CIVIL RIGHTS IN EDUCATION

Presentation by:

Adam I. Kleinberg
Miranda Sokoloff Sambursky Slone Verveniotis LLP
240 Mineola Blvd.
Mineola, NY 11501
akleinberg@msssv.com

Materials prepared by:

Adam I. Kleinberg
Melissa Holtzer
Miranda Sokoloff Sambursky Slone Verveniotis LLP
240 Mineola Blvd.
Mineola, NY 11501
akleinberg@msssv.com
mholtzer@msssv.com

1st Amendment Developments

Morse v. Frederick, 127 S. Ct. 2618 (2007)

The United States Supreme Court found that a student's speech was not entitled to First Amendment protection, notwithstanding the fact that the speech was expressed out of school.

In January 2002, the Olympic torch relay passed through Alaska on the way to the Winter Olympics in Salt Lake City, Utah. A local high school permitted its staff members and student body to leave school during the school day in order to observe the torchbearers. Notably, the principal deemed the departure from school as an "approved social event or class trip."

As the torchbearers passed by, Joseph Frederick and his friends opened up a 14 foot banner stating, "BONG HITS 4 JESUS." The students were standing across the street from the school. The school principal proceeded to confiscate the students' banner and issue Frederick an 8 day suspension.

The United States Supreme Court found that the challenged speech was not protected under the First Amendment. The Court found that, although the speech occurred outside of the classroom, the incident occurred during school hours, under school supervision, and at an event sanctioned by the school. Thus, the banner was classified as student speech.

The Court offered varying descriptions regarding the banner's message, ranging from cryptic to curious to gibberish. Nonetheless, the Court found that the school principal reasonably

interpreted the banner as promoting the use of illegal drugs, thus, providing sufficient justification for the disciplinary action.

While the majority found that the school possessed a sufficient interest in prohibiting the speech, in his dissent, Justice Stevens found that the "the banner was unlikely to persuade even the 'dumbest' student to become an illegal drug user."

***Doninger v. Niehoff*, 2008 WL 2220680 (2d Cir. 2008).**

A student's mother sought a preliminary injunction after a school district barred her daughter, Avery Doninger, from running for student class secretary. The school district took this step after Doninger had posted derogatory and incendiary comments on her blog. The blog was not posted on a school-related website.

In sum, Doninger was frustrated by perceived obstacles placed by school faculty and administrators to the scheduling of a school-sponsored "battle of the bands" competition. Doninger took to the Internet, first sending a mass e-mail designed to drum up support for the students' cause. Frustrated by the administration's response, Doninger posted the following blog entry,

> Jamfest is cancelled due to douchebags in central office . . . And here is a letter my mom sent to [the Superintendent] and cc'd [the Principal] to get an idea of what to write if you want to write something or call her to piss her off more. im down.

The District Court denied the requested relief, finding that the plaintiff failed to demonstrate a substantial likelihood of success on the merits. In affirming this decision, the Second Circuit recognized that the Supreme Court had not yet addressed a school's authority to regulate speech that does not occur on school grounds or at a school-sponsored event.

Nonetheless, the Second Circuit found that Doninger's speech was not protected under the First Amendment, as it "would foreseeably create a risk of substantial disruption within the school environment." <u>See</u> *Doninger v. Niehoff*, 2008 WL 2220680 at pp. 6-7 (2d Cir. 2008) *citing Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d Cir.2007). In reaching this determination, the Second Circuit found that the blog contained offensive language which had the potential of disrupting the school's efforts to resolve the controversy. Further, the Court found that the blog contained misleading information which would likely result in administrators expending extensive time and energy to correct the disseminated information.

Thus, the Court found that plaintiff could not establish a likelihood of prevailing on the First Amendment claim as the student's conduct posed a substantial risk that it would divert school staff from their core educational responsibilities.

<u>Student Speech- Threats of Violence</u>

In *Wisniewski v. Board of Ed*, 494 F.3d 34 (2d Cir. 2007), a student named Aaron sent instant messages to a number of his classmates, all of which contained a disturbing icon. Aaron's AOL profile icon, which was visible with every instant message that he sent, was a cartoon depiction of a pistol firing a bullet at a person's head, above which were dots representing splattered blood. Beneath the drawing appeared the words "Kill Mr. VanderMolen," Aaron's English teacher at the time. One of Aaron's classmates alerted VanderMolen to the situation and the school district ultimately suspended Aaron for five days.

