

LEADERSHIP Insider

PRACTICAL PERSPECTIVES ON SCHOOL LAW & POLICY

A Membership Benefit of NSBA National Affiliates

Friend of the Court

NSBA *amicus* briefs filed in 2005-06

By Francisco Negrón Jr.

One way NSBA supports its National Affiliates is through a dynamic legal advocacy effort to ensure the rights of school boards. That legal advocacy effort includes filing *amicus* or friend of the court briefs in federal and state appellate courts, including the United States Supreme Court.

In litigation, parties may become so focused on their individual arguments that the wider impact of a court's ruling—on students, schools, and public education—can be overlooked or minimized. NSBA's *amicus* briefs provide valuable real-world context to frame the arguments of the parties. By calling on the legal expertise of school law attorneys around the country who are members of the Council of School Attorneys, NSBA multiplies greatly its ability to file *amicus* briefs, and taps into the wealth of legal know-how of school law experts in the field.

Over the past year, NSBA has leveraged COSA members' expertise to file a plethora of *amicus* briefs on cases covering a range of issues affecting school boards across the country—First Amendment matters, school finance, special education, and vouchers. Brief summaries of this year's notable cases follow.

FIRST AMENDMENT

Garcetti v. Ceballos

361 F.3d 1168 (9th Cir. 2004), *cert. granted*, 125 S.Ct. 1395 (Feb. 28, 2005)

On the basis of his own investigation, Assistant Los Angeles County District Attorney Richard Ceballos believed that a sheriff had lied in an affidavit to obtain a search warrant. He wrote a memorandum outlining his beliefs and recommending that the case arising from the search be dismissed. After a meeting involving the district attorney's office and the law enforcement agency, his supervisor took a different view of the case and instructed Ceballos to change the memorandum. The memorandum was then turned over to defense counsel, and Ceballos testified for the defense.

Subsequently, Ceballos was demoted and received undesirable assignments. He

sued his employer, the Los Angeles district attorney, claiming the demotion was retaliation against him for speaking out on a matter of public concern. The district court ruled in favor of the employer, but the U.S. Court of Appeals for the Ninth Circuit reversed, holding that Ceballos' speech in the memo was protected by the First Amendment right of free expression—regardless of the fact that the speech was in fulfillment of his job duties.

After the employer appealed, the U.S. Supreme Court granted certiorari, and oral argument was held on Oct. 12, 2005.

NSBA's *amicus* brief focuses on the effect the Ninth Circuit's decision will have on the ability of local school boards to control employee speech that affects the educational process. The brief argues that the Ninth Circuit's ruling unreasonably interferes with public schools' ability to control the speech of employees who are tasked with fulfilling the school's educational mission. It also argues that school

boards' ability to control school curriculum would be significantly undermined if school employees receive First Amendment protection for speech about any matter of public concern uttered in a classroom.

Current Status

The case was argued last fall. However, a one-hour reargument has been scheduled for Tuesday, Mar. 21, 2006. It appears the newest member of the Court has opted to weigh in on this case. Given Justice Alito's prior rulings, some speculate he may side with the employer.

Child Evangelism Fellowship v. Montgomery County Public Schools

368 F.Supp.2d 416 (D. Md. 2005), *appeal docketed*, No. 05-1508 (4th Cir. May 11, 2005)

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Abbeville County School District v. State, No. 31-0169 (S.C. Ct. Comm. Pl. Dec. 29, 2005) at www.thestateonline.com/news/pdfs/AbbevilleOrder.pdf

Murphy v. Arlington Central School District, 402 F.3d 332 (2nd Cir. 2005), *cert. granted*, 2006 WL 36745 (Jan. 6, 2006)

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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.

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

Child Evangelism Fellowship of Maryland (CEF-MD) sued the Montgomery County Public Schools for denying the group's request that teachers distribute materials promoting the clubs in classrooms as they did for other community organizations, such as the Boy Scouts and the 4-H Club. Although a Maryland federal district court upheld the district's refusal, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the case to the district court.

In response to the ruling, MCPS revised its policy to limit classroom distribution to materials from five categories of organizations: the school district; county, state, or federal government agencies; parent-teacher organizations; licensed day-care providers operating on campus; and nonprofit youth sports leagues.

The policy allows organizations or groups that do not fall into any of the five categories to gain entry if an organization within the five agrees to sponsor the group. The policy places no restrictions on the content of the materials to be distributed, religious or otherwise. CEF-MD does not fit into any of these five categories and has been unable to secure sponsorship, so it remained barred from having its materials distributed.

