



Ennis Roberts Fischer SCHOOL LAW REVIEW



1714 West Galbraith Rd.
Cincinnati, Ohio
45239

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School Alcohol Policy Overly Vague and Ambiguous

PHONE
(513) 421-2540
(888) 295-8409

FAX
(513) 562-4986

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Ennis, Roberts & Fischer's School Law Review has been developed for use by clients of the firm. However, the review is not intended to represent legal advice or opinion. If you have questions about the application of an issue raised to your situation, please contact an attorney at Ennis, Roberts, & Fischer for consultation

Monroe County Board of Education v. K.B., 110 LRP 52474 (Ala. Ct. App. 09/17/10).

The Alabama Court of Civil Appeals recently decided that a school policy prohibiting students from using alcohol at a school function was void for vagueness. It did not provide students with due process rights when applied to using alcohol before prom.

R.H. was a junior at Excel High School when he attended the prom after drinking with other students. While at the prom, faculty members smelled alcohol on the students and the assistant principal administered a Breathalyzer test that confirmed R.H. had consumed alcohol before coming to the prom. The school never contended that R.H. actually consumed or possessed alcohol while at the prom. The principal suspended R.H. for five days for violating a policy set out in the handbook which stated "no student shall carry, possess, or use drugs, drug paraphernalia, or alcohol" at a school function. The school board's discipline committee assigned R.H. to

an alternative school for one year.

R.H. appealed this action to the juvenile court, which found that in the policy the word "use" means "to ingest alcohol while on school property or at any other school function." Since there was no evidence or contention that R.H. "used" alcohol on school property or at the school function, the juvenile court ordered that the student be allowed to attend Excel High School, rather than the alternative school. The court also found that the punishment was unreasonable because the board failed to detail the possible consequences of policy violations.

The school board appealed. The Alabama Court of Civil Appeals stated that while courts must allow an agency to interpret its own rules and regulations, a student still has constitutional rights related to any board action. The court wrote, "Due process of law requires fair notice that one's conduct is subject to a law or regulation."

The issue in this case was whether a student should have known, by reading the board policy,

that drinking alcohol before a school function would result in disciplinary action. The court found that the answer to that question was not clear and therefore held that the board policy was unconstitutionally ambiguous and vague. Since the student was not given his due process rights, the court affirmed the juvenile court's ruling and allowed for R.H. to be placed back into Excel High School.

How this Affects your District:

While the Alabama Court of Civil Appeals is not binding authority in Ohio, courts in Ohio can learn from the decision in this case regarding due process afforded to students. School boards, when developing a policy, should be as specific as possible with their meaning of particular terms within the policy. Any regulations should be explicit enough to give students notice of the status of their behavior. In this case, the school district's policy was void for vagueness because it did not give notice of the type of conduct that was prohibited, nor the punishment that would be given should the student partake in that conduct.

Inquiries Regarding Immigration Status Prohibited for Enrollment

In a May 6, 2011 Dear Colleague letter, the United States Department of Education's Office for Civil Rights along with the United States Department of Justice, Civil Rights Division, suggested that school districts should not inquire as to potential students' immigration status.

The letter first stated that all children have equal access to public education. It is therefore unconstitutional to base enrollment in public school on parents', guardians', or students' actual or perceived immigration status. This chills equal participation in education and excludes some children.

Numerous legal bases exist for prohibiting immigration status to be used to assess education rights. First, Titles IV and VI of the Civil Rights Act of 1964 prohibit discrimination based on traits such as race, national origin, or color. In addition, regulations for Title VI prohibit districts from utilizing criteria or methods of administration that effectively discriminate, or defeat or substantially impair the objective of a program on the basis of race, color, or national origin.

Second, in 1982 the United State Supreme Court held in *Plyler v. Doe* that "a State may not deny access to a basic public education to any child...whether present in the United States legally or otherwise." The Court stated that denying a child a public education creates a lifetime of hardship. It also denies children the ability to live within civic institutions and the ability to meaningfully contribute to society. Immigration status is therefore irrelevant to a child's ability to enroll in public school.

As a result, districts may not discriminate against or deny access to public education to children because of their immigration status or their parents' or guardians' status. However, school districts can ask for documents or information to prove other essential prerequisites to enrollment.

Proof of Residence:

Generally, school districts are only required to provide free public education to children that reside within district limits. As a result:

- School districts may ask for proof of residence to ensure that a student resides within the district. These residency requirements must be applied in the same way to all potential students.
- Examples of proof of residence include: phone and electric bills and lease agreements.
- School districts may not inquire about immigration status in order to prove residency within the district.

