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SCHOOL LAW REVIEW

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Documents Must be Utilized Before they are Public Records

State ex rel. Enquirer v. Ronan, 2010-0217 (November 24, 2010).

The Supreme Court of Ohio held last month that documents must be utilized in official business to be public records.

On February 5, 2009 a reporter for the Cincinnati Enquirer requested applications submitted regarding the available superintendent position with Cincinnati Public Schools (CPS). All applications were sent to a post office box that CPS would empty on March 16. CPS Superintendent Mary Ronan replied to the request, stating that all documents would be prepared and sent to the reporter after the P.O. Box was emptied in March.

On March 5 the Enquirer filed a writ of mandamus to compel CPS to provide the records. It also requested attorney fees. On March 16 CPS opened the post office box, and redacted the confidential information. Superintendant Ronan provided the documents to the Enquirer on March 17.

The Court then dismissed the suit as moot and did not award the Enquirer attorney fees. On appeal, the Enquirer argued attorney fees should not have been denied.

The Court first outlined the test that determines whether a court may award attorney fees under R.C. 149.43. They may be awarded where, "1) a person makes a proper request for public records pursuant to R.C. 149.43, 2) the custodian of the public records fails to comply with the person's request, 3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and 4) the person receives the requested records only after the mandamus action is filed, thereby rendering the claim… moot."

The Court then compared the case to *In re. State ex rel. Beacon Journal Publishing v. Whitmore* where a judge had received letters at work attempting to persuade her to impose a certain criminal sentence. The judge read the notes, but did not rely on them. Therefore the Court held the letters were not public records.

Based on *Whitmore*, the Court held that receiving a document does not make it public record. Thus, the applications were not public records until CPS received, reviewed, or otherwise used them for business. Until then, it was not required to disclose them.

Finally, the Court stated that even if it held otherwise, the Enquirer could not collect attorney fees since it was reasonable for CPS to provide the documents when it picked them up and reviewed them.

How This Affects Your District:

Enquirer v. Ronan is important since it informs districts when documents become records and when attorney fees may be ordered. First, if a district properly complies with a record request, attorney fees are properly denied. Second, the fact that a district has received resumes and other application materials, does not make them public records. Finally, the application materials were not records until the district opened the P.O. Box and actually used them. Until then, they were not subject to disclosure.

Inside This Issue:

District's Prohibition on Religious Materials Held Impermissible

J.S. ex rel. Smith v. Holly Area Schools, 09-14225 (E.D. Michigan October 26, 2010).

The United States District Court for the Eastern District of Michigan recently held that a prohibition of all distribution of student materials was not a reasonable time, place and manner restriction on student speech.

J.S. was a second grade student at Holly Area Schools in the spring of 2009. That June J.S. brought envelopes to school advertising a summer camp held at his family's church. He gave one envelope to a classmate in the hall and started distributing others in students' cubbyholes. J.S.'s teacher, Ms. King, made him stop distributing the envelopes and told him that church materials cannot be passed out at school.

J.S.'s mother, Katharine Smith, then contacted Principal Inhulsen who told her that religious material cannot be passed out on school grounds according to district policy. He also informed Ms. Smith that the invitations could not be passed out during non-instructional time or in the "flyer forum".

In later correspondence Kent Barnes, the district superintendent, told Ms. Smith that she simply could not distribute religious materials to J.S.'s classmates. After the suit was filed, the district sent home a notice that outside groups and individuals could no longer submit any materials for school distribution.

The issue before the Court was whether it should order a preliminary injunction allowing J.S. to distribute religious invitations and flyers at school if the materials were not disruptive. The Court stated that a school district may put time, place, and manner restrictions on speech if it is viewpoint neutral and regards the school's interest in the purpose of the forum.

In light of other caselaw, the Court determined that the District's restrictions were not reasonable since it did not allow J.S. to pass out materials anywhere on school grounds at any time. A blanket prohibition on the basis of viewpoint is not a constitutional time, place, and manner restriction. Students may publish speech that is not libelous, disruptive or obscene.

The District then argued that it did not completely ban student-to-student speech as the "flyer forum" in the school lobby was still available. The Court rejected this contention as unreasonable stating that given the school's interest in the effectiveness of the "flyer forum", it did not provide a reasonable opportunity for students to use it. Evidence showed the flyer rack was intended for adult use and many students could not even reach the top levels of the rack. The flyer rack was also not in an area students usually passed through. Thus the it did not provide a meaningful opportunity for student speech.

