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OPINION, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (AUGUST 25, 2023)

RECOMMENDED FOR PUBLICATION
PURSUANT TO SIXTH CIRCUIT I.O.P 32.1(B)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDALL MCELHANEY,

Plaintiff-Appellant,

v.

DUSTIN WILLIAMS; WILLIAM STEPP; NATHAN BROWN; TIMOTHY MARTIN; JOHN PETTIT; PUTNAM COUNTY, TENNESSEE SCHOOL SYSTEM,

Defendants-Appellees.

No. 22-5903

Appeal from the United States District Court for the Middle District of Tennessee at Cookeville.
No. 2:21-cv-00019
Waverly D. Crenshaw, Jr., Chief District Judge.

Before: GILMAN, READLER, and MATHIS, Circuit Judges.

OPINION

CHAD A. READLER, Circuit Judge.

Youth sports are as much about instilling life lessons as they are winning and losing. Child athletes can be forgiven for occasionally losing sight of this bigger picture. But we expect more from their parents.

As this case demonstrates, those expectations are not always met. Randall McElhaney is an enthusiastic supporter of his daughter, who, when this dispute arose, was an infielder on her high school softball team. His passion, however, sometimes gets the best of him. When his daughter was benched, McElhaney sent text messages to her coach criticizing his managerial decisions. In response, school officials banned McElhaney from attending games for the next week.

A dispute over the team's starting infield soon became much more. McElhaney filed this suit, alleging that school officials retaliated against him for criticizing his daughter's coach, speech that McElhaney believed was shielded by the First Amendment. Defendants moved for summary judgment on qualified immunity grounds. In their minds, McElhaney was not denied a constitutional right, let alone one that was clearly established. Reaching only the clearly established prong of qualified immunity, the district court granted defendants' motion and entered judgment in their favor.

As we see things, it is clearly established at a low level of generality that when a school employee interacts with a student, speech by the student's parent about those interactions enjoys First Amendment protection. On that basis, we must reverse the district court. We

remand the case to resolve whether retaliation occurred in the first instance.

I.

Randall McElhaney is the father of L.M., who played softball for the Upperman High School team during her senior year. McElhaney was a dedicated booster of both his daughter and her team. For the season at issue, McElhaney was a season ticketholder, having purchased seats behind home plate, where a sign identified McElhaney as the ticket owner.

At the softball season's inception, the school distributed to team members and their families a "Parent-player Information" sheet. Primarily, the form addressed expectations for student conduct. For example, the form explained that a player may be suspended if she does not show up in uniform for a game or maintain the requisite grade point average. The sheet also included instructions to parents. Parents were encouraged to be "supportive" of the players and to refrain from "negativity." And they were prohibited from attending team practices or interacting with their child mid-game.

The instruction sheet set guidelines for discussing playing time with the coaches. When it came to the student athletes, coaches had an "open door" policy. But the same was not true for parents: "Playing time is a non negotiable for coaches to talk directly with parents about."

During her senior year, L.M. played second base and pitched for the Upperman team. As the season progressed, L.M.'s playing time decreased. McElhaney was not pleased with this development. While sitting

with his daughter at home, McElhaney texted Upperman Coach Dustin Williams to express his displeasure:

> You need to look at the books and find out which kid has made the least amount of errors on the team. I can tell you [L] is with 0. You benched [L] out of 2nd base after I rebutted what Mike told you that [L] needed to under hand that ball to [A] at 1st in the Soddy Daisy Tournament and I said [L] had to throw it fast like that to get the girl out because if she wouldn't have the girl would have been safe. [C] has made two errors already at 2nd base and you had to get onto her during the Dekalb County game and she does not cover bases at all. She has no idea what she is doing. She got played over every one of her middle school years at 2nd. So you are benching an upper classman to put her there. That is not understandable at all. Your other 2 pitchers don't leave the field at all. I didn't understand when you took [L] out of the pitching circle why she didn't just trade places with [A] at 2nd the other night in Livingston. . . .
>
> [L] is right here and said she doesn't disagree with any of what wa[s] just said. I told her this is what she should have said to you in the teachers lounge when she talked to you today.

Williams responded, conveying the view that McElhaney either reconsider his tactics or reconsider his participation in team events:

> I am sorry you feel this way, and sorry that you don't understand that we are only trying to do what we feel like is best for our team currently. I don't feel like running down other players is the best way to approach the situation nor do I feel like questioning our programs structural integrity is beneficial for anyone involved. We enjoy having [L] on our team and appreciate her heart . . . she is a great kid and a joy to be around, but I am under no circumstances going to continue to justify our reasons for what we do inside of our program or what we feel like is best for us. It seems from the comments I have heard that have came from you outside the park that you are extremely displeased with how we are running the program and have an exponential amount of opinions on how we should be running it . . . crazy we have to have that conversation at 6-0 in the district but everyone is entitled to their own opinion. It seems we have reached the boiling point and you have a couple of options . . . 1.) go talk to my administration about how you feel 2.) walk away from the program or 3.) allow us to continue working daily to do what we feel like is best for our program and support us instead of running us down. I will not have this conversation again and feel completely disrespected in how this is being handled.

McElhaney texted a somewhat conciliatory reply:

> If you feel so disrespected, I would love for you to tell me how this . . . situation should be handled any differently than discussing it

> with you instead of running to someone else. . . . I have coached several teams in my past so its not like I don't know what I'm talking about. . . . I will never go to administration over a coach unless they physically harm my kid. I don't believe in that. If I ever feel I need for my kid or kids to step away from a team I will pull them. Then we will have a decision to either not . . . play at all or have them transfer and play for someone else. My kids are no where near allstars and I don't treat them that way at all. I would like . . . for her to remain with the team but would also like to see her be able to contribute as well. . . . In a nutshell maybe I shouldn't have said anything to you and maybe . . . just let my kid to learn to talk with you and address all of her concerns.

Yet his response did not bring the matter to a close. Williams believed that McElhaney violated team policy by texting Williams to complain about his daughter's removal from the starting lineup. Williams "especially" objected to McElhaney "injecting his daughter into th[e] equation." On those grounds, he forwarded the messages to Upperman Principal William Stepp.

Stepp found the text messages "inappropriate." So he took action: he banned McElhaney from a week's worth of softball games. In Stepp's mind, the suspension was warranted by McElhaney's violation of team rules, a violation that McElhaney made worse by putting L.M. into "the middle" of the matter. McElhaney challenged that decision to no avail. The school district officials that reviewed the matter informed McElhaney that they would not "overrule" Stepp's decision.

McElhaney did not honor the suspension. He attended L.M.'s next game. By all accounts, McElhaney did so without disrupting the game. Yet when Stepp spotted McElhaney in the stands, he asked him to leave. A School Resource Officer warned McElhaney that failing to do so would render him a trespasser. Fearing arrest, McElhaney left the field.

