IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

JONATHAN MORGAN, et al.,	§	
	§	
Plaintiffs,	§	
	§	
v.	§	Case No. 4:04cv447
	§	
THE PLANO INDEPENDENT SCHOOL DISTRICT, et al.,	§	
	§	
Defendants.	§	

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE JUDGE

Defendant Lynn Swanson has filed a Motion to Dismiss Plaintiffs' "Other Claims" Based on Qualified Immunity (Dkt. 331). The Fifth Circuit has already held that Swanson was not liable for Plaintiffs' claims as to constitutional violations in regard to elementary students in the Plano ISD. *See Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011), *cert. den.*, 132 S. Ct. 2740 (2012). Accepting Morgan's allegations as true, the question is: What is left to decide? *See id.* at 389. In this case, Morgan claims that he was prevented from distributing religious content information at his son's "Winter Break" party.[1]

The content of the material Morgan wanted to distribute was a card which described "The Legend of the Candy Cane."[2] According to Morgan, when he tried to show it to Swanson, she refused to look at it and covered her eyes. He claims that Swanson refused to override one of her

[1] f/n/a Christmas.

[2] The story begins with a humble Hoosier candy maker's desire to make a special gift for the King of Kings.

teacher's decisions to not allow his son to distribute the laminated card.

Later that day, Morgan attended the winter break party. He states that other classmates and their parents were present. Morgan then asked whether he could pass out the card to adults as opposed to children. According to Morgan, Swanson refused his request.

Later on, Swanson approached Morgan and recanted her position and told him that he could distribute the cards to other consenting adults and parents by leaving the cards in the school library or alternatively distributing them when he was entirely off school property. She told him any other attempt would be in violation of PISD policy and custom.

His constitutional complaint is that he was denied an opportunity to distribute the message to other adults. Defendant argues that Swanson is entitled to qualified immunity from these parent-to-parent speech claims and that the Fifth Circuit's opinion in this matter already rejects Plaintiffs' legal theory.

The Fifth Circuit's holding in *Morgan* does not foreclose review of the issue raised by Plaintiffs. As Judge Benavides, writing for the majority, noted, the issue before the court was whether the principals violated clearly established law when they restricted elementary students from distributing written religious materials while at school. As the court noted, the complicated body of law failed to place the constitutionality of the principals' conduct beyond debate entitling them to qualified immunity on the defense as raised. Although the law was not clearly established, a separate majority of the court held that the principals' actions as alleged in the complaint were unconstitutional.

The doctrine of qualified immunity protects government officials from civil damages liability when their actions could reasonably have been believed to be legal. *Morgan*, 659 F.3d at 370. This immunity protects "all but the plainly incompetent or those who knowingly violated the law." *Id.* at 371 (citations omitted). The Fifth Circuit held that Swanson was entitled to qualified immunity on Plaintiffs' complaint because clearly established law did not put the constitutionality of her actions beyond debate. *Id.* Noting the constitutional imperatives in this area and the balancing act required, the court found a lack of adequate guidance for Swanson's conduct. *Id.* (citations omitted).

Here, the salient question is whether the state of the law in 2003 gave Swanson fair warning that her treatment of the parent Morgan was unconstitutional. *See Hope v. Pelzer*, 536 U.S. 730, 741 (2002). No party has cited to any case directly on point.

Plaintiffs rely heavily on the Fifth Circuit's decision in *Chiu v. Plano Independent School Dist.*, 339 F.3d 273 (5th Cir. 2003). In that decision, the plaintiffs complained that the employees of the PISD prohibited them from distributing materials critical of a proposed math curriculum at public meetings convened specifically to discuss that curriculum. These meetings were held on school premises after hours. The meetings were also announced in a local paper, as well as flyers sent home with the students.

The Fifth Circuit held, in part, that the school speech policy was unconstitutional as applied to the plaintiffs. First, the court noted that the expressed activity was a matter of public concern. *Id.* at 282. The activity took place after school hours. The court also noted that there was no evidence that the distribution of materials created a disruption of "normal school operations." *Id.*

Chiu dealt with an after hours meeting called by the District for the purpose of discussing a school curriculum. This was not Doug Morgan's party. It was his son's. Evidently, parents could attend but in this instance should Swanson realistically have been on notice that a parent wanted to use a child's party as a sounding board for his own religious beliefs. It appears from the pleadings that Swanson was caught off guard. In any event, after *Hope*, the Supreme Court stated that unconstitutional conduct which is not obvious must at least be clearly established to warrant liability under an immunity analysis. *See Brosseau v. Haugen*, 543 U.S. 194, 201 (2004).

After wading through this case for several years, the Court takes some license in making a few observations. Swanson probably over-reacted to Doug Morgan's request. But she was not alone. The PISD also over-reacts to these situations. But the parents are not with out blame also. There is just *no* happy medium in what, as Judge Benavides noted, was a balancing act. *See Morgan*, 659 F.3d at 364.

Unfortunately, much of the confusion over the years has resulted from conflicting judicial decisions carving one exception to First Amendment guarantees only to find an exception to that exception. Schools, in response to an ever-evolving body of law, have reacted with policies trying to comport with whatever constitutional imperative confronts them. All parties are then aggrieved. One believes that the very heart of our First Amendment has been cut out; the other fears backlash from those who would not countenance religious speech with the strident cry of "thou shall establish no religion." Ultimately, the courts have done what the court in *Shanley v. Northeast Indep. School Dist*., 462 F.2d 960 (5th Cir. 1972) warned against – become involved in the day-to-day operations of the schools. Based on what the Fifth Circuit has already held in Swanson's qualified immunity

appeal, the Court finds that Plaintiff Morgan's claims should be dismissed.

Therefore, the Court recommends that Defendant Swanson's Motion to Dismiss Plaintiffs' "Other Claims" Based on Qualified Immunity (Dkt. 331) be GRANTED.

Within ten (10) days of this report, the parties shall file a joint status report, taking into consideration the findings herein and all other rulings made in this case over the past eight years, listing the issues that remain and the remaining deadlines to be set by the Court.

Within fourteen (14) days after service of the magistrate judge's report, any party may serve and file written objections to the findings and recommendations of the magistrate judge. 28 U.S.C.A. § 636(b)(1)(c).

Failure to file written objections to the proposed findings and recommendations contained in this report within fourteen days after service shall bar an aggrieved party from *de novo* review by the district court of the proposed findings and recommendations and from appellate review of factual findings accepted or adopted by the district court except on grounds of plain error or manifest injustice. *Thomas v. Arn*, 474 U.S. 140, 148 (1985); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

SIGNED this 25th day of September, 2012.

Don D. Bush

DON D. BUSH
UNITED STATES MAGISTRATE JUDGE