Ennis Roberts Fischer
School Law Review

1714 West Galbraith Rd.
Cincinnati, Ohio
45239

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

FAX
(513) 562-4986

November 2009

Inside This Issue:

School's Confederate Flag Ban Upheld by Fifth Circuit

A.M. v. Cash,
No.08-10477
(5th Cir. Oct. 9, 2009)

On October 9, the United States Court of Appeals for the Fifth Circuit ruled that a school district policy prohibiting the display of the Confederate flag on school property does not violate students' free speech or equal protection rights. The dispute in this case arose when two students at a local high school donned purses displaying the Confederate flag on school property. According to the school, the purses violated a policy adopted during the 2002-2003 school-year prohibiting displays of the Confederate flag. This policy was adopted after a series of racial incidents, several of which specifically involved the flag.

After bringing the Confederate flag purses to school, the students were sent home pursuant to the policy. The students subsequently sued the school district, alleging that the Confederate flag policy violated their rights to free speech, due process, and equal protection. The district court, however, granted the school district's motion for summary judgment under the substantial disruption standard set forth by the United States Supreme Court in *Tinker v. Des Moines*.

On appeal, the Fifth Circuit affirmed the district court's decision, finding that a school may restrict student expression if there is a reasonable likelihood that the expression will cause a substantial disruption in the operation of the school. The students argued that the school must present evidence of actual past disruption. The Fifth Circuit explored the familiar *Tinker* standard and specifically noted that a "mere expectation" of disruption is not enough; however, a school does not need to wait until such a disruption occurs before it can restrict student expression. Under this standard, the court determined that it was clearly reasonable for the district to adopt the Confederate flag policy as it had experienced racial hostility in the past. Furthermore, the Court cited to other circuit court decisions that upheld a ban on the Confederate flag, such as *Barr v. Lafon*, which was discussed in the September, 2008 issue of the School Law Review. In each case cited by the Court, the bans were upheld due to a history of racial tension.

The students then argued that the district's dress code was vague, and as a result, violated their due process rights. The Fifth Circuit rejected this argument by determining that the policy provided sufficient notice that displays of the Confederate flag were prohibited. Similarly, the Court rejected the students' equal protection argument. Because the students were not members of a suspect class, the school only needed to demonstrate that its policy was rationally related to a legitimate government purpose. The Fifth Circuit determined that avoiding substantial disruption to school operations is a legitimate government interest, and that the ban on Confederate flag displays was rationally related to carrying out this purpose.

How this impacts your district:

This decision highlights the issues that may confront a school when deciding to prohibit certain expression under a dress code policy. Student expression is generally governed by the *Tinker* standard, which allows a school to restrict student expression if the expression presents a foreseeable risk of substantial disruption. As set forth in *Tinker* there does not have to be an actual disruption, however, such a disruption must be reasonably foreseeable in order to restrict expression. The

(Continued on page 2)

School's Confederate Flag Ban Upheld by Fifth Circuit

cases referred to in the opinion, for example, cite a history of racial tension to justify banning displays of the Confederate flag.

Furthermore, the due process challenge should serve as a reminder that any policy limiting student expression should be spelled out clearly. A well-written student handbook will help prevent confusion as to what is expected of students, and as in this case, assist in any challenges to school policy.

Retaliation Suits Under the ADA and § 504

Baker v. Riverside County Office of Educ., No. 07-56313 (9th Cir. Oct. 23, 2009)

The United States Court of Appeals for the Ninth Circuit ruled that a special education teacher has standing to bring a retaliation suit against a school district for events that occurred after the teacher asserted the rights of disabled students under Title II of the Americans with Disabilities Act (ADA) and §504 of the Rehabilitation Act. The teacher had been involved in a dispute with the school district over the level of services that the district was proving to disabled students. Unsatisfied with the district's response to her inquiries, she eventually filed a complaint with the U.S. Department of Education's Office for Civil Rights. The complaint alleged that the district was failing to provide disabled students with a free and appropriate education as required by law. According to the teacher, after she filed this complaint the district engaged in several adverse employment actions which made her work environment intolerable. She claimed that the work environment created by the district in response to her complaint with the Office of Civil Rights forced her to resign, and as a result, that she was constructively discharged.

Following her resignation, she filed an additional suit with the Office for Civil Rights, this time alleging that the district retaliated against her for filing the initial complaint on behalf of the disabled students. The Office for Civil Rights agreed that the district had retaliated, and the teacher filed suit in Federal District Court in California alleging that the district violated the anti-retaliation provisions of both § 504 and the ADA. The District Court, however, dismissed the suit finding that the teacher did not have standing to sue under either statute.

The Ninth Circuit disagreed with the District Court. It rejected the school district's argument that standing to bring suit under the anti-retaliation provisions is limited to persons with disabilities. Instead, the Ninth Circuit determined that the anti-retaliation provisions of both § 504 and the ADA provide standing for non-disabled individuals who are retaliated against for attempting to protect the rights of the disabled. The Court looked to the language of the statute and found that nothing in § 504 requires an individual to have a disability in order to have standing, nor does it require an individual to have a "close relationship to a disabled person" as the district had suggested. The Ninth Circuit determined that this broad interpretation of § 504 is consistent with Congress's intent to protect the rights of the disabled. It found similar language in the ADA and determined that regulation implementing the ADA's anti-retaliation provisions reinforced that the teacher has standing. Consequently, the Ninth Circuit remanded the case to the District Court.

