NO. 11-41359

In the United States Court of Appeals
For the Fifth Circuit

BARBARA WYATT
Plaintiff - Appellee

v.

RHONDA FLETCHER; CASSANDRA NEWELL,
Defendants - Appellants

Brief of Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION
CIVIL ACTION NO. 6:10-CV-674
JOHN D. LOVE, JUDGE PRESIDING

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities have an interest in the outcome of this case as described in the fourth sentence of Fifth Circuit Rule 28.2.1. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

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REQUEST FOR ORAL ARGUMENT

Appellants respectfully suggest that oral argument is warranted under the standards set forth in Fifth Circuit Rule 28.2.4 and Federal Rule of Appellate Procedure 34(a)(2). Oral Argument would assist the Court in resolving the issues presented in this appeal. Consequently, Appellants request that the Court grant Oral Argument in this case.

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STATEMENT OF JURISDICTION

This is an appeal from the district court's denial of Appellants' Motion for Summary Judgment based on qualified immunity. An order on a motion for summary judgment denying qualified immunity is immediately appealable under the collateral order doctrine. *Mitchell v. Forsyth*, 427 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985). Additionally, this Court has jurisdiction over Coaches Fletcher's and Newell's appeal of the district court's denial of their Motion for Summary Judgment on the issue of their official immunity from Appellees' state law claims because this Court has "jurisdiction to hear . . . [a] defendant['s] claim of official immunity because Texas law, like the federal doctrine, provides a true immunity from suit and not a simple defense to liability." *Murray v. Earle*, 405 F.3d 278, 294 (5th Cir. 2005) (quoting *Roe v. Tex. Dep't of Protective & Reg. Servs.*, 299 F.3d 395, 413 (5th Cir. 2002) (internal quotation marks omitted). Therefore, this Court has jurisdiction over the present appeal.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: A teacher is entitled to qualified immunity if he or she "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). There is no clearly established law in this Circuit of which a reasonable teacher would have known which guarantees a student a privacy interest in his or her sexual orientation regardless of the circumstances. Therefore, the district court erred in determining that Coaches Fletcher and Newell are not entitled to summary judgment on the issue of qualified immunity.

ISSUE NO. 2: This Court has held that "students in a school environment have a lesser expectation of privacy than members of the population generally." *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995). Here, the district court did not assess any relevance to the fact that the events giving rise to this appeal occurred in a school setting when denying qualified immunity to Coaches Fletcher and Newell on Appellees' Fourth Amendment claim. Therefore, the district court erred in assessing the materiality of the facts which it held precluded Coaches Fletcher's and Newell's Motion for Summary Judgment on the issue of qualified immunity.

ISSUE NO. 3: "Government officials in Texas are officially immune from liability

for the performance of their (1) discretionary duties (2) in good faith (3) as long as they are acting within the scope of their authority." *Murray*, 405 F.3d at 294. Appellees have sued Coaches Fletcher and Newell for exercising their discretion in calling a meeting with S.W.'s mother to discuss her behavior. The competent evidence in the record shows that Coaches Fletcher and Newell acted in good faith at all times. Therefore, the district court erred in determining that a fact issue precluded their Motion for Summary Judgment on the issue of official immunity.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

Appellees filed their Amended Complaint in the present case on October 4, 2011, alleging that Coaches Fletcher and Newell violated S.W.'s rights to privacy and detained her in violation of the Fourth Amendment when they informed Plaintiff that her daughter might be involved in an inappropriate relationship with an adult. (ROA Vol. I, pp. USCA5 520-USCA5 530.) Coaches Fletcher and Newell filed their Motion for Summary Judgment on September 1, 2011, arguing that they were entitled to qualified immunity from Plaintiffs' claims. (ROA Vol. I, p. USCA5 173-VOL II, p. USCA5 468.) Appellee responded to the Motion for Summary Judgment on October 4, 2011, (ROA Vol. II, pp. USCA5 531 -USCA5 665), and Coaches Fletcher and Newell replied on October 12, 2011. (ROA Vol. II, pp. USCA5 684-USCA5 701.) The district court conducted a hearing on the Motion for Summary Judgment on October 13, 2011, giving Appellees the opportunity to respond to each argument in Coaches Fletcher's and Newell's Motion for Summary Judgment and the Reply. (ROA Vol. II, pp. USCA5 743- USCA5 802.) The district court entered its Memorandum Opinion and Order Denying Coaches Fletcher's and Newell's Motion for Summary Judgment on November 30, 2011. (ROA Vol. II, pp. USCA5 717-USCA5 739.) Coaches Fletcher and Newell timely filed their Notice of Appeal

of the district court's order on December 14, 2011. (ROA Vol. II, pp. USCA5 740-USCA5 741.)

