Richard Fossey on Christian Legal Society v. Martinez

2010 Emerging Issues 5181

Richard Fossey on Christian Legal Society v. Martinez: A Public Law School Can Bar Recognition of a Christian Student Group under an Accept-All-Comers Policy for Student Organizations

By Professor Richard Fossey

July 9, 2010

SUMMARY: On June 28, 2010, the United Supreme Court issued its decision in Christian Legal Society v. Martinez, ___ U.S. ___, ___ L.Ed.2d ___, *2010 U.S. Lexis 5367 (2010)*, an opinion that may have far ranging implications for the First Amendment rights of student religious groups on public university campuses. Prof. Richard Fossey analyzes the Court's decision and discusses the potential long-term repercussions of this important decision.

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ARTICLE: On June 28, 2010, the United Supreme Court issued its decision in *Christian Legal Society v. Martinez*, ___ U.S. ___, ___ L.Ed.2d ___ , *2010 U.S. Lexis 5367 (2010)*, an opinion that may have far ranging implications for the First Amendment rights of student religious groups on public university campuses. Justice Ruth Ginsburg wrote the majority opinion, in which she was joined by Justices Breyer, Kennedy, Sotomayor, and Stevens.

In essence, the Supreme Court affirmed a two-sentence opinion by the Ninth Circuit Court of Appeals, upholding a decision by Hastings College of Law (Hastings) to deny recognition to the Christian Legal Society (CLS) as a "Registered Student Organization" (RSO), because the group's bylaws restricted membership to Christians who abstained from sexual relationships outside the boundaries of a marriage relationship between a man and a woman. Justice Ginsburg's majority opinion concluded that the law school's policy, requiring RSOs to accept all comers, without regard to religious beliefs or sexual orientation, was a reasonable viewpoint-neutral condition on access to the law school's student-organization forum. The Court rejected the student group's argument that the law school's all-comers policy infringed on its constitutional right of association to reject members who do not share their core religious beliefs.

Justice Alito wrote a lengthy dissent, in which he questioned the factual basis on which the majority opinion was largely based. Specifically, Justice Alito argued that the evidence strongly suggested that Hastings's all-comers policy for student organizations was not a reasonable, viewpoint-neutral policy. Rather, the policy may have been a pretext for denying recognition to CLS because of its religious beliefs on sexual orientation. If that were the case, Judge Alioto wrote, Hastings's decision to deny RSO status to CLS was motivated by the Law School's disapproval of the group's viewpoint, which would be a constitutional violation.

This commentary will review the majority opinion in *Christian Legal Society v. Martinez* and Justice Alito's

dissent. It will then discuss the possible implications of the decision for public universities and for student religious groups at public universities.

***Christian Legal Society v. Martinez*: The Majority Opinion**

In 2004, a group of Hastings law students formed the Christian Legal Society by affiliating with Christian Legal Society-National, an association of Christian law students and lawyers. The national organization required local chapters to adopt bylaws, which mandated members and officers to sign a "Statement of Faith" and to abide by certain principles, including the tenet "that sexual activity should not occur outside of marriage between a man and a woman." The organization interpreted its bylaws "to exclude from affiliation anyone who engages in 'unrepentant homosexual conduct.'" 2010 Lexis 5367 at *20.

On September 17, 2004, CLS submitted an application for RSO status to Hastings, accompanied by a copy of its bylaws. RSO status would entitle CLS to certain benefits, including the right to law-school channels of communication with other students, the right to request financial assistance from the Law School's student-activity fund, and the right to apply for permission to use Law School facilities for its meetings.

Hastings rejected CLS's application because the group's bylaws, which barred membership based on religion and sexual orientation, violated Hastings's Nondiscrimination Policy. CLS requested an exemption from the nondiscrimination policy, but Hastings refused this request. To be an approved RSO, Hastings told the group, CLS was required to accept members without regard to their religious beliefs or sexual orientation.

CLS sued Hastings in a California federal court, alleging a violation of the group's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion. The trial court ruled in favor of Hastings, and the Ninth Circuit affirmed in a two-sentence opinion, stating that the Law School's all-comers rule for student groups was reasonable and viewpoint neutral.

Justice Ginsburg's majority opinion refused to consider CLS's argument that the Law School's nondiscrimination policy was targeted toward groups whose beliefs were based on religion, finding that the group had abandoned this argument when it agreed to a joint factual stipulation. Instead, the Court's majority opinion focused on the Law School's all-comers policy for student groups. Like the Ninth Circuit, the Court concluded that the policy was reasonable and viewpoint neutral.

In the Court's view, Hastings's all-comers requirement helped ensure that all students had opportunities to avail themselves of the leadership, educational, and social opportunities that membership in student groups provides. In addition, the policy encouraged "tolerance, cooperation, and learning among students" and helped the Law School enforce its general Nondiscrimination Policy by eliminating the Law School's need to determine the motivations of student groups that denied membership to certain students. 2010 U.S. Lexis at *51.

***Christian Legal Society v. Martinez*: Justice Alito's Dissenting Opinion**

Justice Samuel Alito filed a lengthy dissenting opinion, in which he was joined by Chief Justice Roberts and Justices Scalia and Thomas. Justice Alito charged the majority with abandoning the Supreme Court's long-established precedents of First Amendment jurisprudence in order to endorse a rule that allows public universities to suppress student speech that is politically incorrect.

In particular, Justice Alito' suggested that Hastings's all-comers rule for student organizations was a pretext for the Law School's decision to deny recognition to CLS. Indeed, Alito argued, there was strong evidence that Hastings denied recognition to CLS because it disapproved of the group's religious beliefs about sexual orientation. Denying recognition on that basis, Justice Alito maintained, constitutes viewpoint discrimination that is prohibited by the First Amendment.

