School Law for Administrators

Bodily Integrity

Special education student sues school district for creating danger after a sexual assault while at school

Citation: *A.A. by Alcis v. School District of Philadelphia, 2020 WL 6822963 (E.D. Pa. 2020)*

A federal district court in Pennsylvania recently granted in part a request for judgement without a trial by a school district and a school reform commission in a case in which the parent of an 11-year old with mental disabilities claimed violations of the child's Due Process rights after the child was sexually assaulted in a bathroom by another student while the teacher's aide escorting the child waited outside the bathroom. The court granted the request for judgment on the claim against the school reform commission because that body was no longer in existence but denied the school district's request finding that a reasonable jury could conclude that the facts and circumstances here were sufficient to find that the district violated the student's constitutional rights. The teacher's aide was supposed to escort the children into the bathroom and acknowledged that the purpose was to stop bad things from happening to mentally disabled children.

A.A. was an 11-year-old special education student at the Warren G. Harding Middle School in the School District of Philadelphia in January 2012, when he was sexually assaulted by another student. A.A. had intellectual disabilities, and he was allegedly sexually assaulted by B., who was in his class and also had intellectual disabilities. One of the three adults in the classroom, Denise Fairy-Coston, escorted A.A. and B. to a bathroom on January 25, 2012. There is some dispute as to what occurred next, because Fairy-Coston claimed that she left the bathroom door open and stood in the doorway while the students were in the bathroom.

However, A.A. maintained that the bathroom door was closed, and Fairy-Coston waited outside. Meanwhile, A.A. was sexually assaulted by B. Afterwards, A.A. wanted to tell Fairy-Coston what had happened, but she did not want to listen to him, telling him, "I'll talk to you later," but she never did.

A.A. did not want to testify about the actual sexual assault, but he did talk to a rape counselor, Amanda Peguero-Marquez. A.A. told Peguero-Marquez that B. had pulled his pants down and told him to lie on the floor, and A.A. did so. Then, A.A. reported, B. put his penis in A.A.'s "butt." Fairy-Coston said she did not recall anything unusual happening that day.

According to Fairy-Coston, the school's bathroom policy required teachers to escort special-needs students to the bathroom and leave the door open so the teacher could monitor what the students were doing in the bathroom and any students outside the bathroom. Fairy-Coston also testified that "one [of] the reasons why you keep the door open is to make sure there's nothing bad happening in the bathrooms" and to protect special education students from each other. She said she was aware that "kids do bad stuff in bathrooms." However, A.A. stated that the door was always closed whenever Fairy-Coston escorted him to the bathroom.

Fairy-Coston testified that: "(1) she 'wasn't trained' to follow the school's bathroom policy; (2) she never received 'any type of training regarding prevention of sexual assaults at the school'; and (3) she 'did not receive any special training to get [her position].'"

A.A., through his mother, Yolette Alcis, filed a Section 1983 lawsuit against the School District of Philadelphia and the School Reform Commission (SRC), claiming violations of A.A.'s substantive rights to bodily integrity under the Fourteenth Amendment. The school district and the SRC (defendants) asked the court for judgment without a trial.

The court noted that, under *Monell v. Dep't of Soc. Servs*., a municipality could only be liable if a constitutional injury resulted from the "implementation or execution of an officially adopted policy or informally adopted custom" (*Wilson v. City of Phila*.). Therefore, the claim against the school district had to show a constitutional violation by an employee that was caused by a policy or custom.

The defendants argued that A.A.'s claim failed because: (1) "there is no admissible evidence that the alleged assault occurred"; (2) A.A. "cannot prove that there was any underlying constitutional violation"; and (3) A.A. "cannot point to an actual policy or procedure that caused" the constitutional violation. In addition, while the case was originally filed in 2015, the defendants argued that the SRC no longer existed as an entity and therefore claims against the SRC must be dismissed.

The court found that, while A.A. did not want to testify about the actual assault, his statements to Peguero-Marquez, a licensed counselor, were sufficient to be admissible at trial to prove that an assault occurred.

Under the "state-created danger" theory, A.A. contended that the school district had a duty to protect him. The Due Process Clause of the Fourteenth Amendment protects the procedural due process rights of individuals and "individual liberty against certain government actions regardless of the fairness of the procedures used to implement them" *(L.R. v. Sch. Dist. Of Phila.)*. While a municipality would not violate the clause by failing to protect an individual from private violence, the court noted that the Third U.S. Circuit recognized the state-created danger theory as an exception to this rule.

