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Sixth Circuit Decides Student Free Speech Case

M.A.L. v. Kinsland
543 F.3d 841 (6th Cir. 2008)

Recently, the United States Court of Appeals for the Sixth Circuit (which includes Ohio) issued a ruling involving student speech on school grounds. Michael, the eighth grade student involved in this case, attended middle school in Michigan where he participated in the "3rd Annual Pro-Life Day of Silent Solidarity" organized by the national group "Stand True." The organization called for students to express their opposition to abortion on the designated day of protest by wearing red armbands, distributing pamphlets containing information about abortion, and to remain silent throughout the day by placing red tape over their mouths to symbolize the silence of unborn children. Michael arrived at school wearing red tape over his mouth and wearing a red sweatshirt with the phrase "Pray to End Abortion" written on the front. He also passed out abortion literature prior to the beginning of the school day.

As soon as first period began, however, Michael's teacher was concerned about the message on the sweatshirt, and sent Michael to the principal's office. A school counselor explained to Michael that the message was "political" and that he would have to wear the sweatshirt inside-out. Michael asked if he could distribute the leaflets he had brought to school, but the principal determined that because the leaflets had not been pre-approved as required by school policy, they could not be distributed at that time. Michael received no further disciplinary action at that time from the principal.

Three months later, Michael and his parents filed a lawsuit seeking injunctive and declaratory relief so that Michael could participate in a similar protest the following week. The federal district court employed a *Tinker* analysis in determining whether to grant the preliminary injunction requested by Michael and his parents. This analysis derives from the landmark Supreme Court case dealing with student free speech, *Tinker v. Des Moines*. Under the *Tinker* standard, a school can prevent student speech that poses a foreseeable risk of material or substantial disruption in the school. In this case, the federal district court determined that the school had not demonstrated a possibility of the leaflets causing such a disruption, and as a result, restricting Michael from distributing the literature violated his First Amendment rights. The district court further determined that the school's literature distribution policy was unconstitutionally overbroad because it prohibited *any* distribution of literature on school grounds. The district court eventually converted the preliminary injunction into a permanent injunction, enjoining the school district from enforcing its literature distribution policy.

The school district appealed the federal district court's ruling to the Sixth Circuit Court of Appeals, which unanimously reversed the district court's ruling and held in favor of the school district. The Sixth Circuit found that school areas such as hallways are considered nonpublic forums, and as a result, the school could place reasonable and viewpoint-neutral time, place, and manner restrictions on speech. The district's policy of pre-approving literature was within these restrictions according to the Sixth Circuit.

Significantly, the Sixth Circuit determined that the *Tinker* analysis was inappropriate in this particular case. The court indicated that such an analysis was appropriate only where an unconstitutional foreclosure of a particular viewpoint has occurred, not when reasonable viewpoint-neutral restrictions are at issue. Central to the court's holding was the fact that it viewed the board's literature distribution policy favorably. The court referred to specific language in the policy, which it believed represented a content-neutral approach. For example, the policy gave the building principal the power to, "deny approval to the distribution of any literature the content or distribution of which he/she reasonably determines…is potentially offensive to a substantial portion of the school community…" The Sixth Circuit believed this lan-

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guage to merely limit the distribution of material which could be lawfully excluded under Supreme Court precedent.

How this decision impacts your district:

This decision has been met with some scholarly criticism since the Sixth Circuit issued its opinion. The court's opinion has been questioned in the way it characterizes Supreme Court precedents on student speech cases, its approving description of the school district's literature distribution policy, and for its determination that *Tinker* should only be applied in cases where schools seek to regulate content-specific speech. In any event, this decision appears to give school districts in the Sixth Circuit a bit more leeway to control on-campus student speech. Even if the *Tinker* standard is being eroded by the Sixth Circuit, school districts must remember that the court stands by the "foreseeable risk of substantial disruption standard" posited by the Supreme Court in *Tinker* when schools are attempting to regulate content-specific speech. Furthermore, in the event that a school district is attempting to regulate content-neutral speech, it must narrowly tailor the regulations to serve a compelling government interest. If your district has any questions pertaining to student speech, please do not hesitate to contact Ennis, Roberts, & Fischer for consultation.