STATEMENT OF THE FACTS

This appeal arises from events which occurred on March 3, 2009, while S.W. was a student at Kilgore Independent School District ("Kilgore ISD") in Kilgore, Texas. S.W. was a student at Kilgore ISD throughout elementary school, middle school, and high school. (ROA Vol. II, pp. USCA5 421 - USCA5 422.) In her deposition, S.W. testified that she has known she was gay since at least the sixth grade, and that she openly held herself out to be gay as early as February, 2009. (ROA Vol. II, pp. USCA5 426.) S.W.'s schoolmates averred that she has been openly gay for several years, and never attempted to keep her sexuality secret–even before the events giving rise to this litigation occurred. (ROA Vol. II, pp. USCA5 443; USCA5 445 - USCA5 446; USCA5 448; USCA5 450; USCA5 452.) Barbara Wyatt admits that she suspected S.W. was gay before the events giving rise to this litigation occurred. (ROA Vol. II, pp. USCA5 407 - USCA5 408.)

S.W. was a member of the Kilgore High School softball team in the 2008-2009 academic year. (ROA Vol. I, pp. USCA5 303.) Although S.W. was athletic, she did not take practices and games seriously, regularly disregarded team rules, and often exhibited a disruptive, unsportsmanlike attitude which made her difficult to coach. (ROA Vol. I, pp. USCA5 362 - USCA5 363; USCA5 365 - USCA5 366; USCA5 395 - USCA5 398; Vol. II, pp. USCA5 423 - USCA5 425; USCA5 433-USCA5 443;

USCA5 445 - USCA5 446; USCA5 448; USCA5 450; USCA5 452.) As a prerequisite of team membership, S.W. and Barbara Wyatt were required to sign an agreement specifically limiting the persons with whom S.W. was allowed to ride to practices and games. (ROA Vol. I, pp. USCA5 303; USCA5 364; USCA5 366; Vol. II, pp. USCA5 395 - USCA5 397; USCA5 432.) S.W. broke this team rule by riding to the softball field with Hillary Nutt, an adult who Coaches Fletcher and Newell believed to be a bad influence, and with whom S.W. admits to being involved in a relationship. (ROA Vol. II, pp. USCA5 427 - USCA5 428; USCA5 431; USCA5 434.)

On March 3, 2009, S.W. spread a rumor among the Kilgore High School varsity softball team that she was dating Hillary Nutt, a person she claimed to be Coach Newell's ex-girlfriend. (ROA Vol. I, pp. USCA5 361; USCA5 381 - USCA5 382; USCA5 394; Vol. II, pp. USCA5 444; USCA5 446; USCA5 448; USCA5 450; USCA5 452.) At the time, S.W. was sixteen years old and Hillary Nutt was eighteen years old. (ROA Vol. II, p. USCA5 429.) Upon hearing that S.W. was spreading this rumor, Coaches Fletcher and Newell decided to discuss the claim with S.W. Coaches Fletcher and Newell made this decision because they believed that Hillary Nutt was a bad influence on S.W. because she talked about drinking and smoking marijuana. (ROA Vol. I, pp. USCA5 369 - USCA5 370; Vol. II, pp. USCA5 379 - USCA5 380;

