School Law for Administrators

Negligence

High school football player sues school district, coach for allowing him to play after he received a concussion

Citation: *Bowen v. Telfair County School District, et al., 2019 WL 4463315, (S.D. Georgia, 2019)*

A federal district court in Georgia has granted in part and denied in part a school district and football coach's request for summary judgment in a case in which a high school football player and his parents sued after the student was told to continue playing after suffering a concussion during a football game. The lawsuit alleged negligence and intentional tort as well as a constitutional claim under Section 1983. While the court agreed to grant judgment on most of the claims, it denied the request with respect to the negligence claim against the coach for failing to follow concussion protocol.

T.B. was injured while participating as a player on the Telfair County High School football team in September 2016. During a game on September 9, 2016, T.B. suffered a concussion and showed symptoms of the injury. However, his coach, Matthew Burleson, allowed T.B. to continue playing the game. T.B. received more blows to the head during the game.

Later, T.B. was diagnosed with a concussion by a doctor. His symptoms included cognitive impairment, memory alteration, mood swings, diminished academic ability, and a reduced ability to complete everyday tasks.

T.B. and his parents filed a lawsuit naming Burleson and the Telfair County School District, among others (defendants). The defendants asked the court for judgment without a trial.

The court granted judgment in favor of the defendants in part and denied it in part.

The court noted the defendants' motion was based on three arguments: 1) that Burleson had qualified immunity for the Section 1983 claim against him; 2) the school district had sovereign immunity under the Georgia Constitution for the state law claims; and 3) Burleson had official immunity under the Georgia Constitution for the state law claims against him in his individual capacity.

QUALIFIED IMMUNITY

Government officials may be protected by qualified immunity if they are acting in their discretionary capacity, if their conduct does not violate well-established constitutional law *(Harlow v. Fitzgerald)*. The court found that Burleson was acting in his discretionary capacity in this instance. There was nothing in the complaint that alleged he was acting outside his authority, and he was an employee of the school district acting within the scope of his employment when the incident occurred. To overcome qualified immunity, T.B. had to show that 1) the official's conduct violated a statutory or constitutional right, and 2) the right was clearly established at the time *(Randall v. Scott)*. Without successfully pleasing facts to satisfy both parts of this standard, T.B.'s Section 1983 failed.

T.B. argued that his constitutional substantive due process rights to physical safety, bodily integrity, and freedom from unreasonable risk of harm were violated under the Fourteenth Amendment. The court noted: "Conduct by a government actor will rise to the level of a substantive due process violation only if the act can be characterized as arbitrary or conscience-shocking in a constitutional sense" *(Davis v. Carter)*. It is difficult to satisfy this standard, as the U.S. Supreme Court has noted that negligent conduct cannot be considered conscience shocking. However, intentionally injurious conduct that is not supported by any government interest can rise to the standard of conscience-shocking. The court went on to cite several cases where the Eleventh U.S. Circuit rejected conduct as conscience-shocking, and the examples were much more egregious than the current case.

T.B. claimed that Burleson and the school district were negligent and acted intentionally with malice to injure him. Essentially, T.B. claimed that Burleson should have known that T.B. was suffering a concussion and prevented him from continuing in the game. However, the court stated it was not required to accept this conclusion without more facts to support it. Compared to the previous examples of cases decided by the Eleventh Circuit, the court found that Burleson's conduct did not rise to the level of conscience-shocking. Therefore, the court found that the claim did not establish that Burleson violated T.B.'s substantive due process rights, and Burleson was entitled to qualified immunity. The court granted judgement in favor of Burleson on the Section 1983 claim.

SOVEREIGN IMMUNITY

Regarding the state tort claims against the school district, the court noted that the Georgia Constitution provided sovereign immunity to the school district as a government agency. T.B. attempted and failed to show a waiver of that immunity was appropriate in this case. The court, therefore, granted judgment in favor of the school district regarding the state tort claims against it.

