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School Board Policies Upheld in Recent Constitutional Challenges

By Sergio D. Simoes, Esq.

Free Speech vs. Promotion of Illegal Drug Use

Two court cases have recently affirmed school board policies concerning student expression, religious liberties, and the roles of public school faculty and staff at school-sponsored events.

In *Morse v. Frederick*, (127 S. Ct. 2618, 168 L.Ed. 2d 290 (2007)), the United States Supreme Court tackled the often difficult issue of students' rights to self-expression and school policies regulating them. The high court considered the case of a senior of a public high school who was suspended for unfurling a banner reading "BONG HiTS 4 JESUS" during the 2002 Olympic Torch Rally, a school-approved event that was supervised by school personnel and attended by members of the public and the media. The senior, who attended with his friends and several other students, displayed the banner as torchbearers and camera crews passed by. The school principal confiscated the banner on sight and suspended the senior for ten days in accordance with school board policy which provided that "[t]he Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors. . . ."

The senior appealed the suspension to the Superintendent who upheld it, but limited it to the time served – eight days. In a written memorandum, the Superintendent explained that the senior "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advise the use of illegal drugs" and because the banner was displayed "in the midst of fellow students, during school hours, at a school sanctioned activity." The District upheld the suspension.

The senior subsequently filed a federal lawsuit in the District Court against the Board and the principal individually, alleging a violation of his First Amendment Rights and a breach of the Civil Rights Act, 42 U.S.C. §1983. On motion, the District Court ruled in favor of the Board and the principal, finding that they had not infringed the senior's First Amendment rights and ruling that the principal had properly interpreted the banner as promoting illegal drug use.

On appeal, the Ninth Circuit Court of Appeals reversed the District Court, holding that the school punished the senior without demonstrating that his speech gave rise to a "risk of substantial disruption" and that his right to display the banner was clearly established.

The Circuit Court decision was challenged to the United (cont'd ➔)

States Supreme Court, which considered whether, under the First Amendment, a principal may restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use. In an opinion delivered by Chief Justice Roberts, the Court reversed the Ninth Circuit, finding that deterring drug use by schoolchildren is “an important – indeed, perhaps compelling interest.” The high court declared that the First Amendment does not require schools to tolerate at school events student expression that promote illegal drug use.

Free Speech vs. Separation of Church and State

In *Borden v. School District of the Township of East Brunswick*, No. 06-3890 (3d. Cir. April 15, 2008), the Third Circuit Court of Appeals heard the case of a football coach of a public high school team who brought suit against the District for its policy prohibiting faculty participation in student-initiated prayer. The coach asserted that the policy was unconstitutionally vague and overbroad, and violated his Federal and State Constitutional rights, including his freedom of speech, academic freedom, freedom of association, and his due process rights.

During his tenure at the high school, the coach, who had held the post since 1983, engaged in pre-game prayer activities that occurred at the team dinner and while taking a knee in the locker room. The team participated in this tradition for twenty-three seasons until the 2005 season, when the Superintendent received complaints from parents concerning the practices of the coach. The Superintendent, Principal, and Athletic Director contacted the coach about the complaints and advised him to stop leading the students in prayer. The Superintendent also provided the coach with the District guidelines on prayer which prohibited district representatives from leading, encouraging or mandating students to participate in prayer activities during athletic events. The coach asked the players whether they would like to preserve the tradition; the majority of the

players answered affirmatively. The coach thereafter continued the tradition by bowing his head during the prayer before the meal and remaining on one knee during the pre-game meetings.

The coach filed suit against the District, the Board of Education, and the Superintendent alleging that the policy violated his rights under the New Jersey and United States Constitutions. The District Court held that the coach’s request to bow his head in silence and take a knee did not violate the Establishment Clause of the Constitution, and found that the school guidelines were vague and overbroad, and thus violated his Constitutional rights.

On appeal, the Third Circuit overturned the District Court, holding that the Board’s guidelines were not unconstitutionally vague or overbroad because they did not compel individuals to guess at their meaning and did not prohibit faculty involvement in prayer activities. The Court also held that the policy was not a deprivation of his freedom of speech because the coach was acting as a public employee and his acts were not matters of protected public concern.

The Court also determined that the Board’s policy did not violate the coach’s academic freedom because such freedom applies only to educational institutions, not to individuals. The Third Circuit also ruled that the guidelines did not interfere with his association or due process rights since his acts fundamentally violated the Establishment Clause of the Constitution. Consequently, the Court upheld the District policy finding that Districts have “a legitimate educational interest in avoiding Establishment Clause violations” and such policies are reasonably related to those interests.



The information provided here is necessarily general and is not intended as legal advice or a substitute for legal advice. If you have any questions regarding this Alert, please contact Anthony P. Sciarrillo of the EdLaw Group at edlawgroup@lindabury.com.

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