USCA5 435.) Also, their ages made any physical relationship between S.W. and Hillary Nutt a potential crime. (ROA Vol. II, p. USCA5 429.) *See* TEX. PENAL CODE ANN. § 22.011. Finally, the record shows that the rumors regarding S.W. and Hillary Nutt were causing dissension on the softball team. (ROA Vol. I, pp. USCA5 367 - USCA5 368; Vol. II, pp. USCA5 443 - USCA5 444; USCA5 446.) For these reasons, Coaches Fletcher and Newell met with S.W. in the softball locker room after school to discuss the situation. (ROA Vol. II, p. USCA5 383.) During that conference, Coach Fletcher asked S.W. about the note she had written which started the rumor about S.W., Hillary Nutt, and Coach Newell. (ROA Vol. II, pp. USCA5 384 - USCA5 385.) The record shows that Coaches Fletcher and Newell never asked S.W. if she was gay or a lesbian. (ROA Vol. II, p. USCA5 436.) Rather, they asked S.W. if she was involved with Hillary Nutt, and S.W. confirmed their relationship. (ROA Vol. II, pp. USCA5 436 - USCA5 437.) At no point did Coaches Fletcher and Newell ever stand over S.W. during the conversation in the locker room. (ROA Vol. II, pp. USCA5 435 - USCA5 436.) After the conversation in the locker room ended, Coaches Fletcher and Newell asked S.W. to return later. When Coaches Fletcher and Newell asked S.W. who she was riding with, she lied and told them that she was riding with her grandmother. (ROA Vol. II, p. USCA5 435.) She was actually riding with Hillary Nutt at the time in violation of the contract she and her mother signed.

(ROA Vol. II, pp. USCA5 427 - USCA5 428; USCA5 431; USCA5 434.)

After leaving the field, Coaches Fletcher and Newell called Barbara Wyatt and asked to confer with her about S.W's behavior. (ROA Vol. I, pp. USCA5 356; Vol. II, p. USCA5 386.) During the conference regarding S.W.'s possibly-inappropriate relationship, Coaches Fletcher and Newell never used the words "gay" or "lesbian." (ROA Vol. I, p. USCA5 358; Vol. II, p. USCA5 415.) Rather, they told Barbara Wyatt that S.W. was involved in an inappropriate relationship. (ROA Vol. II, p. USCA5 388.) Coaches Fletcher and Newell told Barbara Wyatt the identity of the person with whom S.W. was involved when Barbara Wyatt asked. (ROA Vol. I, p. USCA5 359; Vol. II, pp. USCA5 386 - USCA5 387.) The record shows that Coaches Fletcher and Newell had this conversation with Barbara Wyatt in order to stop S.W. from spreading rumors and causing dissension on the softball team, and also to inform her that her daughter might have been involved with an adult. (ROA Vol. I, p. USCA5 357; Vol. II, pp. USCA5 393 - USCA5 394.)

SUMMARY OF THE ARGUMENT

An official is entitled to qualified immunity from civil damages for performing discretionary functions "insofar as [the official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. 2727. The facts of this case, however, present a matter of first impression to the courts in this Circuit. The district court noted several times in its opinion that this Court "has never explicitly held that a student has a privacy right in keeping his or her sexual orientation confidential. . . ." (ROA Vol. II, p. USCA5 724; *see also* USCA5 730.) In finding that Coaches Fletcher and Newell are not entitled to qualified immunity, however, the district court was required to find–without previous precedent from this Court–that a student has a reasonable expectation of privacy in his or her sexual orientation which always outweighs an educator's interest in safeguarding the well-being of the student. (ROA Vol. II, p. USCA5 724.) Coaches Fletcher and Newell argue that the district court erred in making such a finding.

Even if the district court did not err in forging this rule, however, Coaches Fletcher and Newell are entitled to qualified immunity from Appellee's claims. In making this finding, the district court was required to extend the parameters of the existing privacy laws in this Circuit. The district court's decision amounts to an

enunciation of a new rule of law. Because the rule of law which Appellees claim Coaches Fletcher and Newell allegedly violated originated in the district court's Memorandum Opinion denying qualified immunity to Coaches Fletcher and Newell, it was not clearly established for the purposes of the qualified immunity analysis. *See Harlow*, 457 U.S. at 818, 102 S. Ct. 2727. Because the law which Plaintiffs claim Coaches Fletcher and Newell violated was not clearly established at the time of the events giving rise to this litigation, they are entitled to qualified immunity from Plaintiff's claims. *See Anderson v. Creighton*, 483 U.S. 635, 640, 107 S. Ct. 3034, 97 L. Ed. 2d 523 (1987); *Pierce v. Smith*, 117 F.3d 866, 871 (5th Cir. 1997).