Finally the Court addressed Mrs. Smith's allegation that the District engaged in viewpoint discrimination when it refused to let her communicate with other parents through the flyer forum. The District argued that they may close the forum to all outside groups and individuals.

The Court agreed that the District could close a limited public forum after it was opened. Closing a forum solves problems of equal access while avoiding the appearance of government endorsement. However, facts arose suggesting that the District did allow other organizations or individuals to send home advertisements for volleyball, basketball, Lego classes, a festival, and Halloween activities with students. The Court held that Mrs. Smith's argument was not moot since the forum may have been reopened.

Finally, the Court granted a preliminary injunction. It held that a preliminary injunction would avoid irreparable injury to the plaintiff but would not harm the district.

How This Affects Your District:

School districts must walk a fine line between allowing student speech and making sure religious messages are not associated with the district. Since this case comes out of a fellow district guided by the Sixth Circuit, it is persuasive to Ohio's Northern and Southern Districts.

When writing and implementing policies on outside advertisements, districts should allow some student speech. Lewd, obscene and disruptive speech may be prohibited, but other speech should be permitted subject to certain time, place, and manner restrictions imposed by the district. *Smith v. Holly Area Schools* is instructive in that it shows that a complete prohibition on certain student speech is impermissible.

In addition, if districts allow speech in certain regulated time, place or manners, all viewpoints must be allowed. Districts may not open a limited public forum for speech and allow some viewpoints while excluding others.

Teachers' Speech Regarding Curriculum is not Protected

Evans-Marshall v. Board of Ed. of the Tipp City Exempted Village School District, No. 09-3775 (6th Cir. 2010).

The United States Court of Appeals for the Sixth Circuit recently held that a teacher's curricular speech is made as a government employee and thus is not protected under the First Amendment.

In 2001 Ms. Evans-Marshall was employed at the District as an English teacher. She assigned her 9th graders *Fahrenheit 451* and taught a unit on government censorship. Ms. Evans-Marshall asked groups of students to choose a book for debate from the American Library Association's list of the "100 Most Frequently Challenged Books." When a parent complained about one group's book, *Heather Has Two Mommies,* Principal Wray told Evans-Marshall to have the students choose another book.

Evans-Marshall next assigned *Siddhartha* a book on spirituality, Buddhism, romance, personal growth, and family relationships. As a result, many parents attended the October 2001 school board meeting to complain about the book choices. In November, nearly 100 parents showed up to the board meeting to express concerns. The board and administrators explained that the district purchased many of the books in previous years. They also said that not everyone finds certain material objectionable. Many parents, however, were still upset.

Another incident arose when Evans-Marshall asked support staff to make copies of three of her student writing samples so she could provide them to other students for help with assignments. One of the staff members showed the samples to Wray, who found them inappropriate. One was a first-hand account of rape and another was a story about a boy who killed a priest and then desecrated a church. Evans-Marshall explained that the samples were not for class use and she would not use them anymore if he preferred. At that point, Wray told Evans-Marshall he planned on reining in the themes of her class discussion and materials.

Another argument ensued soon after. Evans-Marshall asked for a copy of a model exam so she could "give [Wray] back exactly what he wanted." Wray called her a "smart a--." Superintendent Zigler told them to meet to work things out.

Unfortunately, the two could not work out their differences. Evans-Marshall did inquire whether anything other than her curricular choices bothered Wray, and he stated that he would figure something out for her evaluations. The evaluations then not only criticized her choices, but her attitude and demeanor. Evans-Marshall filed objections to the evaluations and a grievance with Mr. Zigler.

The school board later voted not to renew Evans-Marshall's contract because of problems with communication and teamwork. After a formal hearing, the board reinstated their prior decision. Evans-Marshall then filed suit alleging retaliation which infringed her First Amendment right to "select books and methods of instruction for use in the classroom without interference from public officials."

The Court addressed the case by outlining three questions that the plaintiff must prevail upon to win her case: 1) was the individual involved in "constitutionally protected" activity; 2) would the employer's conduct discourage individuals of 'ordinary firmness' from continuing to do what they were doing; and 3) was the employee's exercise of constitutionally protected rights a 'motivating factor' behind the employer's conduct?

In addressing the first prong, the Court stated that not all employee speech is protected. Only speech that "fairly may be considered as relating to issues of political, social, or other concern to the community" is protected. Otherwise, public officials. like the school board, have broad discretion to respond to speech. To prove that her speech was constitutionally protected, Evans-Marshall had to show: 1) that her speech touched on a matter of public concern; 2) that her right to speech outweighed the employer's right to control it; and 3) her speech was not made pursuant to her official duties.

