Pinellas County School Board Attorneys Office

Legally Speaking

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In This Issue

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Educate and prepare each student for college, career and life.

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Supreme Court Supports Football Coach's Private Prayer

By David Koperski, School Board Attorney

Over the summer, the U.S. Supreme Court ruled in favor of a public high school football coach who engaged in certain personal prayers on the field after games. The interplay between religion and the public schools has always been fertile ground for litigants seeking to harvest favorable rulings in the courts. Stated constitutionally, this interplay exists between, on one hand, the 1st Amendment rights to freely exercise religion and engage in free speech and, on the other, the 1st Amendment prohibition against the establishment of religion, commonly known as the "separation of church and state." This latest case provides guidance regarding public employees' religious and speech rights while at work.

The facts are especially important in this case as the Court ruling was based upon some, but not all, of the coach's actions. Joseph Kennedy was a football coach for a public high school in Washington. For years, he often prayed at midfield immediately after each game. When he first began,

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Legal Department Mission Statement

The mission of the School Board Attorney and Staff Attorney Offices is to provide the highest quality legal services to the Pinellas County School Board, the Superintendent and the District by ensuring timely and accurate legal advice and effective representation on all legal matters.

Supreme Court Rules Maine's Voucher Program Unconstitutional

By Laurie Dart, Staff Attorney

In the Spring 2022 *Legally Speaking* (Volume XXII Issue 2), we noted that the U.S. Supreme Court recently heard oral arguments in *Carson v. Makin*, a case challenging a law in Maine that authorized public funding for students to attend private schools if they lived in a school district that did not operate its own secondary school. Families who wanted to send their children to Christian schools challenged the statute as unconstitutional because it excluded schools that provide religious instruction from the program.

In a decision authored by Chief Justice Roberts, the Supreme Court reversed the First Circuit's opinion and ruled that Maine's tuition assistance

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his prayers were private, quiet, and solitary. As time passed, others joined him, including players and coaches. After this, his private prayers morphed into speeches and a group prayer.

After this practice was noted by another school's staff member, the school district wrote to Kennedy that his actions were "problematic" under the 1st Amendment's Establishment Clause (i.e., the "separation of church and state" provision). The district told him to keep any post-game motivational speeches entirely secular, which he did. He also did not pray on the field immediately after games, but waited until everyone had left the stadium and then prayed alone on the field as he did when he first began this practice. However, after several games of this, he wrote a letter to the district, through his lawyer, requesting to resume his quiet, private prayer on the fifty-yard line immediately after the game. The district's concern was that the group that came together gave others the impression that the district was endorsing or approving the religious practice. Kennedy's letter also announced that he would, in fact, be resuming his practice at the next football game. At that game (call this Game 1), Kennedy walked out to the fifty-yard line immediately after the game to engage in his private, quiet prayer, and some adults joined.

After this, the district again wrote to Kennedy and advised him that he could not engage in activity that could lead to a perception that the district was endorsing religion. The district asked that he again allow the stadium to empty before his prayer. However, Kennedy continued his practice of praying immediately after the game for two more games (call these Games 2 and 3), with one being a solitary prayer and the other having other adults present. After Game 3, the district suspended Kennedy with pay and prohibited him from taking any part in the football games. After the season was over (the Knights finished 3-7), Kennedy's annual contract was not renewed based upon the district athletic director's recommendation and findings that Kennedy "failed to follow district policy" and "failed to supervise student-athletes after games due to his interaction with [the] media and [the] community."

Several months later, Kennedy sued the district for violations of his 1st Amendment Free Speech and Free Exercise rights. The federal trial and appellate courts ruled in favor of the district throughout the case because of the Establishment Clause concerns. Seven years after the football season in question, the Supreme Court issued its final ruling in June 2022.

The Supreme Court, via a 6-3 majority, ruled in Kennedy's favor, stating that the district could not punish him for his private religious activities and speech. The Court addressed each of the 1st Amendment clauses as noted below. But, it first made clear that it was basing its decision upon certain facts, the most important of which was that the district had disciplined Kennedy for three specific instances of post-game, on-field prayer that involved private, quiet prayer (i.e., Games 1-3), and not any post-game prayers before that. With that, the Court addressed the constitutional issues.

Free Exercise Clause

The Court concluded that the district's actions violated Kennedy's 1st Amendment right to freely exercise his religion. The general rule in this area is that the government may not unduly burden a person's sincerely-held religious beliefs or practices. One way it could do that is to apply rules to religious activities that are not equally applied to non-religious activities. In this case the Court said he was disciplined for engaging in personal religious activities while on duty, but other employees who engaged in similar non-religious personal activities while on duty were not disciplined. The Court gave the examples of employees speaking with friends, making a dinner reservation and briefly checking personal email while at work. Of course, the district's response was that it was concerned about violating the Establishment Clause.

Free Speech Clause

The general rule in this area is that public employees have the right to speak as a citizen on matters of public concern, but those rights may be outweighed by the public employer's interest in promoting operational efficiency. And, public employees generally have no right to free speech while they are engaged in the performance of their duties. The parties' legal dispute in this area boiled down to whether Kennedy's prayers were made as a private citizen (his argument), or whether his prayers were made during the performance of his job duties (the district's argument). The Court concluded that the prayers were private speech. It noted that other employees often engaged in quick personal business during the post-game period, such as calling their homes or speaking with friends in the stands. As above,

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Current Legal Challenges to HB 7 and HB 1557

By Sara Waechter, Assistant School Board Attorney

The close of the 2022 legislative session brought many changes to the educational landscape throughout the state. Two of the most impactful and widely discussed pieces of legislation were HB 7 and HB 1557. Since their implementation, several lawsuits have been brought challenging the constitutionality of HB 7 and HB 1557 in federal courts.

