



National School  
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# LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

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## Schools and the Supreme Court: Key decisions of 2009-10

By Sonja Trainor

When the U.S. Supreme Court completed its work in late June 2010, it had issued landmark decisions regarding corporate campaign contributions and gun rights, but no decisions directly involving a K12 public school district. Yet the 2009 term produced decisions of great importance to schools in their roles as public entities, employers, and educational institutions. This issue of *Leadership Insider* reviews these rulings and provides a preview of cases of importance to school districts that the Court will consider in 2010.

A crucial part of NSBA's role as legal advocate for public school boards is the amicus (friend of the court) program operated by the Office of the General Counsel. In conjunction with its state school boards associations and Council of School Attorneys members, the NSBA legal staff carefully tracks cases of importance to schools and, with the approval of the Executive Committee, files amicus briefs at the appellate and Supreme Court levels arguing the policy implications of issues before the court. The briefs are written pro bono by private attorneys or by NSBA staff attorneys. In the Supreme Court's 2009 term, each of the three cases in which NSBA filed amicus briefs was decided favorably toward public schools.

### The Supreme Court's October 2009 term: What decisions affected public schools?

The court's rulings in the following cases may affect your work—as you formulate policy, make employment decisions, and interact with members of the public.

### *Christian Legal Society Chapter of the University of California, Hastings College of Law v. Martinez (June 28, 2010)*

In this case, the Court was asked to consider whether a public law school may have a policy requiring school-recognized student groups not to discriminate on the basis of categories protected by law, even if such a policy arguably burdens a religious group's First Amendment rights. A narrow majority of the Court (5-4) decided that it may.

Hastings College of Law in California allows a student group to be a Registered Student Organization (RSO)—thereby obtaining access to school funds and facilities—if it agrees to comply with the school's nondiscrimination policy, which the school interprets to require acceptance of all comers. The Christian Legal Society's (CLS) bylaws require members and officers to sign a "statement of faith" affirming belief in Christian tenets and agreeing to conduct their lives according to prescribed principles. Hastings interpreted CLS's bylaws to be out of compliance with the nondiscrimination policy, as they bar students based on religion and sexual orientation. It rejected CLS's application to join the school's RSO program, as well as its requested exemption from the policy. CLS claimed that the school's refusal violated its First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.

The Supreme Court decided that a public law school could condition access to a student organization forum on compliance with an all-comers policy without violating the U.S. Constitution. It

explained that the SRO program at Hastings was a limited public forum, but its restriction on First Amendment rights was reasonable and viewpoint neutral. The Court left open the possibility that CLS could argue on remand that Hastings' policy has been selectively enforced (against CLS and not against other groups that restrict membership), and is therefore pretext for discrimination.

In his strong dissent, joined by three other justices, Justice Alito opined that Hastings' policy substantially burdens religious groups' freedom of association, and is not viewpoint neutral because "religion is a viewpoint from which ideas are conveyed." Alito suggested that CLS had been targeted because its viewpoint was out of favor with the prevailing sense of political correctness on campus. He found strong evidence in the record that the all-comers policy was announced as a pretext and criticized the majority for failing to address the issue.

Public schools often feel the tension

### NSBA'S AMICUS BRIEF URGED THE COURT TO ...

... consider the effect of its decision on K-12 public school districts, which should have the authority to institute similar across-the-board anti-discrimination policies, if they so choose. The brief cited social science research showing that participation in extracurricular activities improves academic achievement, noting that such participation free from discrimination gives students opportunities to develop social and leadership skills that advance democracy. Check out the brief at [www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/Christian-Legal-Society.aspx](http://www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/Christian-Legal-Society.aspx).

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## About NSBA

The National School Boards Association is the nationwide advocacy organization for public school governance. NSBA's mission is to foster excellence and equity in public elementary and secondary education in the United States through local school board leadership. Founded in 1940, NSBA is a not-for-profit federation of state associations of school boards and the school boards of the District of Columbia, Hawai'i, and the U.S. Virgin Islands.