To establish a state-created danger claim, the following ele-

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First Amendment

Court reconsiders case after First Amendment retaliation claim added to amended complaint

Citation: *G.S. v. Penn Trafford School District, 2020 WL6135729 (W.D. Pa. 2020)*

A federal district court in Pennsylvania has granted the request of a school district and its employees to dismiss a lawsuit brought against it by the mother of a student who claimed that her child was bullied and that she was suspended after complaining of the bullying, thus chilling her right to freedom of expression. The court disagreed, finding that the school district had suspended the student after she got in a fight with another student and that her suspension did not prevent her from making complaints about bullying or harassing behavior by other students.

S.S., a student at Penn-Trafford High School in the Penn-Trafford School District, was repeatedly bullied by a group of students. S.S. reported the bullying to Assistant Principal Gregory Capoccioni. On December 15, 2016, another student, A.T., yelled a derogatory phrase at S.S., which S.S. interpreted as a reference to her repeated reporting of incidents with other students to Capoccioni. The assistant principal told S.S. just to yell back at the other students. When S.S. yelled back at students to leave her alone, A.T. threatened to fight her. On December 16, 2016, S.S. was called to Capoccioni's office because of a rumor that S.S. might participate in a fight. S.S. told Capoccioni that A.T. used marijuana but asked him not to call A.T. to his office. However, Capoccioni called A.T. to his office and allegedly questioned her about her marijuana use.

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ments are required: (1) the harm was foreseeable and fairly direct; (2) a state actor acted with a degree of culpability that shocked the conscience; (3) there was a relationship between the state and the individual that made him a foreseeable victim; and (4) "a state actor affirmatively used his or her authority in a way that created a danger to the citizen or that rendered the citizen more vulnerable to danger than had the state not acted at all" *(Bennett v. Phila.)*.

The court found the complaint demonstrated all four of these elements, therefore establishing a state-created danger. As to the first element, Fairy-Coston had testified that "kids do bad stuff in bathrooms," and also that the door was supposed to be kept open to protect the children from anything bad happening. The court found that a reasonable jury could find that the harm A.A. suffered was foreseeable and a direct result of Fair-Coston's actions.

Under the second element, the court found that the risk of harm to mentally challenged students using the bathroom together without supervision was an "obvious" risk and Fairy-Coston should have known. Additionally, the school's policy required the doors to be left open, and when A.A. tried to talk to Fairy-Coston about what happened, she did not want to listen. Therefore, the court found as a matter of law that Fairy-Coston may have acted with a degree of culpability.

The third element was also met, as there was a relationship between the school and A.A. such that he was a foreseeable victim as opposed to a member of the public in general. A reasonable jury, according to the court, could find that A.A. was a foreseeable victim of Fairy-Coston's actions.

Finally, the decision by Fairy-Coston to leave A.A. and B. alone in the bathroom without supervision was an affirmative act that placed A.A. in greater danger than if he had remained in his classroom, where there were three adults present. That decision addressed the fourth element of affirmative action. Thus, the court concluded that a reasonable jury could find that a constitutional violation occurred.

Regarding the *Monell* claim, the court noted that liability can occur when an alleged policy, practice, or custom shows a failure to train or supervise municipal employees, and that the failure amounts to deliberate indifference. The court also noted that a "single violation" may be enough to show deliberate indifference in situations where the consequences to train or supervise were "highly predictable" *(Connick v. Thompson)*. Fairy-Coston stated she did not receive any special training to get her position, and she was not trained to follow the school's bathroom policy. A.A. testified that the door to the bathroom was always closed when Fairy-Coston escorted him.

The court stated that a reasonable jury could find that A.A.'s violation was a "highly predictable" result of the school district's alleged failure to train or supervise employees on taking mentally challenged students to the bathroom.

In addition, the bathroom was always locked when not in use, and only school staff had the key, which supported the inference that there was a predictable danger in allowing mentally challenged students to go to the bathroom unsupervised.

A reasonable jury could find that the school district's failure to train or supervise caused A.A.'s injuries. The court therefore concluded that a reasonable jury could find that A.A. satisfied all the elements of a *Monell* claim against the school district.