Currently, there are three pending challenges to HB 7, which prohibits teaching or business practices that, among other things, contend members of one ethnic group are inherently racist or that a person's status as privileged or oppressed is necessarily determined by their race or gender. In the first lawsuit, the trial court declared a portion of the law unconstitutional and issued a preliminary injunction blocking the law. That challenge was brought by private entities seeking to protect the right of private employers to "engage in open and free exchange of information with employees to identify and begin to address discrimination and harm" in their organizations. The trial court found that the new law violates free speech protections and is impermissibly vague. However, and importantly to note, the court's ruling and injunction only applied to the portion of HB 7 affecting private businesses. As applied to public schools, HB 7 has not been blocked and is still in effect.

The second lawsuit to HB 7 was filed by college professors and students claiming that the law amounts to "racially motivated censorship" that will "stifle widespread demands to discuss, study and address systemic inequalities." Similarly, the third lawsuit was filed by a group of K-12 teachers and a student claiming that the law violates free speech, academic freedom, and access to information in public schools. To date, there have been no pertinent rulings affecting HB 7's legal status in these lawsuits.

Likewise, HB 1557 also has lawsuits pending in federal trial courts. The first was brought by two families on behalf of their children, a senior high school student, and CenterLink (an association of LGBTQ centers). However, unlike the pending HB 7 lawsuits which have been brought against the State of Florida, this HB 1557 lawsuit presents a new legal twist in being brought against the local school boards (Orange, Indian River, Duval, and Palm Beach) charged with implementing the law's directives. On August 26, 2022, the plaintiffs' filed a motion for a preliminary injunction on the grounds that HB 1557 "impermissibly chills" their freedom of speech and is unconstitutionally overbroad and vague. The trial court has yet to rule on this motion.

In the second pending lawsuit, opponents of HB 1557 filed their challenge against various state and local defendants. On September 29, 2022 the trial court dismissed the case finding that the plaintiffs lacked standing and gave the plaintiffs 14 days to file a revised lawsuit.

Given the impact of HB 7 and HB 1557 on public school education across Florida, these cases are being closely monitored and any updates will be reported in upcoming volumes of *Legally Speaking*.

Maine Voucher Program Decision

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program violated the Free Exercise Clause of the First Amendment because it specifically excluded families from using the state funded tuition assistance at religious schools. In support of the decision, the Court relied on earlier decisions finding that States cannot withhold public benefits solely because the recipient is a religious organization. For example, in *Trinity Lutheran Church of Columbia, Inc.*, a children's learning center was denied a grant from the State of Missouri to resurface the playground because the facility was operated by a church. In *Espinoza v. Montana Department of Revenue,* families were denied the opportunity to use funds from a state sponsored scholarship program because they intended to use the scholarships at Christian schools. In both cases, the Supreme Court found the state programs unconstitutional.

In *Carson*, the dissenting opinions argued that the majority decision is contrary to the principles of separation of church and state as well as government neutrality in religious matters. In response, Chief Justice Roberts stated:

"…there is nothing neutral about Maine's program. The State pays tuition for certain students at private schools— so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally available public benefit because of their religious exercise." •

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the district argued that its concerns regarding the Establishment Clause justified its actions.

Establishment Clause

There are various tests the Court has applied over the years to determine when an Establishment Clause violation occurs. In this case, the Court said that the district was placing too much emphasis on tests that included an "endorsement" component, and upon the historically popular *Lemon* test. Rather, the Court said governmental entities must interpret the Establishment Clause by "reference to historical practices and understandings," and their actions must "accord with history and faithfully reflect the understanding of the Founding Fathers."

The Court recognized that the various clauses in 1st Amendment may cause tension at times, but it said that each clause must be read as equals to the others. However, at least in this case, the Court did not find any tension between the clauses because of the district's misapplied concerns regarding the Establishment Clause. The Court concluded: "And in no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights."

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This case reinforces the rights of public employees to engage in private religious activities, even at work, during times when the employees have a "brief lull" in their duties where they can engage in private activities.

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Reminder – Politicking in the Schools

As we approach the homestretch of the 2022 election season and the General Election on November 8th, please remember that certain rules apply to political activities on school grounds and other district property. In short, based upon Florida law and our own School Board policies, we must remain neutral in elections and cannot act in any way that would further the campaigns of political candidates or questions on the ballot.

For more information, please see our full article on this topic in the last issue of Legally Speaking (Vol. XXII, Issue 2) accessible here: ***https://www.pcsb.org/LegallySpeaking***

Welcome Sara Waechter

We are very happy to introduce our new-ish Assistant School Board Attorney, Sara Waechter. Sara started with us in May and jumped right into various areas of our department's operations and practice. She is highly qualified and brings over a decade of experience as a practicing attorney. Sara is a Pinellas County native and product of PCS, having graduated from St. Petersburg High School. If you have the pleasure of working with Sara on an issue, please welcome her to the District.

The School Board Attorney and Staff Attorney Offices would like to wish you and your families a Safe and Happy Fall and Holiday Season