In Justice Alito's view, the case before the Court was quite similar to the facts of *Healy v. James, 408 U.S. 169; 92*

S. Ct. 2338; 33 L. Ed. 2d 266 (1972), in which the Supreme Court ruled that a public college could not deny recognition to the Students for a Democratic Society based on the college president's disagreement with the group's philosophy. In the *CLS* decision, the majority minimized the impact of the Law School's decision to deny recognized status to CLS, stating that the organization still had access to the Law School's bulletin boards and could create its own web site to attract members. Justice Alito pointed out that the Supreme Court had rejected a similar argument in *Healy v. James,* in which a public college argued that it had not violated the First Amendment rights of the Students for Democratic Society, since the group continued to have the freedom to meet off campus even though the college had denied it access to the student newspaper and campus bulletin boards. "This Court does not customarily brush aside the claim of unlawful discrimination with the observation that the effects of the discrimination were really not so bad," *Justice Alito wrote. 2010 U.S. Lexis 5367* at *100 (Alito, J. dissenting).

Implications for Public Universities and Public-University Student Groups

Christian Legal Society v. Martinez has important implications for the First Amendment rights of student groups on public university campuses.

1. An Accept-All-Comers Policy Has the Potential for Barring All Religious Groups from Public University Campuses. First, the decision departs from a line of Supreme Court decisions stretching back almost 30 years, in which the Court has held that a public educational institution may not exclude a group from its limited open forum simply because the group has a religious viewpoint. *Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132* l. Ed. 2d 700 (1995); *Good News Club v. Milford Central School, 533 U.S. 98, 121 S. Ct. 2093, 150 L. Ed. 2d 151 (2001); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 113 S. Ct. 2141, 124 L. Ed. 2d 352 (1993); Widmar v. Vincent, 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981).*

If, as the *Christian Legal Society* decision held, a public university can bar a religious group from a limited public forum solely because the group limits its membership to people who share the group's religious beliefs, then it can bar most religious groups. After all, virtually every religious group is exclusionary in some regard. The Roman Catholic Church denies communion and all its sacraments to persons who are not Catholic; and the Church of Jesus Christ of Latter Day Saints (Mormons), the nation's fourth largest religious group, has many exclusionary practices. Under the *CLS* decision, public universities and school districts can avoid the application of *Widmar*, *Lamb's Chapel*, *Good News Club*, and *Rosenberger* and ban most religious groups from their limited open forums simply by passing an all-comers policy and excluding any religious group that practices even one exclusionary rite.

2. Student Groups at Public Universities with an Accept-All-Comers Policy May Have No Constitutional Right to Reject Members Who Are Hostile to the Groups' Missions. Second, established Supreme Court jurisprudence has recognized a constitutional right of association that includes a group's right to exclude individuals from membership whose admission would interfere with the group's ability to convey its views. *Boy Scouts of America v. Dale, 530 U.S. 640, 120 S. Ct. 2446, 147 L. Ed. 2d 554 (2000).* Under the Supreme Court's recent *CLS* decision, a public university can apparently abrogate this principle simply be adopting an all-comers policy for student organizations. If this is really the case, then all student organizations at public universities could conceivably be transformed from advocacy groups to mere debating societies in which a cacophony of students who disagree on a particular topic can gather for the purpose of arguing. It seems inconceivable that the Supreme Court intended for its *CLS* holding to require a pro-choice student group at a public college to admit a strident anti-abortion advocate to membership or that a pro-life group is required to put a militant pro-choice student on its membership roles. On the other hand, the Court may have concluded that the educational benefits of a public university's all-comers policy - including the promotion of tolerance for the views of other students - outweighs any constitutional right a student group might have to bar members who are hostile to the group's mission.

3. The *CLS* Decision Raises the Possibility that Hostile Groups Could Hijack a Student Group's Mission. Third, both the majority and the dissenting opinion discussed the possibility that a public university's all-comers rule might allow a hostile force of students to join a student organization for the avowed purpose of destroying it. For

example, a mob of students hostile to gays could flood the membership roles of a university gay-student group and elect officers who would then dismantle the organization.

Dismissing this scenario "as more hypothetical than real," the *CLS* majority suggested that the Law School could impose a rule that requires student-group members to be committed "to a group's vitality, not its demise." *2010 U.S. Lexis 5367* at *55-57. Thus, if a hostile student takeover was suspected, Hastings might be required to examine the motivations of student-group applicants who were accused of joining a group for the purposes of sabotage. Presumably, a student so accused would be entitled to some sort of due process hearing. This is a complication the Law School may not have anticipated when it adopted its all-comers rule for student organizations.

4. The *CLS* Decision May Impact Single-Sex Student Groups Such As Fraternities and Sororities. Fourth, the Supreme Court's endorsement of an all-comers rule for a public law school has the potential of discomfiting more student organizations than the Christian Legal Society and other religious groups. Fraternities and sororities that have traditionally limited membership to one sex could also be forced off campus by a university's all-comers rule.

In *Chi Iota Colony of Alpha Epsilon Pi Fraternity v. City University of New York, 502 F.3d 136 (2d Cir. 2007),* for example, the Second Circuit Court of Appeals ruled that a state university's policy against gender discrimination was compelling and justified the university's decision to deny recognition of an all-male Jewish fraternity on the grounds that fraternity membership was exclusive to males. The fraternity argued that the University had violated its constitutional right of association, but the Second Circuit concluded that the fraternity was not the type of organization that was entitled to assert associational rights under the First Amendment. The Second Circuit's decision was based on the fraternity's discriminatory policy toward women, not an all-comers rule. Nevertheless, the *CLS* decision certainly buttresses the constitutional argument that a public university could bar all single-sex student groups from campus simply by passing an all-comers rule.