Birth Certificates:

School districts provide education to children between minimum and maximum ages. However, there are restrictions as to how districts may go about proving age:

- They may ask for a birth certificate (or comparable document) to prove that a potential student falls within the district's age requirements.
- Foreign birth certificates may serve this purpose. Districts may not require United States birth certificates.

Social Security Numbers:

The Departments of Education and Justice are aware that some districts use students' Social Security numbers as school identification numbers. Regarding this:

- School districts may ask a parent to provide a Social Security number for use as a student identification number. If they do so, they must:
 - Inform the potential student or parent that providing a Social Security number is voluntary, and
 - Inform the potential student or parent what use the Social Security number will serve.
- School districts may not require a Social Security number for enrollment.
- Any policy regarding Social Security numbers must be applied equally to all students.

Data on Race and Ethnicity:

School districts are required by the Department of Education and states to report information regarding students' race and ethnicity. As a result:

- School districts may ask for information regarding race and ethnicity.
- This information may not be used to discriminate.
- School districts may not refuse to enroll a student who elects not to provide this information.

Silent Cheerleader Failed to State Claim, Supreme Court Refuses Case

John Doe, Jane Doe ex rel. H.S. v. Silsbee Independent School District, No. 09-41075 (5th Cir. September 16, 2010).

The United States Supreme Court recently opted not to hear a case in which a cheerleader refused to cheer for one member of the basketball team who had allegedly assaulted her. As a result, the Fifth Circuit's dismissal of all claims for failure to state a claim stands.

H.S. was allegedly sexually assaulted by defendant Rahkeem Bolton and another fellow high school student, Christian Roundtree. The prosecutor assigned to the case, David Sheffield, told H.S. and her family that there was enough evidence against the boys to go to trial. However, Bolton was not indicted. Sheffield said the jury was racially divided on whether to indict the young man who is African American. In addition, the parents claimed that they later heard derogatory comments regarding H.S. with information that could only have been known by someone who was familiar with the criminal investigation and proceedings.

H.S. was a basketball cheerleader at her high school and Bolton played on the boys' basketball team. Because of the alleged assault, H.S. refused to cheer for Bolton at a game. She was given the option to go home or cheer when the other cheerleaders cheered. H.S. opted to go home rather than cheer. As result or her decision, H.S. was removed from the cheer squad although she was allowed to try out the following year.

H.S. and her parents then sued the prosecutor, Silsbee Independent School District, the superintendent, the high school principal, and H.S.'s cheerleading coach under § 1983. The United States Court for

the Eastern District of Texas dismissed all the claims. H.S. and her parents then appealed to the United States Court of Appeals for the Fifth Circuit.

To address Silsbee's and other appellees' motion to dismiss H.S.'s numerous claims, the Court of Appeals first explained that it would review the claims anew as if the trial court had not (*de novo*). It then stated that the appellees' motion to dismiss for failure to state a claim should be granted if the facts plaintiff alleged were insufficient to state a plausible claim for relief and if the facts were not "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." To show a valid § 1983 claim, a plaintiff must allege that a state actor has violated a Constitutional right or a right secured by United States law.

H.S. first claimed that District Attorney Sheffield deprived her of her right to freedom from bodily injury and stigmatization when he "defamed" H.S. in a press conference regarding her case and illegally revealed secret details of the indictment hearing. The Fifth Circuit explained that although bodily integrity is protected under the Fourteenth Amendment, mere psychological injury is not a violation of the Fourteenth Amendment's protection of bodily integrity. There must be some bodily harm.

Next, the court found that freedom from false stigmatization is not protected under the Fourteenth Amendment. The court stated that a person's reputation is not a property or liberty interest that will invoke Due Process concerns. As a result, the court affirmed dismissal of the claims against Sheffield.

H.S.'s next claim alleged that Silsbee Independent School District (Silsbee), Superintendent Bain, Principal Lokey, and Sissy McInnis the cheerleading coach, deprived her of property by removing her from her position on the cheerleading squad. In its decision to dismiss the claim, the court explained that students do not have a constitutionally protected interest in extra-curricular activities. In addition, as a cheerleader, H.S. had entered into a contract with the district. She violated the contract when she refused to cheer, which was sufficient for removal.

H.S. next contended that Silsbee, Bain, Lokey and McInnis violated her right to equal protection by treating her differently because she is a girl. Although the Fifth Circuit stated a showing of discriminatory intent or purpose will sustain this claim, the appellants did not show that gender motivated any of the appellees' decisions.