On remand, the group argued that the revised policy violates its free speech rights by effectively still excluding speakers with religious viewpoints. MCPS countered that the policy avoids any free speech problems because its restrictions are content neutral. The district court noted that under the former policy, the Fourth Circuit had concluded that MCPS had created a limited public forum. Under the revised policy, however, the district court found that "MCPS has indicated that it does not wish to create a limited public forum and it no longer opposes [CEF-MD's] flyers on the basis of their religious content."

As a result, the court concluded that the revised policy constitutes a nonpublic forum subject only to a constitutional test of reasonableness. The new policy passes this test because the school district sought to reduce the "burgeoning number of organizations" distributing their materials in the classroom by "limit[ing] the subject matter to activities of traditional educational relevance to students and the categories of speakers to organizations involved in those activities."

Based on the record, the court concluded that the revised policy is content neutral; the fact that the revision came in

response to the current litigation did not alter this conclusion. Because CEF-MD could gain access to the classroom distribution forum if an approved group sponsored or endorsed its message, the court ruled that its motion for a permanent injunction requiring distribution was moot.

CEF-MD has appealed the district court's decision to the Fourth Circuit. NSBA has submitted an *amicus curiae* brief in support of MCPS urging the Fourth Circuit to affirm the lower court's ruling. The brief argues that local schools need and have the discretion to set reasonable, viewpoint-neutral criteria for access to nonpublic or limited forums in public schools, and that school board policies setting reasonable, viewpoint neutral criteria for forum access are not constitutionally invalid because of granting access to some groups but not to others.

Current Status

Party and *amicus* briefs have been filed. Scheduling of the date for oral argument is pending.

SCHOOL FINANCE

Abbeville County School District v. State

No. 31-0169 (S.C. Ct. Comm. Pl. Dec. 29, 2005) at www.thestateonline.com/news/pdfs/AbbevilleOrder.pdf

A coalition of rural South Carolina school districts brought suit in a court of common pleas, a trial-level court, claiming the state legislature's funding formula fails to recognize that rural districts lack the local tax base to provide adequate funding for public schools.

The trial court ruled that South Carolina is failing to provide students with the opportunity to receive a "minimally adequate education" as required under the state constitution, because the state has not provided "effective and adequately funded early childhood intervention programs designed to address the impact of poverty on [students'] educational abilities and achievements."

However, it concluded that the plaintiffs' instructional facilities are sufficiently safe and adequate, and the state's curriculum standards more than sufficiently rigorous, to satisfy the constitutional standard. With the exception of funding of early childhood intervention programs, the court concluded, the state's funding scheme for public education passes constitutional muster.

To determine the constitutionality of the funding scheme, the court relied on the definition of “minimally adequate education” established by the state supreme court in *Abbeville County School District v. State*, 515 S.E.2d 58 (S.C. 1999). In that case the court stressed that the phrase “minimally adequate” creates a floor rather than ceiling for the legislature, a floor that requires:

1. The ability to read, write, and speak the English language, and knowledge of mathematics and physical science;

2. A fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and

3. Academic and vocational skills.

A “minimally adequate education” does not require instruction in music, art, physical education, foreign languages, and extracurricular activities or sports, the court held. Applying this standard to the extensive factual evidence presented, the court concluded that the districts’ instructional facilities are sufficient, as are the state’s curriculum standards and teacher licensing system.

However, given “irrefutable” evidence about the impact of poverty on academic opportunity and the potential of early childhood intervention programs to help offset this impact, the court concluded that the state defendants have failed in their constitutional responsibility to provide adequate funding for such programs.

Current Status

Neither party has yet filed an appeal with the South Carolina Supreme Court.

SPECIAL EDUCATION

Murphy v. Arlington Central School District

402 F.3d 332 (2nd Cir. 2005), cert. granted, 2006 WL 36745 (Jan. 6, 2006)

After the parents of Joseph Murphy prevailed in their IDEA suit to recover reimbursement for private school tuition from New York’s Arlington Central School District, they sought recovery of fees of \$29,250 for the services of an educational consultant.

The district granted the parents’ application for fees in part but denied it in part on the grounds that:

1. IDEA does not allow “lay advocates” to recover attorneys’ fees;

2. Although experts’ fees are recoverable, the consultant’s fees could not be recovered because she did not testify as an

expert or provide a litigation consulting service;

3. The consultant’s time records were insufficient;

4. The consultant failed to establish there was a market rate for her services; and

5. The consultant’s fees for representing the parents during nonjudicial state “special education due process hearings” are specifically exempted from the IDEA.

