Court Report

April 2022

US Supreme Court

- **First Amendment - Sanctions**

***Houston Comm. College System v. Wilson*, -- S.Ct. --, 2022 WL 867307 (Mar. 24, 2022)**

Editor's Note: While this case relates to an elected community college board in Texas, the holding may be instructive to Alabama school boards and their use of the censure/sanction process under the School Board Governance Improvement Act of 2012.

This case involved the elected board of trustees for the community college system. One member had a turbulent term during which he often engaged in fierce disagreements with the other board members, which included him repeatedly suing the board. The board ultimately reprimanded the member. He responded by accusing the board of misconduct in the media, initiating robocalls to constituents and hiring a private investigator to surveil a fellow member. Two years after initially reprimanding the member, the board censured him and imposed various penalties, including barring him from holding an officer position, barring him from being reimbursed for travel, requiring board approval for other expenditures and recommending additional training. Following the censure, the member sued the board claiming that the censure violated his First Amendment rights. The lower court ultimately dismissed the suit and the member appealed to the Fifth Circuit which ruled in his favor. The board appealed to the US Supreme Court on the issue of

whether the member could state a First Amendment claim based solely on the censure.

The Court first addressed whether a purely verbal censure could be deemed a violation of the First Amendment. The First Amendment prohibits the government from retaliating against a person based on his protected speech. The Court noted that there was no precedent for holding a verbal censure--a longstanding practice across all levels of government--violated the First Amendment.

To establish a First Amendment retaliation claim, one must show that the government took an adverse action in response to protected speech; and that the government would not have otherwise taken that action. Examples of adverse actions include arresting someone or firing them from their government job but not every action rises to the level of a materially adverse action. Rather, an adverse action must be one that would "chill a person of ordinary firmness" from engaging in future protected speech. Here, the member did not claim that the initial reprimand violated the First Amendment. Rather, he claimed that the censure did because it went beyond a verbal criticism by the board. The Court rejected the distinction. First, the Court noted that as an elected official, a certain amount of criticism is to be expected. Second, the First Amendment applies to both sides of a dispute. If the member had a First Amendment right to speak his opinion, his fellow members had the right to do the same. The member was still able to represent his constituents. He also continued to engage in the same type of speech after he was initially reprimanded. Therefore, the censure clearly did not chill his ability to engage in future speech. With that, the Court reversed the Fifth Circuit's decision.

While the Court rejected the member's claim, it stated that censures could rise to the level of a First Amendment retaliation claim depending on the circumstances, but they were not severe enough here. The Court was careful to note that its holding was based only on the facts before it, and that other punishments, including expulsion or exclusion, may lead to a different result.

Eleventh Circuit

- **Fourth Amendment – Strip Search**

***T.R. v. Lamar County Board of Education*, 25 F.4th 877 (11th Cir. Feb. 4, 2022)**

Upon smelling marijuana in a classroom, a teacher alerted the principal and assistant principal who searched each students' belongings. During that search, officials found drug paraphernalia in one student's backpack and two students reported that they saw the girl light a cigarette in the class. After being taken to the counselor's office, the student admitted to smoking marijuana regularly but denied smoking in the classroom. She also denied having any marijuana on her person. Nevertheless, the principal and counselor decided to conduct a strip search. No marijuana was found during the strip search but a marijuana cigarette was found under the student's desk the next day. The student sued the board, the superintendent and school administrators for violating her Fourth Amendment right to be free from an unreasonable search. The lower court entered judgment in favor of the defendants and the student appealed to the Eleventh Circuit.

All citizens, including students, are protected from unreasonable searches by the Fourth Amendment. While law enforcement must meet the probable cause standard to search a person, school officials must meet the lesser standard of reasonableness. A court will ask (1) was the search justified at its inception; and (2) was the search reasonable based on the circumstances. A search is considered justified at its inception if the official has a reasonable belief that the search will show a violation of a law or school rule, but the scope of the search must also be reasonable given the age and sex of the student and the type violation alleged. In one case, a teenage girl was strip-searched because she was suspected of giving other students Ibuprofen. The Supreme Court held that while the search could have been properly conducted to look for the pills, it was unreasonable to conduct a strip search under the circumstances. *Safford Unified S.D. v. Redding*, 557 U.S. 364 (2009).