Additionally, the district court erred in assessing the materiality of the facts which it held precluded Coaches Fletcher's and Newell's Motion for Summary Judgment on the issue of qualified immunity with respect to Plaintiff's Fourth Amendment claim. "[S]tudents in a school environment have a lesser expectation of privacy than members of the population generally." *Milligan v. City of Slidell, La.*, 226 F.3d 652, 655 (5th Cir. 2000) (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 657, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)) (internal quotation marks omitted). This Court has openly doubted that students have a right not to be summoned to a school official's office and questioned on disciplinary matters. *Id.* Any such right "hardly squares with the schools' obligation to inculcate the habits and

manners of civility" within students. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3195, 3163, 92 L. Ed. 2d 549 (1986)). "Teachers . . . control their movements from the moment they arrive at school; for example, students cannot simply walk out of a classroom . . . [or] walk out of a principal's . . . office in the middle of any official conference. Students at school thus have a significantly lesser expectation of privacy in regard to the temporary "seizure" of their persons than does the general population." *Id.* In light of this Court's previous rulings, it is clear that S.W.'s Fourth Amendment rights were not treated with deliberate indifference as a result of the meeting she had in the locker room with Coaches Fletcher and Newell. To the extent that S.W. had a right to be free from being called into the locker room to conference with the coaches to be questioned about a matter involving her safety or discipline, such right is far outweighed by the educators' interest in protecting S.W.'s safety and maintaining discipline on the softball team. Therefore, Coaches Fletcher and Newell did not violate a clearly established right of which a reasonable teacher should have known. The district court therefore erred in denying their Motion for Summary Judgment on the issue of qualified immunity.

Finally, the uncontroverted evidence in the record shows that at all times relevant to this litigation, Coaches Fletcher and Newell were performing discretionary duties, in good faith, and within the scope of their authority. Therefore, the district

court erred in determining that a fact issue precluded their Motion for Summary Judgment on the issue of official immunity.

ARGUMENT AND AUTHORITIES

A. Applicable Standards

i. Standard of Review

This Court reviews an order denying an official's motion for summary judgment on the issue of qualified immunity by determining "whether the district court erred in assessing the legal significance of the conduct that the district court deemed sufficiently supported for purposes of summary judgment." *Kinney v. Weaver*, 367 F.3d 337, 347 (5th Cir. 2004) (en banc). The Court reviews de novo the district court's legal determination as to the materiality of the identified fact issues. *Lemoine v. New Horizons Ranch & Ctr., Inc.*, 174 F.3d 629, 634 (5th Cir. 1999).

ii. Summary Judgment Standard

Summary judgment is authorized if the movant establishes that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). Facts are considered "material" if they "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). A material fact creates a "genuine issue" if the evidence is such that the trier of fact reasonably could resolve the factual dispute in favor of either party. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511. Rule 56(c) mandates "the entry of summary judgment, after

adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552, 91 L. Ed. 2d 265 (1986). A party moving for summary judgment bears the initial burden of identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. *Id.*

If the party moving for summary judgment meets the initial burden, Rule 56(c) requires the nonmovant to go beyond the pleadings and show by affidavits, depositions, answers to interrogatories, admissions on file, or other admissible evidence that specific facts exist over which there is a genuine issue for trial. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which that evidence supports that party's claim. *See Forsyth v. Barr*, 19 F.3d 1527, 1537 (5th Cir. 1994).

Factual controversies are to be resolved in favor of the nonmovant, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support

a party's opposition to summary judgment." *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998). Unless there is sufficient evidence for a jury to return a verdict in the nonmovant's favor, there is no genuine issue for trial. *Anderson*, 477 U.S. at 249, 106 S. Ct. at 2511.

iii. Qualified Immunity Standard

The usual summary judgment burden of proof is altered in the case of a qualified immunity defense. *See Michalik v. Hermann*, 422 F.3d 252, 262 (5th Cir. 2005). Once an official pleads his good faith, the burden then shifts to the plaintiff, who must rebut the defense by establishing that the official's allegedly wrongful conduct violated clearly established law. *Id.* The plaintiff bears the burden of negating qualified immunity and cannot rest on conclusory allegations and assertions, but must demonstrate genuine issues of material fact regarding the reasonableness of the official's conduct. *Id.*

Public officials acting within the scope of their authority generally are shielded from civil liability by the doctrine of qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). "The doctrine of qualified immunity serves to shield a government official from civil liability for damages based upon the performance of discretionary functions." *Cozzo v. Tangipahoa Parish Council-President Gov't*, 279 F.3d 273, 284 (5th Cir. 2002). "The Supreme Court has

characterized the doctrine as protecting 'all but the plainly incompetent or those who knowingly violate the law.'" *Id.*