He was not content, however, to let things be. Invoking 42 U.S.C. § 1983, McElhaney filed a civil rights action against Williams, Stepp, various school athletic administrators, and the School Resource Officer. McElhaney asserted that his communications with Williams constituted protected speech under the First Amendment and that the school officials had impermissibly retaliated against him for exercising those speech rights. Further, he added, defendants did not afford him due process before infringing on his property right to his season tickets.

The officers moved for summary judgment, asserting that they were entitled to qualified immunity for their actions. The district court agreed. Applying *Lowery v. Euverard*, 497 F.3d 584, 589 (6th Cir. 2007), the district court held that the "right to attend games after [McElhaney] criticized the coach" was not clearly established, meaning defendants' purportedly retaliatory acts did not violate McElhaney's settled constitutional rights. The district court likewise concluded that McElhaney did not experience a due process violation because any alleged injury he suffered could be remedied through a breach of contract action. Accordingly, the court entered judgment in favor of defendants. This timely appeal followed.

II.

McElhaney challenges the district court's entry of summary judgment to defendants on both his First Amendment and due process claims. We review the district court's determination de novo. *El-Khalil v. Oakwood Healthcare, Inc.*, 23 F.4th 633, 634 (6th Cir. 2022) (summary judgment); *Peterson v. Heymes*, 931 F.3d 546, 553 (6th Cir. 2019) (qualified immunity). By rule, we must affirm the district court's summary judgment decision if "there [wa]s no genuine dispute as to any material fact" and defendants were "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

A. *First Amendment Retaliation.* McElhaney leads off with his First Amendment retaliation claim. To prevail on that claim, he must show that: (1) he engaged in constitutionally protected speech, (2) the officers took adverse actions against McElhaney that caused him to suffer an injury that would likely chill a person of ordinary firmness from continuing that activity, and (3) the officers' actions were motivated, at least in part, by the exercise of his constitutional rights. *Myers v. City of Centerville*, 41 F.4th 746, 759 (6th Cir. 2022).

Because today's appeal arises from the successful assertion of qualified immunity, we must modify our inquiry. Qualified immunity shields officials from trial "unless their actions violate clearly established rights." *DiLuzio v. Vill. of Yorkville*, 796 F.3d 604, 608 (6th Cir. 2015) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). Overcoming the invocation of qualified immunity requires McElhaney to turn a double play of sorts. He must show both that (1) school officials violated his constitutional rights, and (2) that

"the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011). As McElhaney must touch both bases, a court need resolve only one of the two inquiries in defendants' favor to grant judgment to defendants. *See Pearson v. Callahan*, 555 U.S. 223, 236 (2009).

That is the tack the district court took in addressing only the second prong. As it rightly recognized, clearly established law "should not be defined at a high level of generality." *White v. Pauly*, 580 U.S. 73, 79 (2017) (quotation marks omitted). What does that mean in effect? On the one hand, we do not require an earlier decision that is "directly on point." *Mullenix v. Luna*, 577 U.S. 7, 12 (2015). But on the other, "existing precedent" must place the contours of the right "beyond debate." *Id.* The constitutional right at issue here is the right not to be subjected to retaliation for engaging in First Amendment activity. In this appeal, the parties have focused their disagreement on the protected nature of McElhaney's speech, so we turn to that question now.

"[T]he First Amendment bars retaliation for protected speech," which is what McElhaney alleges occurred here. *Crawford-El v. Britton*, 523 U.S. 574, 592 (1998); *accord Zilich v. Longo*, 34 F.3d 359, 365 (6th Cir. 1994). That being the case, we ask whether any reasonable official would have understood that McElhaney's speech was protected, and thus that the official could not retaliate against him. *See Crawford-El*, 523 U.S. at 593; *see also Bloch v. Ribar*, 156 F.3d 673, 682 (6th Cir. 1998) ("The unlawful intent inherent in such a retaliatory action places it beyond the scope of a[n] . . . officer's qualified immunity if the right retaliated against was clearly established." (citation

omitted)). We believe any reasonable officer would have understood that McElhaney's speech was protected.

Start with the settled understanding of the First Amendment. "[T]he bedrock principle underlying" the Amendment's free speech guarantee "is that states cannot prohibit speech merely because it offends the sensibilities of others." *Higgins v. Ky. Sports Radio, LLC*, 951 F.3d 728, 734 (6th Cir. 2020) (quoting *Texas v. Johnson*, 491 U.S. 397, 414 (1989)). It follows that, "other than 'in a few limited areas,'" "almost all speech is protected" from governmental interference. *Novak v. City of Parma*, 932 F.3d 421, 427 (6th Cir. 2019) (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010)). Especially so, it bears adding, when government censorship is based on the views expressed within the speech. *See Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393–94 (1993).

"[T]he right to criticize public officials" is safely within that protected speech zone. *Jenkins v. Rock Hill Loc. Sch. Dist.*, 513 F.3d 580, 588 (6th Cir. 2008). Discourse of that nature is typically off limits from government regulation. *Id. Jenkins* exemplifies the point. There, we held that a parent's complaints to a school administrator and subsequent letter to a newspaper were protected speech for First Amendment purposes. *Id.* at 583–85, 588; *see also Wenk v. O'Reilly*, 783 F.3d 585, 599 (6th Cir. 2015) (applying *Jenkins* to reject qualified immunity in a First Amendment retaliation case involving a parent's criticism of a teacher relating to the treatment of that parent's child).

True, there are a handful of categories of speech for which content-based prohibitions may be permissible. But it is a short and somewhat notorious

list. It includes "speech expressed as part of a crime, obscene expression, incitement, and fraud." *Novak*, 932 F.3d at 427 (citing *United States v. Alvarez*, 567 U.S. 709, 717, 720 (2012)). Unless the nature of their speech falls within one of those "historic and traditional" categories, *Alvarez*, 567 U.S. at 717, schools cannot regulate the content of parents' speech about their child to a school employee who interacts with the child. *See Jenkins*, 513 F.3d at 588; *Wenk*, 783 F.3d at 599. That is precisely the nature of the clearly established right at issue here.

Defendants see things differently. By and large, however, their arguments speak to the constitutional violation prong—specifically, whether defendants' conduct in fact violated the First Amendment—a question the district court is best equipped to answer on remand. To the extent defendants' arguments touch upon the clearly established inquiry, they do not change our conclusion. For example, defendants believe that the First Amendment allows them to place "substance restrictions" on parental speech to school officials, including a prohibition against "directly debating with [a] coach about playing time." As a matter of decorum, that rule might well make good sense. But for better or worse, the First Amendment protects many statements and actions that arguably lack decorum. *See, e.g.*, *Snyder v. Phelps*, 562 U.S. 443, 448 (2011) (holding that the Westboro Baptist Church's protest of military funerals with signs that display "Thank God for IEDs" and "Thank God for Dead Soldiers" is protected speech).