The Court first considered whether the school officials were entitled to qualified immunity. In order to be granted qualified immunity, the school officials must have been acting within their discretionary authority, and the law must not have been clearly established at the time of the incident. While the Court agreed that the principal and counselor were acting within their discretionary authority, the students' Fourth Amendment rights were clearly established by two similar cases involving strip searches. In order to justify a strip search under the circumstances, school officials needed more than the

general possibility that the student hid contraband in their underwear. For example, the strip search may have been justified if school officials were told by a witness that the student had hidden the drugs in her underwear. Here, the Court held that the school officials were not entitled to qualified immunity and the Fourth Amendment claim could move forward.

The Court next considered the student's invasion of privacy claim. School employees and officials would be entitled to state agent immunity if they are using their discretion in the education and supervision of students, and are not acting willfully, maliciously, fraudulently, in bad faith or beyond their authority. In this case, it was clear that the school officials were using their discretion, but the student claimed they acted beyond their authority by conducting the strip search. Specifically, board policy required the superintendent approve any strip search but he was not contacted prior to the search here. The Court agreed that the officials acted beyond their authority because they did not contact the superintendent first, and therefore, were not entitled to state agent immunity on this claim.

Finally, the Court considered the student's outrage claim. The lower court rejected the outrage claim because the conduct complained of was not so extreme "as to go beyond all possible bounds of decency". *Wilson v. Univ. of Ala. Health Servs. Found.*, 266 So.3d 674 (Ala. 2017). Again, the Court disagreed and determined that there was a question of fact as to whether the conduct was extreme enough to find outrage. The Court reversed the case and remanded it back to the lower court for further proceedings.

U.S. District Courts

Editor's Note: Court Report does not typically summarize district court cases but given the gravity and timeliness of the issues presented, we do so here.

- **Title IX - Bullying**

***Adams v. Demopolis City Schools*, 2022 WL 855288 (S.D. Ala. Mar. 22, 2022)**

This case was filed following the tragic suicide of a 9-year old girl allegedly due to bullying she suffered at school. The incidents of verbal and physical bullying involved a boy shoving the girl, pulling her hair, calling her the "n-word" and making fun of her skin tone. Teachers wrote the boy up and sent him to the office for his conduct. School officials also came up with various strategies to protect the girl from bullying. Following the girl's suicide, her family sued the board as well as the superintendent, principal, assistant principal and teacher for violations of the girl's rights under Title IX, Title VI, her Fourteenth Amendment rights to substantive due process and equal protection, and multiple state law claims including wrongful death. Following discovery, the defendants moved for summary judgment.

The court first considered the Title IX (sex) and Title VI (race) claims brought against the board. A board can be sued for damages for student-on-student harassment that is based on race or sex discrimination if the board (1) had actual knowledge of the harassment and was deliberately indifferent to it; and (2) the harassment was so severe and pervasive that it deprived the student of educational opportunities. After reviewing the incidents of bullying, the court found that the testimony was too general to establish that the bullying was severe and pervasive. It failed to sufficiently identify the number of incidents and the identities of the students involved. It also identified incidents that may be upsetting but were typical childhood behaviors of teasing, name-calling and pushing. Even if the family could show actual knowledge on the part of school officials, the teachers were not deliberately indifferent. Teachers sent the boy to the office, disciplined him with in-school suspensions and developed a plan to protect the girl from incidents of bullying. The family also claimed that the board's failure to promptly adopt the policy required by

the Jamari Terrell Williams Student Harassment Prevention Act demonstrated an indifference to bullying. The board responded that it adopted the policy shortly after the State Department published its model policy. The court agreed that the slight delay in adopting the anti-bullying policy was not evidence of deliberate indifference. Additionally, there was no evidence that the board's original bullying policy was insufficient nor was there evidence that adopting the Williams Act policy would have prevented the girl's suicide. Because the family could neither show severe and pervasive harassment nor deliberate indifference, the board was entitled to summary judgment on the Title IX and Title VI claims.

The court next considered the family's claims that the defendants violated the girl's substantive due process rights by failing to protect her from bullying and inadequately training school employees. Under the Fourteenth Amendment, the government is required to protect a citizen's fundamental rights but those protections do not extend to offenses by private actors. Because the defendants had no duty to protect the girl from the actions of a third party, there was no constitutional violation. Absent a constitutional violation, the sufficiency of the school's response and the adequacy of the training was irrelevant. Additionally, even if there had been a constitutional violation, the individual defendants would have been entitled to qualified immunity. Accordingly, the court entered judgment in favor of the defendants on the substantive due process claims as well.

