

IN THIS ISSUE:

- *Supreme Court Chills Pro-Drug Use Message In Schools*..... 1
- *Diversity Ruling*..... 1
- *Special Education Cases Receive Supreme Court Attention* 2
- *School Facilities Use Policies Under Scrutiny*..... 3
- *Playing By The Rules*..... 3
- *Bible Bill Passed Into Law* 4

Supreme Court Chills Pro-Drug Use Message In Schools

On June 25, 2007, the United States Supreme Court handed down a split decision favoring an Alaskan school district in Morse v. Frederick, a highly publicized student free speech controversy commonly referred to as the "Bong Hits 4 Jesus" case.

In Morse, high school students were spotted unfurling a banner, displaying the message "Bong Hits 4 Jesus," while they were standing across the street from school grounds after being released to observe an Olympic Torch Relay. Consistent with the established school policy prohibiting such messages at school events, Principal Morse instructed the students to take down the banner, which she regarded as promoting drug use. When student Joseph Frederick refused to follow this directive, he was given a 10-day school suspension, which was upheld by the Superintendent.

Following this incident, Frederick sued the district claiming that the school's actions violated his First Amendment rights and that he could sue Principal Morse for personal damages. Subsequently, before reaching the Supreme Court for review, the Ninth Circuit Court of Appeals held that suspending Frederick for these actions was a violation of his First Amendment rights and that Principal Morse was not immune from personal liability for monetary damages.

Reversing the Ninth Circuit's decision, the Supreme Court held that school officials did not violate the First Amendment by confiscating the pro-drug use banner at a school event because schools may take steps to safeguard those entrusted to their care from speech that may reasonably be regarded as encouraging illegal drug

use. Reaching this conclusion, the Court first rejected Frederick's argument that the matter was not a school speech case because the event in question occurred during normal school hours and was sanctioned by the principal as an approved social event at which the district's student conduct policies applied. Second, the Court also noted that the banner statement may have two interpretations: (1) an imperative encouraging viewers to smoke or (2) celebration of drug use.

Third, in reasoning that administrators may restrict student speech at school when reasonably viewed as promoting illegal drug use, the Court reiterated that the constitutional rights of students in public schools are not automatically co-extensive with the rights of adults in other settings. In other words, because of the special characteristics of a school environment, schools have a compelling interest to regulate pro-drug messages. Finally, the Court called attention to the nation's drug use problem among youth and emphasized that to render any opinion to the contrary would be inconsistent with the legislation passed, regulations implemented, and millions of dollars spent in efforts to stop the epidemic. Additionally, because the Court ruled in favor of the school district and principal, it did not reach the issue of qualified immunity. Significantly, even the dissent expressed that Principal Morse would not be personally liable.

This case is a victory for school districts nationwide that are continually striving to ensure drug-free schools and protect students entrusted to their care.

Diversity Ruling

On June 28, 2007, the United States Supreme Court issued a ruling in the combined "diversity cases," Parents Involved in Community Schools v. Seattle School District No. 1 and Meredith v. Jefferson County Board of Education. Giving rise to this litigation, the Seattle school district had implemented a system which classified children as either "white" or "non-white," and used that classification to allocate slots in oversubscribed high schools. Similarly, the Jefferson County school district had classified children as either "black" or "other," and used the classification to make certain elementary school assignments and to rule on student transfer requests.

Opposing this practice, interested parties and parents whose children were or could be assigned under these plans filed suit alleging that these race-based allocations violated the Fourteenth Amendment Equal Protection guarantee. Issuing a split 5-4 decision, the Court held that the two school districts failed to show that classifying students by race and assigning them on that basis, as a means of

achieving racial diversity in the districts' schools, was not narrowly tailored enough to satisfy constitutional requirements.

Reaching this conclusion, the Court relied on previous cases which have held that governmental racial classifications must show an exact connection between the justification and the classification. Under this standard, the diversity plan must first be "narrowly tailored," meaning it only affects the smallest number of people necessary to achieve the goal and that race is not determinative across the board. Second, the plan must be necessary to achieve a "compelling government interest." Significantly, the Court recognized that at least two interests qualify as compelling: (1) remedying the effects of past intentional discrimination and (2) achieving "diversity in higher education." The Court, however, stated that neither of these interests was present in the cases at issue. Particularly, the Court noted that the effects of past discrimination were not a concern because the Seattle school district had never operated segregated schools and the Jefferson County school district had been judicially found to have eliminated the effects of prior segregation.