For more information, visit [www.nsba.org/na](http://www.nsba.org/na).

## About the National Affiliate Program

The National Affiliate Program extends NSBA's services directly to local school districts.

School districts are eligible to join, provided they are members in good standing of their state school boards associations.

## About the Council of School Attorneys

The Council of School Attorneys provides information and practical assistance to attorneys who represent public school districts. It offers legal education, specialized publications, and a forum for the exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

between the conflicting rights addressed in this case. On one side is the right to be free from category-based discrimination, harassment, and exclusion; on the other, the right to speak according to one's conscience, to engage in public debate on important issues, and to express sincerely held religious beliefs without fear of suppression. The Court decided that the school had made a reasonable choice in resolving this tension: "Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting *all* organizations to express what they wish but *no* group to discriminate in membership." Public school boards now have strong authority supporting a decision to implement a reasonable, viewpoint-neutral anti-discrimination policy that may incidentally burden First Amendment rights.

## City of Ontario v. Quon (June 17, 2010)

This case presented the justices with an opportunity to define the limits of a public employer's ability to monitor electronic communications of employees on employer-issued equipment. The Court declined to address many of the "issues of far-reaching significance," however. It decided the case on the simple issue of whether the department's review of the employee's messages was reasonable.

Sgt. Jeff Quon, a SWAT team member, was issued a police department pager with texting capabilities. Each pager was allotted a limited number of characters sent or received each month; any usage in excess of that limit would be charged an additional fee. Quon had previously signed an acknowledgement that he had read and understood the department's written policy stating that the department reserved the right to monitor all Internet and e-mail use, and that employees have no expectation of privacy in such communications. The department made it clear in oral statements and by memorandum that the policy covered text messages. The lieutenant in charge of the department's contract with the service provider told Quon, however, that his pagers and texts would not be audited if he exceeded the monthly limit, as long as he paid the department for the overages.

After several months of overages, the police chief decided to determine whether the current character limit was too low, or if the overages were for personal messages. At the department's request, the service provider produced transcripts of Quon's

text messages for two months. An internal investigation revealed that the vast majority of Quon's text messages during work hours were not work related, and that many were sexually explicit. He was disciplined for violation of department rules.

Quon's suit against the department claimed that officials had violated his Fourth Amendment right against unreasonable search and seizure by obtaining and reviewing transcripts of his electronic communications.

The Court determined that the chief's stated purpose for reviewing the messages was a "legitimate work-related rationale," and that the search was reasonable in scope. The review of the transcripts was not "excessively intrusive" because it was limited to only two months in which Quon exceeded the limit rather than all the months he did. "As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications." The Court also noted that the department viewed Quon as having only a limited expectation of privacy in his texts, lessening the risk that the review would intrude on private details of his life.

Of particular importance to school districts is the Court's reluctance in *Quon* to rule on what constitutes a reasonable expectation of privacy in electronic communications sent through an employer's equipment. Here, the very clear written policy of the department stated that employees do *not* have a reasonable expectation of privacy in such communications. If its policy statement is not enough, thereby making any review of employee e-mail a Fourth Amendment search, just what purpose is served by the policy? *Quon* suggests that a court may consider such policies when deciding whether an employer review of communications is reasonable. Conservatively, however, you

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... recognize that the setting and public nature of school employee electronic communications indicate that there should be no expectation of privacy. The interest of a school board in reviewing such communications extends beyond the operational realities of the workplace to the crucial concern of student safety. Check out the brief at [www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/City-of-Ontario-v-Quon.aspx](http://www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/City-of-Ontario-v-Quon.aspx).

should assume that employees will have an expectation of privacy in such communications, and any search or review of them will have to be reasonable.