For the most part, defendants' understanding of the First Amendment rests on student-speaker precedents, which allow for some institutional restraint on

speech. In that context, school officials' "special interest" in avoiding disruption of educational programs justifies regulating student speech. *Mahanoy Area Sch. Dist. v. B. L. ex rel. Levy*, 141 S. Ct. 2038, 2044–45 (2021) (discussing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)). As an example, consider *Lowery*. There, students protested against their high school football coach, at which point the school kicked the students off the team. 497 F.3d at 585–87. We held that the students did not have a valid First Amendment claim because the coach legitimately feared that the speech would disrupt the team's educational goals. *Id.* at 600–01. In reaching these conclusions, we emphasized the need to "balance . . . a student athlete's First Amendment rights and a coach's need to maintain order and discipline." *Id.* at 587, 589, 596–97. That framework, however, does not guide our consideration of parental speech about educational institutions. *See Jenkins*, 513 F.3d at 588 (assessing parental speech about a student child's education without looking to *Tinker*); *see also id.* ("Speech is generally protected by the First Amendment, with restrictions on only limited types of speech, such as obscenity, defamation, and fighting words[.]" (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 382–83 (1992))); *cf. Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986) (recognizing that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings").

When it comes to students, "courts must apply the First Amendment 'in light of the special characteristics of the school environment.'" *Mahanoy*, 141 S. Ct. 2038, 2044 (2021) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)). In that setting,

the school is standing in the place of the students' parents, assuming their role to preserve the educational experience. *Id.* at 244–45 (citing *Fraser*, 478 U.S. at 684). Parents, however, have a different relationship to school activities than do students. After all, the school is not acting as a parent's temporary guardian when the parent attends his or her child's extracurricular activity or a parent-teacher conference. As a result, the "disruption" standard applicable to student speech has not been applied to run-of-the-mill adult speech targeting school officials. *See, e.g.*, *Jenkins*, 513 F.3d at 588.

Defendants offer no compelling reason why this case should be treated differently. The lone adult speech case defendants point to is *Blasi v. Pen Argyl Area School District*, 512 F.App'x 173 (3d Cir. 2013) (table) (per curiam). There, the Third Circuit upheld a ban on a parent's attendance at his child's high school basketball game after the parent sent 17 racially charged emails to the coach. *Id.* At 174. To the extent that those emails were deemed to be "threatening," *see id.*, the First Amendment would not protect the parent's speech because "true threats" are not protected speech. *Virginia v. Black*, 538 U.S. 343, 351 (2003). Separately, the Third Circuit cited *Lowery* for the general proposition that student athletes enjoy limited First Amendment rights. *Blasi*, 512 F.App'x at 175. But, again, because *Lowery* dealt only with student athlete speech, 497 F.3d at 600–01, it is a poor guide for cases involving adult speech in the context of student athletics.

Lastly, defendants emphasize that McElhaney violated the rules in the "Parent-player Information" sheet distributed at the start of the season. McElhaney,

we note, balks at the idea that he agreed to be bound by the information sheet. The form, to his mind, "reads as parental advice rather than a team 'rule' or 'policy.'" Nor, he adds, does anything there make a parent's attendance contingent on a subjective determination of whether the parent's speech is "supportive," unlike the specific punishments tied to student behavior.

However one resolves these dueling interpretations, those conclusions do not bear upon McElhaney's clearly established rights as a parent speaker. *See Jenkins*, 513 F.3d at 588. Rather, they speak largely to whether defendants had a retaliatory motive when they suspended McElhaney—which, if so, would be at odds with the First Amendment. That is not to say that school officials are entirely hamstrung in dealing with a parent like McElhaney. For example, it does not appear as though Williams was required to respond to the texts criticizing his coaching decisions. *See L. F. v. Lake Wash. Sch. Dist. #414*, 947 F.3d 621, 626–27 (9th Cir. 2020). Likewise, as McElhaney himself acknowledges, a school may impose reasonable, viewpoint neutral, time, place, and manner restrictions on parental interactions with the school. Here, the Upperman softball team rules already contained several such restrictions, including a ban on interactions between parents and players during games (a time restriction) and a prohibition on parents attending practice (a place restriction). But retaliating against speech on the basis of its content, as alleged here, drifts into foul territory.

* * *

In this day and age, one need not look (or scroll) far to find speech she deems disrespectful. Many of us might share her sentiment. But that does not mean the

disrespectful speech opens one up to government retaliation. The First Amendment muscularly protects most types of speech. For today's purposes, it is enough to say that those protections encompass a parent's criticism of the ways in which school employees treat the parent's child at school. *See Jenkins*, 513 F.3d at 588. In that situation, it is clearly established at a low level of generality that a school official may not retaliate against the parent for the content of his speech. *See id.*

Accordingly, McElhaney has satisfied the clearly established prong of the qualified immunity inquiry. That leaves the threshold question of whether a constitutional violation in fact occurred, a determination best made by the district court on remand. *Cf. Novak*, 932 F.3d at 430 (remanding a First Amendment retaliation qualified immunity claim). Back in the district court, the evidence might show that none (or only some) of defendants' actions were motivated by McElhaney's speech, rather than the time, place, or manner of that speech. Or it might show that the ban was not a sufficiently adverse action. *Rudd v. City of Norton Shores*, 977 F.3d 503, 514–15 (6th Cir. 2020) (collecting cases on instances of "adverse action"). Either way, these questions are best answered by the district court in the first instance.

B. *Due Process.* McElhaney also contends that his due process rights were violated because he was deprived of his contractual right to sit in his reserved game seats without sufficient process. His claim has a fundamental flaw: it is a state law claim, not a federal one. Whatever property rights McElhaney maintained in his season tickets, those rights were subject to school and team rules, meaning school officials conceivably

could suspend McElhaney from sitting there due to a rules violation. Whether McElhaney's tickets were so conditioned, however, is a state contract law question. *Ramsey v. Bd. of Educ. of Whitley Cnty.*, 844 F.2d 1268, 1273 (6th Cir. 1988). That fact is dispositive here because there is no due process violation for a deprivation that can be completely remediated under state contract law. *Id.* McElhaney's recourse, in other words, is a suit for breach of contract, not a § 1983 action. *Id.*

On this point, it bears reminding that although McElhaney asserted in his complaint a state contract claim against the Putnam School Board, the district court declined to exercise supplemental jurisdiction over the claim. McElhaney may still have a viable breach of contract claim, but that is not for us to say. All we need conclude is that McElhaney did not appeal the declination of supplemental jurisdiction, meaning the issue is not part of this appeal.

* * * * *

We reverse in part, affirm in part, and remand the matter for proceedings in accordance with this opinion.

JUDGMENT, UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (AUGUST 25, 2023)

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RANDALL MCELHANEY,

Plaintiff-Appellant,

v.

DUSTIN WILLIAMS; WILLIAM STEPP; NATHAN BROWN; TIMOTHY MARTIN; JOHN PETTIT; PUTNAM COUNTY, TENNESSEE SCHOOL SYSTEM,

Defendants-Appellees.