In assessing qualified immunity, the court must conduct a bifurcated analysis. *See, e.g., Collins v. Ainsworth*, 382 F.3d 529, 537 (5th Cir. 2004), cert. denied, 547 U.S. 1055, 126 S. Ct. 1661, 164 L. Ed. 2d 397 (2006). The threshold question has two parts. The initial inquiry asks whether, taken in the light most favorable to the party asserting the injury, the facts alleged show that the official's conduct violated a constitutional right. *See Scott v. Harris*, 550 U.S. 372, 377, 127 S. Ct. 1769, 1774, 167 L. Ed. 2d 686 (2007). "If, and only if, the court finds a violation of a constitutional right, 'the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case.'" *Id.* To be clearly established for purposes of qualified immunity, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. *Brown v. Miller*, 519 F.3d 231, 236 (5th Cir. 2008). The unlawfulness of the defendant's actions must have been readily apparent from sufficiently similar situations, but it is not necessary that the defendant's exact act have been held illegal. *Id.* at 236-37.

If the defendant's actions violated a clearly established constitutional right, the final step of the analysis asks whether qualified immunity is appropriate, nevertheless,

because the defendant's "actions were objectively reasonable" in light of "law which was clearly established at the time of the disputed action." *Collins*, 382 F.3d at 537 (citations omitted). An official's conduct is objectively reasonable unless "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Wooley v. City of Baton Rouge*, 211 F.3d 913, 919 (5th Cir. 2000). A plaintiff must allege sufficient facts to demonstrate that no reasonable officer could have believed his actions were proper. *Babb v. Dorman*, 33 F.3d 472, 477 (5th Cir. 1994). Whether an official's conduct was objectively reasonable is a question of law for the court, not a matter for the jury. *Williams v. Bramer*, 180 F.3d 699, 703 (5th Cir. 1999).

B. ISSUE NO. 1: A teacher is entitled to qualified immunity if he or she "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." There is no clearly established law in this Circuit of which a reasonable teacher would have known which guarantees a student a privacy interest in his or her sexual orientation regardless of the circumstances. Therefore, the district court erred in determining that Coaches Fletcher and Newell are not entitled to summary judgment on the issue of qualified immunity.

An official is entitled to qualified immunity from civil damages for performing discretionary functions "insofar as [the official's] conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818, 102 S. Ct. 2727; *see also Colston v. Barnhart*, 130

F.3d 96, 99 (5th Cir. 1997); *Hare v. City of Corinth, Miss.*, 135 F.3d 320, 326 (5th Cir. 1998). "Clearly established" means that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034.

As a threshold matter, although the district court made a commendable effort at enunciating a wholly new rule of law without the benefit of any precedent whatsoever, it erred in determining that a student has a privacy interest in his or her sexual orientation regardless of the circumstances. The Supreme Court has established that "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety . . .. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults." *Bd. of Ed. v. Earls*, 536 U.S. 822, 830-31, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002). While this Court has never specifically determined what types of disclosures are of such a personal nature that they constitute a constitutional violation, it is clear that courts must balance one's expectation of privacy against the need for disclosure. *Nat. Treas. Employees Union v. U.S. Dept. of the Treas.*, 25 F.3d 237, 242-43 (5th Cir. 1994); *see, e.g.*, *Zuffuto v. City of Hammond, La.*, 308 F.3d 485, 490 (5th Cir. 2002). ". . . [W]hen the privacy right is invoked to protect confidentiality, there is no violation if a legitimate

state interest outweighs the plaintiff's privacy interest." *Cinel v. Connick*, 15 F.3d 1338, 1342 (5th Cir. 1994) (citing *Fadjo v. Coon*, 633 F.2d 1172, 1176 (5th Cir. 1981)).