The Second Circuit held that that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." *See Wisniewski*, 494 F.3d at 39 citing *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, (1969). Applying this test, the Court found it was reasonably foreseeable that the icon would come to the attention of school authorities and the teacher whom the icon depicted being shot. *Id*. Accordingly, the suspension did not violate Aaron's First Amendment rights.

Similarly, in *Boim v. Fulton County School Dist.*, 494 F.3d 978 (11th Cir. 2007), the Eleventh Circuit found there to be no First Amendment right allowing a student to knowingly make comments, whether oral or written, that reasonably could be perceived as a threat of school violence, whether general or specific, while on school property during the school day. Further, the court found that where there is no violation of First Amendment rights, there is no right to expunge information from a student record.

***Cuff v. Valley Central School District,* 2008 WL 1990788 (S.D.N.Y., 2008)**

Plaintiffs, on behalf of their son B.C., filed a lawsuit against the Valley Central School District (the "District") in the United States District Court for the Southern District of New York. The Complaint alleged violations of 42 U.S.C. § 1983 and First Amendment rights.

Essentially, plaintiffs alleged that the District and its elementary school principal imposed excessive discipline to B.C., a 5th grade student, as a result of what plaintiffs deemed an "innocuous" statement in response to a classroom assignment. According to the Complaint, B.C.'s science teacher asked the students to fill in a picture of an astronaut with things describing their personality. B.C. proceeded to write in things such as his birthday, his favorite sports, and the statement "blow up the school with all the teachers in it." Plaintiffs maintained that the statement was not shared with B.C.'s classmates and that B.C. had never exhibited any violent tendencies wither in or out of school.

According to the Complaint, B.C.'s teacher notified the principal, who then imposed a five day out of school suspension. Plaintiffs, through counsel, asked the District's Board of Education to expunge B.C.'s record of the incident. The Board denied the request.

In sum, plaintiffs alleged that the suspension was an excessive response and that school authorities knew, or should have known, that B.C. posed no threat and had neither the means nor the capacity to "blow up the school."

In March of 2008, Judge William C. Conner granted the District's pre-answer motion to dismiss the complaint. Relying on the Second Circuit's decision in Wisniewski, Judge Conner found that there was no doubt that B.C.'s statement would foreseeably create a risk of substantial disruption within the school environment as it was made directly to a teacher. The Judge rejected plaintiffs' claims that B.C. was not capable of the suggested violence as even a failed attempt would substantially interfere with the learning environment.

The key analysis is the reasonableness of the school official's interpretation of the statement, not the subjective intent of the speaker. The court took note of the increasing problem of threats in the educational setting and found that great deference is afforded to school officials who perceive a threat as serious and mete out discipline to ensure safety within the school. Accordingly, the speech was not afforded First Amendment protection.

Price v. NYC Board of Education **(1st Dept. 2008) (N.Y.L.J. 4/28/08)**

This decision attempted to balance the Dept. of Education's interest in maintaining order and discipline in schools with the concerns of parents and guardians for their children's well-being.

In September of 2005, the Department of Education issued Regulation A-412, which "set forth the responsibilities of school staff for maintaining security in the schools." The Regulation further provided that "Beepers and other communication devices are prohibited on school property, unless a parent obtains the prior approval from the principal/designee for medical reasons."

Also in September of 2005, the Department of Education (the "Department") issued its Disciplinary Code "for the maintenance of order on school property." The Code enumerated various infractions ranging from Level 1 (Insubordinate Behaviors) to Level 5 (Seriously Dangerous or Violent Behavior). One of the Level 1 infractions was bringing a cell phone to school without authorization.[1]

In April of 2006, the Department announced that students at certain schools would be scanned by metal detectors before entering school. While the intended targets were weapons such as box cutters and guns, thousands of cell phones were detected and confiscated.

A parent advocacy group circulated a petition calling for a moratorium on the prohibition of cell phones. The parents alleged that the ban infringed on their rights to provide their children with a tool of protection. The United Federation of Teachers supported a ban on cell phone use on school grounds, but agreed with the call to end the ban on possession.

The Department refused to reconsider the issue and a group of parents sought judicial review of the ban via an Article 78 proceeding. The parents alleged that the Regulation was an abuse of authority as it was not necessary to the maintenance and discipline of the school. They also alleged that the ban was arbitrary and capricious.