No. 22-5903

Appeal from the United States District Court for the Middle District of Tennessee at Cookeville.

Before: GILMAN, READLER, and MATHIS, Circuit Judges.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the judgment of the district court is AFFIRMED IN PART, REVERSED IN PART, and the case is

REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/ Deborah S. Hunt
Clerk

**MEMORANDUM OPINION,
UNITED STATES DISTRICT COURT MIDDLE
DISTRICT OF TENNESSEE,
NORTHEASTERN DIVISION
(SEPTEMBER 8, 2022)**

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

RANDALL MCELHANEY,

Plaintiff,

v.

DUSTIN WILLIAMS; WILLIAM STEPP; NATHAN BROWN; TIMOTHY MARTIN; JOHN PETTIT; AND PUTNAM COUNTY SCHOOL SYSTEM,

Defendants.

No. 2:21-cv-00019

Before: Waverly D. CRENSHAW, JR.,
Chief United States District Judge.

MEMORANDUM OPINION

Pending before the Court is Defendants' Amended Motion for Summary Judgment (Doc. No. 39) on Plaintiff's allegation of alleging violation of his constitutional rights and breach of contract. Because the

Court finds that Defendants are entitled to qualified immunity on Plaintiff's First Amendment claim, and summary judgment is appropriate on his Fourteenth Amendment claim, those claims will be dismissed. Additionally, the Court will decline to exercise supplemental jurisdiction over the state law contract claim.

I. Factual Background[1]

Plaintiff Randall McElhaney is the father of L.M., a student at Upperman High School and member of the girls' varsity softball team. The school is located in Baxter, Tennessee, and competes with other schools in the area in accordance with Tennessee Secondary School Athletic Association Rules. (Doc. No. 47, SUMF ¶¶ 1-3).

Dustin Williams, the Head Coach of the girls' team, drafted a "Parent-player Information" sheet that was provided to all parents and students. Among other things, that sheet instructed that "playing time is a non negotiable for coaches to talk directly with parents about." (Doc. No. 39-1 at 1). The sheet also contained a paragraph for "Parents" that reads:

> "Parents need to be supportive of the program on the field and off the field. In the stands and at home. We understand every parent wants what is best for their child. Please remember this program wants what is best for this team and we have to strive for that. We need parents to be supportive of other players, other players on the team, and

[1] The following facts are drawn primarily from Defendant's Statement of Undisputed Material Facts and Plaintiff's responses thereto. (Doc. No. 47).

> the program. By doing this the season will be a much more pleasant and enjoyable, result being the kids will gel more like a team instead of individuals, and parents will gel as well. Guarantee your child sees and feels negativity and it will affect how they perform on and off the field. Practices are closed on the field or in the gym. No Parents or legal guardians are allowed to attend practice. No parents are to interact with their child during the games . . . this means no parents in the dugout during the games and no parent coming to the dugout coaching or giving instructions. Again let's be positive and cheer the girls on the field.

(*Id.* at 3) (syntax and grammar in original) (emphasis added). The policies were in effect during all times relevant to this litigation, and Plaintiff understood those policies. (Doc. No. 39-3, McElhaney Depo. at 74-76).

On April 15, 2021, Plaintiff sent text messages to Coach Williams that Defendants characterize as being critical of L.M.'s playing time, her teammates, and coaching decisions. Plaintiff contends the messages were not meant to be criticism, but instead were simply his efforts to receive "an explanation of [Coach] Williams' decision in light of the data (player statistics)," and an attempt to "advocat[e] for his daughter." (Doc. No. 47, SUMF ¶ 5). Whatever characterization is proper, the following excerpts suggest the tenor of the text messages:

"L"[2] came home and said she talked to you. You need to look at the books and find out which kid has made the least amount of errors on the team. I can tell you "L" is with 0. You benched "L" out of 2nd base after I rebutted what Mike told you that "L" needed to under hand that ball to "A" at 1st in the Soddy Daisy Tournament and I said "L" had to throw it fast like that to get the girl out because if she wouldn't have the girl would have been safe. "C" has made two errors already at 2nd base and you had to get onto her during the Dekalb County game and she does not cover bases at all. She has no idea what she is doing. She got played over every one of her middle school years at 2nd. So you are benching an upper classman to put her there. That is not understandable at all. Your other 2 pitchers don't leave the field at all. I didn't understand when you took "L" out of the pitching circle why she didn't just trade places with "A" at 2nd the other night in Livingston. No matter who makes errors in the outfield you just leave them in there. They take bad angles and they don't catch the ball or they just run up and let it fall in front of them when they can make a play. . . . "L" is right here and said she doesn't disagree with any of what was just said. I told her this is what she should have said to you in the teachers lounge when she talked to you today."

---

[2] "L" is a reference to L.M.

Coach Williams responded:

> "I am sorry you feel this way, and sorry that you don't understand that we are only trying to do what we feel like is best for our team currently. I don't feel like running down other players is the best way to approach the situation nor do I feel like questioning our programs structural integrity is beneficial for anyone involved. We enjoy having "L" on our team and appreciate her heart . . . she is a great kid and a joy to be around, but I am under no circumstances going to continue to justify our reasons for what we do inside of our program or what we feel like is best for us. It seems from the comments I have heard that have came from you outside the park that you are extremely displeased with how we are running the program and have an exponential amount of opinions on how we should be running it . . crazy we have to have that conversation at 6-0 in the district but everyone is entitled to their own opinion. It seems we have reached the boiling point and you have a couple of options . . . 1.) go talk to my administration about how you feel 2.) walk away from the program or 3.) allow us to continue working daily to do what we feel like is best for our program and support us instead of running us down. I will not have this conversation again and feel completely disrespected in how this is being handled."

Plaintiff replied:

> 'If you feel so disrespected, I would love for you to tell me how this [sic] would this situa-

> tion should be handled any differently than discussing it with you instead of running to someone else . . . My arguments are backed up by stats . . . Just because someone hasn't cost you a game at 2nd base' doesn't mean that 'L' shouldn't be on the field. . . . I have coached several teams in my past so its not like I don't' know what I'm talking about. . . . I will never go to administration over a coach unless they physically harm my kid. I don't believe in that. If I ever feel I need for my kid or kids to step away from a team I will pull them. Then we will have a decision to either not and play at all or have them transfer and play for someone else. My kids are no where near allstars and I don't treat them that way at all. I would like her [sic] for her to remain with the team but would also like to see her be able to contribute as well. . . . In a nutshell maybe I shouldn't have said anything to you and maybe just let my kid to learn to talk with you and address all of her concerns."

(Doc. No. 39-2 at 2-13) (syntax and grammar in original). The exchanges were solely between Plaintiff and Coach Williams, but were shared by Plaintiff with L.M. Coach Williams also forwarded the exchanges to Williams Stepp, the Principal of Upperman High School.