OFFICIAL IMMUNITY

T.B. also brought state negligence and intentional tort claims against Burleson, who claimed he was entitled to official immunity under state law. The court stated that, under the Georgia Constitution, "state employees are subject to tort suits in only two situations: when injuries are caused by their negligent performance of ministerial duties, and when injuries flow from their official functions carried out with actual malice or actual

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Headlines on School Law

ESSA under examination

The federal Every Student Succeeds Act (ESSA) was signed into law at the end of 2015, replacing the more-than-a-decade old K-12 law, No Child Left Behind. That law was widely known to have heavy federal clout and, along with several grant programs such as Race to the Top, became controversial for its control of states' education policy. The federal bipartisan rewrite that became ESSA is known as an attempt to transfer significant autonomy and flexibility back to states and local education bodies.

A recent study by Megan Duff and Priscilla Wohlstetter with Teachers College, Columbia University reports a mixed bag of results over the last couple of years. Yes, the researchers say, ESSA does limit the role of the Secretary of Education and does increase "state flexibility around school improvement and assessments." However, now there appears to be a new problem which occurs in the areas of the Education Department's (ED's) responsibility to provide guidance, support, and "corrective action" to states. Here, Duff and Wohlstetter say, "Our analysis found the current administration is falling short of their end of the bargain."

The analysts report three main "take-aways" from their study with implications on future ESSA implementation:

While the Secretary of Education is explicitly limited by ESSA in pushing states to adopt specific standards, strategies for school turnaround, and academic goals, the law does direct the Department of Education to require that state standards are "college-and-career-aligned," that turnaround efforts be "evidence-based," and that academic goals be well thought-out and ambitious. ED cannot be too laissez-faire in its oversight role and must provide the guidance and support states need to achieve the goals as stated in ESSA.

However, the analysts write in relation to the state submittal of ESSA plans, "We are struck by the blanket approval of all plans, even those that remained in conflict with some objectives of the law, suggesting the federal government has, for now, left the carrots and sticks behind." They go on to report that "the current administration may be granting even more power to states than the law prescribes," leaving some states a bit at sea on planning and how their new roles should be defined.

In response to submitted state plans, ED did list out suggestions for better state compliance with ESSA. Such feedback focused on state violations of the federal law and areas in which insufficient information had been submitted. But, the researchers from Columbia University claim, ED prioritized some areas of ESSA over others, namely emphasizing sections on accountability and school improvement (77 instances of violations) over all the other titles combined (five violations in all).

When states chafed at suggested improvements of their plans, ED leaned toward giving away. As compared to NCLB's lengthier review process, the reporters state, "Under ESSA, however, all state plans were fully approved by the federal government within a few months—even ESSA plans that were not fully in compliance with the law." Duff and Wohlstetter define this situation as both sides learning through negotiation. "It may take time for both sides to strike the appropriate balance between autonomy and accountability, and it remains possible that the Education Department will take a more forceful approach as states begin implementing and revising their ESSA plans." One conclusion of the analysts is that ED may be deliberately relying on negotiations rather than sanctions—as a savvy approach to monitoring, though they say that increasing state autonomy "does not absolve the federal government of its responsibility."

In terms of plan submittal, states fell into two rounds, first in April of 2017 and then September of the same year. The Duff and Wohlstetter study looked only at first round submittals. And some in the education community believe that a public

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intent to injure." Therefore, a public employee "may be personally liable only for ministerial acts negligently performed or performed with malice or intent to injure."

A ministerial act is one that an employee carries out as a duty to execute. The opposite of a ministerial act is a discretionary act, which requires deliberation and judgment rather than being directed toward a specific duty. T.B. listed five ways that Burleson acted negligently. The first four ways, according to the court, were discretionary acts and, thus, could not support a claim against Burleson because he was entitled to official immunity regarding those acts. However, the last point that T.B. raised was ministerial. T.B. claimed that Burleson failed "to perform his ministerial duties established by [school district] policies, Meadows policies, Georgia High School Association . . . Policies, and Georgia Law in regards [sic] to concussions and preventing catastrophic injuries post-concussion."

The court noted that because the last claim referred to a ministerial act, Burleson was not entitled to official immunity in this instance. Therefore, Burleson was entitled to official immunity in this instance. Therefore, Burleson was entitled to official immunity except for the negligence claim regarding his failure to follow concussion treatment and prevention policies.

The court concluded it granted in part and denied in part the defendants' request for judgment without a trail, granting judgment for all but the negligence claim against Burleson in his ministerial capacity.