School Employees Challenge Legality of Background Check Laws

On February 6, 2009 two former Cincinnati public school employees filed a lawsuit in federal court naming Cincinnati Public Schools (CPS), the State of Ohio, and the Ohio Department of Education (ODE) as defendants. The lawsuit stems from the implementation of the Ohio law regarding background checks for school employees, the results of which cost both of the plaintiffs their jobs with CPS. According to the complaint filed in the United States District for the Southern District of Ohio, one of the plaintiffs was originally employed at the age of eighteen by CPS in 1977 for a period of four months, which ended as a result of a conviction for felonious assault. At the time, CPS indicated to the Ohio Parole Board that it wished to offer employment to the individual upon his release from prison. The plaintiff served two years in prison, and was rehired by CPS after his release in 1980. The plaintiff was then employed by CPS for thirty consecutive years until the new background check law required CPS to terminate him after a search was conducted in November of 2008. The plaintiff chose early retirement instead of termination.

The other plaintiff had been employed as an instructional assistant by CPS for a period of eighteen years beginning in 1986. In 1983 the plaintiff was convicted of "acting as a go-between in the purchase and sale of $5.00 of marijuana." This conviction was subsequently expunged in 2000.

As the complaint indicates, the plaintiffs were subject to termination as a result of House Bills 190 and 428 which were enacted by State of Ohio in 2007 and 2008. These bills resulted in a new statutory provision, Ohio Revised Code section 3319.391, which requires a criminal records check of all current employees of a school district. This law specifies that any current employee who has been convicted of certain enumerated offenses must be released from his/her employment with the school district.

The complaint further illustrates that ODE has subsequently adopted administrative rule OAC 3301-20-01 which specifies the circumstances in which an individual may be hired or retained if she meets certain "standards in regard to rehabilitation set by the department." This rule seeks to discern whether an individual will not jeopardize the health, safety, or welfare of the persons served by the district. The rule considers factors such as, the nature and seriousness of the crime, the extent of the applicants past criminal activity, the age of the applicant when the crime was committed, the amount of time that has lapsed since the criminal conduct, the individual's past conduct and work, and evidence of rehabilitation. The plaintiffs allege that they are eligible for employment under these criteria, however, they are still arbitrarily excluded from employment because convictions for felonious assault and drug abuse automatically disqualifies an individual for consideration under this rule.

The complaint alleges the CPS unlawfully terminated the plaintiffs as a result of the proceeding laws and regulations. Interestingly, the complaint acknowledges that CPS adhered to these laws, but the plaintiffs claims are based on a theory that the application of the law is, in fact, unlawful. The plaintiffs allegations include several counts. First, they argue that their termination denies them equal protection of laws pursuant to 42 USC §1983 because they are not permitted to satisfy the rehabilitation criteria established by ODE. This count further alleges that the plaintiffs are denied equal protection because the legislative scheme and rule of ODE fall disproportionately on African American employees. The second count alleges that the plaintiffs were denied their right of substantive due process secured by the Fourteenth Amendment of the United States Constitution and enforced through 42 USC §1983. The third count alleges that the Ohio laws violate a prohibition on ex post facto laws as provided in Article I, Section 10, of the United States Constitution. Finally, the fourth count alleges that the application of HB 190 and HB 428 violates Section 28, Article II, of the Ohio Constitution which prohibits retroactive legislation.

It is unclear what will result from this complaint, but it is important to note that the allegations which have been raised focus on the legality of the background check laws, not in the manner in which they were enforced by CPS. An outcome in favor of the plaintiffs in this case could result in a change in the law. The lawsuit is at its earliest stages and Ennis, Roberts, & Fischer will notify you with any new information concerning this case and how it may affect your district in the future.