After conferring with Plaintiff (in a meeting also attended by Athletic Director Nathan Brown), Principal Stepp decided that a one-week suspension from Plaintiff attending games would put some time and space between him and Coach Williams. Later, after speaking with Plaintiff briefly and telling him he would not

intervene, Timothy Martin, the Deputy Director of Schools upheld the suspension decision. (Doc. No. 43, SUMF ¶¶ 6-8). Plaintiff then met with Corby King, the Director of Schools for Putnam County, but King, too, concluded that the suspension was appropriate. (*Id.* ¶ 9).

Notwithstanding the suspension, Plaintiff attended his daughter's softball game on April 20, 2021 and sat in the stands. (Doc. No. 46 as 3).[3] During the third inning, Principal Stepp approached Plaintiff and asked him to leave. As the two walked towards the gate, they were joined by School Resource Officer John Pettit. Frustrated that he was not allowed to watch his daughter play, Plaintiff said, "this is bullsh**." Officer Pettit reiterated that Plaintiff needed to leave the game, stating that Principal Stepp was in charge of the school, and if he wanted Plaintiff to leave he would have to leave or be considered trespassing. Plaintiff's entreaty that he be allowed to watch the game from outside the gate was rebuffed and he left the ballpark to avoid risking arrest. (*Id.*). At no point did Officer Pettit touch or arrest plaintiff. (Doc. No. 43, SUMF ¶ 13).

II. Application of Law

Based upon the above facts, Plaintiff alleges that he was retaliated against for exercising his free speech rights in violation of the First Amendment to the

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[3] The facts surrounding Plaintiff's attendance at this game are drawn from his brief. Because, however, they are statements of alleged facts, Plaintiff should have filed his own statement of undisputed facts under Local Rule 56.01 so that Defendants could respond. Nevertheless, they appear to be undisputed and are accepted as true for purposes of this opinion.

United States Constitution and Article I § 19 of the Tennessee Constitution, and denied due process in violation of the Fourteenth Amendment and Article I, ¶ 8 of the Tennessee Constitution. He also claims breach of contract based upon his paying $375 for a season ticket and his inability to attend games for a week.[4]

A. Constitutional Claims[5]

1. First Amendment Claim

"A First Amendment retaliation claim has three elements: '(1) the plaintiff engaged in protected conduct [*i.e.*, constitutionally protected speech]; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) . . . the adverse action was motivated at least in part by the plaintiff's protected conduct.'" Myers v. City of Centerville, 41 F.4th 746, 759 (6th Cir. 2022) (quoting *Thaddeus-X v. Blatter, 175* F.3d 378, 394 (6th Cir. 1999) (*en banc*). Defendants argue that Plaintiff cannot establish a First

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[4] This figure included $175 for preferred seating, a $150 players fee, and a $50 fee for not having to work the concession stands.

[5] Although Plaintiff brings both federal and state constitutional claims, "[t]here is no private right of action for damage under the Tennessee Constitution." *Bennett v. Metro. Gov't of Nashville & Davidson Cty.,* (M.D. Tenn. 2019) (citing *Cline v. Rogers,* 87 F.3d 176, 179–180 (6th Cir. 1996); *Bowden Bldg. Corp. v. Tenn. Real Estate Com'n,* 15 S.W.3d 434, 446 (Tenn. Ct. App. 1999)). Plaintiffs only prayer for relief is $250,000 in compensatory damage, three times that amount in punitive damage, and attorney fees. Perhaps it was for this reason that Plaintiff's claims under the Tennessee Constitution are unaddressed in the parties' filings and will not be addressed at any more length here.

Amendment retaliation claim and, in any event, they are entitled to qualified immunity on this claim. The Court agrees with the latter argument.

"Qualified immunity shields government officials in the performance of discretionary functions from standing trial for civil liability unless their actions violate clearly established rights." *DiLuzio v. Vill. of Yorkville,* 796 F.3d 604, 608 (6th Cir. 2015). Once the defense is raised, a plaintiff must come forward with evidence from which a jury could find "(1) that the official violated a statutory or constitutional right, and (2) the right was 'clearly established' at the time of the challenged conduct." *Ashcroft v. al-Kidd,* 563 U.S. 731, 735 (2011). Both prongs must be met, and judges "can exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson v. Callahan,* 555 U.S. 223, 236 (2009). Exercising that discretion here, the Court considers the second prong first and concludes that Plaintiff has wholly failed to establish that the law was "clearly established" under the circumstances of this case.

"'[C]learly established law should not be defined at a high level of generality'–it 'must be particularized to the facts of the case.'" *White v. Pauly,* 137 S. Ct. 548, 552 (2017) (internal citations and quotation marks omitted). This does not require a plaintiff to identify an earlier decision that is "directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate." *Mullenix v. Luna,* 577 U.S. 7, 12 (2015) (quoting *al–Kidd,* 563 U.S. at 741). "[T]his narrow definition of 'clearly established' functions to protect 'all but the plainly incompetent

or those who knowingly violate the law.'" *Mitchell v. Schlabach,* 864 F.3d 416, 424 (6th Cir. 2017) (quoting *Mullenix,* 136 S. Ct. at 308). It also serves to protect "reasonable" but "mistaken" decisions by officials acting in good faith. *Hunter v. Bryant,* 502 U.S. 224, 229 (1991).

It is the plaintiff's burden to show "that the right was 'clearly established' at the time of the challenged conduct." *al-Kidd,* 563 U.S. at 735 (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). In the absence of a clear constitutional violation, the decision as to whether existing legal authority has placed the statutory or constitutional question beyond debate is determined by looking first to Supreme Court precedent, then to Sixth Circuit precedent, and then to decisions of other courts of appeal. *Barber v. Miller,* 809 F.3d 840, 845 (6th Cir. 2015); *Flint v. Kentucky Dep't of Corr.,* 270 F.3d 340, 347 (6th Cir. 2001).

In an effort to show that his First Amendment right to freedom of speech was violated when the school barred him from attending a week's worth of games, Plaintiff "asks this Court to consider . . . the Second Circuit case of *Frierson v Reinisch,* 806 Fed. App'x 54 (2nd Cir. 2020)[.]" (Doc. No. 46 at 7). There, the court affirmed the denial of qualified immunity on a motion for summary judgment where a father of a basketball player was banned from attending games after he expressed his displeasure with the coaching staff during meetings with students and parents. Noting that it had previously found that when "a public school invites parents and other spectators to attend sporting events held in its gymnasium, the gymnasium operates as 'a limited public forum,'" the Second Circuit reiterated its position that a school may restrict access to such a forum "only when (1) 'its

restrictions are reasonable and viewpoint neutral,' or (2) 'there is a clear and present danger of disruptions such as disorder, riot, obstruction of the event, or immediate threat to public safety.'" *Id.* at 58 (quoting *Johnson v. Perry,* 859 F.3d 156, 175 (2nd Cir. 2017)).