The Court determined that Evans-Marshall's speech certainly touched upon a matter of public concern. Education and issues discussed in school are certainly something the public cares about. The Court also determined that Evans-Marshall's interest as a citizen in commenting in class on matters concerning the public outweighed the board's interest to promote efficiency of its services. However, she lost on the last prong.

When Evans-Marshall made her controversial statements, she did so pursuant to her duties as a teacher. She did not speak as an individual citizen. Because of this, the First Amendment could not shield her from employee discipline. The Court reasoned that expression is exactly what a teacher sells in exchange for a salary. When she taught, she did what she was hired to do and she had no free speech right to dictate curriculum.

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Teachers' Speech Regarding Curriculum is not Protected, cont.

Evans-Marshall then argued that teachers are not every day citizens and they have a right to select tools and methods of instructions without interference from public officials. The Court pointed out however, that Ohio law gives boards of education the right to prescribe curriculum in 3313.60(A) in order to allow the public a say in what is taught in their schools. The Court also declined to create constitutional stalemates out of curricular disputes and to allow courts to decide what certain public officials are elected to determine.

Because Evans-Marshall could not establish that her speech was indeed protected, the Court did not continue its analysis and ruled in favor of the school district.

How This Affects Your District:

This case is important first, because it solidifies the idea that Boards of Education can decide curriculum. Teachers do not have a right to determine they may teach a concept or subject contrary to the district's decisions.

This case also helps districts to determine whether they may discipline teachers for their speech. If a teacher's speech regards his or her profession, is a matter of public concern, and outweighs the interest of the school board, then it is likely protected. However, if a teacher's speech does not meet these criteria the speech is not protected. An attorney can help districts to determine whether speech is protected and how districts should react to employee speech they find objectionable.

Damages have Same Causation Requirement in 1983 Claims

Los Angeles County, California v. Humphries, 09-350 (US November 30, 2010).

The United States Supreme Court recently held that plaintiffs suing a municipality under United States Code section 1983, must show that their injury was caused by a municipal policy or custom regardless if they seek monetary or prospective relief.

In California, law enforcement and other state agencies are required by law to investigate allegations of child abuse. They must report all allegations that are "not unfounded even if they are inconclusive or unsubstantiated." All reports are then kept in a Child Abuse Central Index that is accessible to state agencies for ten years.

Mr. and Mrs. Humphries were accused of child abuse, their case was investigated, and they were exonerated. The Humphries then wanted their names removed from the Index. However, the state statute, or any local statute, did not provide a way to review whether a report was unfounded or to challenge inclusion in the Index. The Humphries filed suit against Los Angeles County and other agencies claiming they violated their constitutional rights by failing to provide such a procedure.

The Ninth Circuit held that plaintiffs were entitled to a hearing and were prevailing parties, but Los Angeles County denied liability since the law was a state statute. It refused to pay the $60,000 in damages. Los Angeles County asserted that the Ninth Circuit should have remanded the issue of its liability for attorney fees along with the issue of whether it was liable for constitutional violations. It challenged the Ninth Circuit's holding that limitations to liability do not apply to claims for prospective relief.

The Court first analyzed a previous decision, *Monell v. New York City Department of Social Services*. In *Monell*, the United States Supreme Court held that a municipality is not liable for the acts of others, however, it could be held liable "when execution of a government's policy or custom inflicts injury."

Next the Court analyzed the text of section 1983. It found nothing in the statute to suggest that a causation requirement to prove liability should differ between types of relief. The statute, which states that a defendant "shall be liable… in an action at law, suit in equity, or other proper proceeding for redress," supported its position. The Court then rejected all the Humphries alternate arguments.

How This Affects Your District:

Many times plaintiffs sue school districts and municipalities together for section 1983 violations committed by an employee. Often, section 1983 claims are filed in conjunction with other civil rights violation allegations.

The United States Supreme Court's unwillingness to apply a different standard to prospective relief, like attorney fees, limits liability school districts may face in section 1983 claims. In cases such as this one, a district is only liable for prospective relief, along with other damages, if it violated a plaintiff's constitutional rights through its own custom or policy.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff. Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

Upcoming Speeches:

Jeremy Neff
at Butler County ESC on January 6 and 10, 2011
Roundtable/Legal Update

Administrator's Academy Dates at Great Oaks Instructional Resource Center

January 20th, 2011– *Gear Up for Negotiations*

April 7th, 2011 – *Media and Public Relations*

June 21st, 2011 – *Student Education and Discipline*

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