[1] While not specifically identified until September of 2005, it is important to note that cell phones would have been prohibited under a prior ban on "personal communication devices."

In sum, the parents insisted that the cell phones were a vital communication and security device upon which students and their families rely during school commutes and for after school activities. Dangerous neighborhoods, the scarcity of pay phones, and the role in coordinating meeting points were all cited. The parents alleged a liberty interest deprivation, claiming that the ban infringed on their fundamental right to provide for the care, custody and control of their children.

The Department countered by describing how cell phones threatened order in the schools through peer harassment, classroom disruption, examination cheating, and criminal purposes. Further, to install some sort of lock system would be cumbersome, expensive, and virtually impossible to implement.

The Department argued that the Court need only apply a rational basis test, rather than a strict scrutiny analysis. In this regard, the Regulation would easily pass a rational basis test as education was a legitimate state interest and the ban was reasonably related to the advancement of such interest.

The New York County Supreme Court rejected the parents' Constitutional claims, finding the ban central to the educational mission. In this regard, the Court found that the 14th Amendment right to provide for the care, custody, and control of children did not embrace a right to communicate with children by cell phones. Accordingly, the Court did not engage in either a strict scrutiny or a rational relationship analysis.

In April of 2008, the First Department affirmed the decision of the Supreme Court. First, the Appellate Court found that the challenge to the rationality of the policy was nonjusticiable, as the situation presented a school official's decision of an inherently administrative process without a showing of an ultra vires act or failure to perform a required act. While the courts are routinely involved in cases involving teacher tenure, discrimination, and dismissal, this ban was entirely a matter of policy and no discrete issues of law were implicated.

The Appellate Court found that the liberty interest at stake is not absolute and only afforded Constitutional protection in appropriate cases. Here, the cell phone ban does not deprive parents of their ability to raise children in manner in which they see fit. Thus, had the Court applied a Constitutional analysis, it would have been a rational basis test. In this regard, the Appellate Court found that the Department had a rational interest in having staff spend time on education, not waging a war against cell phones.

While the parents argued that lockers could be installed to control the use of cell phones inside the schools, the court refused to interfere with a governmental agency's allocation of its finite resources.

We note that the Court recognized that the Regulation expressly authorized schools to permit a child to possess a cell phone if he or she has a medical reason. Thus, children who are legitimately predisposed to physical and/or psychological issues are able to have a cell phone to reach their parents when not in school. Also, the Court could think of no reason why the

Department would preclude schools from entertaining reasonable applications for exemptions to the policy which do not rely on medical issues, but involve equally compelling situations.

Peer Abuse

An action may lie under Under Title IX of the Education Amendments of 1972, where a school acts with deliberate indifference to known acts of student-to-student sexual harassment. See *Davis v. Monroe County Board of Ed. et al.*, 526 U.S. 629, 640 (1999). Damages are only available where the behavior is so severe, pervasive, and objectively offensive that it denies the victim equal access to education. *Id*.

***Doe v. East Haven Bd. of Educ*., 200 Fed.Appx. 46 (2d Cir., 2006)**

In *Doe v. East Haven*, the Second Circuit the plaintiff alleged a title IX claim against the Board of Education of her high school for their failure to act following an off-campus rape. In this regard, plaintiff reported that she was the victim of an off-campus rape by two of the District's high school students. Shortly thereafter, plaintiff was subjected to persistent name-calling in school, such as liar, whore, and slut.

A jury awarded $100,000 to the plaintiff and the defendant appealed the award to the Second Circuit. The Second Circuit affirmed the decision and award, finding that a reasonable fact-finder could conclude that school authorities acted in a clearly unreasonable fashion, where the alleged victim of a rape complained of verbal harassment based on her sex and related to the rape for five weeks before authorities took concrete action to get the perpetrators of the harassment to stop.

A district will be deemed 'deliberately indifferent' to acts of student-on-student harassment only where the response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances." *See Davis*, 526 U.S. at 648. Although there is no Title IX right to make particular remedial demands, here the Court found a reasonable fact-finder could conclude that school authorities acted in a clearly unreasonable fashion. In this regard, the victim complained of verbal harassment based on her sex and related to the rape for five weeks before authorities took concrete action to get the perpetrators of the harassment to stop.