—School Law Bulletin,
Vol. 46, No. 21, November 10, 2019, pp. 4-5.

Accusations from 1970 result in a Child Victims Act lawsuit in New York

Two women, who allege that they were sexually abused by their gymnastics coach in 1970 have filed suit against the Town of Brighton and the Brighton school district. The women claim that the abuse occurred when they were participating in the town's gymnastics program in the 1970s. The two suits, filed by Barbara Shields of Rochester and Annette Miano James of Florida, fall under the New York Child Victims Act. The school district is named in the suit because the gymnastics coach was also a teacher in the district.

The legal complaints allege that Duncan Ververs, a former Council Rock Elementary School teacher and former Brighton Recreation Department gymnastics director and coach, abused them on hundreds of occasions between 1971, when they were in 7th and 9th grade, respectively, and when they graduated from high school in 1975 and 1976. According to the lawsuit, the town and school district failed to protect the women, who were minors at the time; that they knew or should have known that Ververs was sexually abusing the minors; and that they failed to "adequately supervise the conduct of Ververs."

In a formal statement issued by the school district, a spokesman said: "The District has been apprised of this matter through the plaintiffs' attorney. However, it has not, as of now, received formal notice of any lawsuit. As is the District's practice, we cannot comment on matters regarding pending litigation, which we understand this now is. The District remains committed to student well-being and works diligently for every child, every day in every way."

Source: *Rochester City Newspaper*

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confrontation early in the process between Sen. Lamar Alexander, R-Tenn and Secretary DeVos may have helped define for DeVos her "lenient" approach to plan review.

Sen. Alexander, one of the principal ESSA authors and chairman of the Senate education committee, became aware of complaints from Delaware that its plan was being subjected to excessive suggestions from ED about needed revision. Alexander publicly rebuked ED for overstepping its new role under ESSA—a role of reduced direction of states—and Delaware soon became the first state to have its plan approved by DeVos.

ESSA AND SUPPORT OF LOW-PERFORMING SCHOOLS

A recent *Ed Week* piece takes a hard look at the new flexibility for states and schools built into ESSA's policies. There are still many controversies bubbling up from ESSA, and one such argument, still unresolved, centers on the question of whether greater autonomy and flexibility for states works better for "consistently underperforming" student subgroups than the stricter monitoring provided by No Child Left Behind. Some believe the new flexibility is designed to allow states the innovative space to find solutions to underperforming. Others think the backing off of federal education officials signals a kind of abandonment of struggling student groups.

ESSA defines schools which call for more help and resources as one of three categories: in need of comprehensive support and improvement; in need of targeted support and improvement; or in need of additional targeted support and improvement.

One early conclusion from counting the numbers in these categories, state by state, was reached by the Center on Education Policy (CEP): namely that states vary markedly on how they apply the categories. For example, in Florida 69% of schools were placed in one of these categories, while in Maryland only 3% of schools were aligned by officials with any of the three definitions. In Arizona officials said 41% of schools needed targeted support while in Kansas that category was suggested for only 6%.

However, CEP's deputy director Diane Rentner cautioned against using many comparisons, state to state, saying that was a complicated strategy. "It's 50 different approaches," Rentner said. "We tried not to compare states to one another because the state plans are very different." Some states identified half their public schools for some type of school improvement while 19 states' submitted plans hadn't identified any schools needing targeted support and intervention.

The basic conclusion emerging from any of these new studies, as an *EdWeek* report on ESSA put it, is that "ESSA's rollout remains a work in progress."

—School Law Bulletin,
Vol. 46, No. 17, September 10, 2019, pp. 1-3.

Discrimination

Court finds discrimination student suffered was sufficiently severe and pervasive to state plausible claim

Citation: *Verrett v. Independent School District #625, 2019 WL 2870076 (D. Minn. 2019)*

A federal district court in Minnesota recently granted in part and denied in part a school district's request to dismiss discrimination and constitutional claims brought against it by the parent of a fifth grade student whose science teacher used a discriminatory metaphor in attempting to discipline the student. The court found that while the complaint did not sufficiently make out a due process complaint, it concluded that there were merits to both the discrimination and equal protection claims.