Conclusion

Christian Legal Society v. Martinez is a significant development in Supreme Court jurisprudence on the constitutional rights of student organizations at public colleges and universities. Although the decision has the potential for removing a great many student religious groups from campus, the impact on campus life may be minimal. After all, as the *CLS* majority pointed out, "Private groups, from fraternities and sororities to social clubs and secret societies, commonly maintain a presence at universities without official school affiliation." *2010 U.S. Lexis 5367* at *53. Indeed, many religious organizations maintain student centers on the periphery of public university campuses for the benefit of their student members, and lack of official status has not seemed to have hampered them in the least.

On the other hand, now that Hastings has committed to an all-comers policy for student organizations, it may find that it has created difficulties for itself that it did not anticipate.

For example, now that the Law School has adopted an all-comers policy for student groups, it must enforce that policy with all student groups, not just the Christian Legal Society. Hastings may find itself forced to scrutinize every registered student group to make sure all groups are adhering to the policy. A student religious group, a student group organized around sexual orientation, or a student group devoted to the interests of a particular race or ethnic identity is not likely to welcome a student who applies for membership if the group suspects the applicant is hostile to the group's core mission. But under Hastings's all-comers policy, a student group may have no choice.

Finally, the problem of hostile student takeovers may not be as hypothetical as the *CLS* majority assumed it to be. When it comes to religion, sexual orientation and volatile public issues like abortion, many students hold passionate opinions. It is not inconceivable that a controversial student group that was denied university recognition under an all-comers policy might use that policy to sabotage an approved student group that has an opposing viewpoint. If Hastings's all-comers policy leads to a proliferation of hostile student-group takeover attempts, the law school may find that its policy has created more problems than it solved, in spite of the fact that five members of the Supreme Court

endorsed it.

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Roberts on Safford Unified School District #1 v. Redding

2009 Emerging Issues 4731

Nathan M. Roberts on Safford Unified School District #1 v. Redding, 129 S. Ct. 2633 (2009)

By Nathan Roberts

December 16, 2009

SUMMARY: Safford Unified School District #1 v. Redding is important to educators, parents and students. The decision addresses student privacy rights pursuant to search and seizure under the Fourth Amendment and qualified immunity for school administrators. Nathan M. Roberts, a school law professor and former school board attorney, provides an expert analysis of this case.

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ARTICLE: *Safford Unified School District #1 v. Redding, 129 S. Ct. 2633, 174 L. Ed 2d. 354*, 2009 LEXIS 4735 (2009), involves student privacy rights pursuant to search and seizure under the Fourth Amendment and qualified immunity for school administrators. It addresses important issues regarding the limits of student privacy on campus regarding their right to be secure in their persons from unreasonable searches and seizures and whether a school administrator should be personally liable for requiring a 13-year-old girl to remove her clothes down to the underwear and pull out her bra and the band on her underpants in search of prescription strength ibuprofen. *Safford Unified School District #1 v. Redding* has serious implications for public school districts as it provides direction for school administrators on the thorny topic of student Fourth Amendment rights and the difficult task of protecting students from harm while also respecting their privacy rights at school.

It has been over two decades since the Supreme Court first established that students have a constitutional right under the Fourth Amendment to be free from unreasonable searches while at school. In *New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985),* the Court recognized that school officials have an important interest in maintaining safety and order in the schools, but that this interest must be balanced against the student's constitutionally protected right to privacy. Thus, the Supreme Court opined, school officials can only conduct searches that encroach on a student's privacy when they have a reasonable suspicion that the search will turn up evidence of wrongdoing. In addition, the Court stated, the scope of the search must be reasonable-not unreasonably intrusive into a student's privacy given the nature of the infraction and the age and gender of the student.

In essence, the Supreme Court's decision in *T.L.O.* mandates educators to be reasonable when making decisions about searching students. The Court clearly ruled that school teachers and administrators are not required to follow the more rigorous constitutional search and seizure guidelines that apply to police officers. In particular, school officials are not required to obtain a warrant before searching a student. Moreover, educators need have only a reasonable suspicion

that the search will uncover contraband, while police officers typically must meet the more rigorous probable cause standard in order to initiate a search.

The *T.L.O.* reasonableness standard has been the prevailing standard in state and federal courts; and school searches conducted in good faith have been generally upheld in litigation. However, in July 2008, the Ninth Circuit Court of Appeals ruled that the strip search of an eighth-grade student in order to find prescription-strength ibuprofen was a violation of the student's constitutional right to privacy under the Fourth Amendment. In a divided *en banc* decision, a majority of the Ninth Circuit judges ruled that the search of Savana Redding, a thirteen-year-old middle school student, was not justified at its inception; the decision to search was primarily based on the testimony of one other student who had herself been implicated in bringing prescription drugs to school. Nor was the search justified in its scope, being entirely unreasonable in the Ninth Circuit's view, when the purpose of the search was merely to find prescription-strength ibuprofen. The Ninth Circuit went on to rule that Savana Redding's right to be free from the search that she experienced was well established under the law, and that the assistant principal who directed the search could be held personally liable in damages for violating her constitutional rights.