No doubt, the facts presented here are somewhat analogous to those in *Frierson,* not the least of which is that there has been no showing of a clear and present danger had Plaintiff been allowed to attend his daughter's softball games during the week he was banned.[6] For a number of reasons, however, *Frierson* is insufficient as a matter of law to place the constitutional question beyond debate.

To begin, *Frierson* is an unpublished decision and this alone is sufficient to ignore it as precedential authority. The Sixth Circuit has explained:

> [A] plaintiff cannot point to unpublished decisions to meet []his burden. Basic logic tells us at least this much. After all, the qual-

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[6] The Court notes that, in its Memorandum of Law, Defendants assert:

> The events of this case all occurred against a backdrop known to the individual school Defendants, and particularly Principal Stepp, as Plaintiff in the past had a number of confrontations with staff employed by the Putnam County Board of Education where he acted as a bully and had been asked to leave softball games and school parent-teacher meetings. Plaintiff had been hostile in the past when he did not get his way.

(Doc. No. 40 at 4-5). Those allegations are not set forth in Defendants' Statement of Material Facts and therefore the Court does not rely upon them in reaching its conclusion because they may be disputed in whole or in part.

> ified-immunity inquiry looks at whether a right has been clearly established. For a right to be clearly established, "existing precedent must have placed the statutory or constitutional question beyond debate." . . . Yet how can an unpublished case place a question beyond debate when it doesn't even bind a future panel of this court? It can't.

Bell v. City of Southfield, 37 F.4th 362, 367–68 (6th Cir. 2022) (internal citations omitted).

Even if unpublished authority counted, *Frierson* could hardly be considered to have placed the issue beyond debate when an equally, non-controlling unpublished Third Circuit case reached the opposite conclusion on facts much more analogous to those presented here. In *Blasi v. Pen Argyl Area Sch. Dist.,* plaintiff, the father of two high school basketball players, sued the school district when he was banned from attending a game after he sent numerous "emails to coaches complaining about their coaching methods, the behavior of his sons' teammates towards them, and alleged favoritism toward white, inferior players." 512 F.App'x 173, 175 (3d Cir. 2013). Noting that plaintiff's First Amendment claim was "made in the context of an athletic program in which his sons' participation, and by extension his own, is voluntary," and that "[p]laintiff was aware of and agreed to the standards required of students, and their parents, in order to participate in the School District's basketball program, including restrictions on the manner and tone of speech used with respect to coaches and other players, *id.* at 175, the Third Circuit found dismissal warranted. Among other things, the court noted that "[t]he narrower goals of an athletic team differ from those of academic

pursuits and are not always consistent with the free-wheeling exchange of views that might be appropriate in a classroom debate," and that "[s]chool officials have a legitimate interest in affording student athletes 'an educational environment conducive to learning team unity and sportsmanship and free from disruptions that could hurt or stray the cohesiveness of the team.'" *Id.* at 175.

Further, and again assuming that unpublished decisions could establish rights of which a reasonable official would know, it is likely that, of the two, *Blasi* would be given more purchase in this circuit. In arriving at its conclusion, the Third Circuit in *Blasi* specifically referenced the Sixth Circuit's decision in *Lowery v. Euverard,* 497 F.3d 584 (6th Cir. 2007), a case involving plaintiffs' removal from a high school football team after a player criticized the coach and called for his dismissal. A couple of points from *Lowery* are worth noting. First,

> The contour of First Amendment protection given to speech depends upon the context. For example, it is beyond question that citizens have a First Amendment right to criticize the government's military policy. However, does this mean that an enlisted soldier has a First Amendment right to be disrespectful towards his commanding officer? To ask that question is to answer it.

Id. at 587. Thus, it was "overly abstract and also misleading" to characterize the qualified immunity issue in *Lowery* as being "whether it is permissible for school officials to engage in viewpoint discrimination against student athletes[.]" *Id.* at 589. Likewise, the Second Circuit statement in *Frierson* that "[i]t is well-established

that the government may not retaliate against individuals for exercising their rights under the First Amendment" 806 Fed. App'x at 57-58 is too broad. Rather, a better question is whether a reasonable official would believe that Plaintiff had an unfettered right to attend games after he criticized the coach and his opinions on how to run the softball team, just as the appropriate question in *Lowery* was whether there was a constitutional right to remain on the team after the player/plaintiff said he hated the coach and did not want to play for him.

Second, and somewhat related to the last point, there is a difference between what may be allowable in the classroom and what is permitted in the locker room or on the playing field. As the Sixth Circuit stated in *Lowery*:

> The Supreme Court has held that student athletes are subject to more restrictions than the student body at large. . . . This greater degree of oversight is due to the differing natures of the classroom and playing field. One of the purposes of education is to train students to fulfill their role in a free society. Thus, it is appropriate for students to learn to express and evaluate competing viewpoints. The goal of an athletic team is much narrower. Of course, students may participate in extra-curricular sports for any number of reasons: to develop discipline, to experience comradery and bonding with other students, for the sheer "love of the game," etc. Athletic programs may also produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic

> team is to win the game, and the coach determines how best to obtain that goal.
>
> * * *
>
> The success of an athletic team in large part depends on its coach. The coach determines the strategies and plays, and "sets the tone" for the team. The coach, particularly at the high school level, is also responsible for providing "an educational environment conducive to learning team unity and sportsmanship and free from disruptions and distractions that could hurt or stray the cohesiveness of the team." The ability of the coach to lead is inextricably linked to his ability to maintain order and discipline. Thus, attacking the authority of the coach necessarily undermines his ability to lead the team.

497 F.3d at 589, 594 (internal citations omitted).

Plaintiff also misplaces reliance on the Supreme Court's decision in *Mahoney Area Sch. Dist. v.* B.L., 141 S. Ct. 2038 (2021) for the proposition that "[i]f a public display using vulgarity to protest a high school coaching decision enjoys First Amendment protection, then [his] private text message to [Coach Williams], which did not include profanity or vulgar language, must enjoy the same protection." (Doc. No. 46 at 11). *Mahoney* was decided on June 23, 2021, meaning that it could not have clearly established law for events that took place months before. Moreover, the speech at issue in *Mahoney* occurred via Snapchat pictures posted by plaintiff while at a convenience store, that were distributed to a non-school audience and were unrelated to any guidelines relating to expected conduct.

Indeed, the Supreme Court identified "three features of off-campus speech" but "left for future cases to decide where, when, and how those features" may "call for First Amendment leeway." 141 S. Ct. at 2046. Nowhere did the Supreme Court suggest that school officials are relieved from the "affirmative duty to not only ameliorate the harmful effects of disruptions, but to prevent them from happening in the first place," even though, "[f]orecasting disruption is unmistakably difficult to do." *Lowery,* 497 F.3d at 506.

