locker-room prayer.

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- The Court of Appeals disagreed with the lower court, which had ruled in Borden's favor, and sided with the school.

- The Court rejected Borden's free speech claim, noting that a public employee's free speech rights are limited.

  - Following the *Connick/Pickering* test, the Court found that Borden's stated interests in his silent behavior were personal to Borden and his team and were not matters of public concern.

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- Turning to the religion side of the First Amendment, the Court held that the school had a legitimate educational interest in avoiding Establishment Clause violations, and the guidelines were reasonably related to that interest.

- As the Court noted:

"In fact, based on the history and context of Borden's conduct in coaching the EBHS football team over the past twenty-three years, Borden is in violation of the Establishment Clause when he bows his head and takes a knee while his team prays."

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

The *Borden* opinion ended with two interesting observations.

- First, the Court indicated some level of agreement with the school that the athlete prayers were never really "student-initiated"; that by sending an email to the team captains asking them to poll the team about the prayers and then asking for the results, Borden himself actually initiated the prayers.
  - While the Court noted that this would be problematic under *Santa Fe ISD*, it did not reach the issue, as it had already decided that Borden's behavior was unconstitutional.

Borden v. School District of the Township of East Brunswick, 523 F.3d 153 (3rd Cir. 2008)

- Second, the majority opinion stressed that Borden's own personal history was what made his behavior unconstitutional:

> "We agree with Borden that bowing one's head and taking a knee can be signs of respect. Thus, if a football coach, who had never engaged in prayer with his team, were to bow his head and take a knee while his team engaged in a moment of reflection or prayer, we would likely reach a different conclusion because the same history and context of endorsing religion would not be present."

- However, another judge writing in concurrence felt that a head coach kneeling with his team at prayer could virtually never be seen by a reasonable observer as doing anything other than endorsing religion.

What are Vouchers?

A school voucher program is an arrangement whereby public funds are made available to qualified parents to cover some or all of the expenses associated with enrolling their child in a participating private school of their choosing….

Definitional aspects of school vouchers

- the source of the funds (governmental)
- the purpose for which the funds are provided (to enroll a school-age child in a private school); and
- the party whose decisions fulfill that purpose (a parent or legal guardian of the child).

Why do People Want Vouchers?

the "values claim" rationale for vouchers

arising out of the century-long battle between the Catholic and Protestant churches for control over whose religion and values would be taught in the American public school system

Why do People Want Vouchers?

the "racial-justice" rationale for vouchers

emphasized the right of low-income and minority parents to send their children to academically rigorous private schools

Proponents of Vouchers Say…

vouchers would improve the quality of education in America by increasing competition between public schools and participating private schools, thereby forcing the public schools to improve to retain students.

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Opponents of Vouchers Say…

vouchers take money away from public schools that are already severely underfunded, especially in recent years.

Additionally, while an individual student who uses a voucher to attend a private school may benefit individually from that decision, it is unclear what impact the removal of that student's money would have collectively on the students remaining at the public school.

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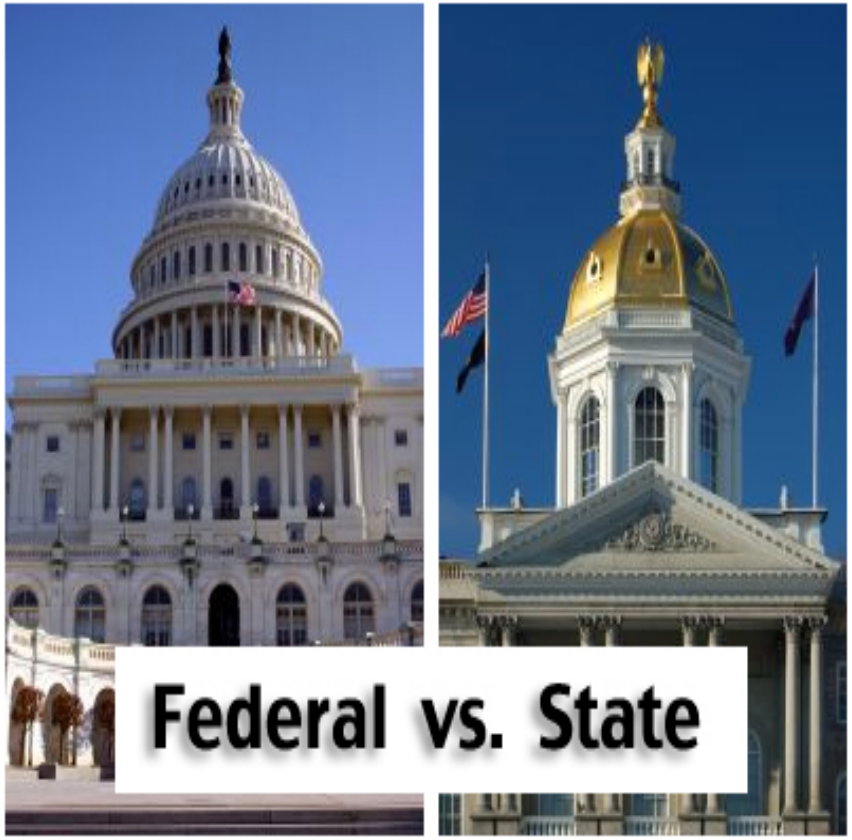
The (Federal) Constitutionality of Voucher Programs: *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002)

The Court noted that "our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals."

The Court noted that when public funds are made available to religious schools "only as a result of numerous, private choices of individual parents of school-age children," this ensures that "no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally."