The court, therefore, denied the defendants' request for judgment on the claims against the school district. Due to the fact that the SRC no longer exists as an entity, the court dismissed all claims against it.

—School Law Bulletin,
Vol. 48, No. 2, January 25, 2021, pp. 4-6.

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Later, A.T. asked S.S. if she was "snitching" about A.T. using drugs. The girls began physically fighting, and S.S. went to the nurse's office. The nurse called S.S.'s mother, G.S., telling her that S.S. was involved in an altercation. G.S. arrived and saw S.S.'s swollen face. Capoccioni met with G.S. and told her that S.S. was suspended for three days for fighting.

In early 2017, after S.S. had served her suspension, G.S. met with Capoccioni and Principal Anthony Aquilio to see if they would remove S.S.'s suspension from her record. She was told that decision was up to the superintendent. G.S. then met with Superintendent Matthew Harris and Assistant Superintendent Scott Inglese, who reviewed the suspension, but decided not to remove it. Inglese, after checking with Capoccioni and Aquilio, learned that S.S. had a history of "telling on others," was frequently reporting bullying incidents with other students, and had verbal conflicts with other students. All of this factored into the administrators upholding the decision to suspend S.S. for fighting.

G.S. filed a lawsuit against the school district and the four administrators (defendants). The lawsuit claimed state-created danger against Capoccioni, Aquilio, Harris, and Inglese. The complaint alleged a *Monell v. New York City Department of Social Services* claim against the school district and the four administrators for having a "custom, policy, or practice of ignoring repeating incidents of bullying, which caused students to continue to be bullied online and caused students to be physically assaulted by other students." The defendants asked the court to dismiss the claims, and the court agreed, closing the case without allowing G.S. to file an amended complaint.

G.S. appealed and argued that the court should have given her leave to amend a First Amendment retaliation claim against the defendants. Because the court had not explained how it determined whether the amended complaint would have been futile or inequitable as to G.S.'s claim, the Third U.S. Circuit sent the case back for further consideration, and G.S. filed an amended complaint. The defendants again asked the court to dismiss the amended complaint.

The court dismissed the amended complaint with prejudice.

G.S., in her amended complaint, raised the issue of First Amendment retaliation because she said "S.S. engaged in conduct protected by the First Amendment, specifically reporting instances of bullying to her assistant principal, Mr. Capoccioni" through 2016, and he repeatedly brushed off her concerns. G.S pointed out that after the fight between A.T. and S.S. on December 16, 2016, when both girls were called to Capoccioni's office, "a person of ordinary firmness" like S.S., would feel deterred from exercising her First Amendment rights if she expected she would suffer a three-day suspension as a result.

G.S. alleged that the defendants retaliated against S.S. for complaining about being bullied and harassed by refusing to expunge the suspension from S.S.'s record. S.S. had already served her suspension when G.S. asked officials to remove it. G.S. took issue with some of the factors which went into the decision to uphold the suspension. These were that S.S. had a history of "telling on others," frequently being in the office complaining of bullying, and having verbal confrontations with other students. However, G.S. did not allege that S.S. was deterred from making any other statements or complaints about bullying because of the decision to uphold the suspension.

To establish First Amendment retaliation, G.S. had to allege: "(1) constitutionally protected conduct, (2) retaliatory action sufficient to deter a person of ordinary firmness from exercising his constitutional rights, and (3) a causal link between the constitutionally protected conduct and the retaliatory action" *(Thomas v. Indep. Twp.)*. The court found there were insufficient facts in the amended complaint to show retaliation against Capoccioni, Aquilio, Harris, and Inglese in their individual capacities. There were no facts showing that Capoccioni and Aquilio were decision-makers or that they made any affirmative acts to violate S.S.'s First Amendment rights. Therefore, the claim against Capoccioni and Aquilio was dismissed with prejudice.

Furthermore, the court found that the amended complaint failed to support a claim of retaliation against Harris or Inglese. The fact that the administrator refused to remove the suspension for fighting from S.S.'s record did not amount to deterring S.S. from making complaints about being bullied or harassed. The complaint failed to provide any allegations that S.S. was deterred from making further complaints or statements about bullying. The complaint also failed to make a connection to Harris and Inglese. The court therefore dismissed the complaint against Harris and Inglese with prejudice.