The Supreme Court affirmed in part and reversed in part holding the strip search of the student was unjustified. The substance of the suspicion in this case failed to correspond to the level of intrusion. The offense of possessing a non-dangerous prescription strength medication was simply too minor to justify such an intrusive search into a school child's privacy. The school officials knew the item being searched for was only prescription strength ibuprofen. The fact that the item involved did not rise to the level of a serious threat to safety or health indicates that the search should have been limited in its scope. Further, the record did not contain any evidence to suggest the student was hiding the pills in her underwear; therefore, the search should have been limited to her back pack and outer clothing. Basically, the Court opined that there was no indication of danger or safety risk to the students based on the strength or quantity of the drugs and there was no evidence the drugs were being stored in her underwear. The principal did not ask the informant about the location of the drugs or when she had allegedly received the drugs from Redding. However, because of the differences of opinion reflected in the lower courts regarding how the *T.L.O.* standard applies to limit the intrusiveness of searches based on the age and gender of the student and the nature of the violation, the Court further ruled the school officials were entitled to qualified immunity.

Conclusion. *Safford* helps clarify the *T.L.O.* reasonableness standard for school searches in that the search as actually conducted must be reasonably related in scope to the circumstances which justified the search originally. The scope of the search must not be excessively intrusive in light of the object of the search and its dangerousness to the health and safety of the students.

Safford provides further guidance for school officials and the legal community on student Fourth Amendment rights and privacy at school, while at the same time raising the question about how much evidence of misconduct is necessary to justify a strip search in the schools. Although several previous courts had ruled that a strip search is constitutionally unreasonable if officials are only looking for money, *Safford* is the first federal court to rule that a strip search for a non-dangerous prescription-strength medication is also inherently unreasonable under the Fourth Amendment.

Justice Souter's opinion suggests that administrators should consider several factors in their analysis to determine if a search, particularly a strip search, is warranted. First, the administrator should determine the dangerousness of the item at issue. If the item is determined to be dangerous to the safety or health of the students, the administrator should then determine where the item might be hidden to determine a reasonable course of action. This involves a review of the size of the item and the statements from witnesses about where the item is stored and when the last time the witness saw the item on the student.

Perhaps the most interesting aspect of the *Safford* decision, at least from the perspective of a public school administrator, is its conclusion that the search of Savana Redding was not justified at the inception. In the Court's view, the uncorroborated testimony of a classmate who had herself been implicated in bringing unauthorized prescription

drugs to school did not provide reasonable grounds for suspecting that Redding might have prescription medications on her person and hidden in her underwear. Unfortunately, the Supreme Court did not make clear just how much evidence of wrongdoing the school authorities are required to amass before it would be constitutionally reasonable to strip search a student. In *Safford*, the Supreme Court highlighted the failure of the school officials to question the informant about where Redding might be holding the drugs and to differentiate between dangerous drugs that could perhaps substantiate a more intrusive search and non-serious drugs like prescription strength ibuprofen that do not warrant an intimate search that is both embarrassing and humiliating. When confronted with a search issue, administrators should analyze the dangerousness of the contraband sought along with the weight of evidence of wrong-doing to determine the appropriate degree of intrusiveness of their search.

RELATED LINKS: For further discussion of student Fourth Amendment rights in public schools relative to strip searches, see David C. Blickenstaff, Strip Searches of Public School Students: Can New Jersey v. T.L.O. Solve the Problem?

- 99 Dick. L. Rev. 1 (1994).

For a general discussion of student safety, control and discipline, see James A. Rapp,

- Education Law, Ch.9 (LexisNexis Matthew Bender).

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3 of 6 DOCUMENTS

Roberts on Parents Involved in Community Schools v. Seattle Public Sch. Dist. 1

2008 Emerging Issues 2024

Roberts on Parents Involved in Community Schools v. Seattle Public School District 1

By Nathan M. Roberts

March 17, 2008

SUMMARY: Parents of Community Schools v. Seattle School District No. 1 is important to educators, parents and students. The decision addresses the social and educational benefits some school districts believe come from racial diversity in secondary education as weighed against the consequences of using race as an isolated factor in classifying students. The case examines the limits of the Equal Protection Clause and its application to secondary education as opposed to higher education as described in Grutter v. v. Bollinger. The decision provides guidance regarding constitutionally permissible methods to assign students to schools and programs. Click on the Expert Commentary link above to see an analysis of the case by Nathan M. Roberts, a school law professor and former school board attorney.

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ARTICLE: Cite as: Roberts, Nathan M. *Parents Involved in Community Schools v. Seattle Public School District 1 and Meredith v. Jefferson County Public Schools*. LexisNexis Expert Commentary, *(Insert date you accessed the document online)*.

Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1; Meredith v. Jefferson County Public Schools, 127 S. Ct. 2738, 168 L. Ed. 2d 508, 2007 U.S. LEXIS 8670 (2007), involves two school districts that voluntarily approved race-conscious student assignment plans. The plans were designed as both a remedial measure to address de facto segregation and to also achieve the educational goal of a diverse student body that would reflect the racial make-up of the community served by the school district. *Parents Involved in Comm. Schs. v. Seattle Sch. Dist. No. 1* has significant implications for public school systems as it provides guidance regarding the range of constitutionally permissible student assignment policies for programs and schools.

The Seattle School District approved an open choice policy for incoming freshmen. The students were allowed to choose which of the ten high schools they wanted to enroll in as a student. When a high school reached capacity, a set of tiebreakers was utilized to determine which students would be admitted. The first tiebreaker admitted students who already had a sibling enrolled in the school. The second tiebreaker admitted students who would not alter the racial balance of the school as it related to the racial balance of the district by more than ten percent. The Seattle School District had no previous history of forced segregation.