Finally, the court considered the state law claims of wrongful death against the board and school officials. As a local agency of the state, the board enjoyed absolute immunity and was entitled to judgment on that basis. Additionally, the school officials were entitled to state agent immunity because their actions were made in the course of the discretionary function of educating and supervising students and there was no evidence to show that they acted willfully, maliciously or in bad faith.

- **First Amendment – Public Comments**

***Moms for Liberty v. Brevard Public Schools*, 2022 WL 272940, -- F.Supp.3d -- (M.D. Fla. Jan. 24, 2022)**

This case involves public comments at school board meetings. The board's policy provided the following:

- All public comments must be directed to the board chair; not to individual members;
- The chair has the authority to "interrupt, warn, or terminate a … statement when [it] is too lengthy, personally directed, abusive, obscene, or irrelevant;" and
- The chair can ask people who do not observe reasonable decorum to leave the meeting.

A local non-profit group sued the board claiming that its public participation policy violated their First Amendment rights on its face and as applied. They also claimed that the chair selectively enforced the policy based on whether or not he agreed with the speaker's viewpoint.

At the preliminary injunction stage, the court first considered whether the "personally directed" and "abusive" prohibitions constitute content and viewpoint discrimination on its face. Content-neutral restrictions apply regardless of the content of the speech. For example, rules regarding speaker procedures, disruptions and decorum are considered content-neutral. Viewpoint-neutral restrictions apply regardless of the position being advocated. Here, the court noted that it was acceptable to require comments be directed to their chair since individual members possessed no power. The Eleventh Circuit had also previously approved prohibitions against abusive comments at board meetings. As a result, the court held that the board's policy appeared to be appropriate on its face and unlikely to succeed on the merits.

The court next considered the group's claim that the policy was unconstitutional as applied to them. Specifically, the group claimed that individuals promoting viewpoints that the board chair agreed with were allowed to speak freely without interruption while the chair routinely

interrupted and ejected group members based on the messages they were promoting. The court's review of video evidence of multiple board meetings did not bear this out. Both group members and non-group members were routinely interrupted by the chair in a respectful manner—regardless of their viewpoints. The one occasion a group member was ejected was appropriate based on his irrelevant comments and abusive conduct. Additionally, that group member was allowed to attend future meetings unimpeded. In light of the evidence submitted, the group was unlikely to succeed on the merits of its "as applied" claim.

Finally, the group argued that the policy is overbroad and vague, but the court disagreed. "A restriction is overbroad if it reaches a substantial amount of constitutionally protected conduct." *Vill. of Hoffman Ests. v. Flipside*, 455 U.S. 489 (1982). A restriction is vague if a reasonable person could not determine what is prohibited. Because abusive, irrelevant and disruptive speech are not constitutionally protected, the policy is not overbroad. And because the policy clearly delineates the types of speech that are not allowed, the policy is not vague. Because the group could not establish that it is likely to succeed on the merits, the court denied its request for a preliminary injunction. The group has appealed the court's decision to the Eleventh Circuit.

Alabama Attorney General's Opinion

- **Donation of Public Funds**

A.G. Op. 2022-013

This opinion addressed whether a city could donate money to a local board of education to benefit a high school within its city limit. City spending is controlled by the Constitution of Alabama and the so-called Dillon Rule.

The Constitution of Alabama prohibits a political subdivision of the state from granting money or a thing of value for the benefit of a private individual, corporation or association. Ala. Const. art. IV, §94. This rule does not apply to grants from one political subdivision to another. Since cities and local boards of education are both political subdivisions of the state, the Constitution would not bar the grant.

The Dillon Rule is a principle of Alabama law that a city can only spend funds on something that is expressly allowed, impliedly allowed or essential to the city's operation. *Ala. Code* §16-13-36 expressly allows cities and counties to grant money to local boards for the construction, repair, operation, maintenance or support for new or existing public schools within the city or county's jurisdiction. If the city determines that the money it wishes to spend falls within the categories listed, it is a proper expenditure.

Matters of Interest

- **Sexual Misconduct – Restitution**

State of Alabama v. Carrie Cabri Whitt (News Article)

This long-pending case involving criminal charges brought against a teacher for sexual misconduct with students has culminated in the teacher being ordered to repay the school system more than $100,000 for the time she was on paid administrative leave. While the board did not have the authority to require this repayment, the local district attorney decided to request restitution to the school system as part of the now-former teacher's sentence. This is the first known time a local district attorney has taken this step.

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