The Fight Turns to the States (Constitutions)



…and the Blaine Amendments

See http://www.blaineamendments.org/

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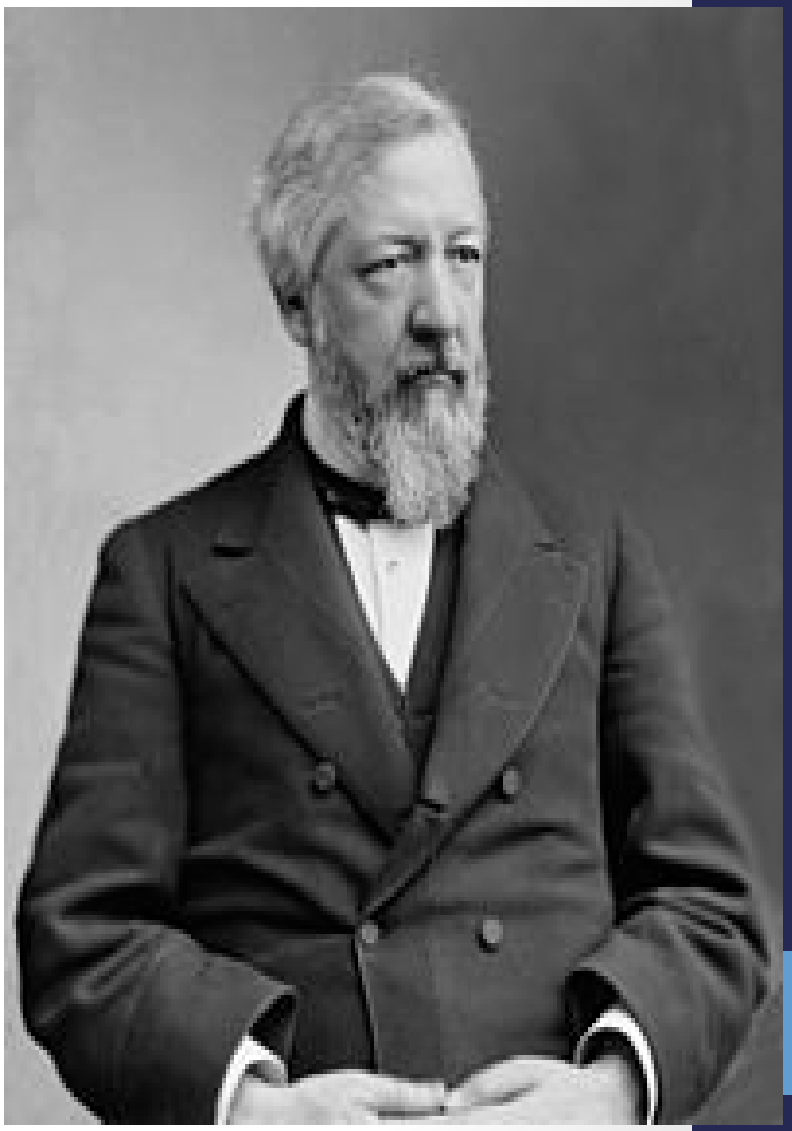
The Original Blaine Amendment:

"No State shall make any law respecting an establishment of religion, or prohibiting the free exercise thereof; and no money raised by taxation in any State for the support of public schools, or derived from any public fund therefor, nor any public lands devoted thereto, shall ever be under the control of any religious sect; nor shall any money so raised or lands so devoted be divided between religious sects or denominations."



Does Texas have a Blaine Amendment?

Arguably, it has two:

Tex. Const. art. 1, sec. 7: "No money shall be appropriated, or drawn from the Treasury for the benefit of any sect, or religious society, theological or religious seminary; nor shall property belonging to the State be appropriated for any such purposes."

Does Texas have a Blaine Amendment? Arguably, it has two:

Tex. Const. art. VII, sec. 5(c): "The available school fund shall be applied annually to the support of the public free schools. Except as provided by this section, the legislature may not enact a law appropriating any part of the permanent school fund or available school fund to any other purpose. The permanent school fund and the available school fund may not be appropriated to or used for the support of any sectarian school. The available school fund shall be distributed to the several counties according to their scholastic population and applied in the manner provided by law."

The Boogeyman Waiting in the Wings….

Lieutenant Governor Dan Patrick and Senate Education Committee Chairman Larry Taylor (R-Friendswood) introduced Senate Bill 3, which would create both “Education Savings Accounts” and “Tax Credit Scholarships”

"Education Savings Accounts"

Would take a percentage of the average amount of school spending per pupil and move those state dollars into a parent-controlled account.

- $5836 per child per year if income is more than twice the reduced-price lunch limit (more than $89,910 for family of four)
- $7295 per child per year if income is less than twice the reduced-price lunch limit
- $8754 per child per year if child is disabled regardless of income)

*Amounts are based on a percentage (60, 75 and 90%) of the state average maintenance and operations expenditures per student in average daily attendance for the preceding fiscal year.

"Education Savings Accounts"

- Can be used for tuition at accredited private schools, online courses, textbooks, curricula, private tutors.
- No more than 10% can go to computers or software
- Cannot be used for school supplies, food and child care expenses.

"Tax Credit Scholarships"

- insurance companies would get a dollar-for-dollar credit on their state insurance premium tax for donations to nonprofits that help low- and moderate-income parents afford sending their kids to private or parochial schools.

- The scholarships would not be an entitlement, but would be offered on a first-come, first-served basis.

- Tax credits would be capped at $100 million in the first year, and would increase by 10 percent a year.

Would these proposals be constitutional?

Arizona Christian School Tuition Org. v. Winn, 131 S.Ct. 1436 (2011)

- Supreme Court dismissed for lack of standing an Establishment Clause challenge to a similar program in Arizona.

- In a 5-4 decision, the Court found that the plaintiffs lacked standing, largely because the decision to give money to the STOs – and the decision of the STO's how to use the money – were private decisions of individuals, and not decisions by the government.

Questions? Comments?

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