### **Perdue v. Kenny A. (April 21, 2010)**

Attorneys for nine Georgia foster children filed suit against state and local agencies and individuals, alleging that foster child services in two Georgia counties were inadequate. The parties negotiated a settlement, after which the plaintiffs filed suit to recover attorney's fees and costs under the federal statute that allows a court to award "reasonable" attorney's fees for prevailing parties in civil rights actions.

After using the "lodestar" method for determining reasonable attorney's fees (number of hours multiplied by the hourly rates prevailing in the community), the district court enhanced the award by 75 percent for a total of \$10.5 million. The U.S. Court of Appeals for the 11th Circuit affirmed the award under its own precedents.

The Supreme Court decided that the calculation of an attorney's fee may be increased due to superior performance, but only in extraordinary circumstances. In this case, it found that the district court did not properly justify the 75 percent enhancement. The Court's ruling appears to prevent fee enhancements from becoming the rule in cases in which a party may recover attorney's fees. It should assist school districts trying to determine whether a settlement in such a case (such as certain special education or employment discrimination matters) is in the district's best interest.

#### **NSBA'S AMICUS BRIEF URGED THE COURT TO ...**

... limit attorney's fee enhancements. School districts are frequent targets of litigation under federal statutes with fee-shifting provisions. NSBA's brief highlighted the budgetary constraints faced by school districts, exacerbated by litigation of any kind and further exacerbated by attorney's fees awards.

### **Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson (March 30, 2010)**

The False Claims Act (FCA) permits a private person to file a lawsuit and obtain a money judgment by alleging that a person or entity has filed fraudulent claims for payment against the United States. The whistleblower may share in a percentage of

the proceeds from the suit, but cannot base his or her action on allegations or transactions that are made public by the government.

In *Graham County v. Wilson*, the Supreme Court decided that the FCA's bar on suits based on allegations that had been publicly disclosed may be triggered by state or local government disclosures, not just by those made at the federal level.

As Justice Stevens noted in the Court's decision, however, the new Patient Protection and Affordable Care Act amends the FCA to limit the public information ban to federal sources and expands which whistleblowers will be considered "original sources," making FCA suits easier to file. A whistleblower may be able to bring an FCA suit based on information learned in a state or local administrative proceeding in some circumstances. School districts have recently settled large FCA claims.

### **Lewis v. City of Chicago (May 24, 2010)**

Employers across the country may be re-examining the ongoing effects of their employee selection processes after the Court's decision in *Lewis v. City of Chicago*. The Court decided 9-0 that job applicants who do not file a timely charge challenging the adoption of an employment practice may assert a disparate impact claim at a later time challenging the employer's later application of that practice.

Here, the city of Chicago had administered a screening exam. Periodically, the city would pull applicants who scored in a certain range on a test, making them eligible for the next phase of the process. Some African-American applicants claimed that this approach had a disparate impact on them.

*Lewis v. City of Chicago* allows employees and prospective employees more time to determine whether a practice has a disparate impact on them, as the clock restarts each time a particular practice is "applied." If your board uses an employment screening tool, it may be a good time to examine whether it has a disparate impact on individuals based on characteristics such as race and sex.

### **Doe v. Reed, (June 24, 2010)**

In a case that may have implications for school districts in their role as public bodies, the Court decided in *Doe v. Reed* that, as a general matter, the public disclosure of a referendum petition, which contained signers' names and addresses, did not violate the First Amendment.

School districts facing objections from

members of the public for modest burdens on speech, such as the requirement that they identify themselves before speaking at a board meeting, can now point to this decision for the proposition that disclosure requirements do not necessarily violate the First Amendment.

## **Briefly Noted**

### **Do you and your lawyer know about the Coverdell Teacher Liability Protection Act?**

Coming Spring 2011: Join us for an informative webinar on this somewhat obscure, but potentially valuable federal statute that provides immunity for school personnel. Attorneys from Husch Blackwell Sanders in Kansas City will provide an overview of the act in the context of the case they are currently presenting before the Missouri Supreme Court.