T.S.V. was in the fifth grade at Expo Elementary School in Independent School District #625. T.S.V. is African American and was one of only three African American students in her science class. On a day in June 2017, the science teacher attempted to get T.S.V.'s attention as she talked with her African American classmates. When the teacher failed to get T.S.V.'s attention, he stated, in front of the class, that this was why there is an achievement gap between African American and white students. While saying this, the teacher made hand gestures, clearly separating the white students from the three African American students.

T.S.V. left the room crying and encountered another teacher in the hallway, telling the other teacher about what the science teacher had done to make her upset. The other teacher escorted T.S.V. to the office and the assistant principal called T.S.V. into her office (she knew T.S.V.). After hearing about the incident, the assistant principal pulled up information on the achievement gap on her computer and reviewed it with T.S.V. She then asked T.S.V. to fill out a behavioral reflection form. Though the district has argued that such forms are not meant to be used for discipline, one of the questions asks the student to reflect on what they could have done differently in the future to avoid whatever problem they were having. T.S.V. wrote that in the future she should not listen to her teacher. During this time, the other students involved were called to the office to give their account and the science teacher also came to the office, telling T.S.V. that he didn't mean to say what he said.

Later that day, T.S.V.'s father who was at the school for another event, learned about the incident from another parent. This marked the beginning of many interactions between T.S.V.'s father and his wife and district administrators. The gist of the interactions between these parties was that T.S.V.'s family was extremely upset about the incident and the way it was handled. They felt that the district failed to provide a nondiscriminatory environment in its classrooms, responded inappropriately when T.S.V. told administrators about the incident, failed to timely notify the parents of the situation, and failed to respond appropriately with an apology, discipline, and other measures to ensure such activity wouldn't happen in the future. The district on the other hand assured the family that there had been meetings with the teacher and assistant principal to review the incident and that the district was taking steps to reinforce their commitment to a discrimination free environment. The district never confirmed if the teacher and assistant principal had been disciplined, failed to provide any information on training or other measures they were taking in the aftermath of this incident, and declined a proposal from T.S.V.'s father's wife for specific actions to be taken.

T.S.V.'s father withdrew her from the school and later filed a lawsuit against the district, alleging discrimination, due process, and constitutional equal protection claims. They also alleged a complaint under the Equal Educational Opportunities Act. The district asked the court to dismiss all claims, arguing that they lacked merit.

The court granted the district's motion in part, dismissing the EEOA claim (a desegregation law in the state) and the due process complaint. On the due process complaint, the court noted that because the family had voluntarily withdrawn T.S.V. from school, the district did not owe them any due process and therefore did not violate the Fourteenth Amendment. The court however declined to dismiss the Title IV and Minnesota Human Rights Act discrimination complaints and the equal protection complaint, finding that the family had stated a plausible claim on both counts, which was all that was required on a motion for dismissal.

Regarding the discrimination complaints (which are both considered according to the same standard), the court noted that to state a claim of racial hostility, T.S.V.'s family needed to show that the district was deliberately indifferent to known acts of discrimination that occurred under its control. Thus, turning to the substance of the complaint, the court recited the basic facts. An elementary school teacher, angered when students in his class failed to stop talking, used those students as a metaphor for the achievement gap, using his hands to underscore the separation between African American and white students in the classroom. The teacher gave no context to the statement during class and later claimed he didn't mean it when the students became upset. This alone was evidence he knew the comment was inappropriate, and the court found that the teacher's "discriminatory conduct was sufficiently severe and offensive to plausibly state a Title IV claim."

The court then pointed out that the incident was not isolated to the teacher. Instead, when the student went to the office, the assistant principal showed the student data on the achievement gap and then required her to write a behavioral reflection form. In the court's view, this fact pattern could support the inference that "T.S.V. was exposed to discriminatory comments, shown data to support the comments, and punished for her reaction." These were sufficient facts to show that the discrimination was "pervasive," according to the court. And when added to the overall response of the district, which was essentially unknown because the district failed to share any information about it, the court found that the family had pleaded sufficient facts plausibly showing the district was deliberately indifferent to alleged discrimination. Therefore, the family had a plausible claim. However, the court dismissed T.S.V.'s father individually from the lawsuit.

—School Law Bulletin,
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