The Jefferson County schools in Kentucky were once subject to court ordered desegregation, but in 2000, that order

was dismissed after the court determined that the Jefferson County schools had achieved unitary status. Once the decree was dissolved, a voluntary student assignment plan was adopted to encourage racial balancing in the schools. Parents of elementary school children submitted an application listing their first two choices for attendance within a specified geographic range of their residence. If a school was too close to the extremes of the racial guidelines, a student whose race would upset the racial balance would be denied admission. Middle and high school students did not use location, but were denied admission if they would disturb the racial balance objectives set out by the district.

The Supreme Court in an opinion authored by Chief Justice Roberts ruled that any government action that distributes burdens or benefits based on individual racial classifications is subject to strict scrutiny. Strict scrutiny requires that the action taken by the government be narrowly tailored to achieve a compelling government interest. The Court addressed three issues in the opinion. First, how are the Equal Protection rights of public high school students affected by the jurisprudence of *Grutter v. Bollinger, 539 U.S. 306, 123 S. Ct. 2325, 156 L. Ed. 2d 304 (2003)?* Second, is racial diversity a compelling interest that can justify the use of race in selecting students for admission to public high schools? Third, may a school district that is not racially segregated and that normally permits a student to attend any high school of his/her choosing deny a child admission to his/her chosen school solely because of race in an effort to achieve a desired racial balance in particular schools, or does such racial balancing violate the Equal Protection Clause of the Fourteenth Amendment?

The Court determined that the only acceptable uses of race in public school assignments are to either remedy past, intentional segregation or to create educational diversity in higher education. In the case of the Seattle plan, it failed because there was no history of previous forced segregation. Further, with regard to Jefferson County, the Court determined that Jefferson County had no current interest in remedying past segregation because it had been ruled unitary in 2000. The Court distinguished *Grutter*, a higher education case opining that the governmental interests in creating a diversified learning experience in higher education was different from that of secondary education. The Court took note that in *Grutter*, the Michigan Law School used admission criteria that incorporated race among other factors, in determining students who would provide a more diversified learning experience deemed beneficial in law schools. The Supreme Court in *Grutter* found a compelling interest in considering various factors that establish a diverse learning environment as opposed to race alone. The Court opined that the law school application process was different because the applicants were viewed as individuals and not merely as members of a racial group and that was allowable for law schools who were trying to diversify their schools on many levels.

Chief Justice Roberts writing for the plurality held that racial diversity in all primary and secondary education is not a compelling interest that can justify race-based admissions. The Court was unconvinced that attempting to undue de facto segregation caused by housing patterns served as a compelling interest. The Court determined that the school admission plans simply manipulated school enrollments based on race alone and were not based on any pedagogical concept of the level of diversity needed to obtain the stated educational benefits.

The majority of the Court also found the plans were not narrowly tailored. The evidence failed to support a finding that the districts considered plans other than racial classifications to obtain their objectives. The Court held that to satisfy the narrowly tailored exception, the districts would be required to first substantiate serious and good faith efforts at race-neutral alternatives before adopting the plans at issue. The Court did note an important distinction in *Grutter*. The law school in Michigan used race as only one factor in the admission process; however, in Seattle, race was the factor. Interestingly, Justice Kennedy in his concurrence noted that achieving diversity could be a compelling interest if school officials determine that the student-body compositions of certain schools interfere with the objective of offering an equal educational opportunity to all of their students. Justice Kennedy further offered some race-neutral methods that he believed would be constitutional, including strategic site selection of new schools, drawing attendance zones with general recognition of the demographics of neighborhoods, and allocation of resources for special programs.

Conclusion. *Parents Involved in Community Schools v. Seattle School District No. 1* is an important case to

educators, parents and students. The Supreme Court examined the social and educational benefits that come from racial and ethnic diversity in secondary education and determined that the only permitted uses of race in public school assignments are to remedy past, intentional segregation or utilized to create educational diversity in higher education. In light of the Courts ruling, all public school districts with admission plans to schools or special programs must view them individually to determine if they pass constitutional muster. Districts, particularly those that have recently obtained unitary status, will be scrambling to establish policies that achieve or maintain their goals of educational diversity without using race-conscious means to achieve that goal.

When confronted with school or program admission issues, school districts should now determine if race is one of the factors or the only factor in admission decisions. Districts will need to devise new admission policies that utilize other means of determining admission tiebreakers, such as economic need. Other districts may rethink their decision to seek unitary status and remain under court decree so that they can implement new or maintain current admission policies that further their efforts to desegregate while attempting to avoid the re-segregation of the school district.

Cross-references

For a general discussion of educational opportunities and equality, *see* James A. Rapp, Education Law, Ch. 10 (LexisNexis Matthew Bender).

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Hutchens on Board of Education v. Tom F.

2008 Emerging Issues 1983

Hutchens on Board of Education v. Tom F.

By Neal H. Hutchens

March 3, 2008

SUMMARY: The U.S. Supreme Courts decision in *Board of Education v. Tom F., 169 L. Ed. 2d 1 (2007)*, which resulted in a 4 to 4 deadlock among the Justices hearing the case, leaves open the issue of reimbursements for private school placements under the IDEA when parents reject a public school placement and the child has not received special education services in the public school. Neal H. Hutchens, Assistant Professor of Law at Barry University School of Law, who researches in the area of education law and policy, provided this commentary.

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ARTICLE: Overview. The U.S. Supreme Courts decision in *Board of Education v. Tom F., 169 L. Ed. 2d 1 (2007),* resulted in a 4 to 4 split decision over whether a student must receive special education services from a public school before parents who reject the placement called for in the Individualized Education Program (IEP) are entitled to reimbursement for private school tuition. Justice Kennedy did not take part in the decision, and the tie resulted in affirming the Second Circuits decision that a public school placement is not required. The outcome in *Tom F.* means that the issue of whether or not such reimbursements are permissible remains uncertain.