School Construction Bidding Statute Changes

Last year, the Ohio legislature made several important changes to the Ohio school construction bidding statute in Ohio Revised Code section 3313.46. These changes are specifically related to bid advertisements, and are summarized below. If your district has any questions concerning these statutory changes, or if you are planning a construction project in the future, please contact Ennis, Roberts, & Fischer for consultation.

Enacted and now effective Senate Bill 268 generally amends Section 3313.46, ORC, pertaining to bid advertisements as follows:

(1) Clarifies that boards of education must advertise once a week for "not less than" instead of "at least" two consecutive times in a newspaper of general circulation in the district now subject to a new exception discussed below. "Prior to" is also changed to "before" the date set by the board for receiving bids.

(2) In addition to a newspaper of general circulation in the district, boards of education now have the additional option of advertising in trade papers or other publications designated by it, but the board is not required to advertise in this additional manner.

(3) In addition to a newspaper of general circulation in the district, boards of education now have the additional option of advertising by electronic means, including on the district internet web site.

(4) If a board of education advertises on its district internet web site, the board may eliminate the second advertisement otherwise required to be published in a newspaper of general circulation in the district if the first advertisement published in said newspaper meets all of the following requirements:

(a) It is published at least two weeks before the opening of bids.

(b) It includes a statement that the notice is posted on the board's internet web site.

(c) It includes the internet ad dress of the board's internet web site.

(d) It includes instructions describing how the notice may be accessed on the board's internet web site.

Please note that the above changes in the Ohio school construction competitive bidding statute, Section 3313.46, ORC, may save school districts hundreds of dollars per ad if boards can eliminate that second ad in a newspaper of general circulation in the district by also posting on their internet web site per all of the requirements above.

Title IX and Section 1983 in Sex Discrimination Suits

Fitzgerald v. Barnstable School Committee

In December, Ennis, Roberts, & Fisher informed you that that the United States Supreme Court had recently heard oral arguments concerning a student sexual harassment claim against a fellow student. As we discussed in the December issue, the parents of the child alleging discrimination sued the school district based on the prohibition against sex discrimination provided in Title IX of the Education Amendments of 1972. Alternatively, the plaintiffs alleged a violation of their daughter's 14th Amendment equal protection rights and sought relief under the broader federal civil rights law known as Section 1983. Both the Federal District Court and the United States Court of Appeals for the First Circuit decided in favor of the school district, ruling that the plaintiffs had not met the burden of proof under Title IX that the school district acted with "deliberate indifference" to the student's sexual harassment complaints. Both courts further concluded that Title IX precluded application of Section 1983 to this type of case.

The United States Supreme Court granted certiorari to determine whether Title IX foreclosed application of Section 1983, an issue on which, the federal circuits had been split. Of the circuits that had ruled on this issue, four had determined that Title IX provided the sole remedy for a student sex discrimination claim while three circuits had ruled that both Title IX and Section 1983 claims apply.

In a unanimous decision last month, the Supreme Court held that Title IX does not preclude a legal action brought under Section 1983 alleging unconstitutional gender discrimination in a school. The Court highlighted the fact that Title IX prohibits gender-based discrimination in federally-funded education programs and has been interpreted to allow plaintiffs to sue schools over peer harassment. Section 1983 allows a plaintiff to sue a public official who, acting under the color of state law, violates rights which are guaranteed by the federal constitution or statutes. The Court determined that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools, nor a substitute for §1983 suits as a means of enforcing constitutional rights.

How this impacts your district:

The Supreme Court's unanimous decision resolves the circuit split pertaining to whether both Title IX and Section 1983 can provide private remedies in sex discrimination suits against schools. Traditionally, Title IX has been linked to funding for school athletic programs, but Title IX generally prohibits sex discrimination in all federally funded schools and colleges. This opinion solidifies the applicability of both Title IX and Section 1983 claims in these types of sex discrimination suits. Please contact Ennis, Roberts, & Fischer if your district has any questions regarding Title IX or Section 1983 lawsuits.