Whatever privacy interest a student may have in his or her sexual orientation, that right is outweighed by a school's interest in keeping the child safe and inculcating the child with the habits of good citizenship. In the present case, Coaches Fletcher's and Newell's interest in keeping S.W. safe, determining whether she was involved in an inappropriate relationship with an adult, making sure that she was not the victim of abuse, and maintaining discipline on the softball team outweighed any interest S.W. may have had in keeping her sexual orientation from her mother. Indeed, the facts surrounding this appeal illustrate the harm that could potentially result from a bright-line rule permitting a student a complete privacy interest in his or her sexual orientation regardless of the circumstances. Teachers must be permitted to freely and openly converse with students and parents regarding disciplinary issues, especially when they believe that the pupil might be facing a threat of harm. The district court's rule effectively prevents a teacher from engaging in such open and frank communication with a parent. Therefore, such rule is unworkable and is against sound public policy.

Even if the district court's rule were correct, however, the "right" which

Appellees complain Coaches Fletcher and Newell violated was not clearly established in this Circuit at the time that the events giving rise to this litigation occurred. Rather, the facts of this case present a matter of first impression in this Circuit and the law which Appellees claim Coaches Fletcher and Newell allegedly violated was first enunciated in the district court's Memorandum Opinion and Order. As the district court noted in its opinion, "the Fifth Circuit has never explicitly held that a person has a privacy interest in keeping his or her sexual orientation confidential." (ROA Vol. II, p. USCA5 730.) Therefore, the district court was required to create a new rule of law giving a student a reasonable expectation of privacy in his or her sexual orientation. (ROA Vol. II, p. USCA5 724.) Coaches Fletcher and Newell argue that the district court erred in its ruling. Even if the district court did not err, however, Coaches Fletcher and Newell are entitled to qualified immunity from Appellees' claims because the aforementioned rule of law was not clearly established at the time that the events giving rise to this litigation occurred. Indeed, the law surrounding a student's privacy interest in his sexual orientation was–at best–unsettled in this Circuit at the time of which Appellees complain. Even today, neither this Court nor the Supreme Court has ever commented on a student's privacy interest in his or her sexuality nor balanced any such privacy interest with educators' need for frank and open communication with parents. Because the state of the law regarding students'

privacy interests in their sexuality was unsettled at the time of the events giving rise to this litigation, it was not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483 U.S. at 640, 107 S. Ct. 3034. Therefore, Coaches Fletcher and Newell are entitled to qualified immunity from Plaintiff's claims.

Additionally, the record shows that Coaches Fletcher and Newell are entitled to qualified immunity from Appellees' claims because "a defendant's acts are held to be objectively reasonable unless all reasonable officials in the defendant's circumstances would have then known that the defendant's conduct violated the United States Constitution or the federal statute as alleged by the plaintiff." *Thompson v. Upshur Cnty., Tex.*, 245 F.3d 447, 457 (5th Cir. 2001) (emphasis in original); *see also Wooley v. City of Baton Rouge*, 211 F.3d 913, 9 18-19 (5th Cir. 2000). The evidence in the record shows that not all educators in Coaches Fletcher's and Newell's positions would have believed that their actions would have violated a student's constitutional rights. Coaches Fletcher's and Newell's expert, Dr. Mike Moses, has served as a teacher and administrator in four Texas school districts, and has also served as the State Commissioner of Education for almost five years. (ROA Vol. II, p. USCA5 454.) Upon review of Plaintiff's allegations and the actions of Coaches Fletcher and Newell, Dr. Moses concluded that Coaches Fletcher's and

Newell's actions were reasonable and did not violate any constitutional standards. (ROA Vol. II, pp. USCA5 454- USCA5 465.) Additionally, the actions of Coaches Fletcher and Newell were reviewed and found to be reasonable by Kilgore ISD Board of Trustees President Terry George, a former coach and teacher. (ROA Vol. I, pp. USCA5 307- USCA5 308.) By definition, Dr. Moses' and Mr. George's opinions entitle Coaches Fletcher and Newell to qualified immunity because not "all reasonable officials would have realized the particular challenged conduct violated the constitutional provisions sued on." *Wooley*, 211 F.3d at 918-19. Coaches Fletcher and Newell are entitled to qualified immunity because reasonable teachers would not believe that conducting a disciplinary meeting with a student would violate that student's constitutional rights. Additionally, reasonable teachers would not believe that informing the student's parent that her child was potentially the victim of a crime somehow violated the student's constitutional rights. Therefore, the district court erred in denying Coaches Fletcher's and Newell's Motion for Summary Judgment on the issue of qualified immunity.

