School Law Legal Update

Tara B. Brandner
General Counsel

Disclaimer

This presentation is not intended as legal advice.

The information provided in this presentation and any comments or materials are for educational purposes only and should not be considered legal advice or legal opinion.

Please consult with your board’s general counsel for legal counsel as needed.

Agenda

1. United States Supreme Court Cases
    a) School Choice
    b) Board Member Censure
    c) Religious Expression by Employees
2. Questions

School Choice

Espinoza v. Montana Dept. of Revenue

Facts:

In 2015, the Montana Legislature created a scholarship tax credit program that provided tax credits to individuals and businesses who donate to scholarship-granting organizations. The funds from these organizations could be used by families to send their children to private schools.

However, the Montana Constitution includes a “no-aid provision” which prohibits public support for religious or sectarian institutions. In order to reconcile the tax credit program and the Constitutional provisions, the Montana Department of Revenue promulgated a rule prohibiting families from using the scholarships to send their children to religious schools.

Espinoza v. Montana Dept. of Revenue

Facts:

In 2018 the Montana Supreme Court ruled that under the no-aid provision, the state could not operate its scholarship tax credit program, as some recipients would use the scholarships which were funded by public tax credits, to attend religious schools.

Montana parents sued, arguing that the scholarship program discriminated against them based on their religion by prohibiting them from using the scholarships to send their children to schools aligned with their religious values.

Espinoza v. Montana Dept. of Revenue

Legal Precedent:

At the time of the ruling, Montana was one of at least 37 states with “no-aid provisions.” The Supreme Court has repeatedly ruled that religious organizations can receive neutrally distributed government benefits. In 2017, the Supreme Court ruled that the exclusion of religious institutions from state grant programs “solely because of…religious character” discriminates based on religious status and is unlawful. *See Trinity Lutheran Church of Columbia, Inc. v. Comer*

In both 1983 and 2002, the Supreme Court upheld state programs that provided tax deductions for private school tuition expenses and funded voucher programs for students to attend private schools, including religious schools. In 2010, the Supreme Court declined to rule of the merits of the First Amendment question.

Espinoza v. Montana Dept. of Revenue

Issue:

Whether religious schools can receive state funding through school choice programs and can states exclude such schools from school choice funding?

Espinoza v. Montana Dept. of Revenue

Holding:

The Court held that Montana's application of its no-aid provision to its scholarship tax credit program discriminates against religious schools and parents who wish to sent their children to religious schools.

Espinoza v. Montana Dept. of Revenue

Applicability:

The decision establishes a uniform standard of interpretation for state no-aid provisions prohibiting most states from excluding religious schools in their school choice programs.

Establishes precedent that is likely to strike down school voucher programs and other state programs that exclude religious schools and institutions.

Carson v. Makin

Facts:

Maine is one of the least densely populated parts of the United States. As a result, Maine relies on local school administrative units (SAU) but not every SAU operates its own public secondary school. In order to ensure all school age children, have access to a free education and are not required to commute significant distances, an SAU may either (1) contract with a secondary school to provide privileges, or (2) pay the tuition of a secondary school.

In both instances, the secondary school must be either a public school or an “approved” private school. In order to be approved, schools must be both accredited and “nonsectarian in accordance with the First Amendment.”

Carson v. Makin

Facts:

Three families live in SAUs that do not operate a public secondary school of their own but instead provide tuition assistance to parents seeking to send their children to “approved” private schools. Each of the three families opted to send their children to private schools that were accredited but did not meet the nonsectarian requirement due to their religious affiliation. As a result, the schools are not “approved” and therefore do not qualify for tuition assistance.

The families filed a lawsuit in federal court arguing the nonsectarian requirement violates the United States Constitution both on its face and as applied. The US District Court granted summary judgment for the Maine and dismissed the case. The Fifth Circuit affirmed the District Court decision and noted that it had twice before rejected similar challenges and while the US Supreme Court had decided two relevant cases in the interim, those cases do not produce a different outcome.

Carson v. Makin

Issue:

Does the “nonsectarian” requirement for otherwise generally available tuition assistance payments violate the Free Exercise Clause of the First Amendment?

Carson v. Makin

Holding:

On June 21, 2022, the Supreme Court ruled in a 6-3 decision that Maine cannot exclude religious institutions from public funding simply because they are religious. The nonsectarian requirement for otherwise generally available tuition assistance payments violates the free exercise clause of the First amendment.

Carson v. Makin

Applicability:

The decision creates further momentum in the direction of school choice and provides direction that any statutes limiting monetary relief to non-sectarian schools are likely unconstitutional.

Board Member Censures

Houston Community College System v. Wilson

Facts:

The Houston Community College System operates community colleges throughout the greater Houston area. The System is run by a Board of nine trustees that are elected by the public to serve a six-year term without renumeration.