NSBA is joining the Missouri School Boards Association to file an amicus brief in this case. You'll find it at [www.nsba.org/schoollaw](http://www.nsba.org/schoollaw) under Amicus Briefs.

### **A new justice takes the bench**

Elena Kagan, sworn in as the Court's 112th member on August 7, replaces retiring Justice John Paul Stevens and becomes the fourth woman appointed to the Court. After an illustrious career as a law professor, dean of Harvard Law School, policy advisor to President Clinton, and President Obama's Solicitor General, Kagan settles in to her lifetime appointment on the nation's highest court. Although justices have surprised us in the past, Kagan is not anticipated to change the ideological makeup of the Court.

### **Key appellate cases to watch**

The U.S. Court of Appeals for the 3rd Circuit is expected to issue rulings from all of its sitting judges in a case that could provide much-needed guidance on the reach of school officials' authority to regulate off-campus online speech. A ruling by the 3rd Circuit only would be binding in Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands, but the Supreme Court could eventually hear the case. Stay tuned to NSBA's Legal Clips for updates on *J.S. v. Blue Mountain School District* and *Layshock v. Hermitage School District* at <http://legalclips.nsba.org>.

# Cases to watch in the 2010 term

By Katie Demedis and Dana Russo

## Do tax credits that fund mostly religious schools violate the establishment clause?

In *Winn v. Arizona Christian School Tuition Organization*, the U.S. Supreme Court will decide whether Arizona taxpayers may challenge the state's tax credit scheme for contributions to "school tuition organizations" (STOs) that give scholarships to students attending private school and whether the tax credits violate the Establishment Clause. In practice, many STOs limit the schools to which they offer scholarships and a number of STOs only provide scholarships for use at religious schools.

Groups on both sides of the voucher debate are waiting to see not only which side wins this case but also how the Court applies Establishment Clause precedent to these facts. If the plaintiffs lose, Arizona tax dollars will continue to be channeled toward private religious schools, decreasing the amount of revenue available to the state's public schools.

NSBA has filed an amicus brief in this case, which is available at [www.nsba.org/schoollaw](http://www.nsba.org/schoollaw) under Amicus Briefs.

## May employers be liable as "cat's paws" for the bias of a supervisor?

In *Staub v. Proctor Hospital*, the Court will decide whether an employer can be liable for the discriminatory intent of a supervisor who does not make the actual decision to take an adverse employment action, but influences the decision with discriminatory hostility. Under this theory, an employer would be liable even though it had no discriminatory intent of its own, but acted as the "paw" of the discriminating "cat" supervisor. School boards are likely targets for "cat's paw" cases because they almost always rely on the advice of supervisors when making employment decisions.

NSBA has filed an amicus brief in this case, which is available at [www.nsba.org/schoollaw](http://www.nsba.org/schoollaw) under Amicus Briefs.

## May FLSA retaliation claims be based on oral complaints?

In *Kasten v. Saint-Gobain Performance Plastics Corporation*, the Court will decide whether the anti-retaliation provision of the Fair Labor Standards Act (FLSA) protects an oral complaint of a violation. If the Supreme Court holds the FLSA anti-retaliation provision applies to unwritten verbal

complaints, school boards and other employers will have to modify anti-retaliation policies and practices to treat unwritten complaints as protected by the FLSA.

## Does Title VII provide a cause of action for retaliation against third parties?

In *Thompson v. North American Stainless*, the Court will decide whether a closely associated third party, such as a spouse, may bring a federal employment discrimination lawsuit for retaliation where an employee engaged in protected activity and the employer retaliated against the third party. If the Court decides that such third-party claims are allowable, it will be more difficult to take adverse employment actions against the spouse, relatives, and friends of any employee who has recently brought employment discrimination charges. Third-party retaliation claims might be more likely in school districts because they are often one of the largest employers in the community, and numerous relatives may work for the district.

Katie Demedis and Dana Russo are interns with the National School Boards Association's Office of the General Counsel in Alexandria, Va.

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