The court concluded fees for expert or consulting services could be compensated under IDEA but the award of prejudgment interest was not warranted because the parents had not yet paid the consultant.

The U.S. Court of Appeals for the Second Circuit affirmed, ruling that a prevailing party is entitled to recover expert fees under IDEA. The appellate court also ruled that application for such fees “will normally not be approved unless the application is accompanied by time records contemporaneously maintained by the person performing the services.”

While the Second Circuit agreed with the Seventh and Eighth Circuits that the statutory language of IDEA does not specifically authorize awarding expert witness fees, it stated that to rely solely on the statutory text without context would lead to a result Congress did not intend. *T.D. v. LaGrange Sch. Dist. No. 102*, 349 F.3d 469, 482 [7th Cir. 2003]; *Neosho R-V Sch. Dist. v. Clark ex rel. Clark*, 315 F.3d 1022, 1031 [8th Cir. 2003].

The Second Circuit also concluded that prohibiting recovery of expert witness fees for prevailing parents would frustrate the purposes of the IDEA to “ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living” and “to ensure that the rights of children with disabilities and parents of such children are protected.”

Current Status

Arlington Central School District filed a petition for certiorari that was granted on January 6, 2006. NSBA has filed an *amicus* brief in support of the district. No date has been set for oral argument.

Schaffer v. Weast

___ U.S. ___, 126 S.Ct. 528 (2005)

The parents of Brian Schaffer, a special education student in Maryland’s Montgomery County Public Schools,

challenged his initial Individualized Education Program in a due process hearing. After a series of decisions by the hearing officer, the federal district court, and the Fourth Circuit, the U.S. Court of Appeals for the Fourth Circuit ruled that the burden of proof under IDEA, as under most laws, is on the party seeking relief.

The Schaffers filed a petition for certiorari with the U.S. Supreme Court, which granted review and rendered a decision on Nov. 14, 2005.

In a 6-2 decision (Chief Justice Roberts, newly appointed, took no part in consideration or decision of the case), the U.S. Supreme Court ruled that the burden of proof in an administrative hearing challenging an IEP under the Individuals with Disabilities Education Act is properly placed upon the party seeking relief, whether the disabled child or the school district.

The court declined to address whether states could enact their own laws placing the burden of proof on school districts, because no such state law was at issue in the case. The Court rejected the parents’ conclusion that, in effect, “every IEP should be assumed to be invalid until the school district demonstrates that it is not.”

Justice O’Connor, joined by Justices Stevens, Scalia, Kennedy, Souter, and Thomas, wrote that the core of IDEA “is the cooperative process that it establishes between parents and schools” and that “Congress has repeatedly amended the Act to reduce its administrative and litigation-related costs.”

As for concerns over the district’s “natural advantage” in information and expertise, the Court concluded that Congress had addressed that issue when it “obliged schools to safeguard the procedural rights of parents and to share information with them.” Congress had bolstered these safeguards by adding provisions “requiring school districts to answer the subject matter of a complaint in writing, and to provide parents with the reasoning behind the disputed action, details about the other options considered and rejected by the IEP team, and a description of all evaluations, reports, and other factors that the school used in coming to its decision.”

In dissent, Justice Ginsburg argued that “schools striving to balance their budgets ... will favor educational options that allow them to conserve resources” and that the burden of proof is an important check on this tendency. If the district had initially offered Brian the IEP it eventually provided, she suggested, the whole lawsuit could have been avoided. She also suggested that

if the burden of proof would “saddle school systems with inordinate costs,” nine states would not have submitted an *amicus* brief in support of the parents.

In addition to the *amicus* brief filed before the Supreme Court, NSBA had filed one before the 4th Circuit. NSBA argued that the burden of proof should not rest with school systems if parents challenge an IEP.

Deal v. Hamilton County Board of Education

392 F.3d 840 (6th Cir. 2004), *cert. denied*, 126 S.Ct. 422 (Oct. 11, 2005)

Over the course of several years, Zachary Deal’s parents and Tennessee’s Hamilton County Schools developed a series of IEPs for the boy. Zachary’s parents repeatedly sought to have the district fund one-on-one, home-based “applied behavioral analysis,” or ABA, a treatment methodology developed by Dr. Ivan Lovaas at the University of California at Los Angeles. The parents had implemented this program on their own and were convinced it was having exceptional results.