How this impacts your district:

In general, § 504 and the ADA prohibit an employer from discriminating on the basis of a disability. These laws also prohibit an employer from taking an adverse employment action against an employee who has engaged in a protected activity, such as filing a discrimination charge against the employer. Such an adverse employment action is viewed as retaliation against the employee for engaging in a protected activity. This case presented an interesting issue as the teacher involved was claiming that the district retaliated against her for asserting the rights of others, namely the disabled students. Though the teacher herself was not disabled, the Ninth Circuit determined that she had standing bring a retaliation claim under these statutes for asserting the rights of disabled individuals. The logic of the Ninth Circuit's decision, while not binding on the Ohio state courts or the Sixth Circuit, presumably may be extended to future decisions affecting Ohio schools. In any event, school districts must not take adverse employment actions such as demotions, suspensions, and terminations, against an employee who has engaged in an activity protected under State and Federal laws. Furthermore, this case should serve as a reminder that a district should document all employment decisions thoroughly, and in the case of terminations, the district must be prepared to explain in detail why "good and just cause" existed for the employment decision. Ennis, Roberts, & Fischer can assist you if you have questions regarding the decision on whether to take an adverse employment action against an employee.

Parents Challenge the Pledge of Allegiance

Freedom from Religion Foundation v. Hanover School District

A federal district judge in the state of New Hampshire recently ruled that a school district could continue its practice of reciting the Pledge of Allegiance. This case arose when parents of a student in the district objected to exposing their children to the words "under God" used in the pledge. The parents, an atheist and agnostic, alleged that the words were offensive and constituted a violation of both the First Amendment's guarantee of the free exercise of religion and its prohibition against government establishment of religion.

At issue was a law passed in the wake of the terrorist attacks in 2001. The New Hampshire law required schools to set aside time for teachers to lead the pledge in class, but it did not require students to recite the pledge. The court noted that in 1943, the United States Supreme Court in *West Virginia State Board of Education v. Barnette*, prohibited a school from compelling students to recite the pledge. The Court found that the New Hampshire law clearly did not violate this principle, and furthermore, there was no evidence that students in the district had been forced to recite the pledge by district employees.

The Court then considered the parent's First Amendment claims. The decision focused primarily on the requirement to set time aside to recite the Pledge of Allegiance and whether this requirement equated to a government establishment of religion prohibited by the First Amendment. Generally, a law will not violate the Establishment Clause if it has a primarily secular purpose. With this principle in mind, the Court examined the legislative history behind the enactment of the statute. The Court noted that the law was passed in the wake of the September, 11 terrorist attacks, and that the discussion in the legislature when considering the statute stressed the importance of patriotism. As a result, the Court determined that the context suggested a purpose of patriotism rather than promoting theism over atheism or agnosticism.

The Court then explored Congress's addition of the words "under God" to the pledge in 1954. In the court's opinion, the amended language appeared to be a political response to Communism rather than a desire to promote monotheism. In this context, the Court reiterated that the Pledge of Allegiance serves as a civic patriotic affirmation rather than a religious exercise. Thus, according to the court, the pledge serves a primarily secular purpose. As a result, it determined that the statute was constitutional and it granted the school district's motion to dismiss the lawsuit.

How this impacts your district:

It remains permissible to lead the Pledge of Allegiance in classrooms, but teachers must not coerce a student to participate in the pledge. Ohio Revised Code section 3313.602 indicates that a school shall adopt a policy specifying whether or not oral recitation of the pledge shall be part of the school day, and specifically states that this policy shall not require any student to participate. It further prohibits any intimidation that may be used to coerce a student to participate. House Bill 1 also amended this statute to prohibit a school district from preventing a teacher from dedicating a reasonable amount of classroom time to recite the pledge, notwithstanding a school's policy. The amended statute also prohibits any alteration to the language of the pledge.

While this case involved a New Hampshire statute, it still speaks to the larger issue of religion in public schools. School districts in Ohio should be familiar with state law, and more generally, must be aware of First Amendment concerns whenever religion is questionably being introduced into a school setting. As this case makes clear, religious issues can often become contentious with parents. With respect to the pledge, it is vital that school policy and school teachers do not coerce any student into participating.

The Ohio Teacher Residency Program

House Bill 1 created a four-tier educator licensure structure which will take effect in 2011. The new licensing structure begins with a Resident Educator License then proceeds to a Professional Educator License, a Senior Educator License, and a Lead Professional Educator License. The legislation prescribes minimum standards for achieving these licenses, but the State Board will determine further requirements in the near future.