C. ISSUE NO. 2: This Court has held that "students in a school environment have a lesser expectation of privacy than members of the population generally." Here, the district court did not assess any relevance to the fact that the events giving rise to this appeal occurred in a school setting when denying qualified immunity to Coaches Fletcher and Newell on Appellees' Fourth Amendment claim. Therefore, the district court erred in assessing the materiality of the facts which it held precluded Coaches Fletcher's and Newell's

Motion for Summary Judgment on the issue of qualified immunity.

The Fourth Amendment protects the "right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." *Terry v. Ohio*, 392 U.S. 1, 99 S. Ct. 1868, 20 L. Ed. 2d 889 (1968). "The central inquiry under the Fourth Amendment is whether a search or seizure is reasonable under all the circumstances of a particular governmental invasion of a person's personal security. To assess the reasonableness of a . . . seizure, courts balance the governmental interest against the invasion which the search or seizure entails." *Milligan*, 226 F.3d at 654 (citing *Terry*, 392 U.S. at 19, 20-21, 88 S. Ct. 1868) (internal citations omitted). Therefore, the court must consider the "context in which a Fourth Amendment right is asserted." *Id.* "[A] full bore *Terry* analysis is inappropriate" in cases involving the rights of students in a public school. *Id.* "Although the Fourth Amendment applies in schools, the nature of those rights is what is appropriate for children in school." *Id.* at 655 (citing *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995)). The court's reasonableness inquiry "must take into account the school's custodial and tutelary responsibilities for children." *Id.* (quoting *Acton*, 515 U.S. at 656, 115 S. Ct. 2386) (internal quotation marks omitted). "[S]tudents in a school environment have a lesser expectation of privacy than members of the population generally." *Id.* (quoting

Acton, 515 U.S. at 657, 115 S. Ct. 2386) (internal quotation marks omitted). The Fifth Circuit has openly doubted that students have a right not to be summoned to a school official's office and questioned on disciplinary matters. *Id.* Any such right "hardly squares with the schools' obligation to inculcate the habits and manners of civility" within students. *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 106 S. Ct. 3195, 3163, 92 L. Ed. 2d 549 (1986)).

This Court's analysis in *Milligan*, *supra*, is instructive on this issue. In *Milligan*, an assistant high school principal heard rumors that several students planned to have a fight. *Id.* at 653. The assistant principal called one of the students into her office to question him about the fight and warn them not to engage in any such behavior. *Id.* The plaintiff alleged that during that meeting, he felt physically intimidated and did not feel free to leave the assistant principal's office, and later sued the school for violating his Fourth Amendment right to be free from unreasonable seizures. *Id.* at 653- 54. This Court found that any right the plaintiff had to be free from the interrogation in the assistant principal's office did not outweigh the school's interest in preventing the fight, and noted that students in a school environment have a lesser expectation of privacy than the general population. *Id.* at 655-56. "Teachers . . . control their movements from the moment they arrive at school; for example, students cannot simply walk out of a classroom . . . [or] walk out of a principal's . .

. office in the middle of any official conference. Students at school thus have a significantly lesser expectation of privacy in regard to the temporary 'seizure' of their persons than does the general population." *Id.*

In the present case, the district court denied Coaches Fletcher's and Newell's Motion for Summary Judgment on Appellees' Fourth Amendment claim with limited discussion. (ROA Vol. II, p. USCA5 739.) Nowhere in its discussion of Appellees' Fourth Amendment claims, however, did the Court discuss the fact that the events giving rise to this appeal occurred in a school setting or that a student's right to be free from seizures is not as broad as a person in the general public. Therefore, the district court erred in assessing the materiality of the facts which it held precluded summary judgment on Coaches Fletcher's and Newell's behalf.