Because neither school demonstrated these compelling interests, the Court determined that any continued use of race classifications in these schools must be justified on some other basis, *e.g.*, diversity in education. The Court also stated that an individual racial classification plan would have to be necessary to achieve the districts' stated goals and adopted only after good-faith consideration was given to other feasible race-neutral alternatives.

What impact will this holding have on South Carolina public school districts? Clearly, local school districts will want to examine carefully this ruling if they have programs or attendance and transfer rules that classify students by race.

What the Court's decision makes clear, however, is its expectation for those districts not under desegregation orders that, even assuming racial diversity is a compelling interest, racial classifications be used only as a last resort after full and serious consideration of race-neutral alternatives. Given the extent of race-neutral statistical and demographic data now available to districts, it will be difficult for districts to demonstrate that explicitly racial admission classifications are necessary to achieving or maintaining diverse student populations.

Special Education Cases Receive Supreme Court Attention

Two important Individuals with Disabilities Education Act ("IDEA") cases received United States Supreme Court attention this year. On May 21, 2007, the Court issued a ruling in Winkelman v. Parma City School District, a case centered on whether parents have substantive rights under the IDEA. In addition, on February 26, 2007, the Court

granted certiorari in, and will therefore review, Board of Education of the City of New York v. Tom F., a case involving a district's responsibility to pay private school tuition under the IDEA in certain circumstances.

In federal court, parties may represent themselves *pro se*, meaning without a lawyer, but may not represent another party. In Winkelman, the Court addressed the issue of whether non-lawyer parents of a child with a disability could represent themselves in a federal court action reviewing a due process hearing officer's decision that the district provided their child a free appropriate public education ("FAPE") and the child's Individualized Education Plan ("IEP") was appropriate.

The Winkelmans argued that they should be allowed to represent themselves because, as they saw it, the IDEA provided them with a right to have their child receive a FAPE. They supported this argument by citing numerous procedural rights granted by the IDEA to parents in administrative hearings, the right of a "prevailing party who is a parent" to recover attorney's fees spent in a federal action, and the idea that prohibiting parents from bringing claims without legal representation would restrict their access to federal review of their claims.

In opposition to the parents' arguments, the district asserted that the right to a FAPE under the IDEA belongs only to the child. The district based this assertion on the fact that the IDEA expressly provides procedural rights to parents; therefore, if Congress had intended parents to have the substantive rights the parents claim, it would have provided those rights.

Resolving a split among the eleven judicial circuits, the Court issued a 7-2 ruling in favor of the Winkelmans holding that the IDEA grants parents independent, enforceable rights, which are not limited to procedural and reimbursement-related matters but encompass the entitlement to a FAPE for their child. In reaching this decision, the Court focused on the plain language of the IDEA text concluding that these various provisions afforded parents independent rights. The Court further reasoned that because parents have enforceable rights at the administrative stage, it would be inconsistent to bar them from continuing to assert those same rights in federal court at the litigation stage.

The Court also held that because parents enjoy rights under the IDEA, they are entitled to prosecute IDEA claims on their own behalf. In light of this holding, the Court did not reach the parents' argument concerning whether the IDEA entitles parents to litigate their child's claims without a lawyer.

Tom F. will provide the Court another opportunity to chart new territory in special education law regarding private school tuition reimbursements. The Court had previously decided in Burlington School Committee v. Massachusetts Department of Education that parents may receive reimbursement when they place their child in private schools

because of a disagreement over the appropriateness of the child's placement. In that case, the Court found that in order for parents to be entitled to reimbursement, the determination necessary under the IDEA would be that the district's placement of the child was inappropriate and the parents' private school placement was appropriate. In Tom F., the Court will decide whether parents are entitled to tuition reimbursement even when their child was never enrolled in public school during his entire school career.