Federal Courts in Disagreement. In *Tom F.*, the Federal District Court interpreted language in the 1997 amendments to the Individuals with Disabilities Education Act (IDEA) as precluding private school reimbursements when parents decide to reject a public school placement and the child has not previously received special education services in the public school. *No. 01 Civ. 6845, 2005 U.S. Dist. LEXIS 49* (S.D.N.Y. Jan. 4, 2005). The district court held that the plain and unambiguous language of *20 U.S.C. § 1412(a)(10)(C)(ii),* which permits private tuition reimbursements for parents when a child has previously received special education and related services under the authority of a public agency, prohibited reimbursement when a child has not received special education services from the public school. A hearing officer and the state department of education had earlier ruled in favor of the parents.

Vacating and remanding, the *Second Circuit, 193 Fed. Appx. 26 (2nd Cir. 2006),* ordered the district court to follow the holding in *Frank G. v. Board of Education, 459 F.3d 356 (2nd Cir. 2006).* In *Frank G.*, the court rejected the argument that the IDEA mandated that parents could be reimbursed for unilaterally placing a child in a private school only after the child had received special education services in a public school. The opinion stated that *20 U.S.C. § 1412*

(a)(10)(C)(ii) was not the only or even principal section of the IDEA that addressed the issue of reimbursement for a private school. Instead, the court stated that the Supreme Courts decision in *School Committee of Burlington v. Board of Education, 85 L. Ed. 2d 385 (1985)*, interpreting language currently contained in *20 U.S.C. § 1415(i)(2)(C)* and unchanged by the 1997 amendments, permits reimbursement for private school tuition as determined appropriate by the court. According to the court in *Frank G.*, requiring that a student receive special education services in a public school before permitting reimbursement when parents are justified in rejecting the placement proposed in the IEP defeated the key aims of the IDEA to make sure that students receive a free and appropriate education.

Other courts have followed a similar analysis to that of the district court in *Tom F.* In *Lunn v. Weast, No. DKC 2005-2363, 2006 U.S. Dist. LEXIS 36052* (D. Md. May 31, 2006), the court stated that the plain and unambiguous language of the statute, accompanying regulations, and the legislative history supported that a child must receive special education services at a public school in order for parents to be eligible to receive reimbursement for a unilateral placement at a private institution. *See also Balt. City Bd. of Sch. Commrs v. Taylorch, 395 F. Supp. 2d 246 (D. Md. 2005)* (holding that reimbursement is available only when a child had previously received special education services in a public school).

In contrast, the Eleventh Circuit, like the Second Circuit, interpreted the IDEA as not requiring that a student first receive special education services in a public school setting before a parent could receive reimbursement for a unilateral placement. *M.M. v. School Bd., 437 F.3d 1085 (11th Cir. 2006).* In *M.M.*, while the court held that an early intervention program qualified as receiving public special education services, the opinion stated in dicta that this was not a requirement under the IDEA. According to the opinion, requiring parents to first enroll their child in a public school when the placement is not appropriate is contrary to the principles discussed by the Supreme Court in *Burlington*.

Advising Clients. Until the Supreme Court decides to take up the question again, attorneys for parents and school systems should be aware of the unsettled nature of this issue under the IDEA. Parents rejecting an IEP and opting for a unilateral placement should understand that, depending on the ultimate resolution of the issue, the Supreme Court may hold that they are not entitled to reimbursement for a unilateral placement when a child has not previously received special education services at a public school. Attorneys may consider advising parents to opt for even a brief placement in a public school setting. One court interpreting the IDEA as first requiring receiving special education services in a public school stated that enrollment of as little as one day and then providing ten business days notice to the school of the intent to withdraw satisfied the statute. *Taylorch, 395 F. Supp. 2d 246, at 250.*

Even if a court were to hold that reimbursement is permitted when a child has not received special education services in the public school, parents who opt for a unilateral private placement must show that an appropriate public placement was not offered. The parents must also establish the appropriateness of the private placement. *See Frank G., 459 F.3d at 364.* While a private school placement does not have to necessarily meet the same standards as a public school counterpart, the placement must result in meaningful educational benefits for the child. *Id.*

Attorneys for school districts not in the Second and Eleventh Circuits can seek to rely on the argument that the plain and unambiguous wording of the IDEA prohibits reimbursement for a unilateral placement when the child has not received special education services in a public school. School districts, however, may face courts that consider the analysis and holding of *Burlington* to be compelling. Attorneys for school districts will need to show that the 1997 amendments to the IDEA evince a clear congressional intent to favor public school placements. School districts can also argue that making a child try a public school placement does not place a substantial burden on the parents or the child, since parents can opt to remove the child following a brief placement and seek reimbursement.

Cross-references

For further discussion of the IDEA and the issue of reimbursements, *see* James A. Rapp, *Education Law §*

10.18 (LexisNexis Matthew Bender).

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Roberts on Morse v. Frederick

2008 Emerging Issues 1529

Roberts on Morse v. Frederick

By Nathan M. Roberts

December 14, 2007

SUMMARY: School administrators see themselves as responsible for providing students with an environment conducive for learning as well as a safe environment but are also concerned that misinterpreting a students free speech right could place them at risk for personal liability. Morse v. Frederick answers some of the student free speech concerns. This Emerging Issues Analysis provides an analysis of Morse by Nathan M. Roberts.