Calamity Day Make-up Procedures

In light of the recent school closings due to inclement weather, now is a good time to review the current Ohio law regarding the use of calamity days. Ohio Revised Code section 3317.01(B) provides five situations in which a school district may cancel a school-day due to a calamity. The five reasons which qualify as a calamity pursuant to the statute are: disease/epidemic, hazardous weather conditions, inoperability of school buses or other equipment, damage to a school building, and other temporary circumstances due to utility failure. Ohio law allows schools to use up to five calamity days without requiring that these days be made-up at a later date. ORC 3313.482(A), however, requires that school districts make up any calamity days in excess of the allotted five. The next five calamity days must be made up by scheduling and committing to the use of all five of the contingency days required to be adopted by the district's board of education. These days must be made-up by the end of the school year.

Last year, section 3313.482(C) of the Ohio Revised Code was enacted to provide some flexibility to school districts that experience more than ten calamity days. While school districts must follow the above procedures for making up between five and ten days, the district may simply add time to other days remaining on the district's calendar in order to make-up any additional days. The addition of time should occur in one-half hour increments, but Ohio law also allows the district to make-up full days if it so desires. A school district should also be aware that if it intends to use the new extended day mechanism to make-up calamity days, it should indicate the procedure on the waiver request form.

How this impacts your district:

Your district should note several implications of the preceding law with calamity days and be prepared to act accordingly should the allotted number of calamity days be exceeded. For instance, an issue could arise if the district has scheduled a prior holiday as one of its contingency days, such as Martin Luther King Day, but did not exceed the five calamity day limit at the time of the holiday. In such a situation, the district must designate an additional contingency day to account for the excess use of calamity days. Another interesting situation may occur when a district's regularly scheduled school day already exceeds the statutory minimum number of hours that the school must meet each day. In this circumstance, the district cannot simply use the excess scheduled time in its day as provided by the new law to account for an excess of ten calamity days. The district must, according to the law, increase the length of its regularly scheduled day in order to take advantage of this provision. However, the district must only add enough increments to make up the minimum number of hours that a school must meet in a day, as required by state law, and not the amount of time which that particular school schedules to meet. Ohio law provides that elementary schools (grades 1-6) must meet for a minimum of five hours per day and junior and senior high schools (grades 7-12) must meet for a minimum of five and a half hours per day.

Furthermore, there is also an issue with respect to how collective bargaining agreements are potentially affected by calamity days. The issue of making-up the days in excess of the five calamity days allotted in the District's calendar is non-negotiable. State law requires that the District provide at least 178 days of instruction, so the make-up of these days is not an option.

One final issue to consider could be if these days are made-up on a paid holiday, and the Board's collective bargaining agreement with the non-teaching staff calls for premium pay for hours worked on paid holidays. In such event, the district will likely have to reach some agreement on how that provision will be reconciled.

Please contact Ennis, Roberts, & Fischer if your district has any questions regarding the use of calamity days and the make-up procedures.

Upcoming Dates and Deadlines

FEBRUARY 2009

9th: Last day to submit certification for May income tax levy to Ohio Department of Taxation—RC 5748.02

16th: Last day to submit May emergency or dollar-based phased-in levy to county auditor for May election—RC5705.194

19th: Last day for school district to file resolution of necessity, resolution to proceed and auditors certification for bond levy with board of elections for May election—RC 133.18 (75 days before election); last day to submit continuing replacement, permanent improvement or operating levy for May election to board of elections—RC 5705.192, 5705.21, 5705.25; last day to certify resolution for school district income tax levy for May election to board of elections—RC 5705.195; last day to submit phased-in levy for May election to board of elections—RC 5705.213

MARCH 2009

1st: Last day to take action on expiration of superintendent's contract—RC 3319.01.

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

To schedule a speech or seminar for your district, contact us today!

UPCOMING SPEECHES

February 10 - Bill Deters and Jeremy Neff at Brown County ESC: “Special Education Law Update”

February 25 - C. Bronston McCord at the NWOESC Administrative Retreat

March 19 - Bill Deters and Jeremy Neff at Region 6 State Support Team Special Education Law Seminar

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