Defendants are entitled to qualified immunity on Plaintiff's First Amendment claim.

2. Due Process Claim

Plaintiff claims that he "was not afforded the opportunity to be heard at a meaningful time and in a meaningful manner," before being banned from his daughter's ball game for a week. (Doc. No. 46 at 18). Instead, he argues that "Defendants tried to pass the buck from coach to principal to various administrators, each one merely rubber-stamping the decision of the others." (*Id.*).

"The Due Process Clause of the Fourteenth Amendment prohibits states from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. To state a procedural due process claim, a plaintiff must establish that: (1) he has a property interest protected by the Due Process Clause; (2) he was deprived of this property interest; and (3) the state did not afford him adequate pre-deprivation procedural rights." *Cahoo v. SAS Analytics Inc.,* 912 F.3d 887, 900 (6th Cir. 2019); *accord Albrecht v. Treon,* 617 F.3d 890, 894 (6th Cir. 2010).

"As the Supreme Court stated many years ago, 'the root requirement' of due process protection is 'that an individual be given an opportunity for a hearing before he is deprived of any significant property interest.'" *Daily Servs., LLC v. Valentino,* 756 F.3d 893, 903 (6th Cir. 2014) "Property interests are not created by the Constitution," but, instead, "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 538 (1985) (quoting *Bd. of Regents v. Roth,* 408 U.S., 564, 576 (1972)).

Plaintiff's claimed deprivation in this case is allegedly two-fold: he "had a property or liberty interest in his season ticket seating at his daughter's softball games and, more generally, a liberty interest in being in a public place." (Doc. No. 46 at 17). Insofar as Plaintiff claims to have had a property interest because of his season tickets, that fails. "A state breach of contract action is most clearly an adequate remedy for a property deprivation when the only basis for federal jurisdiction is that a state actor is one of the contracting parties." *Ramsey v. Bd. of Educ. of Whitley Cty.,* 844 F.2d 1268, 1273 (6th Cir. 1988). Indeed, "it is neither workable nor within the intent of section 1983 to convert every breach of contract claim against a state into a federal claim." *Taylor Acquisitions, L.L.C. v. City of Taylor,* 313 F.App'x 826, 831 (6th Cir. 2009). Plaintiff has an adequate state law remedy to the extent his due process claim is based on an alleged breach of contract and, indeed, he brings a separate claim for breach of contract.

Plaintiff's claimed liberty interest in being in public also fails. "The preponderance of federal district

courts considering the issue have held that '[t]he opportunity to participate in extracurricular activities is not, by and in itself, a property interest,'" *Brindisi v. Regano,* 20 F.App'x 508, 510 (6th Cir. 2001) (citation omitted) and, "[i]n the context of due process claims, to this Court's knowledge, every court that has considered the issue has concluded that citizens, including parents, do not have a liberty or property interest in accessing school property." *Ritchie v. Coldwater Cmty. Sch.,* No. 1:11-CV-530, 2012 WL 2862037, at *16 (W.D. Mich. July 11, 2012) (collecting cases).

"Only after a plaintiff has met the burden of demonstrating that he possessed a protected property or liberty interest and was deprived of that interest will the court consider whether the process provided the plaintiff in conjunction with the deprivation, or lack thereof, violated his rights to due process." *Hamilton v. Myers,* 281 F.3d 520, 529 (6th Cir. 2002). Because Plaintiff has not carried that burden, summary judgment will be granted on his due process claim.

B. State Law Claim

With the dismissal of Plaintiff's constitutional claims, the Court will not retain jurisdiction over his state law claim against Defendants for breach of contract. Under 28 U.S.C. § 1367(c)(3), there is a "strong presumption in favor of declining to exercise jurisdiction over supplemental state-law claims after dismissing federal anchor claims[.]" *Martinez v. City of Cleveland,* 700 F.App'x 521, 523 (6th Cir. 2017). Although this presumption is not as strong where, as here, a motion for summary judgment has been filed and considered, this Court has declined to exercise supplemental jurisdiction in the vast majority of cases. *Larson v. City of*

Algood, 390 F.Supp.3d 874, 891 (M.D. Tenn. 2019) (collecting cases). Ultimately, however, the decision is a matter of discretion. *Harper v. AutoAlliance Int'l, Inc.,* 392 F.3d 195, 210 (6th Cir. 2004). The Court declines to exercise supplemental jurisdiction here because Plaintiff's breach of contract claim is the type of claim Tennessee courts routinely and skillfully consider and involves an agreement (or not) between locals. In the absence of any federal jurisdiction, fairness and comity dictate that the Tennessee courts should be given the opportunity to decide that controversy.

III. Conclusion

On the basis of the foregoing, the Court will grant Defendants' Amended Motion for Summary Judgment (Doc. No. 39) on Plaintiff's constitutional claims and decline to exercise jurisdiction over Plaintiff's state law claim.

An appropriate Order will enter.

/s/ Waverly D. Crenshaw, Jr.
Chief United States District Judge

ORDER, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF TENNESSEE NORTHEASTERN DIVISION (SEPTEMBER 8, 2022)

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF TENNESSEE
NORTHEASTERN DIVISION

RANDALL MCELHANEY,

Plaintiff,

v.

DUSTIN WILLIAMS; WILLIAM STEPP; NATHAN BROWN; TIMOTHY MARTIN; JOHN PETTIT; AND PUTNAM COUNTY SCHOOL SYSTEM,

Defendants.

No. 2:21-cv-00019

Before: Waverly D. CRENSHAW, JR., Chief United States District Judge.

ORDER

For the reasons set forth in the accompanying Memorandum Opinion, Defendants' Amended Motion for Summary Judgment (Doc. No. 39) is GRANTED IN PART and DENIED IN PART as follows:

(1) The Motion is GRANTED with respect to Plaintiff's First Amendment claim because Defendants are entitled to qualified immunity on that claim;

(2) The Motion is also GRANTED with respect to Plaintiff's Fourteenth Amendment claim because he has not shown that he was denied a liberty or property interest without due process of law; and

(3) The Motion is DENIED with respect to Plaintiff's state law breach of contract claim because the Court DECLINES to exercise supplemental jurisdiction over that claim.

The Clerk of the Court shall enter a final judgment in accordance with Rule 58 of the Federal Rules of Civil Procedure and close this case.

IT IS SO ORDERED.

/s/ Waverly D. Crenshaw, Jr.
Chief United States District Judge

BLASI v. PEN ARGYL AREA SCHOOL DISTRICT OPINION, UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT (JANUARY 30, 2013)

NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

WILLIAM BLASI,

Appellant,

v.

PEN ARGYL AREA SCHOOL DISTRICT.

No. 11-3982

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 10-cv-06814)
District Judge: Honorable Lawrence F. Stengel

Submitted Pursuant to Third Circuit LAR 34.1(a)
November 7, 2012

Before: SMITH, CHAGARES
and WEIS, Circuit Judges.