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ARTICLE: *Morse v. Frederick, 127 S. Ct. 2618, 168 L. Ed. 2d 290, 2007 U.S. LEXIS 8514 (2007)***,** also known as the "Bong Hits 4 Jesus" case involves student First Amendment speech rights and qualified immunity for principals. It addresses significant issues regarding the limits of student free speech rights at school-sponsored events and whether a principal should be individually liable for requiring a student to lower a banner that advocates speech that is reasonably viewed as promoting illegal drug use. *Morse v. Frederick* has major implications for public school systems and students as it provides guidance for school administrators on the difficult topic of student First Amendment rights, while recognizing the difficult task principals have in responding to free speech issues on the spot.

Prior to *Morse v. Frederick*, courts analyzed student First Amendment rights under three cases: (1) *Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969)*; (2) *Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 106 S. Ct. 3159, 92 L. Ed. 549 (1986)*; and (3) *Hazelwood School Dist. v. Kuhlmeir, 484 U.S. 260, 108 S. Ct. 562, 98 L. Ed. 2d 592 (1988)*. *Tinker* holds that student expression may not be suppressed unless school leaders reasonably determine that the expression will "materially and substantially disrupt the learning environment at the school." Student speech that is clearly recognized as political protest (anti-war arm band for example) cannot be suppressed by school administrators simply to avoid the uneasiness and unpleasantness associated with an unpopular view.

Bethel followed *Tinker* and involved the suspension of a student who gave a sexually suggestive speech at a high school assembly. The Supreme Court in *Bethel* held that school officials could suspend a student for offensively lewd or indecent speech because school officials need to have the authority to determine appropriate speech for school assemblies and classrooms and that lewd and indecent speech was not protected by the First Amendment. *Bethel, 478 U.S. at 685*. *Bethel* focuses on the special characteristics of a school and establishes the first exception to the substantial disruption standard of *Tinker*.

Hazelwood adds another exception to *Tinker*. In *Hazelwood*, the court ruled that activities by students that might reasonably be attributed to the school or bear the imprimatur of the school could be regulated without a finding of substantial disruption. The court ruled that schools may exercise editorial control over the style and content of student speech in school sponsored activities as long as it is related to a legitimate pedagogical concern. *Hazelwood, 484 U.S. at 273*.

Morse does not fall under *Tinker, Bethel* or *Hazelwood*, but instead addresses a situation where a student displayed a banner that said "Bong Hits 4 Jesus" at a school-related function while standing across the street from the school. The Ninth Circuit relied on *Tinker* and found there was no evidence that the banner caused any disruption; therefore, the student had the right to display the banner and the principal violated the student's First Amendment rights. The Ninth Circuit further found, contrary to the federal district court, that any reasonable principal would have known they were violating the student's rights; therefore, the principal was not entitled to qualified immunity.

The Supreme Court reversed the Ninth Circuit and found *Tinker* was not the only basis for restricting student speech and drew upon the Fourth Amendment random drug testing cases of *Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1996)* and *Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002)* to hold that deterring drug use by schoolchildren is an important, indeed perhaps a compelling, interest of school districts. Once the Supreme Court established that the prevention of illegal drug use was a compelling interest and that the school district had a school policy on drug prevention, it was straightforward to find that the student was appropriately disciplined for displaying a banner at a school-sponsored activity that appeared to advocate illegal drug use in violation of school policy and the issue of the principal's qualified immunity became moot.

Conclusion. *Morse* now stands for another narrow exception to the substantial disruption standard of *Tinker* and allows school districts to discipline student speech that advocates illegal drug use regardless of any potential substantial disruption.

Morse provides additional guidance for school administrators and the legal community on student free speech rights. The student admitted he was not advocating a political position regarding drugs or religion and the Supreme Court also found the banner was not a substantial disruption; accordingly, *Tinker* was not determined to be the standard for review. Justice Roberts, writing for the majority, rejected the position that *Hazelwood* controlled this case solely because the event was school sponsored. Roberts further opined no one would reasonably believe the banner carried the school's imprimatur. In light of this holding and before restricting student speech based on *Hazelwood*, administrators should carefully review student speech to determine if anyone would reasonably believe the student speech carried the school's imprimatur.

The Supreme Court specifically limited its holding in two important ways. First, the Court refused to categorize the student's speech as "offensive" and allow the student to be disciplined under *Bethel*. The Court restricted its opinion and recognized that many kinds of speech could be categorized as offensive and much religious and political speech today could be considered offensive to someone. Second, Alito and Kennedy in their concurrence specifically limited the use of *Morse* for anything other than speech that a reasonable observer would interpret as advocating illegal drug use (but see *Ponce v. Socorro Independent Sch. Dist., 2007 U.S. App. LEXIS 26862 (5th Cir. 2007)*, in which the Fifth Circuit interprets *Morse* to allow school administrators to bypass the *Tinker* analysis of whether the speech causes a substantial disruption and instead allows a decision based on whether the administrator believes the "content" of the speech could potentially lead to physical harm to students, such as Columbine-type violence advocated in a student notebook).

When confronted with a student speech issue after *Morse*, administrators should now categorize the speech into one

of the following four categories: (1) constitutes a substantial disruption; (2) is offensive; (3) is school sponsored or carries the imprimatur of the school; or (4) could be reasonably interpreted as advocating for illegal drug use. Once the speech is categorized, administrators must analyze it under the appropriate standard to determine if it is permissible student expression.

Cross-references

For further discussion of student free expression in public schools, see Jacobson, Michael, Note, *Chaos in Public Schools: Federal Courts Yield to Students While Administrators and Teachers Struggle to control the Increasing Violent and Disorderly Scholastic Environment,* 3 Cardozo Pub. L. Pol'y & Ethics J. 909 (January 2006).