Regarding G.S.'s *Monell* claim against the school district, the court noted it also failed. The amended complaint did not provide any allegations that the school district had a custom, practice, or policy of retaliation against students for exercising their First Amendment rights. This claim failed as well, and the court dismissed it with prejudice.

The court then addressed the Third Circuit's ruling that the court should have expressly addressed whether an amended complaint would have been futile or inequitable as to First Amendment retaliation. The court noted that the first complaint never mentioned First Amendment retaliation, although G.S. asked for leave to amend in the conclusion of her pleading.

The court noted that, although G.S. now had received permission to amend her complaint, she failed to "cure her pleading deficiencies." The court also noted that any further amendment would be "futile in the eyes of the Court as she can not maintain her action as a matter of law" *(See In re Burlington Coat Factory Sec. Litig.)*. The facts G.S. provided in her amended complaint were basically no different from those in her first complaint and could not support a First Amendment retaliation claim. Therefore, the court dismissed the claim in its entirety with prejudice.

—School Law Bulletin,
Vol. 47, No. 23, December 10, 2020, pp. 3-4.

Special Education

Appeals court upholds private school reimbursement decision

Citation: *Board of Education of Wappingers Central School District v. D.M., 831 Fed. Appx. 29 (2d Cir. 2020)*

The Second U.S. Circuit Court of Appeals has jurisdiction over Connecticut, New York, and Vermont.

The Second U.S. Circuit Court of Appeals has affirmed a lower court's judgment in favor of the parents of an autistic student, finding that the lower court did not err when it agreed with the findings of the state review officer (SRO) that a school district's proposed individualized education plan (IEP) would not offer the autistic student a free appropriate public education (FAPE) and that the private school the parents placed their children in did offer a FAPE. In affirming the lower court's decision, the appeals court noted that a placement need not offer every service a child might need or reach perfection to offer a FAPE.

E.M. was a student in the Wappingers Central School District who was autistic. For the 2017-2018 school year, the school district proposed an IEP pursuant to the Individuals with Disabilities Education Act (IDEA) in which E.M. was to be placed in a classroom with one teacher and 15 other students with similar abilities.

The parents rejected this proposal believing that E.M. required more one-on-one attention in order to make educational progress. Instead, they found a private school called The Ridge in which to place E.M. At this school, E.M. would be in a much smaller classroom setting with significantly more one-on-one attention. The parents sought reimbursement for the private school placement via an administrative hearing under the IDEA and first an impartial hearing officer (IHO) followed by the SRO determined that the school district's IEP did not offer a FAPE, the private school placement did offer a FAPE and therefore the school district needed to provide reimbursement. The district sought a review of the SRO's decision in federal district court and the lower court found that the SRO's decision was thorough and well-reasoned and affirmed its decision. The school district appealed this decision to the Second Circuit appeals court.

The district challenged the findings, arguing that the SRO applied an improper "general educational milieu" standard when determining if the private school provided a FAPE and whether its own IEP provided E.M. a FAPE. The appeals court disagreed. It explained, citing an earlier decision *T.K. v. N.Y.C. Dep't of Educ.* that a private placement is "appropriate if it is reasonably calculated to enable the child to receive educational benefits, such that the placement is likely to produce progress, not regression." The appeals court noted that the SRO addressed the fact that the private placement did not offer occupational or speech therapy and that most of its teaching staff was not certified but found that the school was still able to offer a FAPE based on the small class size and ample one-on-one attention that E.M. would receive. The SRO also took issue with the fact that the district never addressed the issue with its placement that E.M. would not receive the one-on-one attention that his parents believed he needed. The district's reasoning that E.M. would be in a classroom with other students of similar abilities, allowing the teacher to focus her teaching to their level did not make-up for the fact that he needed more one-on-one attention than a teacher could give with 15 students.

The appeals court agreed with the lower court that a preponderance of the evidence established that the private placement was appropriate, and the district's IEP was not. The SRO's findings were "reasoned and supported by the record" and review of the facts was "thorough and careful," thus deserving deference from the court. Therefore, the appeals court affirmed the lower court's decision.

—School Law Bulletin,
Vol. 48, No. 3, February 10, 2021, p. 6.