It is clear that S.W.'s Fourth Amendment rights were not treated with deliberate indifference as a result of the meeting she had in the locker room with Coaches Fletcher and Newell. To the extent that S.W. had a right to be free from being called into the locker room to conference with the coaches to be questioned about a matter involving her safety or discipline, such a right is far outweighed by the educators' interest in protecting S.W.'s safety and maintaining discipline on the softball team. As mentioned above, Coaches Fletcher and Newell had heard that 16 year-old S.W. might have been involved in a romantic relationship with an adult. Additionally, the

rumors S.W. had spread significantly impacted the team's morale. As in *Milligan*, Coaches Fletcher and Newell had a significant interest in promoting discipline and in preventing S.W. from becoming the possible victim of a crime. Furthermore, S.W.'s right to be free from a temporary "seizure" of her person was significantly diminished in the school setting. Coaches Fletcher's and Newell's interest in protecting S.W.'s safety and maintaining the discipline of the softball team outweighed S.W.'s right–if any–not to be called into the locker room for a conference. Therefore, the district court erred in denying Coaches Fletcher's and Newell's Motion for Summary Judgment on the issue of qualified immunity with respect to Appellees' Fourth Amendment claims.

D. ISSUE NO. 3: "Government officials in Texas are officially immune from liability for the performance of their (1) discretionary duties (2) in good faith (3) as long as they are acting within the scope of their authority." *Murray*, 405 F.3d at 294. Appellees have sued Coaches Fletcher and Newell for exercising their discretion in calling a meeting with S.W.'s mother to discuss her behavior. The competent evidence in the record shows that Coaches Fletcher and Newell acted in good faith at all times. Therefore, the district court erred in determining that a fact issue precluded their Motion for Summary Judgment on the issue of official immunity.

Coaches Newell and Fletcher raised the affirmative defense of official immunity in their First Amended Answer. (ROA Vol. I, pp. USCA5 116-USCA5 117.) The district court, however, erred in determining that Coaches Fletcher and Newell are not entitled to official immunity from Plaintiff's state law claim.

"Government officials in Texas are officially immune from liability for the performance of their (1) discretionary duties (2) in good faith (3) as long as they are acting within the scope of their authority." *Murray*, 405 F.3d at 294. Discretionary functions require officials to exercise personal deliberation, decision, and judgment as opposed to merely obeying orders or performing a function which does not permit the actor to make choices. *Id*. An officer acts in good faith "if a reasonably prudent officer, under the same circumstances, *could* have believed that his actions were correct." *Id*. (emphasis in original). An officer acts within the scope of his authority if he discharges the duties generally assigned to him. *Id*.

The undisputed evidence in the record shows that Coaches Fletcher and Newell are entitled to official immunity from Plaintiffs' state law claims because they were acting in good faith within the scope of their employment. *See City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994). First, the evidence in the record shows that Coaches Fletcher's and Newell's actions were within the performance of their discretionary duties as teachers. Indeed, it can hardly be argued that conducting a conference with a parent or student is outside of an educator's discretionary duties. Additionally, the evidence shows that all actions were taken within the scope of Coaches Fletcher's and Newell's authority as teachers and coaches. *See id*. Again, it can hardly be argued that conferences between parents, teachers, and students are

outside of an educator's scope of authority. Finally, the evidence shows that Coaches Fletcher and Newell acted in good faith. *See id*. As mentioned above, the uncontroverted summary judgment evidence shows that Coaches Newell and Fletcher conducted the meetings with S.W. and her mother because she had broken team rules and they were concerned about her fraternization with an adult who might be a bad influence. (ROA Vol. I, p. USCA5 357; Vol. II, pp. USCA5 393-USCA5 394; USCA5 427-USCA5 428; USCA5 431; USCA5 434.) Clearly, these actions were taken in good faith for the purposes of official immunity.

Additionally, the Texas Education Code provides as follows:

> A professional employee of a school district is not personally liable for any act that is incident to or within the scope of duties of the employee's position of employment that involves the exercise of judgment or discretion on the part of the employee, except in circumstances in which a professional employee uses excessive force in the discipline of students or negligence resulting in bodily injury to students.

TEX. EDUC. CODE ANN. § 22.0511(a) (VERNON 2006).

In short, the evidence in the record shows that Coaches Fletcher and Newell are entitled to the official immunity good faith defense. Therefore, Defendants respectfully request that the Court reverse the district court's finding that they are not entitled to official immunity from Appellees' state law claims.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, Appellants respectfully request that the Court reverse the judgment of the District Court and for any and all other relief, at law or in equity, to which Coaches Fletcher and Newell show themselves to be justly entitled.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that the above and foregoing instrument was served upon all counsel of record in the above entitled and numbered cause on April 10, 2012, in the following manner:

_X_ Via ECF

/s/ David Iglesias
David Iglesias

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of FED. R. APP. P. 32(a)(7).

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