H.S.'s last claim against Silsbee, Bain, Lokey and McInnis alleged that they violated her right to free speech. H.S. claimed she symbolically expressed herself when she refused to cheer in order to show her disapproval of Bolton's and Roundtree's actions.

The Court acknowledged that students do have free speech rights in school. The test they used to analyze this claim required them to determine whether the conduct possessed "sufficient communicative elements to bring the First Amendment into play." To do this, the court asked whether H.S.'s intent to convey her message was present and whether there was a great likelihood that the message would be understood by those who saw it. However, the court found H.S. failed to meet this test.

Silent Cheerleader Failed to State Claim, Supreme Court Refuses Case, Cont.

The Fifth Circuit found that even if it assumed H.S.'s speech was sufficiently particularized to warrant protection, it interfered with the work of the school and was thus appropriately banned. Since cheerleaders disseminate a district's support for its athletic teams, the district could have been viewed as a supporter of H.S.'s message of disapproval. This also directly interfered with the district's speech to support its athletic teams. As a result, the final claim was dismissed along with the subsequent claims.

How This Affects Your District:

Although this case does not di-

rectly govern Ohio school districts, it reiterates a general consensus that students do not have a constitutional right to participate in extra-curricular activities. Students also do not have a property or liberty interest in the activities.

Therefore, school districts have discretion to remove a student from his or her position on a school team or in a school club if the student does not conform his or her conduct to requirements of the extra-curricular activity.

In addition, this case found that students have contractual obligations when they participate in extracurricular activities. This is cer-

tainly the case for cheerleading and courts may find this contract extends to other activities. As a result, courts could view a student's refusal to comply with the requirements of an extra curricular activity as a contractual violation.

This case is also important because it affirms that student speech, while allowed in school, can be limited by overarching educational interests. H.S.'s message directly contradicted the district's support for its student athletes and thus was not entitled to full First Amendment protection.

How to Flag Inappropriate Content on Facebook

With students' and staff's increased use of social media, administrators are more likely to hear of or come across inappropriate content on websites such as MySpace and Facebook. Therefore, it is useful for district and school administrators to become knowledgeable as to how they can have such content removed. Facebook has developed ways for people to inform the company that a user's post or content is inappropriate whether or not the notifying person uses Facebook's social network.

If you do not have a Facebook account, you can still flag content as inappropriate by accessing this web address:

- http://www.facebook.com/help/contact.php?show_form=report_tos_violation

On this webpage, Facebook asks for information that will help it correctly identify who is posting the inappropriate content and what

the content is. Information Facebook asks for includes: the full name of the person being reported, the Facebook web address of that person (sometimes searching the internet for that person will provide the web address or a person on Facebook can likely help find it), the web address for the inappropriate content, and any Facebook "networks" the person may belong to. "Networks" most often include the city and state where the person lives or the educational institution he or she attends.

If you do have a Facebook account and can access the inappropriate content, the following web address provides information on how to notify Facebook:

- <http://www.facebook.com/help/?page=1021>

This link takes you to Facebook's page on how to report abusive content. It has information on very specific violations such as how to report abuse, what to do if you are being attacked by someone on

Facebook, how to report a fake profile, how to report a child under the age of 13, and many other issues. Facebook answers each question with a detailed description of how to solve the problem, sometimes in more than one way.

District administrators may also want to become familiar with Facebook's Statement of Rights and Responsibilities and Facebook Principles which detail what type of content the social media network does and does not allow.

- Facebook Principles can be accessed at: <https://www.facebook.com/principles.php>.
- The Statement of Rights and Responsibilities is at the following address: <https://www.facebook.com/terms.php>.

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

Erin Wessendorf-Wortman

At the 2011 Ohio School Resource Officers and D.A.R.E. Officers Combined Annual Conference on June 27, 2011
2011 School Law Update

Bill Deters

At the OSBA Capital Conference School Law Workshop on November 15, 2011
Strategies for Managing your eNightmares

Administrators' Academy Dates at Great Oaks Instructional Resource Center

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

Contact One of Us

William M. Deters II
 wmdeters@erflegal.com

C. Bronston McCord III
 cbmccord@erflegal.com

J. Michael Fischer
 jmfischer@erflegal.com

Gary T. Stedronsky
 gstedronsky@erflegal.com

Jeremy J. Neff
 jneff@erflegal.com

Rich D. Cardwell
 rcardwell@erflegal.com

Ryan M. LaFlamme
 rlaflamme@erflegal.com

Erin Wessendorf-Wortman
 ewwortman@erflegal.com

Pamela A. Leist
 pleist@erflegal.com