

Inside School Law

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Sensible strategies and preventive practices for NSBA National Affiliates

Supreme Court Update

Recent decisions that could affect your schools

By Julie Underwood, General Counsel,
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A new school year brings new teachers, new students—and, sometimes, new legal challenges. Knowing how the Supreme Court has ruled in recent cases can help you steer clear of trouble on such controversial issues as religion and parents' rights. Here's a brief update on important High Court decisions:

Religion

Santa Fe Independent School District v. Doe (Texas)

School-sponsored prayer at the opening of high school football games violates the establishment clause. In this case, students voted whether to have an invocation and selected the student to deliver the message or invocation. The practice was found to be school-sponsored and thus unconstitutional.

This decision emphasizes the clear rule that school-sponsored prayer is unconstitutional. School board members who fail to heed this clear direction might lose their immunity in a case brought under Section 1983 of the Federal Civil Rights Act of 1871. The decision also could have an impact on other student events, such as graduation ceremonies.

Mitchell v. Helms (Louisiana)

Private religious schools can receive government aid in the form of computer hardware and software. The court's plurality opinion stated that if the aid is neutral, there is no violation of the establishment clause.

This ruling reversed two earlier Supreme Court decisions that denied similar types of

aid (maps, charts, overhead projectors, and other instructional materials) to religious schools. Essentially, this decision makes it easier for states to provide sophisticated technology to private and religious schools.

Parents' Rights

Troxel v. Granville (Washington)

A state law that gave anyone the right to petition for visitation with children was ruled unconstitutional. The court reaffirmed the right of parents to make decisions about the upbringing of their children.

Many school requirements might appear to infringe on parents' rights, including required vaccinations, compulsory attendance, and curricular requirements. To avoid challenges, schools should clearly articulate the educational purpose of their policies, stating the policy's educational goal and why the required action either is not within the parent's rights or should supercede them.

Freedom of Association

Boy Scouts of America v. Dale (New Jersey)

Boy Scouts have a First Amendment right to exclude homosexuals as scout leaders. The court did not approve or disapprove of the Boy Scouts' view of homosexuality, but found that the private group should not be forced "to accept members where such acceptance would derogate from the organization's expressive message."

The ruling is likely to lead to pressure on public schools to end sponsorship of Boy

Scout troops. However, schools should still treat the organization as they would any other community group for the purpose of providing meeting space.

Voting Rights Act

Reno v. Bossier Parish School Board (Louisiana)

The federal government may not withhold approval of voting changes for state and local elections unless those changes are intended to or actually do leave minorities in a worse electoral position than before.

Employment

Kimel v. Florida Board of Regents (Florida)

The Age Discrimination in Employment Act (ADEA) of 1967 does not cover the states and political subdivisions considered arms of the state. The statute prohibits discrimination against workers who are at least 40.

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Sensible strategies and preventive practices for NSBA National Affiliates

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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 across the United States and the school boards of the District of Columbia, Guam, Hawaii, and the U.S. Virgin Islands.

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 association.

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 exchange of information, and it supports the legal advocacy efforts of the National School Boards Association.

Displaying the Ten Commandments

By Julie E. Lewis, Staff Attorney, National School Boards Association

Under the First Amendment, public schools must remain neutral toward all religions and between religion and non-religion. The U.S. Supreme Court has ruled repeatedly that the principles of the separation of church and state embodied in the Establishment Clause and the Free Exercise Clause of the First Amendment permit individual or group prayer, but prohibit school-sponsored prayers and religious exercises. It makes no difference that the prayer is nondenominational and participation is voluntary. For example, a prayer endorsed by the New York State Board of Regents for use in public schools was ruled unconstitutional (*Engle v. Vitale*, 370 U.S. 421 (1962)), as was a state statute requiring readings from the Bible (*School District of Abington Township v. Schemp*, 374 U.S. 203 (1963)), even if students were not required to engage in such prayers. In June 2000, the U.S. Supreme Court ruled in *Santa Fe Independent School District v. Doe* that prayer led publicly by a student before a high school football game was essentially school-sponsored and therefore a violation of the Establishment Clause. (See "Supreme Court Update," page 1.)

Recently, there has been a flurry of debate regarding the Ten Commandments and whether or not schools may post them on campus, distribute them on school supplies, or include them on a sports complex wall in exchange for a donation. In a case called *Stone v. Graham* (449 U.S. 39 (1980)), the Supreme Court declared unconstitutional a Kentucky statute requiring the posting of the Ten Commandments on the walls in public school classrooms in that state. However, it is important to note that it was the statute itself—not the posting of the Ten Commandments—that was declared unconstitutional in *Stone*.