The new legislation also recognized that beginning teachers need additional support and training. As a result, House Bill 1 requires the Superintendent of Public Instruction and the Chancellor of the Ohio Board of Regents to establish the Ohio Teacher Residency Program by January 1, 2011. This four-year teacher residency program will attempt to provide new teachers seeking a Resident Educator License with mentoring and guidance geared towards improving teaching skills and student achievement. Though the program has not been finalized, it will include the following components:

- Mentoring by teachers who hold a lead professional educator license
- Counseling to ensure that program participants receive needed professional development
- Measures of appropriate progression through the program
- Alignment to the Ohio Standards for the Teaching Profession
- Self-assessment and reflection

The Ohio Teacher Residency Program

- Goal setting
- Formative assessments

As mentioned above, the new licensing structure does not go into effect until 2011. Therefore, the State Board of Education must still accept applications for new, and renewal and upgrade of, the current educator licenses and permits through December 31, 2010. Because the new licensure structure does not go into effect until 2011, Ohio has developed a plan to allow teachers who hold a two-year provisional license to advance to a five-year professional license during the interim period. This plan is known as the Resident Educator Transition Program. The transition program is designed to bridge the gap between Praxis III, which was eliminated by House Bill 1, and the Resident Educator Program. To be eligible for the transition program, an educator must be teaching under a two-year provisional license, under a teaching contract, with at least .25 Full-Time Equivalent, and teaching in the area of licensure.

Until January 2011, all teachers who have a two-year provisional license must participate in the transition program in order to advance to professional licensure. These teachers must complete the one-year transition program in 2009-2010 or 2010-2011 in order to transition to a five-year professional educator license. The program includes instructional mentoring from a trained mentor and a system of formative assessments over the course of one academic year. After completion of the transition program, the mentor and superintendent will sign the Resident Educator's application for a professional license, completing the transition to a five-year license.

How this impacts your district:

Local districts are responsible for supporting the program by providing instructional mentors and time for mentors and mentees to work together. Each district is allocated approximately $1,800 per licensed teacher with which the district can draw monies to support the transition program. All instructional mentors in the Resident Educator Transition Program must be trained and certified by ODE's state trainers, regardless of previous mentoring experience or training. Local districts are also responsible for arranging for instructional mentors to attend either a two-day regional training session for new mentors, or a one-day training session for experienced mentors who meet certain criteria. The Ohio Department of Education has additional information and resources available on its website.

Student Searches and Cell Phones

A student at Owensboro High School in Owensboro, Kentucky has filed suit against the school district in federal court alleging that school officials conducted a "warrantless and illegal search" when the school officials read text messages on the student's cell phone. According to the lawsuit, the cell phone was confiscated pursuant to school policy after it fell out of the student's pocket during class. The student claims, however, that the teacher, principal and two assistant principals conducted an illegal search of the confiscated phone when they read text messages sent and received by the student. The lawsuit claims that the search of the phone was unconstitutional because the search of private property was conducted without any limitations.

How this impacts your district:

The Fourth Amendment of the United States Constitution contains a prohibition against unreasonable searches and seizures which applies to pupils in the public school setting. Whereas private citizens are subject to a probable cause standard when evaluating the constitutionality of a search, courts have determined that reasonable suspicion is sufficient to justify a search of students. Student searches conducted by school officials under this "reasonableness" standard require the satisfaction of two factors before the search is deemed legal. First, the search must be justified at its inception. This factor is satisfied if at the time of the search, reasonable grounds existed for suspecting that the search would yield evidence that the student was violating either the law or school policy. Second, the scope of the search must be reasonably related to the circumstances surrounding the search. This is satisfied when measures adopted for the search are reasonably related to the objective of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the violation.

Ohio Revised Code section 3313.753 permits boards to adopt policies prohibiting students from carrying cell phones in any school building or on school grounds. Despite this statute, the contents of a student's cell phone are private and are not outside the realm of the Fourth Amendment's guarantee that citizens be free from illegal searches and seizures. The general rule governing searches of students, which includes cell phones, is that school officials need a reasonable suspicion that a student has committed a violation of a school rule or law. In the lawsuit mentioned above, it is clear that the teacher could confiscate the cell phone pursuant to school policy. It is less clear, however, as to whether the school officials had the requisite level of suspicion required to conduct a search of the text messages. We will keep your district updated on any further events that occur in this case.

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
Professional Misconduct

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

UPCOMING SPEECHES

C. Bronston McCord III at the OSBA Capital Conference on November 9, 2009

Newsletter Information

Our monthly newsletter provides legal updates on all areas related to school law.
You can access past issues of our newsletter at our website: www.erflegal.com.
Click on “Client Resources” to access prior issues by year and month.

Please contact Ennis, Roberts, & Fischer if you have any questions pertaining to the newsletter

Contact One of Us

William M. Deters II
wmdeters@erflegal.com

C. Bronston McCord III
cbmccord@erflegal.com

J. Michael Fischer
jmfischer@erflegal.com

David J. Lampe
dlampe@erflegal.com

Jeremy J. Neff
jneff@erflegal.com

Gary T. Stedronsky
gstedronsky@erflegal.com

Ryan M. LaFlamme
rlaflamme@erflegal.com

Rich D. Cardwell
rcardwell@erflegal.com