OPINION

PER CURIAM.

William Blasi, acting as a *pro se* plaintiff in the District Court[1], is the father of two sons whom he describes as being "of mixed race; part white and part ethnic Chinese" and, at the time he initiated this litigation, 13 and 14 years of age. Alleging various violations of his own constitutional rights, plaintiff brought an action pursuant to 42 U.S.C. § 1983 seeking injunctive and declaratory relief against the Pen Argyl School District because of his dissatisfaction with the basketball program in which his sons participated. Plaintiff's complaint contains intimations of racial discrimination against his sons by school officials and by team mates but does not seek relief on that theory.

After a hearing, the District Court denied preliminary injunctive relief concluding the plaintiff was unlikely to prevail. The court then granted the School District's motion to dismiss and entered judgment in its favor. We will affirm.

In the fall of 2009, plaintiff's sons both chose to try out for the Pen Argyl Area School District's interscholastic basketball program and were accepted for teams. They and the plaintiff received a copy of the School District's Athletic Policies which included the "Parental/Spectator Guidelines." Among other things, the Guidelines advised parents of team members to

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[1] Plaintiff proceeded *pro se* but, as was established in the District Court during the hearing on his motion for preliminary injunction, he has been a lawyer and he practiced law for some years in New York. Therefore, the usual tolerance given to the pleadings of *pro se* litigants is not applicable to this case.

refrain from "[r]idiculing or berating players, coaches, officials or other spectators." Plaintiff and his sons each signed a statement acknowledging that he had received and read the School District's Athletic Policies and agreeing to uphold "the standards therein" for the 2009-2010 school year.

From November 12 until December 23, 2009, plaintiff sent 17 e-mails to coaches complaining about their coaching methods, the behavior of his sons' team mates towards them, and alleged favoritism toward white, inferior players.

In a letter to the plaintiff dated December 22, 2009, the school principal stated that plaintiff had sent "scathing and threatening emails in which you berate and harass our coaches and make degrading and deplorable comments about 7th and 8th grade players. . . . This conduct, as you know, is a violation of the Parent/Spectator Guidelines (see enclosure) which was given to you at a parent meeting prior to the start of the 09-10 season and which you and your children signed on 11-19-09. . . . " The letter also called attention to that portion of the Guidelines warning that "[b]ehavior that degrades a player, coach, referee, school official or another parent or fan is subject to disciplinary action by school personnel."

As a sanction for his violation of the Guidelines, plaintiff was barred from attending the next home game, scheduled for January 8, 2010. In response, among other things, plaintiff filed an action in the District Court alleging a variety of constitutional violations including the sanction against him.

We write principally for the parties, who are familiar with the factual context and legal history of

this case. Therefore, we have set forth only those facts necessary to our analysis. We have jurisdiction pursuant to 28 U.S.C. § 1291. Our review is plenary. *See McMullen v. Maple Shade Twp.,* 643 F.3d 96, 98 (3d Cir. 2011).

Plaintiff's amended complaint listed six counts. The third, fourth, fifth, and sixth counts essentially assert that his right to raise his children as he thinks best and/or his right to freedom of speech have been violated by the School District's policies regarding closed basketball practices/tryouts, the School District's game day dress code for members of the middle school basketball team, and the School District's decisions to cut one of his sons from the team and to not promote the other son to the PAASD basketball team. The District Court ably explored those contentions in its detailed memorandum opinion and we see no need to reiterate the court's discussion on those points.

The first and second counts of the complaint set forth plaintiff's charges that the School District violated his constitutional right to free speech both by sanctioning him for the e-mails criticizing his sons' coaches and team mates and by enacting a subsequent amendment of its Guidelines expressly extending the prohibition against degrading, ridiculing or berating coaches and players to the use of electronic media (internet/e-mail etc.). We find no merit in his claims.

School officials have comprehensive authority, consistent with fundamental constitutional safeguards, to maintain an environment suitable for academic and extracurricular learning by all students. *See Tinker v. Des Moines Independent Community Sch. Dist.,* 393 U.S. 503, 89 S. Ct. 733 (1969). There is no constitutionally

protected right to play sports. *See Angstadt v. Midd-West Sch. Dist.,* 377 F.3d 338, 344 n.2 (3d Cir. 2004).

The narrower goals of an athletic team differ from those of academic pursuits and are not always consistent with the freewheeling exchange of views that might be appropriate in a classroom debate. *See, e.g., Lowery v. Euverard,* 497 F.3d 584 (6th Cir. 2007). School officials have a legitimate interest in affording student athletes "an educational environment conducive to learning team unity and sportsmanship and free from disruptions that could hurt or stray the cohesiveness of the team." *Wildman v. Marshalltown Sch. Dist.,* 249 F.3d 768, 771 (8th Cir. 2001).

In order to achieve an effective and efficient athletic program for the students who wish to play, school officials may properly condition participation with a greater limitation of constitutional rights, including the right to free speech, than might otherwise be permissible. *See Tennessee Secondary School Athletic Association v. Brentwood Academy,* 551 U.S. 291, 127 S. Ct. 2489 (2007) (restriction on speech in recruiting athletes); *Vernonia Sch. Dist. 47J v. Acton,* 515 U.S. 646, 115 S. Ct. 2386 (1995) (voluntary participants in school athletics have reason to expect intrusions upon normal rights and privileges).

In this instance, plaintiff's charges are made in the context of an athletic program in which his sons' participation, and by extension his own, is voluntary. Plaintiff was aware of and agreed to the standards required of students, and their parents, in order to participate in the School District's basketball program, including restrictions on the manner and tone of speech used with respect to coaches and other players. Although he makes an unsupported argument of non-

applicability, the plaintiff acknowledges in his complaint that such restrictions were "drafted as a reasonable time, place, and manner regulation of speech."

The Guidelines and the challenged subsequent amendments are reasonably designed to enhance the educational and athletic experience of plaintiff's sons as well as that of other students participating in the program. The Guidelines do not preclude or prohibit criticism of coaches (or even other team members) but regulate the time, place, and manner in which such concerns are expressed in a way necessary to manage an effective and efficient basketball program. The policy permits the coach and players to focus on the game when at hand, without distraction of competing views on the strategies and tactics best calculated to win.

"Athletic programs may . . . produce long-term benefits by distilling positive character traits in the players. However, the immediate goal of an athletic team is to win the game, and the coach determines how best to obtain that goal. . . . „ The plays and strategies are seldom up for debate. Execution of the coach's will is paramount.'" *Lowery v. Euverard,* 497 F3d. 584, 589 (6th Cir. 2007) (citation omitted).

The sanction upon plaintiff was imposed because, contrary to the Guidelines, he used incendiary language denigrating coaches and young players alike. In so doing, plaintiff not only violated his own agreement to refrain from using abusive language, he also jeopardized the interests of other participants in the athletic program.

Judgment of the District Court will be affirmed.