The school board in Tom F. argues that a plain language reading of applicable federal law indicates that reimbursement is not available in cases where the child has never attended public school. However, the Second Circuit has said under similar circumstances that making students enroll in a public school first would place them in the "untenable position of acquiescing to an inappropriate placement in order to seek reimbursement from the public agency that devised the inappropriate placement." Attorneys anticipate making oral arguments during the fall, and a decision in this case is expected by the end of June 2008.

We will keep you updated on the progress of Tom F.

School Facilities Use Policies Under Scrutiny

On December 15, 2006, the Fourth Circuit Court of Appeals handed down a decision regarding the public use of school facilities that potentially has a major impact on facility use policies currently in place in South Carolina school systems. In the case, a school district had a policy that charged public organizations a fee to use its facilities. Under this policy, however, educational organizations were exempted from paying the fee, and certain other groups, specifically including the Boy Scouts and Girl Scouts, received fee waivers. The policy also included a provision to allow a fee waiver when the district deemed it to be in the school's best interest, although there was no evidence the district ever granted a fee waiver under this provision. Child Evangelism Fellowship sought a fee waiver pursuant to this provision, which was denied. Child Evangelism Fellowship then sued the school district alleging a violation of its First Amendment right to free speech.

The Fourth Circuit, agreeing that there had been an infringement on free speech, held that free speech is implicated in a subsidy situation, such as fee waivers, just as it would be in a physical ban from the property of one speaker but not another. The court viewed the fee as a restriction on access to the forum and determined that restriction for some speakers was equivalent to a governmental endorsement of one message over another.

The court's decision rests on district discretion and who was allowed to determine the best interest of the district. The court determined that this type of inquiry could permit the government to decide arbitrarily who pays for access to the forum and who receives the subsidy. The court further

determined that it did not matter if the district actually denied the fee waiver because of the speaker's message or not, as the fact that there is the potential for such abuse is enough to chill free speech and violate the First Amendment.

It is also important to note that intra-school mailing systems may be treated similarly for First Amendment purposes. Therefore, if a school district has a policy of selectively choosing which groups may use the school mail system and which groups may not, then the district could be opening itself up to litigation. Decisions about what is and is not to be distributed must be clear on the face of the policy so that a person would know immediately if its document would or would not be allowed.

Playing By The Rules

On June 21, 2007, the United States Supreme Court, in its second review of Tennessee Secondary School Athletic Association v. Brentwood Academy, issued a unanimous ruling which may affect the way athletic association rules are enforced across the country, ultimately impacting the recruiting efforts of public and private high school coaches nationwide. In this decision, the Court held that enforcing a rule that prohibits high school coaches from recruiting middle school athletes does not violate the First Amendment.

This long-standing dispute between the Tennessee Secondary School Athletic Association ("TSSAA") and Brentwood Academy ("Brentwood"), a Nashville, Tennessee private school commonly regarded as a football powerhouse, originated ten years ago after the TSSAA sanctioned Brentwood for permitting a football coach to send a letter to a group of eighth-grade boys inviting them to attend spring practice sessions. Specifically, the letter from the coach explained that football equipment would be distributed and that "getting involved as soon as possible would definitely be to their advantage." Although the letter was distributed to boys who had signed a contract of intent to attend Brentwood, these athletes had not formally enrolled, and the TSSAA considered this pre-enrollment solicitation to be in violation of its anti-recruiting rule, which prohibited high schools from using "undue influence" in recruiting middle school students of athletic programs.

Opposing the resulting sanction that excluded it from participation in basketball or football play-offs for two years, Brentwood filed suit against TSSAA claiming that enforcement of the anti-recruiting rule was state action in violation of the First and Fourteenth Amendments and that TSSAA's flawed adjudication and investigation of the violation deprived the school of due process.