For further discussion of Morse v. Frederick, *see* James A. Rapp, Education Law, §§ 9.03 and 9.04 (LexisNexis Matthew Bender).

For a general discussion of student safety, control and discipline, *see* James A. Rapp, Education Law, Ch. 9 (LexisNexis Matthew Bender).

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Hutchens on Garcetti v. Ceballos

2008 Emerging Issues 1469

Hutchens on Garcetti v. Ceballos

By Neal H. Hutchens

December 13, 2007

SUMMARY: The U.S. Supreme Courts decision in Garcetti v. Ceballos has significant implications for speech claims by public employees, including at K-12 and higher education institutions. It is unclear the extent to which the decision affects the First Amendment rights of faculty members at public colleges and universities.

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ARTICLE: Overview. *Garcetti v. Ceballos, 164 L. Ed. 2d 689 (2006),* adds another wrinkle in cases establishing the appropriate inquiry for First Amendment claims by public employees, including public education employees. *Garcetti* holds that a public employee engaging in communication pursuant to carrying out his or her official duties does not engage in speech for purposes of the First Amendment. While *Garcetti* applies in a K-12 setting to both teachers and other school employees, its applicability to public higher education faculty is uncertain.

(1) K-12 Public Education Employees

Federal courts have not hesitated to apply *Garcetti* to communications by K-12 employees, including teachers. *See, e.g., Mayer v. Monroe County Cmty. Corp., 474 F.3d 477 (7th Cir. 2007).* In *Mayer*, a probationary teacher claimed her non-renewal stemmed from comments made in a current events class in response to a student question. The *Mayer* court, relying on *Garcetti*, described teachers as hiring out their speech and its content subject to control by school authorities.

While *Garcetti* encompasses many communications made by teachers and other school employees at work, attorneys should caution school districts not to overstep their legal authority. *Garcetti*, for instance, reaffirms that communications made at work do not automatically disqualify an employee from engaging in protected speech. School districts may also not craft overly broad job descriptions in an effort to limit potential First Amendment claims. Accordingly, a teacher complaining that a school engaged in discriminatory hiring practices would still likely receive First Amendment protection for such comments after *Garcetti*. *See Givhan v. W. Line Consol. Sch. Dist., 58 L. Ed. 2d 619 (1979).*

The *Garcetti* decision does not articulate a standard for defining the scope of official duties. Even if not required as part of ones duties, however, a communication may still be made pursuant to carrying out official duties. For example, an athletic director writing memoranda not expressly required in the performance of his job still acted pursuant to carrying out his official duties to oversee the schools athletic department. *Williams v. Dallas Indep. Sch. Dist., 480 F.3d 689 (5th Cir. 2007); see also DAngelo v. Sch. Bd., 497 F.3d 1203 (11th Cir. 2007)* (involving claim by principal that urging conversion of school to charter status resulted in dismissal). *Garcetti* excludes many communications made by schools employees, (for example, those made pursuant to official duties), as speech for First Amendment purposes. But attorneys for school districts and for school employees should be aware that *Garcetti* does not apply to all communications by employees made at school.

(2) Faculty at Public Colleges and Universities

Garcetti applies to communications by non-faculty members at public colleges and universities. *See, e.g., Battle v. Bd. of Regents, 468 F.3d 755 (11th Cir. 2006)* (involving claim by financial aid worker that she was not renewed because of reporting institutional violations of federal financial aid laws). But its reach to faculty members is unclear, including how courts will interpret *Garcetti* in relationship to academic freedom. In *Garcetti*, the majority declined to address questions raised in Justice Souters dissenting opinion regarding the decisions bearing on the First Amendment rights of faculty members.

While long described as a special concern of the First Amendment, *Keyishian v. Bd. of Regents, 17 L. Ed. 2d 629, 640 (1967),* the specific legal contours of academic freedom remain vague. A key area of debate involves whether academic freedom is an institutional right as well as one enjoyed by individuals. At least one court has concluded that if academic freedom exists at all as a recognized First Amendment right, then institutions possess the right rather than individual professors. *Urofsky v. Gilmore, 216 F.3d 401 (4th Cir. 2000).*

Attorneys should be prepared that courts will likely weigh *Garcetti*s appropriateness to professors speech claims. One court--though dealing with speech by a college instructor clearly not made pursuant to her official duties--relied on *Garcetti* for the proposition that courts should give appropriate consideration to the interests of the college in analyzing speech claims. *Piggee v. Carl Sandburg Coll., 464 F.3d 667 (7th Cir. 2006).* Thus, the decision may influence how a court analyzes a faculty members First Amendment claim, even when the facts do not involve communications made pursuant to official duties.

Applying a *Garcetti* standard does not automatically negate a professors First Amendment claim. Courts may view faculty members as essentially employed by institutions to speak as private citizens. Conversely, even if a court takes this stance, attorneys for faculty members face difficulties under the *Pickering/Connick/Garcetti* standard. For instance, defining a matter of public concern is problematic in higher education where narrow academic specializations are common. Attorneys for faculty members may also do well to argue the appropriateness of an alternative standard to evaluate speech by university professors.

The extent of *Garcettis* reach to First Amendment claims by public higher education faculty is uncertain. Attorneys should be prepared to analyze whether First Amendment concerns related to academic freedom alter application of the *Pickering/Connick/Garcetti* factors to faculty members First Amendment claims.

Cross-references:

For further discussion on the First Amendment and grounds for discipline or dismissal of faculty and staff, *see generally* James A. Rapp, *Education Law § 6.13* (LexisNexis Matthew Bender).

For further discussion of academic freedom, *see generally* James A. Rapp, *Education Law Ch. 11* (LexisNexis Matthew Bender).

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