School Law for Administrators

Rehabilitation Act

Parents file lawsuit against superintendent for discriminating against their disabled son who committed suicide

Citation: *Estate of Barnwell by and through Barnwell v. Watson, 880 F.3d 998, 351 Ed. Law Rep. 19 (8th Cir. 2018)*

The Eighth U.S. Circuit Court of Appeals has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

The Eighth U.S. Circuit Court of Appeals recently affirmed a lower court's decision in favor of a superintendent in a case in which the family of a disabled student sued after the student committed suicide. Though the parents believed that the superintendent and principal had not done enough to protect their son from bullying and that this was a result of discrimination, the appeals court agreed with the lower court that there was no evidence that the district was aware of more than immature behavior by other students before his death and that the family's claim about the inadequacy of the district's response after the student's suicide was not actionable.

C.B. was a student in the Little Rock Independent School District when he committed suicide at age 16. Over the course of his adolescence he was diagnosed with attention deficit hyperactivity disorder (ADHD), depression and anxiety disorders, oppositional defiant disorder, and Asperger's disorder. His Asperger's disorder meant he had a hard time understanding social boundaries and could engage in inappropriate behavior, including staring at others or making hurtful or inappropriate remarks. In C.B.'s case, Asperger's produced speech patterns and mannerisms that were perceived as effeminate.

C.B. attended private schools for kindergarten up through the first part of sixth grade. He was hospitalized for treatment when he reported hearing voices. After being discharged from treatment, C.B. entered the Little Rock Independent School District, attending Pulaski Heights Middle School, for the remainder of sixth grade. He was allegedly bullied by other students during his time there and was suspended after saying he wanted to hit the students who were harassing him.

In seventh grade, C.B. went back to private school but was expelled after setting a fire in a trash can when he was smoking in the bathroom. His parents, the Barnwells, home-schooled C.B. from October 2007 through August 2009. He was again hospitalized for an attempted suicide in December 2008, but his therapist, Ruth Fissel, said the actions he took were more of a call for attention than a serious attempt at self-harm. There was no evidence that representatives of the school district were informed of this incident.

C.B. was enrolled in the school district again in 2009 through 2010 as an eighth-grader. He was age 15 and enrolled at Forest Heights Middle School. His mother expressed her concerns about C.B. being bullied because of his experiences at Pulaski. He was suspended for a week in December 2009 for smoking marijuana in the bathroom but he did well in school that year.

C.B. started ninth grade at Parkview Arts Science Magnet High School in August 2010. He was having trouble getting to class on time, he said, because students kept knocking books out of his hands or blocking him in the halls. His educational management team recommended that C.B. leave classes five minutes early to give him time to move through the halls. It took a month for the principal, Dexter Booth, to approve the recommendation.

On October 7, 2010, C.B. was involved in an altercation with another student. According to C.B., a girl called him "fruity" and accused him of coughing on her. He argued back rudely, and she called him a "faggot." He told her she was a "nappy-headed bitch." She drew her hand back as if to strike him, but he hit her first with an open hand. Both students served a one-day suspension and there was no more trouble between them.

Because he kept having trouble with children in his neighborhood and at the bus stop, C.B. stopped riding the bus. As part of his individualized education plan (IEP), C.B. was in a "pragmatics group" to learn social skills. He was doing reasonably well with a B average, but by late November C.B. wanted to leave Parkview. He told Fissel he wanted to be home-schooled or quit school because he did not have any friends. C.B. wrote to his school counselor that he needed to graduate early because he did not "have any friends here because the students aren't mature enough to handle someone that's different and I can't handle being an outcast for four more years and for that reason I plead that you help me finish high school A.S.A.P."

There was no evidence that directly connected C.B.'s wish to leave school with his bullying or harassment. A teacher asked him why he wanted to graduate early, and he simply replied that he wanted to get on with his life and experience what was there for him.

At a meeting of the education management team on December 2, 2010, C.B.'s mother said they were concerned about his being bullied. However, they did not provide specific incidents and C.B. had not reported being bullied to Fissel or his mother. The October 7, 2010 incident was the only evidence that the mother was aware of at the time. The team decided C.B. should be moved to a higher functioning social skills group.

The incident that precipitated C.B.'s suicide occurred on December 7, 2010. C.B. was harassed and responded with a

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rude comment about a classmate's mother. The other student told C.B. he should go home and kill himself. That evening, the parents went out for an appointment. They said C.B. seemed fine when they left. While they were gone, C.B. committed suicide.

The Barnwells found more evidence that C.B. was bullied after his death from other students. Fissel and the Barnwells met with Booth to try to investigate C.B.'s death. Mrs. Barnwell said that Booth was not interested in the names of students who might have information and denied that bullying occurred in the school. According to Mrs. Barnwell, Booth told faculty not to discuss C.B.'s death. Also, a USB drive that C.B. had given to another student was confiscated and never seen again.