The Supreme Court resolved this decade-long dispute by siding in favor of the TSSAA and holding that the enforcement of the anti-recruiting rule and following sanction did not violate Brentwood's free speech or due process rights. In reaching this decision, the Court pointed out that Brentwood made a voluntary decision to join the TSSAA and abide by its rules and that an athletic league's

interest in enforcing its rules sometimes warrants curtailing the speech of voluntary participants. Although the Court noted that TSSAA did not have unlimited authority to condition membership on the relinquishment of constitutional rights, it credited TSSAA's conclusion that "hard-sell tactics directed at middle school students could lead to exploitation, distort competition between high school teams, and foster an environment in which athletics are prized more highly than academics." Supporting this conclusion, the Court further reasoned that that TSSAA's anti-recruiting rules precisely discouraged those types of harms, which could prevent a high school sport's league from operating efficiently and effectively.

While this decision may not have a direct impact on South Carolina high schools at the moment, it is critical that school administrators and coaches comply with the proscribed rules and regulations of their respective sports associations and leagues. Perhaps the moral of the story was best articulated by a dissenting judge in the lower court's opinion: "High School Football is a game, and games have rules."

Bible Bill Passed Into Law

On June 21, 2007, Governor Mark Sanford signed into law what has been referred to by several opponents and the media as a bill to allow South Carolina schools "to teach the Bible." It is debatable, however, as to whether this description accurately characterizes the recently passed legislation.

Pursuant to what will be S.C. Code Ann. § 59-29-230, the board of trustees in any school district may offer an elective course teaching the history and literature of the Old and New Testament of the Bible. While those opposing the legislation have expressed concerns that the new law will allow the Christian community to push their faith on students and blur the lines between separation of church and state, the statute clearly proscribes that courses are optional and are to be taught in an "objective manner with no attempt to influence students as to the truth or falsity of the materials presented." Additionally, while local boards will have the authority to recommend a particular version of the Old and New Testament for classroom use, students will not be required to use the recommended version.

Significantly, boards that choose to offer the courses will be charged with maintaining supervision and control of these classes. Boards will also be responsible for hiring teachers qualified to teach the materials and assuring that those teachers have proper state certification. Importantly, boards must keep in mind that inquiries regarding a teacher's religious beliefs or lack thereof are strictly impermissible.

The State Board of Education is required to develop and adopt academic standards and appropriate instructional materials for the courses which must do the following:

- ensure that the courses do not disparage or

- encourage a commitment to a set of religious beliefs;
- help students gain a greater appreciation of the Old and New Testament as great works of literature, art, and music;
- assist students in gaining a greater insight into the many historical events recorded in the Old and New Testament;
- provide students with a greater awareness of the social customs contained in the Old and New Testament; and
- establish that the Old and New Testaments are the primary text for the courses exploring those eras.

Under these academic standards, students may also be assigned secular literary and historical materials as course supplements.



We are pleased to announce that Matthew J. Myers and Jasmine S. Rogers have joined the firm as associates. Matt was admitted to the South Carolina bar in 2006 and received his J.D. from the University of South Carolina School of Law in 2006 and his B.A. in economics, *cum laude*, from the University of South Carolina Honors College in 1999. Prior to law school, he worked as a commercial loan officer at Carolina First Bank. Jasmine was admitted to the Georgia Bar in 2006 and the South Carolina Bar in 2007. She received her J.D. from the University of Tennessee College of Law in 2006 and her undergraduate degree from the University of Virginia in 2002.



CHILDS & HALLIGAN, P.A.

A Professional Association
Attorneys and Counselors at Law

- | | |
|----------------------|---------------------------|
| Kenneth L. Childs | Thomas K. Barlow |
| William F. Halligan | Allison Aiken Hanna |
| Kathryn Long Mahoney | Keith R. Powell |
| Allen D. Smith | Connie P. Jackson |
| Shirley M. Fawley | Kimberly Kelley Blackburn |
| John M. Reagle | Matthew J. Myers |
| Vernie L. Williams | Jasmine S. Rogers |

The SCHOOL LAW NEWSLETTER is published twice yearly by Childs & Halligan, P.A., The Tower at 1301 Gervais, Suite 900, P.O. Box 11367, Columbia, SC 29211, (803) 254-4035, and is designed only to give general information on the developments actually covered. It is not intended to be a comprehensive summary of recent developments in the law, to treat exhaustively the subjects covered, or to provide legal advice or render a legal opinion.