The Supreme Court held in *Abington* that public schools may teach students about the Bible as long as such teaching is "presented objectively as part of a secular program of education." As such, public schools should adhere to that precedent when teaching about the Ten Commandments. A school's approach to religion should be academic, not devotional. In addition, while schools may expose students to a diversity of religious views, they may not impose, discourage, or encourage any particular view.

School districts that want to post the Ten Commandments should be prepared to answer several questions to establish that they are providing equal access to all religions and not discriminating against or favoring one religion:

1. What is the motive? Is there a secular purpose, or is the school district advancing or inhibiting religion?

2. Is the district favoring one religion over another?

3. Is there excessive entanglement between church and state? That is, is the posting of the Ten Commandments sponsored by the school district? If a district wants to post the Ten Commandments as good rules to follow, the district should be willing to post rules of other religions and other historical documents that do the same. Be prepared to post them all, or post none.

School districts must continue to adhere to the prohibition against school-sponsored prayer as established in *Engle*, *Abington*, and *Santa Fe*. Until the Supreme Court issues a decision reversing its own precedent, or an amendment to the Constitution is passed, the rulings are unequivocal and must be obeyed.

When dealing with religious issues or activities, school districts should also adhere to three important principles, taken from "Public Schools & Religious Communities: A First Amendment Guide," published jointly by the American Jewish Congress, the Christian Legal Society, and the First Amendment Center and endorsed by NSBA:

- Under the First Amendment, public schools must be neutral concerning religion in all of their activities. School officials must take the necessary steps to ensure that any cooperative activities that take place are wholly secular. Persons invited to address students during the school day shall be advised of this requirement and must agree to abide by it before being allowed access to students.
- Students have the right to engage in, or decline to engage in, religious activities at their own initiative, so long as they do not interfere with the rights of others. School districts are urged to adopt policies that reflect recent consensus statements on current law concerning religion in public schools. (See Sources, below.)

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Cyber-Suspensions

Can schools discipline students for their web sites?

By Julie Underwood, General Counsel, National School Boards Association

Wait! Before you expel that student for an offensive web site, consider the following court cases, in each of which the web site or Internet communication originated from home, not from the school computer.

1. A student's personal web site contained his not too flattering opinions of the school and its administration. The student was suspended for 10 days. The principal testified that he disciplined the student because he was upset by the contents of the page—not because he believed it would cause any disruption at the school. A federal court overturned the student's suspension. *Beussink v. Woodland R-IV*, 30 F.Supp.2d 1175 (E.D. Mo. 1998)

2. A student's web site contained mock "obituaries" of at least two of his friends, apparently inspired by a creative writing class from the previous year in which students wrote their own obituaries. Visitors to the web site were asked to vote on who would "die" next—that is, who would be the subject of the next mock obituary. The student was suspended for five days. A federal court overturned the student's suspension, finding that the speech was not intended to, nor did it actually, threaten anyone or manifest any violent tendencies whatsoever. *Emmett v. Kent School District No. 415*, 92 F. Supp.2d 1088 (W.D. Wash. 2000) The district ultimately settled this case, agreeing to pay the student \$1 in damages and \$6,000 for his legal fees and to expunge the suspension from his student record.

3. A student's web site contained derogatory comments about his math teacher and school principal. The site described the math teacher in profane terms, contained a picture of her severed head dripping with blood, a picture of her face morphing into Hitler, and a solicitation for funds to hire a hit man to kill her. The math teacher suffered from anxiety after learning of the web site and subsequently missed the remainder of the school year. The student was permanently expelled from school. A Pennsylvania appellate court upheld the expulsion, finding that the speech constituted a threat against the teacher that materially interfered with the educational process of the school. *J.S. v. Bethlehem Area School District*, 2000 WL 967242 (Pa. Cmwlth. 2000).

4. In a higher education case, a San Francisco City College professor filed an action to shut down "Teacher Review," a student web site that provided reviews of faculty teaching. The site was launched in September 1997; by January 2000, when the case was filed, more than 5,000 reviews of 600 faculty members had been posted. The case has not yet been resolved. *Curzon-Brown v. San Francisco Community College District* (San Francisco Superior Court).