The Barnwells complained to the State Department of Education and then to the U.S. Department of Education's Office of Civil Rights. They later brought a lawsuit against Superintendent Linda Watson in her official capacity. They claimed discrimination on the basis of disability in violation of Section 504 of the Rehabilitation Act. The court did not find sufficient evidence to support their claim and granted judgment in favor of the superintendent. The Barnwells appealed and the appeals court affirmed.

The only claim the Barnwells were pursuing was the school district's alleged violation of Section 504 of the Rehabilitation Act. The section provides that "[n]o otherwise qualified individual with a disability. . . shall. . . .be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance . . .". The Barnwells argued on appeal that: 1) the school employees failed to address allegations of C.B.'s bullying and harassment; and 2) that Booth failed to conduct an adequate investigation into those claims after C.B.'s death.

The court noted that there was nothing in the record to indicate that school officials were aware of any specific instance of bullying before C.B.'s death. The only incident they were aware of, which was addressed, was the classroom altercation between C.B. and another student on October 7, 2010. After both students were suspended for one day there was no more trouble between the two. Regarding the claims that C.B. was being harassed in the hallways between classes, the school district had also addressed the problem, suggesting that he be allowed to leave his classes five minutes earlier. Even though the principal took a month to approve that recommendation, it was addressed two months before C.B.'s death.

The Barnwells argued that during the December meeting of the educational management team, the parents brought up their concerns about bullying. However, there were no specific reports to substantiate these claims. Also, they argued that the school counselor should have asked C.B. why he wanted to leave school. The court noted that, even if the counselor had asked, there was no guarantee what C.B.'s answer would have been. The court noted, "A failure to proactively address such inchoate worries falls well short of establishing the level of bad faith or gross misjudgment needed to support a § 504 claim . . ."

The Barnwells also contended that the court should apply the "deliberate indifference" standard from *Davis v. Monroe Cnty. Bd. Of Educ.* to the school's conduct, rather than the "bad faith or gross misconduct" standard that is usually applied for in Section 504 cases. However, the court noted that the evidence in this case failed to satisfy the *Davis* standard. "Under that standard, an educational institution is liable only where it is (1) deliberately indifferent (2) to known acts of discrimination (3) which occur under its control" *(K.T. v. Culver-Stockton Coll.).*

Also, the discrimination must be so severe, pervasive, and offensive that it deprived the individual of access to the educational opportunities or benefits provided by the school *(Davis).*

There was no evidence of that degree of harassment in this case. The court noted that the U.S. Supreme Court found in *Davis*: "It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender."

The court concluded that there was no evidence that C.B. suffered more than the hurtful and immature behavior the Supreme Court said was not actionable under the law. Since the school district had relatively little information before C.B.'s death, the court could not conclude the district had a clearly unreasonable response to the situation.

The Barnwells argued that Principal Booth failed to adequately investigate any harassment or bullying that might have occurred after C.B.'s death, failed to provide grief counselors at the school, and silenced those who wanted to talk about the suicide. The court noted the Barnwells did not cite any cases that would support the proposition that a school district could wrongly discriminate against a disabled student in violation of Section 504 by not responding to the death with an investigation into harassment that might have occurred, or not responding with enough sensitivity to the death.

In conclusion, the court affirmed the lower court's ruling and granted judgment to the superintendent and the school district.

—School Law Bulletin,
Vol. 45, No. 9, May 10, 2018, pp. 3-5.

In the News

In the wake of recent school shootings, the number of armed security guards in schools is on the rise according to a recent federal study

According to a recently released federal study, armed security officers are becoming more prevalent at America's schools. While this is not surprising, given the fear and upheaval that has followed the most recent wave of school shootings in the country, the results of the study do not sit well with everyone. These results come in the wake of a heated national debate over whether teachers and other school officials should carry guns, or whether there are other ways to work against the increase of gun attacks in schools. It is still up for debate whether the presence of armed officers makes a difference in school shootings. According to the study, armed officers were present at least once a week in 43% of all public schools during the 2015-16 school year, compared with 31% of schools a decade before, according to data from a survey conducted by the National Center for Education Statistics (NCES).

This study was released only days after Education Secretary Betsy DeVos kicked off a federal school safety panel. This panel has not been received well by educators who would like to be included in the process. The panel that DeVos put together consists of her and three other cabinet secretaries, it does not include a single teacher or union member. The panel has unilaterally come to the conclusion that schools should have the option of arming teachers, despite the fact that there is not a single bit of evidence that shows that this option will make schools safer.

In the past it was not uncommon to have an armed security officer in a middle or high school, but it was nearly unheard of at the elementary level. For this reason, the most notable change is that security staff has increased from 26% to 45% at the elementary level in the last decade. This is a notable change. Lauren Musu-Gillette, lead author of the report contends that, "There has been increase in security staff in schools over the last 10 years and it's more pronounced at the primary school level."