David Wilson was elected to the Board on November 5, 2013. Wilson often strongly disagreed with other Board members on the issues before them. In addition, he brought a lawsuit challenging the Board's actions. By 2016, the disagreements led the Board to reprimand Wilson publicly, but his actions did not stop.

Houston Community College System v. Wilson

Facts:

Wilson charged the Board in various media outlets of violating its bylaws and ethical rules, he arranged robocalls to publicize his views; he hired a private investigator to surveil another Board member; and he initiated two more lawsuits. The two lawsuits Wilson filed cost the System over $20,000 in legal fees on top of the more than $250,000 legal fees incurred due to the earlier litigation.

Houston Community College System v. Wilson

Facts:

In 2018, the Board adopted another public resolution censuring Wilson. The resolution stated that Wilson's conduct was "not consistent with the best interests of the college," and "not only inappropriate, but reprehensible." The Board also imposed penalties, stating that Wilson would be ineligible for election to Board officer positions for the 2018 calendar year, was ineligible for reimbursement for System related travel and future requests to access funds would require Board approval. The Board also recommended that Wilson "complete additional training relating to governance and ethics."

Wilson amended the pleadings in one of his pending lawsuits to add claims against the System and Board members under 42 USC 1983 asserting that the 2018 censure violated the First Amendment

Houston Community College System v. Wilson

Facts:

The case was removed to federal court, and Wilson dropped his colleagues from the suit, leaving HCC as the sole defendant. The district court granted a motion to dismiss the complaint on the ground that Wilson lacked Article III standing. The Fifth Circuit reversed, holding that a public “reprimand against an elected official for speech addressing a matter of public concern is an actionable First Amendment claim under § 1983,” but other punishments such as limiting access to funds “did not violate his First Amendment rights” because Wilson did not have an “entitlement” to those privileges.

Houston Community College System v. Wilson

Issue:

Does the First Amendment restrict the authority of an elected body to issue a censure resolution in response to a member’s speech?

Houston Community College System v. Wilson

Holding:

In a 9-0 decision, the Supreme Court determined David Wilson did not possess an actional First Amendment claim arising from his purely verbal censure by the Board of Trustees of the Houston Community College System.

Houston Community College System v. Wilson

Applicability:

Review your board member code of conduct policies with legal counsel.

Employee Religious Expression

Kennedy v. Bremerton School District

Facts:

Joseph Kennedy was a football coach at Bremerton High School. He made it a practice to give “thanks through prayer on the playing field” at the end of each game, by taking a knee at the 50-yard line and praying quietly for about 30 seconds. At first, he prayed on his own but later some of the players joined him.

On September 17, 2015, when the school district learned about this practice it sent Kennedy letter asking him to cease several prayer-related activities that had been taking place. On October 14, Kennedy’s legal counsel sent school officials a letter informing them that he felt “compelled” by his “sincerely-held religious beliefs” to continue his post-game prayer at midfield and asking that he be allowed to continue doing so alone.

Kennedy v. Bremerton School District

Facts:

The district responded through an October 16 letter forbidding Kennedy from engaging in “any overt action” that could appear to a reasonable observer to endorse . . . prayer . . . while he is on-duty as a District-paid coach. That same day, following a football game Kennedy offered a prayer at midfield. He was alone at first, but players from the other team and members of the community joined him before he concluded.

On October 23, Kennedy again knelt and prayed at the 50-yard line, and no one joined him. Similarly, on October 26 Kennedy again knelt alone at midfield to pray while his players were otherwise occupied. While he was praying, other adults gathered around him. Shortly after the October 26 game, the district placed Kennedy on paid administrative leave. The district gave Kennedy a poor performance evaluation and advised against rehiring him. Kennedy did not return for the next season.

Kennedy v. Bremerton School District

Facts:

Kennedy sued in federal court, alleging that the district's actions violated the First Amendment's Free Speech and Free Exercise Clauses and moved for a preliminary injunction requiring the district to reinstate him. The District Court denied the motion, the Ninth Circuit affirmed, and the Supreme Court denied his cert petition.

The District Court then granted summary judgment to the District and the Ninth Circuit affirmed.

Kennedy v. Bremerton School District

Issue:

Does prayer during a school sports activity constitute protected speech, and if so, can a school district prohibit it to avoid violating the Establishment Clause?

Kennedy v. Bremerton School District

Holding:

In a 6-3 vote, the Court held that a school district violated the Free Speech and Free Exercise Clause rights of a football coach when it sanctioned him for kneeling and saying a prayer at midfield alone after the game ended.

Kennedy v. Bremerton School District

Applicability:

Be incredibly careful when disciplining employees for activities that could be protected by the First Amendment.

Questions?

Tara B. Brandner

General Counsel
Fargo Public School District
701.466.1078