5. A student's web site was dedicated to mocking his principal. The site included pictures of the principal having sex with Homer Simpson and sodomizing a pig, and it superimposed his head onto a Viagra ad. The school expelled the student but allowed him to return the following year and graduate in the spring. The student sued the district with the help of the American Civil Liberties Union, and Superior Court Judge Thomas McPhee ruled in his favor. The trial will soon enter a second phase to determine monetary damages. The judge was reported as saying that the case made him "think of how much, at times, I enjoy being a judge. This is one of them."

The issue really isn't technology at all: The issue is whether a school may discipline students for what they do off campus. And the bottom line is that schools have no authority to discipline a student for off-campus behavior unless that behavior has a connection to the school. To punish a student for off-campus speech, the school must show that the speech caused a substantial disruption at school, or that it is reasonable to believe that such a disruption would occur, or that the speech presents an on-campus danger. Students cannot be disciplined for speech that is merely lewd or vulgar unless it is in-school speech. So far, the courts have not found the posting of information on the Internet to be in-school speech.

Districts that discipline students for off-campus behavior run the risk that the punishment will be overturned in court and that the district will be stuck with a bill for damages and the student's legal fees. Instead, districts might try some other approaches:

- Contact the Internet service provider (ISP) that hosts the web page. Offensive pages often violate the ISP's own terms of service and community standards. If that's the case,

the ISP can remove the site. The school gets what it wants without the risk of the lawsuit.

- Contact the student's parents and let them know what is going out to the world from their home computer. In the case in which the student artfully depicted his principal, the parents—once they were informed—made their son remove the pages from his web site and took away his computer privileges.

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Although it might be difficult sometimes, schools should remember their obligation to teach students their constitutional rights and responsibilities. As one judge explained: "Indeed, it is provocative and challenging speech, like *Beussink's*, which is most in need of the protections of the First Amendment. Popular speech is not likely to provoke censure. It is unpopular speech that invites censure. It is unpopular speech which needs the protection of the First Amendment. The First Amendment was designed for this very purpose. Speech within the school that substantially interferes with school discipline may be limited. Individual student speech which is unpopular but does not substantially interfere with school discipline is entitled to protection. The public interest is not only served by allowing *Beussink's* message to be free from censure, but also by giving the students at Woodland High School this opportunity to see the protections of the United States Constitution and the Bill of Rights at work." *Beussink v. Woodland R-IV* 30 F.Supp.2d 1175, 1181 (E.D. Mo. 1998)

Of course, it might be easier for the judge to be detached about the whole thing. It wasn't his face pictured with Homer Simpson or the pig!

Supreme Court Update

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In some states, school districts are considered arms of the state and thus are no longer bound by the ADEA. This decision is one in a series that continues to limit the authority of Congress to directly regulate state activities and increase the immunity states enjoy under the 11th Amendment.

The Court's Next Term

The following issues might come before the Supreme Court in its October 2000 term:

- Whether high school athletic associations are subject to Section 1983.
- Whether states are immune from suits brought under the Americans with Disabilities Act by state employees.
- Whether schools can require drug testing of students who participate in extracurricular activities.
- Whether tuition vouchers can be provided to

religious school students.

- Whether schools can discipline students for displaying the Confederate flag.
- Whether schools can ban religious club meetings in school facilities based on the club's religious instruction and prayer activities.
- Whether schools can permit student-led prayer at graduation ceremonies by student vote.

Ten Commandments

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- Cooperative programs between religious institutions and the public schools are permissible only if:
 - (1) Participation in programs is not limited to religious groups. That is, schools must be open to participation by all responsible community groups. Qualifications should not be established that have the practical effect of including only religious groups. Eligibility should be

stated in writing.

(2) A student's grades, class ranking, or participation in any school program will not be affected by his or her willingness to participate or not participate in a cooperative program with a religious institution.

(3) Student participation in any cooperative program may not be conditioned on membership in any religious group, acceptance or rejection of any religious belief, or participation (or refusal to participate) in any religious activity.

Sources

"Religion in the Public Schools: A Joint Statement of Current Law," <http://www.ed.gov/Speeches/04-1995/prayer.html>

"Guides—Religion and Public Schools," <http://www.ed.gov/inits/religionandschools/guides.html>,

"Public Schools & Religious Communities: A First Amendment Guide," http://www.nsba.org/cosa/pubsem/schools_communities.pdf.

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