There are conflicting views among experts on whether putting such officers on school campuses will make the schools safer or just frighten children and lead to more arrests. Mo Canady, executive director of the National Association of School Resource Officers said, "There needs to be at least one in every school in the country." She continued, "Every school could benefit from one." Ronald Stephens, executive director of the National School Safety Council, agrees, saying that trained officers carrying weapons can help prevent a shooting inside the school and deter a possible shooter from entering. "It sends the signal that the school is being watched and that the care and supervision of children is an important priority," Stephens asserts.

Despite these contentions, there is a lack of concrete data to support these assertions. In fact, according to a 2013 congressional report, the available research at best, "draws conflicting conclusions about whether SRO programs are effective at reducing school violence." "Also, the research does not address whether SRO programs deter school shootings, one of the key reasons for renewed congressional interest in these programs," the study finds.

An education professor at University of Southern California, Ron Astor, who specializes in school behavior, says that putting weapons in schools will make them akin to prisons, intimidate children, and hurt their studies. Instead, he says, research has shown that violence, bullying, and the use of drugs and guns is reduced in warm, caring environments focused on providing support to students. Many educators share this view, or at least are not convinced that arming teachers to adding armed security guards to school is the answer.

—School Law Bulletin,
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Equal Protection

Court rejects student's allegation of Equal Protection violation where student complained of sexual assault under Title IX

Citation: Doe v. Francis Howell School District, 2018 WL 1519374 (E.D. Mo. 2018)

A federal district court in Missouri has granted a school district and its employee's motion to dismiss a lawsuit brought against it by a student who claimed Equal Protection violations, alleging that she was treated differently than other female students who file complaints under Title IX. The court found that the student's argument that she was treated differently than others in her own protected class could not establish a violation of the Equal Protection clause.

Jane Doe was a student in the Francis Howell School District. Though the facts are not detailed with specificity, Doe alleges that she suffered a sexual assault while at school (ostensibly by another student). According to Doe, when she complained about the sexual assault to school employees, the employees failed to properly investigate the situation and continually suggested that she had been complicit in the sexual activity.

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Around the Nation ~ Illinois

After being disallowed from making religious references in his valedictorian speech, a student retained legal council

A student from West Prairie High School in Illinois who was named the co-valedictorian of the 2018 senior class was told by administrators that he was not allowed to make religious comments in his valedictorian speech. Sam Blackledge, followed this mandate, but after the graduation ceremony he decided to follow up the situation by hiring legal counsel by the First Liberty Institute (FLI). He believes that the school district violated his First Amendment Rights.

Speaking to members of the media, FLI's deputy general counsel Jeremy Dys said: "The principal told him he would be able to address his fellow students in that way. And Saturday afternoon he gave a copy of that speech to the principal as requested. He took a look at it and realized there were several references to his faith within that one-page speech he was going to give as the valedictorian."

Dys then informed Blackledge that he would not be able to give the speech unless it was amended. Blackledge elected to forego the speech and just say a few generic words at the ceremony. He is, however, following up legally because he wants to make sure that this doesn't happen to other students in the future and he believes that his rights were violated.

Dys said he hopes to meet with the school board to discuss a course of action and the district has sought legal counsel to guide them through this situation.

Source: *The Daily Review Atlas*

—School Law Bulletin,
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Doe filed a lawsuit against the district and its employees, alleging a Fourteenth Amendment Equal Protection violation. She essentially argued that she was treated differently than other similarly situated students who complained of Title IX violations because her complaint was met with the continued suggestions by school employees that she was complicit in the sexual act that occurred. She also alleged that the district was liable for the actions of its employees because it had failed to appropriately train them on how to investigate and handle such complaints. The district and its employees requested that the claims be dismissed.

The court granted the request to dismiss, though leaving room for Doe to amend her complaint, finding that Doe could not establish an Equal Protection violation based on treatment that differed for students within the same protected class as her, i.e. other female students.

To state a valid claim for a constitutional violation under Section 1983, Doe needed to show that the district acted under the color of state law, depriving her of a constitutionally protected right. A *prima facie* violation of the Equal Protection Clause can be shown by alleging facts that support that the person was otherwise similarly situated to members outside of their protected class, the person was treated differently from members of the unprotected class, and the defendant acted with discriminatory intent.

Here, Doe's contention that she was treated differently from other female students who filed Title IX complaints could not support an Equal Protection violation argument because females are the "protected class." This claim, therefore, failed.

Doe also argued that the district was liable for a constitutional violation because it failed to appropriately train its staff on how to investigate and respond to an allegation of sexual assault. Putting aside that the court already concluded that Doe had not suffered an Equal Protection violation, the court noted that Doe's argument would have failed on this count too because to support such a claim for liability, she would have needed to show that the district had noticed that its methods of investigation or employee training were inadequate and likely to cause a constitutional violation. But, the court noted, nothing in Doe's complaint supported this particular argument. Instead, Doe focused on how she thought the investigation should have been handled. But that her methods would have differed from the school district's methods did not establish that the district was liable for a constitutional violation.

—School Law Bulletin,
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