Dissatisfied with the district’s approaches, they requested an administrative hearing, which concluded, among other things, that the district violated IDEA by “predetermining” that its own program was appropriate, “pursuant to an unofficial policy of refusing to consider” ABA. When the parents sued to dispute some of the hearing officer’s other decisions, a Tennessee federal district court found that the officer had “erred in exalting the Deals’ proposed educational methodology above all others.”

On appeal, the U.S. Court of Appeals for the Sixth Circuit took note of the U.S. Supreme Court’s admonitions that courts should “avoid imposing their view of preferable education methods” and that IDEA requires that district services provide a “floor” of educational benefit rather than that they maximize each child’s potential.

Nonetheless, the appeals court found that the school district’s refusal to consider one-on-one ABA programs and its investment in an alternative methodology suggested that the district had predetermined not even to consider the parents’ arguments for the more costly ABA approach. Noting that the Sixth Circuit, like several other circuit courts, has found that school districts are not specifically required to fund expensive ABA services, the court found this “facile” answer insufficient in

cases where the difference in outcomes between two methods is so great that the provision of the lesser program can amount to a denial of the “free appropriate public education” that IDEA requires.

Acknowledging that courts must avoid second-guessing education experts, the Sixth Circuit found that the district court failed to accord due deference to the hearing officer, who is also an expert. As a result, the Sixth Circuit ruled that IDEA requires school districts to offer IEPs that confer “meaningful” educational benefits to students with disabilities.

The court also ruled that the district had violated IDEA by “predetermining” not to offer the ABA program the parents desired.

The school board filed a petition for certiorari with the U.S. Supreme Court that was denied on Oct. 11, 2005. NSBA took the unusual step of filing an *amicus* brief at the petition stage in support of Hamilton County’s position that the Supreme Court should review the Sixth Circuit’s decision for three reasons:

1. The subjective “meaningful” standard adopted by the court of appeals deviates from *Board of Educ. v. Rowley*, 458 U.S. 176 (1982) and creates uncertainty for state and school district personnel;
2. The Sixth Circuit’s predetermination ruling risks discouraging school district personnel from thorough preparation before IEP team meetings; and
3. The meaningful benefit standard and predetermination standard adopted by the Sixth Circuit contravene principles of federalism.

Current Status

The case was remanded by the Sixth Circuit to the district court for further proceedings based on its ruling.

VOUCHERS

Holmes v. Bush

___ So.2d ___, 2006 WL 20584 (Fla. Jan. 5, 2006)

In a 5-2 decision, the Florida Supreme Court ruled that the state’s Opportunity Scholarship Program, a private school voucher program, violated the Florida constitution’s requirement that the state provide “a uniform, efficient, safe, secure, and high quality system of free public schools.”

The court concluded the OSP violates that provision because it “diverts public dollars into separate private systems parallel to and in competition with the free

public schools that are the sole means set out in the Constitution for the state to provide for the education of Florida’s children.” This diversion not only reduces the money available to free public schools but also funds private schools that are not legally “uniform” in comparison with each other or with the public school system.

Because the court decided the case on this basis, it did not reach the question of whether OSP also violated the Florida Constitution’s establishment clause by providing taxpayer funds to religious schools. A state appeals court had ruled that OSP violated article I, section 3, which prohibits the use of public funds to “directly or indirectly [aid] any sectarian institution” and certified its decision to the Florida Supreme Court for expedited consideration as a “question of great public importance.”

The court rejected the state’s argument that OSP supplements the public education system. Rather, OSP diverts funds that would otherwise be used to provide the system of free public schools as required by the state constitution. Because voucher payments reduce funding for public schools, the court found, OSP undermines the system of “high quality” free public schools that are the exclusive approved means of fulfilling the constitutional mandate to all the state’s children.

OSP also lacks any provision to ensure that private schools accepting vouchers must meet state accountability standards, violating the constitutional requirement of uniformity; in fact, the court noted, the legislature expressly disavowed any intention to regulate, control, or accredit private schools. As a result, private schools are not subject to state curriculum and teacher accreditation standards.

The court found that the language in two other sections of article IX bolstered its conclusion. First, article IX, section 6 of the Florida Constitution restricts the use of revenue from the state school funds to the support and maintenance of free public schools.

Second, while article IX, section 1(b) requires the legislature to provide pre-kindergarten services, that provision does not restrict the state to any particular means of providing these services.

Lastly, the court rejected the state’s contention that its decision could jeopardize other educational and welfare programs. The ruling on OSP rests solely on the provisions of article IX, the court emphasized.

Francisco Negrón Jr. is NSBA general counsel and associate executive director.