The Second Circuit rejected the Board's argument that school authorities could not have had actual knowledge of harassment based on sex, because the victim's gender was irrelevant to the harassment. In this regard, the Court found that a reasonable fact-finder could conclude that the victim would not have been subjected to the harassment but for her sex. Accordingly, a reasonable fact-finder could conclude that school officials actually knew that the victim was being sexually harassed.

Additionally, the Second Circuit rejected the Board's contention that the harassment was not severe and pervasive so as to deny access to educational opportunities and benefits. In this regard, the Board maintained that the harassment lasted no more than five weeks, that the victim's grades did not suffer during the harassment, and that her attendance did not suffer dramatically. The Court found that even where a Title IX plaintiff's "academic performance

does not appear to have suffered," during the alleged sexual harassment but the harassment "simply created a disparately hostile educational environment relative to her peers," the issue of whether the harassment deprived the plaintiff of educational opportunities and benefits is one for the trier of fact. *See Doe v. East Haven Bd. of Educ*., 200 Fed.Appx. 46 *citing Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 748, 750 (2d Cir.2003). Here, the Court found that the victim's emotional distress resulting from seeing her attackers in school, combined with repeated name-calling and absences from class could allow a reasonable fact-finder to find a Title IX violation.

Courts have found that in peer-on-peer harassment cases, parents do not have an actionable claim for either their own emotional damages or for the cost of an alternative education. *See Cavello v. Sherburne-Earlville CSD*, 110 A.D.2d 253, 494 N.Y.S.2d 466 (3d Dept. 1985).

Teacher-Student abuse

***Angilletta v. Mamaroneck U.F.S.D.*, 2007 WL 1760766 (S.D.N.Y., 2007).**

The infant plaintiffs commenced a suit against the defendant District and various of its administrators alleging that they had been inappropriately touched by a music teacher within the District. Plaintiffs alleged claims against all of the defendants under 42 U.S.C. § 1983.

The defendants moved to dismiss the claims as subsumed by Title IX of the Education Amendments of 1972 ("Title IX"). Judge Charles L. Brieant of the Southern District of New York granted defendants' motions based on his prior decision in *Zamora v. North Salem Central School District*, 414 F.Supp.2d 418 (S.D.N.Y. 2006).

In *Zamora*, Judge Brieant examined this very issue in the context of an infant plaintiff's claims against her school district and its officials as related to allegations of inappropriate touching by the plaintiff's teacher. With regard to the plaintiff's claims under 42 U.S.C. § 1983, Judge Brieant dismissed the claims against the district, as well as against the Superintendent and Principal, expressly finding them to be subsumed by Title IX.

> Although [a student] has a constitutional right to an educational environment free of sexual harassment, we have already determined that Title IX provides the exclusive remedial avenue. Congress intended Title IX to be the appropriate vehicle to protect all of plaintiff's rights arising in this situation as Title IX's enforcement scheme fully addresses her constitutional claims against the School District and School Board. Consequently, we hold that [a] plaintiff may not maintain [a] § 1983 claim and thereby bypass the comprehensive remedial scheme created in Title IX.

Id. at 426 *citing Bruneau v. South Kortright Cent. Sch. Dist.*, 163 F.3d 749, 759 (2d Cir. 1998).

Courts in other judicial circuits have echoed Judge Brieant's finding as to the comprehensiveness of the remedial provisions of Title IX. *See e.g. Doe v. Smith*, 470 F.3d 331, 339-40 (7th Cir. 2006)*; Pfeiffer v. Marion Center Area School District*, 917 F.2d 779, 789 (3d Cir.1990). In *Doe*, the Seventh Circuit drew a significant distinction between the alleged tortfeasor who committed the sexual abuse and the school officials who plaintiffs alleged should have stopped the acts.

> Regarding the effect of a Title IX claim, there is a crucial line in our case law between suits against the alleged malefactor who is not shielded from section 1983 liability, *see, e.g., Delgado,* 367 F.3d at 674, and suits against school officials implementing the challenged education practice or policy who are shielded from individual liability, *see, e.g., Boulahanis v. Bd. of Regents,* 198 F.3d 633, 639 (7th Cir.1999). In the latter instance, we have held that a section 1983 claim is not cognizable because Title IX provides comprehensive recourse (the loss of federal funds) for the discriminatory practice or policy.

Doe, 470 F.3d at 339-40. As such, the Seventh Circuit has held that a plaintiff may maintain a § 1983 claim against the perpetrator of the alleged sexual assault, but may not against the school officials responsible for carrying out school policy.